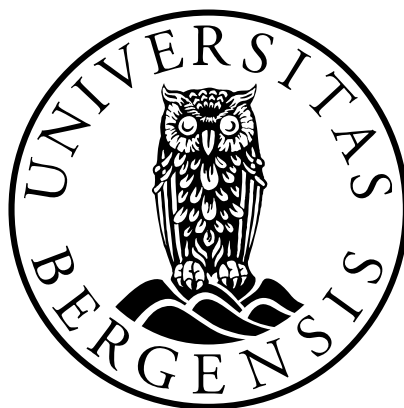


Legal dilemmas:  
The facilitation of the participation of  
small and medium-sized enterprises in  
the procurement of labour market  
programmes

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# 1. Introduction

## 1.1 Topic and issues

The Norwegian Constitution § 110 first paragraph, first sentence, states that the authorities of the State shall create conditions under which every person capable of work is able to earn a living through their work or enterprise.<sup>1</sup>

Within the framework of Norway's constitutional obligations as laid down in § 110, this thesis will explore the facilitation of the participation of small and medium-sized enterprises (SMEs) in the public procurement of labour market programmes. The thesis' outset is that legal dilemmas may arise when facilitating the participation of SMEs in the procurement of labour market programmes. Central to this notion is the tension between the demands of the general interest of the society, and the requirements of the protection of the individual's fundamental rights.

A central tenet of this thesis is that a first interpretation of § 110 imposes a legal barrier as to what measures the contracting authority may make use of in the effort to facilitate the participation of SMEs in the procurement of labour market programmes. The aim, therefore, is to determine if this is the case, and what are the consequences of such a limitation.

### 1.1.1 The right to work

Full employment is an overarching political objective<sup>2</sup> and Norway is, traditionally, among the OECD-countries that spend the most public funding on various labour market programmes and benefits for unemployed people.<sup>3</sup> Participation in working life not only provides an income to cover life expenses, it is also crucial in creating a sense of usefulness and belonging. The Norwegian State's constitutional obligation concerning employment is thus enshrined in § 110 in the human rights chapter of the Constitution, and the United Nations Declaration of Human Rights article 23 (1) states that *"Everyone has the right to work."*

As part of fulfilling the State's constitutional obligations on the right to work,<sup>4</sup> the Norwegian Labour and Welfare Service (NAV) offers a wide range of labour market programmes. In 2019, an average total of 66 937 people participated in one of these programmes.<sup>5</sup> The labour market programmes aim, in general, to strengthen the participants' possibility to find and sustain employment.<sup>6</sup>

### 1.1.2 Efficient use of society's resources

The overall political objective for the economic policy is, within a framework of sustainable development, to maximize value creation in the Norwegian economy.<sup>7</sup> The public procurement regulations are a means to achieve this objective in public demand driven markets. The Public

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<sup>1</sup> LOV-1814-05-17; «Statens myndigheter skal legge forholdene til rette for at ethvert arbeidsdyktig menneske kan tjene til livets opphold ved arbeid eller næring». Translation: <https://lovdata.no/dokument/NLE/lov/1814-05-17>. References in this thesis to § 110, first paragraph, first sentence, will hereafter be abbreviated as § 110.

<sup>2</sup> <https://www.regjeringen.no/no/tema/arbeidsliv/arbeidsmarked-og-sysselsetting/id935/>

<sup>3</sup> NOU Arbeidsrettede tiltak 2012:6

<sup>4</sup> Asbjørn Kjønstad, Aslak Syse og Morten Kjelland, *Velferdsrett I: Grunnleggende rettigheter, rettssikkerhet og tvang*, Gyldendal Juridisk, 6th ed. 2017, p. 143

<sup>5</sup> <https://www.nav.no/no/nav-og-samfunn/statistikk/arbeidssokere-og-stillinger-statistikk/tiltaksdeltakere>

<sup>6</sup> FOR-2015-12-11-1598 § 1-1

<sup>7</sup> Meld. St. 9 (2018-2019) p. 3

Procurement Act aims at promoting efficient use of society's resources based on fair competition, equal treatment of suppliers, transparency, and proportionality.<sup>8</sup>

The overall market for public procurement in Norway amounts to approximately 500 billion every year, constituting 16 % of the GDP.<sup>9</sup> This mirrors the current situation in the EU, where EU Member States spend around 14 % of GDP on the procurement of services, works and supplies every year.<sup>10</sup> As for labour market programmes, NAV spent 5.8 billion on various labour market programmes in 2018, out of which 2.9 billion was used on labour market programmes subject to the public procurement regulations.<sup>11</sup>

The public sector is thus a substantial and significant market, and the ability to obtain contracts with the state is important to many businesses, including the small and medium-sized enterprises (SMEs). The participation of SMEs in public procurement is, moreover, considered pivotal in securing the positive effect of higher competition for public contracts, leading to better value for money for the contracting authorities.<sup>12</sup> SMEs are also often referred to as the backbone of the European economy with a high potential for creating employment opportunities, growth and innovation.<sup>13</sup>

Within the EU, considerable attention is being paid on how to facilitate the participation of SMEs in public procurements. The Commission of the European Communities has developed a code of best practices on how to facilitate SMEs' access to public procurement.<sup>14</sup> Directive 2014/24/EU also explicitly states that the public procurement regulations should aim at "*facilitating in particular the participation of small and medium-sized enterprises (SMEs) in public procurement,*" and, furthermore, that public procurement "*should be adapted to the needs of SMEs.*"<sup>15</sup>

Similarly, the Norwegian government has stated that access to public contracts for providers of goods and services is important so that more companies can create value for society, expressing an aim that all suppliers that want to shall be able to participate in competitions for public contracts.<sup>16</sup> In "Granavolden-plattformen" the government in particular stresses a focus on small and medium-sized companies, pledging to work towards allowing both small and medium-sized enterprises a fair possibility to compete for the award of public contracts.<sup>17</sup>

## 1.2 What is the dilemma?

In recent years, secondary aims of the public procurement regulations have gained increased focus and relevance. In particular, environmental and social considerations have been identified as important social goals that can be met through public procurement. One of the aims of the Directive 2014/24/EU is, consequently, to impulse the 2020 policy for "*smart, sustainable and inclusive growth*" while ensuring the most efficient use of public funds.<sup>18</sup>

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<sup>8</sup> LOV-2016-06-17-73 §§ 1 and 4

<sup>9</sup> Meld. St. 22 (2018-2019), p. 20

<sup>10</sup> ec.europa.eu (official EU website)

<sup>11</sup> Riksrevisjonen, Revisjonsrapport for 2018 om anskaffelser og oppfølging av arbeidsmarkedstiltak i arbeids- og velferdsetaten, p. 4

<sup>12</sup> Commission of the European communities, 2008, p. 2

<sup>13</sup> Ibid. p. 4

<sup>14</sup> Ibid.

<sup>15</sup> Directive 2014/24/EU, rec. 2 and 78.

<sup>16</sup> Meld. St. 22 (2018-2019) p. 11

<sup>17</sup> Politisk plattform, Granavolden 17. January 2019, p. 36

<sup>18</sup> Directive 2014/24/EU, rec. 2

As for the right to work, Directive 2014/24/EU acknowledges the importance of employment, stating in the preamble that *“employment and occupation contribute to integration in society and are key elements in guaranteeing equal opportunities for all.”*<sup>19</sup>

The basic aim of the public procurement regime is, nonetheless, to promote efficient use of society’s resources by opening up the markets to competition.<sup>20</sup> The Court of Justice of the European Union (CJEU) has thus expressed that the *“principle objective”* of the public procurement regulations is to ensure the *“free movement”* of services and the *“opening up”* of the market to *“undistorted competition.”*<sup>21</sup> The prohibition in the Directive 2014/24/EU article 18 (1) against *“artificially narrowing competition”* further underscores this point.

The public procurement rules are thus not primarily concerned with the enforcement of environmental or other social standards. From a normative perspective, then, the public procurement regulations *“do not mandate the use of procurement for the enforcement or promotion of human rights norms.”*<sup>22</sup> Relevant decisions that relate to human rights norms are, therefore, to a large extent left to the discretion of the contracting authorities, and, consequently, subject to the relevant checks and balances.<sup>23</sup>

There is, regardless of what service or good that is being procured, always a need to balance the measures that can promote the participation of SMEs against other considerations that are important to the contracting authority. This balancing of interest is, in my view, especially important in the procurements of services that are pivotal in the securing of the individual’s fundamental rights.

A special characteristic of labour market programmes is that they are essential tools in the fulfilling of the State’s constitutional human rights obligations pursuant to § 110 of the Norwegian Constitution. Opening up the market to competition by means of facilitating the participation of SMEs may lead the contracting authorities to make decisions that are more focused on the objective of the public procurement regulations, than on the individual’s right to work. The procurement of labour market programmes and the facilitation of the participation of SMEs in these procurements thus demonstrate a tension between the demands of the general interest of the society, and the requirements of the protection of the individual’s fundamental rights.

### 1.3 Research questions and outline

The legal effect of the Norwegian Constitution § 110 in the procurement of labour market programmes has, to my knowledge, not been debated in legal theory, nor has it been tried before the courts. The purpose of my thesis, therefore, is to discuss what legal dilemmas may arise when facilitating the participation of SMEs in the procurement of labour market programmes. I also aim to clarify whether § 110 imposes a legal barrier as to what measures the contracting authority may make use of in this respect, and to determine what will be the consequences of such a limitation.

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<sup>19</sup> Directive 2014/24/EU, rec. 36

<sup>20</sup> LOV-2016-06-17-73 §§ 1 and 4

<sup>21</sup> C-454/06 – Pressetext Nachrichtenagentur, paras. 32-33

<sup>22</sup> According to Dr Albert Sanchez-Graells, Public Procurement and ‘Core’ Human Rights: A Sketch of the EU Legal Framework

file:///C:/Users/B120614/AppData/Local/Packages/Microsoft.MicrosoftEdge\_8wekyb3d8bbwe/TempState/Downloads/SSRN-id3103194%20(1).pdf

<sup>23</sup> Ibid.

Moreover, I will ask the question of whether the aim in Directive 2014/24/EU to facilitate the participation of SMEs has sparked a change in NAVs procurement practice regarding the procurements of labour market programmes.

My thesis follows an outline in which, first, in the following chapter, the legal sources and methodological approach is established. The answering of the question of whether § 110 imposes a legal barrier as to what measures the contracting authority may make us of in the effort to facilitate the participation of SMEs in the procurement of labour market programmes, requires an initial interpretation of the strength of the constitutional protection of the individual's right to work, which will be presented in chapter 3.

In chapter 4, I will look more closely into the nature of labour market programmes, and the procurement regulations governing the procurement processes of these programmes. In chapter 5, I will explore what means are available to the contracting authorities that may facilitate the participation of SMEs in the procurement of labour market programmes and point out possible dilemmas in light of my thesis' research problem. In chapter 6, I will present a case-study of two procurement processes conducted by NAV in 2015/2016 and 2019/2020 concerning framework agreements on two specific labour market programmes.

In chapter 7, I will focus my attention on what I believe to be the most problematic measure in the facilitation of the participations of SMEs in the procurement of labour market programmes, and present a legal analysis that aims to clarify whether this measure is in conflict with the constitutional protection of the individual's right to work. Furthermore, I will look at what are the consequences of such a limitation. In chapter 8, I will end with a conclusion, and present a view to the future.

## 2. Sources of law and methodology

### 2.1 Overview

My thesis' main focus is to offer a legal dogmatic analysis in which I am resorting to both national and international law in the effort to answer my thesis' research problem. As my introduction has shown, the answering of my research problem requires the use of sources from different areas of law. The Norwegian Constitution and the Covenant on Economic, Social and Cultural Rights, as well as both Norwegian and EU legislation on public procurement, are sources that are especially relevant for my analysis. The presence of constitutional rights and international law has made it necessary for me to discuss and establish the hierarchy of legal norms within the Norwegian jurisdiction, as well as the legal effect of international law in the areas pertinent to my research problem.

### 2.2 The impact of EU law on public procurement

The doctrinal starting point in Norwegian law is that of dualism,<sup>26</sup> which entails that international law has to be incorporated or transformed into Norwegian law by the competent political institutions, before it can be given legal effect in Norway.

As party to the EEA-agreement, Norway has an obligation to implement EU law on public procurement.<sup>27</sup> New regulations on public procurement entered into force in Norway on January 1,

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<sup>26</sup> Justice dr. juris Arnfinn Bårdsen, Norwegian Supreme Court: *The Norwegian Supreme Court and the internationalisation of law*. Norwegian Supreme Court, para 7.

<sup>27</sup> LOV-1992-11-27-109 art. 3

2017. The main reason behind the change in regulations was a need to implement the new EU Directives on public procurement.<sup>28</sup> Norwegian law and regulations on public procurement is thus largely an enforcement of Norway's obligations under the EEA-agreement.

The procurement of labour market programmes falls under the scope of the Public Sector Directive 2014/24 EU, which regulates the procurement procedures for the award of public work contracts, public supply contracts and public service contracts. Public procurement in Norway is regulated by the Public Procurement Act and accompanying regulations, the most important being the Public Procurement Regulation.<sup>29</sup>

Public procurement law is closely linked to EU-politics and the basic aims of the Treaty of the Functioning of the European Union (TFEU) regarding the free movements of goods, services, capital and persons.<sup>30</sup> When interpreting EU-law on public procurement, the CJEU applies a teleological method of interpretation, paying particular attention to the aim and purpose of EU-law.<sup>31</sup> The decisions of the CJEU are binding to the Member States, in contrast to the decisions of the EFTA-court, which are only advisory.<sup>32</sup>

The EEA agreement contains an explicit aim to harmonize EEA and EU law.<sup>33</sup> This implies that there is a presumption of conformity between Norwegian domestic law stemming from the EEA-agreement, and EU-law. Directive 2014/24 EU, as well as the decisions of the CJEU, are thus important legal sources when interpreting Norwegian law on public procurement.

### 2.3 The impact of international human rights law

The impact of international human rights law was triggered in 1999 through the passing of the Human Rights Act.<sup>39</sup> Pursuant to §§ 2 and 3 of this act, the European Convention on Human Rights as well as four other UN-conventions are to be considered Norwegian law, with priority over other legislation. As for the right to work, the International Covenant on Economic, Social and Cultural Rights is the Covenant that deals most comprehensively with this right.<sup>40</sup>

The State's general obligation to respect and ensure human rights was accentuated more clearly as part of the 2014 constitutional reform; § 92 of the Norwegian Constitution now states that the authorities of the State shall respect and ensure human rights as they are expressed in this Constitution and in the treaties concerning human rights that are binding for Norway.<sup>41</sup>

The referral to "*treaties concerning human rights that are binding for Norway*" implies that the constitutional and the international context run parallel; the level of human rights protection according to the Norwegian constitution "*shall not run short to that of the parallel convention*

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<sup>28</sup> Innst. 358 L (2015-2016), p. 2

<sup>29</sup> LOV-2016-06-17-73 and FOR-2016-08-12-974

<sup>30</sup> Directive 2014/24/EU, rec. 1

<sup>31</sup> C-283-00 Commission v. Spain, para 73

<sup>32</sup> The EFTA-court interprets the EEA-agreement on behalf of the EFTA-states Iceland, Liechtenstein and Norway

<sup>33</sup> Ibid. art. 1 (1)

<sup>39</sup> LOV-1999-05-21-30

<sup>40</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, A/RES/2200

<sup>41</sup> «Statens myndigheter skal respektere og sikre menneskerettighetene slik de er nedfelt i denne grunnlov og i for Norge bindende traktater om menneskerettigheter»



rights.<sup>42</sup> The International Covenant on Economic, Social and Cultural Rights is thus an important legal source when determining the strength of the constitutional protection of the right to work pursuant to § 110 of the Norwegian Constitution.

## 2.4 The Norwegian Constitution and constitutional interpretation

In line with traditional legal method, the constitutional text is always the starting point for the establishing of the legal rule. The text is, however, just the starting point; the framer's intentions, the constitutional history, the context and the provisions object and purpose will also have to be taken into consideration.<sup>43</sup>

The basic legal effect of constitutional rights is that they acquire the force of *lex superior*, which implies that constitutional rights have the highest possible rank in the hierarchy of legal norms that are applicable within the Norwegian jurisdiction; *any other law, enactment, regulations or governmental decision must yield*.<sup>44</sup> Does this also apply to international agreements entered into by Norway?

The Supreme Court of Norway answered this question in a ruling in 2016, where the Court ruled that the status of the Norwegian Constitution as *lex superior* also includes international agreements entered into by Norwegian government, such as the Human Rights Act and the EEA-agreement.<sup>45</sup> As for my thesis' research problem, this implies that if a conflict is established between the effort to facilitate the participation of SMEs in the public procurement of labour market programmes and the constitutional protection of § 110, then the Constitution will prevail.

## 2.5 The fair balance test

A particular methodological approach when dealing with constitutional and convention rights is 'the fair balance principle'. This principle has been established through case-law from the European Court of Human Rights (ECHR) and implies that the State, when dealing with these rights, must strike a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights, attaching particular importance to the latter.<sup>46</sup> The Norwegian Supreme Court has also applied this fair balance principle in a 2016 ruling on the constitutional protection of the freedom of association and freedom of assembly pursuant to § 101 of the Norwegian Constitution.<sup>47</sup>

The assessment to be followed when performing the fair balance test involves a two-step analysis. First, the lawfulness of the interference in the fundamental right is established. This implies a verifying of whether the contested provision affects the core content of the human right, or if the freedom can still be exercised otherwise. The next step is the evaluation of the proportionality of the interference, which involves a consideration of the legitimate aim of the measure; that is if the

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<sup>42</sup> Supreme Court Justice dr. Arnfinn Bårdsen, Norwegian Supreme Court: *Interpreting the Norwegian Bill of Rights* (Annual seminar on Comparative Constitutionalism 21-22 November 2016 Faculty of Law, University of Oslo) para 17

<sup>43</sup> Supreme Court Justice dr. Arnfinn Bårdsen, Norwegian Supreme Court: *The Norwegian Supreme Court as the Guardian of Constitutional Rights and Freedoms* ("Norway in Europe, Centre for European Law, Oslo 18<sup>th</sup> September 2017), para. 19

<sup>44</sup> *Ibid.* para. 3

<sup>45</sup> HR-2016-2554-P para. 80

<sup>46</sup> The Belgian Linguistic case (*No. 2*) (1968) 1 EHRR 252, Case C-314/12 UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH [2014] EU:C:2014:192, *Beyeler v. Italy* ECHR 2000-I 57 para. 107, *Sporrong and Lönnroth v. Sweden*, IHRL 36 (ECHR 1982) para. 69.

<sup>47</sup> HR-2016-2554-P para. 117

measure was adopted in the public or general interest, the appropriateness of the measure; that is if the measure is effective and adequate to achieve its purpose, the necessity of the measure; that is if a solution of less interference can achieve the same goal, and then, finally, the fair balance test, which is the assessment of whether the measure managed to strike a fair balance between the demands of the public or general interest and the protection of the individual's fundamental rights.<sup>48</sup>

The rationale of the fair balance principle is to provide effective protection of fundamental rights, while at the same time allowing the State a margin of appreciations when it comes to regulating the exercise of these rights. The application of this principle will, therefore, commonly involve a consideration of both political, economic and social issues.

The fair balance principle has been criticised by scholars who advocate a narrow, positivistic notion of law and who require a clearer textual basis for the acceptance of specific obligations.<sup>49</sup> As will be demonstrated in my analysis, the textual guidance of § 110 of the Norwegian Constitution is limited, and a legal conclusion can therefore not be drawn simply by looking at the wording of this provision. The fair balance principle will, therefore, be prevalent in my analysis.

## 2.6 The NAV case-study

As my thesis will show, many of the measures that may facilitate the participation of SMEs in public procurement are subject to discretionary decisions by the contracting authority. The motivation behind looking into the NAV procurement processes, therefore, is to make use of empirical data to illustrate the relevance of my thesis, and to gain insight that is valuable to qualify my thesis' research problem.

Being employed at NAV, I know these procurement processes well. What makes these processes particularly relevant in light of my research problem, I believe, is that Directive 2014/24/EU had not yet been implemented in Norwegian law at the time of the 2015/2016 process. The procurements were thus conducted according to the regulations in the repealing Directive 2004/18/EC and repealing Public Procurement Act and Regulation.<sup>50</sup> Directive 2004/18/EC did not contain an explicit aim to facilitate the participation of SMEs. It is therefore relevant to examine whether this explicit aim in Directive 2014/24/EU has sparked a change in procurement practice.

The case-study will only make use of publicly available information on these procurement processes, the main source being the contract notices published on Doffin, which is the Norwegian national database for notices of public procurements. To make the case-study manageable for the purpose and scope of this thesis, it will be restricted mainly to the procurement processes in NAV Rogaland.

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<sup>48</sup> Case C-283/11 Sky Österreich GmbH v Österreichischer Rundfunk [2013] EU:C: 2013:28, Case C-314/12 UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH [2014] EU:C: 2014:192. See also Caterina Sganga; A Decade of Fair Balance Doctrine, and How to Fix It. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3414642](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3414642)

<sup>49</sup> Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*, (Copyright 2009 by Koninklijke Brill NV, Leiden, The Netherlands) p. 199

<sup>50</sup> Lov om offentlige anskaffelser av 16. juli 1999 nr. 69 og forskrift om offentlig anskaffelser av 7. april 2006 nr. 402

## 3. The strength of the constitutional protection of the right to work

### 3.1 An unconditional claim to employment?

With regard to the strength of the constitutional protection of the right to work, the most basic question is whether § 110 gives the individual an unconditional claim to employment. The provision states that *“The authorities of the State shall create conditions under which every person capable of work is able to earn a living through their work or enterprise.”*<sup>51</sup> Looking only at the wording of the provision, a first interpretation could be, although the text is not clear on the matter, that the State is obliged to ensure that every person capable of work is provided with a specific opportunity to work, or to run an enterprise. The establishing of the legal rule requires, however, that the constitutional history and the framer’s intention is also taken into consideration.

### 3.2 Constitutional history and the framer’s intention

The idea of the State’s obligation to provide employment for all people who are able to work surfaced in various declarations from the French revolution as early as in the 18th. century.<sup>52</sup> It was not until after the Second World War, however, that this obligation was established in the Norwegian Constitution. In the post-war years, there was a political consensus that the State should conduct a politics that aimed at full employment. The post-war constitutional change has to be understood as part of the rebuilding of Norway after the war, focusing on economic growth and possibilities for everyone.<sup>53</sup>

On November 16, 1954, a new provision was added to the Norwegian Constitution § 110. This new provision laid down that *“It is the responsibility of the authorities of the State to create conditions enabling every person capable of work to earn a living by his or her work.”*<sup>54</sup> The initiative to the amendment came in a letter sent from the Ministry of Social Affairs to the Ministry of Justice and Police on August 18, 1948. The initial proposal did not receive the required constitutional majority of votes, as the minority in Parliament perceived the proposal as not sufficiently clear on the matter of the proposal being intended as a political platform, and not a legal binding constitutional right and obligation. During the debate in Parliament a new proposal was made, which was later accepted in 1954.<sup>55</sup>

### 3.3 Current constitutional law

As a result of the constitutional revision in 2014, § 110 is now placed in the human rights chapter of the Constitution. Another change following the constitutional revision is that “enterprise” has been included in the provision. § 110 now states that *“The authorities of the State shall create conditions under which every person capable of work is able to earn a living thorough their work or enterprise”*.<sup>56</sup> The inclusion of “enterprise” has broadened the scope of the provision, signalling a

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<sup>51</sup> «Statens myndigheter skal legge forholdene til rette for at ethvert arbeidsdyktig menneske kan tjene til livets opphold ved arbeid eller næring”. Translation: <https://lovdata.no/dokument/NLE/lov/1814-05-17>

<sup>52</sup> The French Constitution of 1791; Declaration of the Rights of Man of 1793, see Frede Castberg, *Norges Statsforfatning II*, Oslo 1964, p. 307

<sup>53</sup> Henriette Sinding Aasen and Nanna Kildal in Henriette Sinding Aasen and Nanna Kildal (red.) *Grunnloven og velferdsstaten*, Fagbokforlaget Vigmostad & Bjørke AS 2014, p. 111

<sup>54</sup> LOV-1814.05-17: «Det paaligger Statens Myndigheter at lægge Forholdene til Rette for at ethvert arbeidsdygtigt Menneske kan skaffe seg Udkomme ved Sit Arbeide». Translation: <https://lovdata.no/dokument/NLE/lov/1814-05-17>

<sup>55</sup> Dokument 16 (2011-2012), Rapport fra Menneskerettighetsutvalget om menneskerettigheter i Grunnloven, avgitt 19. desember 2011, p. 227 and 228

<sup>56</sup> «Statens myndigheter skal legge forholdene til rette for at ethvert arbeidsdyktig menneske kan tjene til livets opphold ved arbeid eller næring”. Translation: <https://lovdata.no/dokument/NLE/lov/1814-05-17>

responsibility for the State to conduct a politics that is not only conducive to the individual's right to work, but that is also conducive to a well-functioning labour market.

As for the basic question of whether § 110 gives the individual an unconditional claim to employment, it is today considered to be positive law that this provision is to be understood as a directive outlining the State's obligation to conduct a politics that is conducive to employment, trade and industry.<sup>57</sup> This understanding implies that the provision does not constitute a legal right that gives the individual an unconditional claim to employment, or that can serve as basis for legal proceedings against the State for the lack thereof.

### 3.4 The constitutional obligation to respect and ensure human rights

This understanding does not imply, however, that § 110 is of no legal significance. The Norwegian Constitution § 92 requires every governmental body, including the Supreme Court of Norway, to respect and ensure human rights as they are expressed in the Norwegian Constitution and in the treaties concerning human rights that are binding for Norway.

The right to work imposes, as all human rights, three types or levels of obligations on the State; the obligations to respect, to protect and to fulfil.<sup>58</sup> The International Covenant on Economic, Social and Cultural Rights is the Covenant that deals most comprehensively with the right to work.<sup>60</sup>

Pursuant to Article 6, paragraph 1 of the Covenant, the State recognises that the right to work *"includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts"* and that the State *"will take appropriate steps to safeguard this right."* Article 6, paragraph 2 exemplifies in a general and non-exhaustive manner obligations incumbent upon the State; to achieve the full realization of the right to work the steps taken *"shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment, under conditions safeguarding fundamental political and economic freedoms to the individual."*

As for the extent of the State's obligations, the Covenant establishes a core obligation to ensure the satisfaction of minimum essential levels of each of the rights covered by the Covenant. These core obligations include at least a requirement *"to ensure the right of access to employment, especially for disadvantaged and marginalized individuals and groups, permitting them to live a life in dignity,"* and to *"avoid any measure that results in discrimination and unequal treatment in the private and public sectors of disadvantaged and marginalized individuals and groups or in weakening mechanisms for the protection of such individuals and groups."*<sup>61</sup>

The principal obligation of the State is to ensure *"the progressive realization of the exercise of the right to work."* The Covenant imposes, however, various obligations which are of immediate effect.

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<sup>57</sup> Henriette Sinding Aasen and Nanna Kildal in Henriette Sinding Aasen and Nanna Kildal (red.) *Grunnloven og velferdsstaten*, Fagbokforlaget Vigmostad & Bjørke AS 2014, p. 110, and also Asbjørn Kjønstad, Aslak Syse og Morten Kjelland, *Velferdsrett I: Grunnleggende rettigheter, rettsikkerhet og tvang*, Gyldendal Juridisk, 6th ed. 2017, p. 36

<sup>58</sup> E/C.12/GC/18, 6 February 2006, General comment No. 18 Article 6 of the International Covenant on Economic, Social and Cultural Rights para. 22

<sup>60</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, A/RES/2200

<sup>61</sup> E/C.12/GC/18, 6 February 2006, General comment No. 18 Article 6 of the International Covenant on Economic, Social and Cultural Rights para. 31

This entails an obligation to “*guarantee*” that the protection of the right to work will be exercised “*without discrimination of any kind*” and the obligation “*to take steps*” to ensure the realisation of this right.<sup>62</sup> Even though the Covenant acknowledges that the realization of the right to work is progressive and takes place over a period of time, it emphasises that this fact should not be interpreted as depriving the State’s obligation of meaningful content. The State therefore has an obligation to “*move as expeditiously and effectively as possible towards the full realization of article 6.*”<sup>63</sup>

Moreover, a general principle of equality is now laid down in the Norwegian Constitution § 98, which states that all people are equal under the law and that no human must be subject to unfair or disproportionate differential treatment. This provision is part of the State’s constitutional obligation to ensure that all individuals and groups of people are allowed to participate in working life.

### 3.5 Judicial review of § 110

The threshold for judicial review must be separated from the interpretation of the material rule. The boundaries are, however, sometimes difficult to draw. In the legal preparations leading up to the constitutional revision in 2014, the threshold for judicial review was debated alongside with the material rule. According to the preparatory work, the threshold for judicial review of § 110 is presumed to be very high.<sup>64</sup> To the courts, then, § 110 has been of little significance. In 1996 the Borgarting appeal court rejected the relevance of this provision on the basis that it does not give the individual a legal claim against the State.<sup>65</sup> This was also the case in a ruling from a District Court in 2019.<sup>66</sup> The legal effect of this provision has, however, not been tried before the Norwegian Supreme Court.

Legal theory suggests that the provision may serve as a basis for legal proceedings in cases where the State is conducting a politics that is blatantly undermining the aim of full employment, for instance by using mass-unemployment as a political monetary tool.<sup>67</sup> Other legal sources suggest that if the State does not fulfil its obligations to facilitate the individual’s participation in working life, this may constitute a violation of § 110. Even though the individual cannot make a claim for work on the basis of this provision, a person with legal interest may still instigate legal proceedings with a claim that State legislation or practice is in breach with § 110.<sup>68</sup>

## 4. The procurement of labour market programmes

### 4.1 The importance of employment

As pointed out in chapter 1, full employment is an overarching political objective. It is in the interest of society that as many people as possible are employed and able to provide for themselves.

Participation in working life is also crucial for the individual in creating a sense of usefulness and belonging. The labour market programmes are important tools in the labour market policy, and shall

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<sup>62</sup> Ibid. para. 19

<sup>63</sup> Ibid. para. 20

<sup>64</sup> Dokument 16 (2011-2012), Rapport fra Menneskerettighetsutvalget om menneskerettigheter i Grunnloven, avgitt 19. desember 2011, p. 231

<sup>65</sup> LB-1995-2823

<sup>66</sup> TOSLO-2019-177664

<sup>67</sup> Asbjørn Kjønstad, Aslak Syse og Morten Kjelland, *Velferdsrett I: Grunnleggende rettigheter, rettssikkerhet og tvang*, Gyldendal Juridisk, 6th ed. 2017, p. 134

<sup>68</sup> Henriette Sinding Aasen and Nanna Kildal in Henriette Sinding Aasen and Nanna Kildal (red.) *Grunnloven og velferdsstaten*, Fagbokforlaget Vigmostad & Bjørke AS 2014, p. 111

support the political aim of full employment.<sup>70</sup> The labour market programmes are also part of the fulfilling of the State's constitutional obligations on the right to work pursuant to § 110 of the Norwegian Constitution.<sup>71</sup>

This chapter will look more closely into the nature of labour market programmes, and the regulations governing the procurement processes of these programmes. The aim is to explore whether the procurement regulations *in itself* indicates that the contracting authorities should exercise restraint in emphasising other considerations than the welfare of the individual when procuring these programmes.

## 4.2 Labour market programmes

The Labour Market Act aims at facilitating an inclusive working life through a well-functioning labour market with high levels of occupational employment and low unemployment.<sup>72</sup> Pursuant to the Labour and Welfare Administration Act § 4, NAV is responsible for administering the Labour Market Act.<sup>73</sup> The Labour and Welfare Administration Act § 14a entitles any person that seeks or needs assistance from a NAV office to find employment the right to an assessment of his or hers need for support.<sup>74</sup>

Should the assessment conclude that a person is in need of a labour market program, a necessary and appropriate program may be initiated pursuant to the Labour Market Act § 12. The labour market programmes aim, in general, to strengthen the participants' possibility to find and sustain employment.<sup>75</sup> Pursuant to § 1-3 of the Labour Market Regulation, a condition for entering a program is that participation in the programme is both a necessary and appropriate means to increase the participant's possibility to find and sustain employment.

NAV offers a wide range of labour market programmes.<sup>76</sup> The programmes include, in general, such programmes as education, training, work-practice, vocational rehabilitation, wage subsidy and general help and advice. The structure, content and length of the programmes vary depending on the nature of the programme and the participants' need for assistance. The Labour Market Act does not give the individual a legal right to a labour market program. The NAV offices have the authority to decide whether a labour market program is to be initiated. The decision has, nevertheless, to be made according to the general principles of administrative law, which also gives the individual a right to lodge an appeal.<sup>77</sup>

## 4.3 The procurement of labour market programmes

The Public Procurement Regulation is divided into five parts, relating to value and classification of the procurement. In the procurement regime, labour market programmes are classified as health- and social-services.<sup>78</sup> Directive 2014/24 EU establishes that Member States are free to determine the

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<sup>70</sup> Riksrevisjonens undersøkelse av forvaltning og bruk av arbeidsmarkedstiltak i NAV, Dokument 3:5 (2017-2018) p. 7

<sup>71</sup> Asbjørn Kjønstad, Aslak Syse og Morten Kjelland, *Velferdsrett I: Grunnleggende rettigheter, rettsikkerhet og tvang*, Gyldendal Juridisk, 6th ed. 2017, p. 143

<sup>72</sup> LOV-2004-12-10-76 § 1

<sup>73</sup> Ibid.

<sup>74</sup> «Alle som henvender seg til kontoret, og som ønsker eller trenger bistand for å komme i arbeid, har rett til å få vurdert sitt bistandsbehov»

<sup>75</sup> FOR-2015-12-11-1598 § 1-1

<sup>76</sup> Ibid.

<sup>77</sup> LOV-2004-12-10-76 §§ 16 and 17

<sup>78</sup> FOR-2016-08-12-974 annex 3, Annex XIV of Directive 2014/24/EU.

procedural rules applicable for these services as long as such rules allow the contracting authorities to take into account the specificities of these services.<sup>80</sup>

Pursuant to § 30-1 (3) of the Public Procurement regulation the contracting authorities may, therefore, take into account the specificities of these services in all phases of the procurement process. This applies in particular to the need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services, the specific needs of different categories of users, and the involvement and empowerment of users and their participation in society.<sup>81</sup>

Pursuant to § 5-1 of the Public Procurement Regulation, all procurements regardless of value or classification is subject to part I of the regulations, whereas procurements classified as health- and social services with an estimated net value equal to or greater than the EU-threshold, is subject to part IV of the regulation.

Pursuant to § 5-3, the EU threshold for health- and social-services is MNOK 7.2.<sup>82</sup> The procurements of labour market programmes with an estimated net value between NOK 100 000 and MNOK 7.2 are thus subject to the regulations as set out in part I of the Public Procurement Regulation, whereas the procurements of labour market programmes with an estimated net value equal to or greater than MNOK 7.2 are subject to the regulations as set out in part I and IV. For other services, the public procurement rules have to be applied for contracts with an estimated value net equal to or greater than MNOK 1, 3.<sup>84</sup>

Part I contains few explicit rules, the inference thus being that the contracting authorities have a wide margin of appreciation when conducting procurements only subjected to the part I-regulation. Part IV follows largely the same scheme as set out in part I, although a few more rules apply; there is an obligation to use contract notices as a means of calling for competition, to send a contract award notice on the results of the procurement procedure, and a requirement that the award notice shall include a justification for the choice of tenderer. Moreover, a stand still period of at least 10 days applies.<sup>85</sup>

Pursuant to § 30-1 (5) the contracting authorities are, furthermore, not bound by the regular 4-years limitations on the duration of framework agreements as set out in § 26-1 (4).<sup>86</sup> The contracting authorities may therefore enter into long-term agreements if this is due, for instance, to the needs of the users of the service.

To take account of the specific characteristics of health- and social-services, then, both a higher EU-threshold and a more lenient set of rules apply. This indicates a lack of cross-border relevance for the procurements of such services below the EU-threshold. It also acknowledges, I believe, a need for the contracting authorities not to be bound by strict procedural regulations when procuring such services, in which the need to ensure quality and continuity for the individual user is crucial.

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<sup>80</sup> See also Directive 2014/24 EU art. 76

<sup>81</sup> Ibid. art. 76 (2)

<sup>82</sup> New thresholds apply from February 12, 2020:

<https://www.regjeringen.no/contentassets/48242c43007d4e4c95dec5d63b2df498/nye-terkelverdier-av-12-februar-2020.pdf>

<sup>84</sup> See also Directive 2014/24 EU art.

<sup>85</sup> FOR-2016-08-12-974 §§ 30-5, 30-7, 30-8 and 30-9. See also Directive 2014/24 EU art. 74-76

<sup>86</sup> See also Directive 2014/24/EU art. 33 (1)

## 5. The facilitation of the participation of SMEs

### 5.1 What is an SME?

In the definition adopted by the Commission of the European Communities, the category of SME's is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million and/or an annual balance sheet total not exceeding EUR 43 million.<sup>90</sup>

The Directive 2014/24/EU refers to the definition of the Commission Recommendation from 2003. The Directive says, however, that the definition is to be used "*for the purpose of this paragraph and paragraph 4 of this Article,*" suggesting that the legal scope of the definition is limited to this specific provision in the Directive.<sup>91</sup> If applying the EU definition, almost all enterprises in Norway would fall under the scope of the definition. An SME in a Norwegian context is normally understood as an enterprise which employs fewer than 100 persons.<sup>92</sup> It is thus my understanding that the definition of what is an SME has to be understood relatively in relation to the specific country in question.

### 5.2 The aim to facilitate the participation of SMEs in public procurement

Directive 2014/24/EU contains an explicit aim to facilitate the participation of small and medium-sized enterprises (SMEs). The preamble of the directive thus states that the public procurement regulations should aim at "*facilitating in particular the participation of small and medium-sized enterprises (SMEs) in public procurement,*" and, furthermore, that public procurement "*should be adapted to the needs of SMEs.*"<sup>93</sup> Being subject to the public procurement regulations, the procurement of labour market programmes is not exempt from this objective, as will also be demonstrated through the NAV case-study.

In order to properly explore my thesis' research problem; that legal dilemmas may arise when facilitating the participation of SMEs in the procurement of labour market programmes, it is necessary to look more closely at what measures are available to the contracting authority in this respect. I will also attempt to demonstrate that the interests of SMEs may be taken care of in the procurement of labour market programmes without this *necessarily* affecting negatively the protection of the individual's right to work. It is, I believe, a matter of being aware of possible dilemmas and of finding a way to balance these different interests to create a win-win situation.

My thesis' research problem also indicates that not *all* measures available to facilitate the participation of SMEs are necessarily equally problematic in light of the constitutional obligations pursuant to § 110. If the interest of SMEs in the procurement of labour market programmes can be taken care of in a number of ways, without having to resort to measures that challenge the rights of the individual, then this is a relevant argument in a 'fair balance' analysis of the constitutional protection of the right to work.<sup>94</sup>

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<sup>90</sup> 2003/361/EC, annex I, art. 2

<sup>91</sup> Directive 2014/24/EU, art. 83 (3)

<sup>92</sup> Meld. St. 22 (2018-2019) p. 30

<sup>93</sup> Directive 2014/24/EU rec. 2 and 78.

<sup>94</sup> European Court of Human Rights: Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights, p. 27



### 5.3 Measures that may facilitate the participation of SMEs in the procurement of labour market programmes

The preamble of Directive 2014/24/EU states that the contracting authorities should be encouraged to use the European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts. The contracting authorities should, in particular, be encouraged to divide large contracts into lots.<sup>95</sup>

The division of contracts into lots is a measure that is particularly well suited both to enhance competition in general and to facilitate the participation of SMEs that may not be able to tender to larger contracts. The following analysis of the different measures that the contracting authorities may use will also include measures that are not directly targeted at the facilitation of the participation of SMEs, but that are nevertheless suited to enhance competition in general, thus more indirectly affecting the level of the participation of SMEs.

The Public Procurement Regulation parts I and IV contain few explicit rules governing the procurement process. Applying a “the greater subsumes the lesser” approach, the inference is that everything that is allowed in the less flexible parts of the Public Procurement Regulation is allowed in parts I and IV, unless explicitly stated otherwise. The following analysis of the different measures that the contracting authorities may use to facilitate the participation of SMEs in public procurements of labour market programmes therefore contains legal references to part III of the Public Procurement Regulation. Part III regulates procurements above the EU-thresholds for most of the different categories of procurements that are subject to the Public Procurement Regulation.<sup>96</sup>

#### 5.3.1 Choice of procedure

The contracting authorities’ choice of procedure affects the level of competition in public procurements in general. The Public Procurement Regulation § 13-1 provides a list of the different types of procedures allowed for procurements subjected to the Part III procedural regulations.<sup>97</sup> Following an interpretation of Part IV, § 30-1 (1) and (2), the contracting authority may choose any of these procedures in the procurement of labour market programmes.

A basic division can be made between an open procedure and a restricted procedure. In an open procedure, any interested economic operator may submit a tender. In a restricted procedure, any economic operator may submit a request to participate, but only the economic operators invited to do so by the contracting authority may submit a tender. Other procedures are the competitive procedure with negotiation, competitive dialogue, innovation partnership and use of the negotiated procedure without prior publication.

Labour market programmes are complex services. The need for dialogue with the tenderers may therefore be important to the contracting authorities. A way to balance the interests of both SMEs and the individual user of a labour market programme, I believe, is to use the competitive procedure with negotiation without pre-qualification, in which any interested economic operator may submit a tender. In that way, the contracting authority may facilitate the inclusion of SMEs while at the same

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<sup>95</sup> Directive 2014/24 /EU rec. 78

<sup>96</sup> FOR-2016-08-12-974 § 5-1 (3)

<sup>97</sup> See also Directive 2014/24/EU art. 26-32

time being able, through negotiations, to adjust the tenders so that they meet the specifications of the contracting authority and the needs of the participants in these programmes.

### 5.3.2 Selection criteria

Pursuant to the Public Procurement Regulation § 16-1 (1), the contracting authority may impose selection criteria.<sup>98</sup> Selection criteria serve the purpose of ensuring that a tenderer has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded. The selection criteria may only relate to suitability to pursue the professional activity, economic and financial standing and technical and professional ability. Pursuant to § 16-1 (2) the contracting authority may require means of proof as evidence for the fulfilment of the selection criteria.<sup>99</sup>

As for the selection criteria regarding economic and financial standing, the contracting authority may only impose requirements that are relevant to ensure the performance of the contract to be awarded.<sup>101</sup> This may include a requirement that tenderers have a certain minimum yearly turnover, including a certain minimum turnover in the area covered by the contract. The requirement cannot, however, exceed two times the estimated contract value, except in duly justified cases.<sup>102</sup> With regard to the interests of SMEs, this regulation prevents the contracting authorities from making disproportional requirements, de facto excluding SMEs with smaller economies from tendering in the competition.

As for the selection criteria regarding technical and professional ability, the contracting authorities may impose requirements that are relevant to ensure that tenderers possess the necessary human and technical resources and experience to perform the contract.<sup>103</sup> This may include a requirement that tenderers have a sufficient level of experience demonstrated by documentation pertinent to the most important contracts performed in the past 3 years.<sup>104</sup> The market for labour market programmes deviates from other markets in the respect that NAV is often the sole purchaser of these programmes. A requirement related to contracts performed could therefore be detrimental not only to the participation of SMEs, but to competition in general.

The imposing of selection criteria is not compulsory, hence the wording in § 16-1 (1) that such requirements “may” be imposed. This allows the contracting authority a wide margin of appreciation which can be used to open up the competition to SMEs that may have difficulties in meeting certain criteria. Selection criteria are, however, often necessary to ensure that tenderers will be able to perform according to the needs of the contracting authority. Selection criteria may therefore be highly justified, even though the result is that some tenderers are excluded from the competition.

This balancing of interests between opening up for competition and securing good performance by imposing selection criteria is, I believe, particularly important when procuring services that are pivotal in the securing of the individual’s fundamental rights, such as the right to work. In the procurement of labour market programmes the contracting authorities, therefore, will have to

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<sup>98</sup> See also Directive 2014/24/EU art. 58

<sup>99</sup> Ibid. art. 60

<sup>101</sup> FOR-2016-08-12-974 § 16-3 (1)

<sup>102</sup> Ibid. § 16-3 (1)(a)

<sup>103</sup> Ibid. § 16-5 (1)

<sup>104</sup> Ibid. § 16-6 (1)(b)

impose selection criteria that help ensure quality and stability of performance, even if this means that the imposed selection criteria may reduce the level of participation of SMEs.

### 5.3.3. Reliance on the capacities of other entities and joint tendering

Pursuant to § 16-10 (1) of the Public Procurement Regulation, a supplier may rely on the capacity of other entities with regard to the selection criteria relating to economic and financial standing and technical and professional ability, as set out pursuant to § 16-1 (1).<sup>105</sup> Pursuant to § 16-11 (1), the contracting authorities are furthermore required to accept certain forms of co-operation between tenderers.<sup>106</sup> These possibilities in the regulations can be conducive to the participation of SMEs, should an SME on its own not be able to meet the criteria set out by the contracting authority. As for the protection of the individual's right to work, I see no immediate disadvantages with respect to this measure.

### 5.3.4 Subcontracting

The possibility of using subcontractors follows presumably from § 19-2 (2) of the Public Procurement Regulation<sup>107</sup>, which states that a tenderer may be asked to indicate whether he intends to subcontract parts of the contract. The possibility of subcontracting has also been confirmed by EU-rulings.<sup>108</sup> A subcontractor is normally understood as an economic operator that tends to one or more of the contractual obligations that is concluded between the main economic operator and the contracting authority.<sup>109</sup> Sub-contracting may provide SMEs with good opportunities, particularly where SMEs can provide added value in the form of specialised or innovative products or services.<sup>110</sup>

As for work contracts relating to construction and cleaning, the contracting authority is obliged to limit subcontracting to only two subcontractor levels in the contract chain.<sup>111</sup> According to legal preparations, this regulation is aimed at fighting crime in the workplace, in particular social dumping.<sup>112</sup> The limitation does not, however, apply if a higher subcontractor level in the contract chain is necessary to secure a sufficient level of competition.<sup>113</sup>

The limitation applies to specific work contracts. I will submit, however, that there is a legitimate concern that subcontracting will make it more difficult to ensure that contracts are effectively and properly carried out also in relation to service contracts. If a labour market programme is subcontracted, then at least it will be important for the contracting authorities to implement measures to monitor the supply-chain, to make sure that expectations are met.

### 5.3.5 Award criteria

Pursuant to § 18-1 (1) of the Public Procurement Regulation, the contracting authority may identify the most economically advantageous offer on the basis of the lowest price or cost, or best price-

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<sup>105</sup> See also Directive 2014/24 /EU art. 63

<sup>106</sup> Ibid. art. 19

<sup>107</sup> Ibid art. 71 (2)

<sup>108</sup> C-176/98 – Holst Italia para, 26 and 27 and C-314/01 – Siemens and ARGE Telekom para. 43

<sup>109</sup> <https://www.regjeringen.no/no/tema/naringsliv/konkurransepolitikk/offentlige-anskaffelser-/andre-kolonne/bruk-av-underleverandorer/id2563725/>

<sup>110</sup> Commission of the European communities, 2008, p.10

<sup>111</sup> FOR-2016-08-12-974 § 19-3 (1)

<sup>112</sup> NOU 2014:4 Enklere regler – bedre anskaffelser, p. 20

<sup>113</sup> FOR-2016-08-12-974 § 19-3 (2)

quality ratio.<sup>114</sup> Pursuant to § 18- 1 (7), the contracting authority may also use a quality-only criterion for the award, provided that the cost-element takes the form of a fixed price or cost.

Tenderers that are highly focused on quality, for instance SMEs that offer specialized services, may have difficulties in being awarded contracts in competitions where the most economically advantageous tender is identified on the basis of a price or cost alone, or where price or cost is given a relatively high weighting. It could therefore be conducive to the participation of SMEs to include a quality-criterion in the basis for the award of a contract, and, depending on the type of contract, give quality a relatively high weighting.

Directive 2014/24 EU allows for the member states to prohibit the cost-only criterion for the award of health- and social services contracts.<sup>115</sup> Such a prohibition has, however, not been implemented in Norwegian law. This implies that labour market programmes may, in theory, be awarded on the basis of a cost-only criterion. In general, a cost-only criterion will not allow the contracting authority to consider “*the specificities of these services*”, as required by Directive 2014/24/EU.<sup>116</sup> For certain labour market programmes, for instance the obtaining of a driver’s license for heavy vehicles as offered by NAV in Agder, a cost-only criterion may not present a dilemma as only authorized personnel is allowed to give this training.<sup>117</sup> The quality of the programme may then be secured through the imposing of a selection criteria relating to technical and professional ability of the tenderer pursuant to § 16-1 (1).

### 5.3.6 Division of contracts into lots

Pursuant to the Public Procurement Regulation § 19-4 (1), contracting authorities may decide to award the contract in the form of separate lots. Pursuant to § 19 (3) the contracting authority shall indicate in the contract notice or in the invitation to confirm interest, whether tenders may be submitted for one, for several or for all of the lots. Legal theory on the division of contracts into lots points out that putting more contracts out to tender, lowering their value, increases the chances for SMEs to win some lots and obtain “*a slice of the procurement pie*”.<sup>118</sup>

The dividing of contracts into lots can be done on a quantitative or a qualitative basis. An SME tendering in a competition for a labour market programme may have an interest in tendering in certain areas whilst not in others or may have an interest in offering a specialized service. By dividing the contract into lots, the SMEs can opt to submit a tender for the number of lots that is appropriate for the capacity, area of expertise or geographical location of the company. NAV Oslo offers, for instance, specialized labour market programmes targeted at people with hearing-disabilities.<sup>119</sup>

The possibility of awarding the contract in the form of separate lots does not ensure, however, that contracts for all lots are not awarded one tenderer only. Pursuant to § 19 (4) the contracting

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<sup>114</sup> See also Directive 2014/24 /EU art. 67 (2)

<sup>115</sup> Ibid. art. 76

<sup>116</sup> Ibid. art. 76

<sup>117</sup> <https://www.doffin.no/Notice/Details/2019-314737>

<sup>118</sup> Ignacio Herrera Anchustegui, Division into Lots and Demand Aggregation – Extremes Looking for the Correct Balance? p. 2. To be published in GS Ølykke & A Sánchez-Graells (eds), Reformation or Deformation of the EU Public Procurement Rules in 2014 (Cheltenham, Edward Elgar Publishing, 2016).

<sup>119</sup> <https://www.doffin.no/Notice/Details/2016-770407>

authorities may, therefore, limit the number of lots that may be awarded one tenderer, even where tenders may be submitted for several or all lots.<sup>120</sup>

Should the contracting authority decide to limit the number of lots that may be awarded one tenderer, this would not only enable SMEs to participate in the competition, but also ensure that the contracting authority awards a contract to more than one tenderer. In theory, then, such a limitation could allow the opportunity of more than one SME being awarded a public contract.

A limiting of the number of lots that may be awarded one tenderer entails, however, an acceptance of the fact that contracts for some lots will not be awarded the tenderer with the most economically advantageous offer. As for labour market programmes, such a limitation may very likely result in a situation in which the users of the programmes in the lots that cannot be awarded the tender with the best price-quality ratio, will receive an offer of poorer quality than the users in the lots that are awarded the tenderer with the best price-quality ratio. This scenario will be a definite outcome where contracts are awarded based on fixed price or cost and a quality-only criterion.

## 6. NAV case- study

### 6.1 Background

NAV is a pivotal public entity in the securing of the rights of the citizens to make a living through their work. As part of fulfilling the State's constitutional obligations concerning employment, NAV administers welfare laws and regulations and is required by law to provide jobseekers with advice and help, in which labour market programmes are essential tools. NAV is also a contracting authority when procuring labour market programmes, subject to the public procurement regulations that aim to promote efficient use of society's resources.

Assessment and Follow-up are two nationally available labour market programmes.<sup>121</sup> Pursuant to the Labour Market Regulation, Assessment and Follow-up are subject to the public procurement regulations.<sup>122</sup> Following a change in the Labour Market Regulation from January 1, 2015, NAV in each county conducted a series of procurements of these programmes in 2015/2016. NAV has commenced new procurement processes of these programmes in 2019/2020.

The change in the Labour Market Regulation was part of a government-initiated reform which aims were to simplify the regulations on labour market programmes, to increase the diversity of suppliers, and to increase the quality of the programmes through means of competition.<sup>123</sup> The aim to increase the diversity of suppliers entailed an aim to facilitate the participation of SMEs.<sup>124</sup>

The labour market programmes Assessment and Follow-up are described as follows on NAV's official homepage; *"Assessment is available to both the employed and unemployed. The scheme is also an option for persons on long-term sick leave who wish to re-enter the labour market. Assessment entails extra assistance for to chart or test the participants work capabilities. It may chart or assess whether a person will be able to continue working at the same job if the working situation and/or work tasks need to be adapted to his or hers capabilities, what assistance or adaptations the participant needs to get a job, the participants skills, competences and opportunities"*.<sup>125</sup>

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<sup>120</sup> See also Directive 2014/24 /EU art. 46 (1) and (2)

<sup>121</sup> [www.nav.no](http://www.nav.no)

<sup>122</sup> FOR 2015-12-11-1598 §§ 2-6 and 4-6

<sup>123</sup> Høringsnotat – et enklere tiltakssystem tilpasset brukernes behov, p. 1

<sup>124</sup> Evaluering av offentlig anskaffelse: Nytt avklarings- og oppfølgingstiltak, Delrapport 1, Proba samfunnsanalyse, p. 41

<sup>125</sup> <https://www.nav.no/en/home/benefits-and-services/relatert-informasjon/assessment>

*“Follow up is meant for those who are in need of personal assistance to gain or keep suitable employment, and need extensive placement and follow-up assistance. The measure is tailored to the participants individual needs based on his or her opportunities on the labour market. The participant can get practical assistance to find suitable tasks or employers beyond those he or she have already tried, adapt his or hers work or work situation and further guidance.”<sup>126</sup>*

## 6.2 The 2015/2016 procurement process

NAV Rogaland published a contract notice for Follow-up on April 22, 2015 and for Assessment on May 20, 2015.<sup>128</sup> An examination of the contract notices in Doffin shows that NAV Rogaland has chosen the procedure “negotiated procedure without pre-qualification.”<sup>131</sup> As pointed out in chapter 5 this choice of procedure, where any interested economic operator may submit a tender, promotes a high level of competition, thus more indirectly affecting the level of participation of SMEs. This procedure is also well suited to safeguard the interests of the users of the programmes, as it allows the contracting authorities to adjust the tenders through negotiations so that to best meet their expectations and the needs of the users.

The selection criteria may, as also demonstrated in chapter 5, relate to suitability to pursue the professional activity, economic and financial standing and technical and professional ability. As for suitability to pursue the professional ability, NAV Rogaland has for both programmes required that the tenderer is a “*legally established business.*” The required means of proof is a certificate of registration from the Brønnøysund Register Centre.<sup>133</sup> As for economic and financial standing, the criterion is that the tenderer has “*sufficient financial capacity to perform the contract.*” Means of proof is a credit evaluation and the company’s latest annual report, including an independent auditor’s report.

When it comes to the selection criteria technical and professional ability, the criteria are “*good performance capacity*” and “*methods for quality assurance.*” Means of proof relating to performance is a description of the tenderer’s professional ability and a description of relevant units in the company. Means of proof relating to methods for quality assurance is a description of methods of quality assurance, and/or a certificate issued by an authorized company that proves compliance with a quality assurance standard.<sup>134</sup>

What is particularly worth noticing with respect to the aim to facilitate the participations of SMEs, is that NAV Rogaland did not require for the economic operator to have experience from the performance of similar contracts, or for the economic operators to include the CV’s of staff assigned to perform the contracts. Such requirements would both have led to a de facto exclusion of newly established economic operators, or smaller operators that did not have the necessary staff in the pre-contractual phase.

It is also worth noticing that the criterion related to economic and financial standing only requires “*sufficient financial capacity to perform the contract.*” The criterion is vague, but it is probably more lenient than a requirement made pursuant to the Public Procurement Regulation § 16-3 (1) a) that

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<sup>126</sup> <https://www.nav.no/en/home/benefits-and-services/relatert-informasjon/follow-up>

<sup>128</sup> <https://www.doffin.no/Notice/Details/2015-125758> and <https://www.doffin.no/Notice/Details/2015-154747>

<sup>131</sup> <https://www.doffin.no/Notice/Details/2015-125758> and <https://www.doffin.no/Notice/Details/2015-154747>

<sup>133</sup> Brønnøysund Register Centre is a Norwegian government agency that is responsible for the management of numerous public registers for Norway

<sup>134</sup> [file:///C:/Users/B120614/AppData/Local/Packages/Microsoft.MicrosoftEdge\\_8wekyb3d8bbwe/TempState/Downloads/Konkurransesgrunnlag%20del%20I%20Oppfølging%20Rogaland%20revidert%20\(1\).pdf](file:///C:/Users/B120614/AppData/Local/Packages/Microsoft.MicrosoftEdge_8wekyb3d8bbwe/TempState/Downloads/Konkurransesgrunnlag%20del%20I%20Oppfølging%20Rogaland%20revidert%20(1).pdf) and [file:///C:/Users/B120614/AppData/Local/Packages/Microsoft.MicrosoftEdge\\_8wekyb3d8bbwe/TempState/Downloads/Konkurransesgrunnlag%20del%20I%20Avklaring%20Rogaland%20\(1\).pdf](file:///C:/Users/B120614/AppData/Local/Packages/Microsoft.MicrosoftEdge_8wekyb3d8bbwe/TempState/Downloads/Konkurransesgrunnlag%20del%20I%20Avklaring%20Rogaland%20(1).pdf)

tenderers are obliged to have a certain minimum yearly turnover, including a certain minimum turnover in the area covered by the contract, which could exclude SMEs with smaller economies.

As for the protection of the right to work, the imposing of selection criteria in these procurements helps ensure quality and stability of performance so that the interests of the individual is also safeguarded.

The procurement documents furthermore shows that the contracts for both Assessment and Follow-up will be awarded the most economically advantageous offer on the basis of the best price-quality ratio, in which the relative weighting of the quality and price criterion is 60 % and 40 % respectively. This weighing of the award criteria signals that quality is more important than price in the procurement of these programmes. An emphasis on quality may also, as demonstrated in chapter 5, be conducive to the participation of SMEs that focus particularly on quality, for instance through innovative services.

Regarding the division of the contract into lots, NAV Rogaland has divided the contracts for Assessment and Follow-up into five geographical lots, where tenders may be submitted for all lots. This is yet, then, another practical example of how the aim to facilitate the participation of SMEs is enforced in the procurement of labour market programmes.

### 6.3 The 2019/2020 procurement process

Examining the contract notices for Assessment of February 6, 2020 and Follow-Up of September 5, 2019,<sup>135</sup> one of the most significant changes from the 2015/2016 process is that NAV Rogaland has now limited the number of lots that may be awarded one tenderer to two out of five lots. Tenders may be offered for all lots. NAV Rogaland has also changed the award criteria; the contract notice now states that the contract will be awarded the most economically advantageous offer on the basis of the best price-quality ratio, in which the relative weighting is quality 70 % and price 30 %.<sup>136</sup>

The possibility of limiting the number of lots that may be awarded one tenderer, which is now an available option pursuant to the Public Procurement Regulation § 19 (4), was not an explicitly stated option for the contracting authority in 2015, which was prior to the implementation of Directive 2014/24 EU in Norwegian law.

Pursuant to the Freedom of Information Act, I have asked NAV Rogaland for the procurement protocols, including information on the price and quality assessments for the procurements of Follow-up in the 2019/2020 process.<sup>137</sup> The documentation shows that the consequence of having limited the number of lots that may be awarded one tenderer, is that two of the lots are not awarded the tender with the best quality-price ratio. In both of these lots, the tenders that are awarded a contract are assessed to be of lower quality than the tender that would have won, had there not been such a limitation.

I have asked for the same documentation from NAV Trøndelag. This documentation shows, similarly, that the contract in one lot is awarded a tender that is assessed to have the third-best quality-price ratio, and where the quality of this tender is assessed to be of considerably lower quality than the tender that would have won, had there not been a limitation in the number of lots that may be awarded one tenderer.

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<sup>135</sup> <https://www.doffin.no/Notice/Details/2019-326274> and <https://www.doffin.no/Notice/Details/2020-392600>

<sup>136</sup> <https://www.doffin.no/Notice/Details/2020-392600> and <https://www.doffin.no/Notice/Details/2019-326274>

<sup>137</sup> LOV-2006-05-19-16 § 23 (3)

## 7. A legal barrier?

### 7.1 The most problematic measure in the facilitation of the participation of SMEs in the procurement of labour market programmes

In light of my thesis' research problem, I believe that the most problematic measure in the facilitation of the participations of SMEs in the procurement of labour market programmes, is a decision pursuant to the Public Procurement Regulation § 19 (4) to limit the numbers of lots that may be awarded one tenderer, as was a measure opted for in the 2019/2020 NAV Rogaland procurement process.

The mere inclusion of a cost or price criteria in the procurement of labour market programmes entails, of course, an acceptance of a belief that the efficient use of society's resources requires cost-control. There is always a risk, then, that the quality of the tender may not be the decisive factor when awarding a public contract.

Although a matter of continuous political debate, there is also no doubt that health- and social services are subject to political priorities and cost containment, without this being a violation of fundamental civil rights. Legal preparations leading up to an amendment of the Norwegian Constitution § 110 in 1954 thus explicitly states that the nature of the State obligations concerning the right to work is determined by the economic circumstances under which the State operates at any given time.<sup>138</sup>

Accepting the second or even third-best offer for some lots as a result of having limited the number of lots that may be awarded one tenderer has, however, nothing to do with cost control, and this, I believe, makes such a measure unique in the context of welfare services provided by the State as part of a constitutional obligation. Although one cannot be sure of the outcome, there is a risk that the second or third-best offer may even be of both higher price and poorer quality, something which is not 'value for money.' This measure may, then, ultimately undermine the aim of the Public Procurement Act of ensuring the efficient use of society's resources.

A study on the effect of labour market programmes commissioned by the Ministry of Labour and Social Affairs concludes that the quality of a labour market programme may be a decisive factor as to whether the programme achieves its objective; which is to strengthen the participants' possibility to find and sustain employment.<sup>139</sup> As for the right to work, then, there is a risk that a poorer quality labour market programme weakens the mechanism of protection that these programmes offer as part of the constitutional obligation pursuant to § 110.

Because these labour market programmes are so essential in the fulfilling of the State's constitutional obligations on the right to work it may be easily argued, I believe, that a decision to limit the number of lots that may be awarded one tenderer in the procurement labour market programmes is not a sound discretionary decision. My thesis' outset, however, is that § 110 may even impose a legal barrier in this respect.

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<sup>138</sup> Innst. S. nr. 220 (1954) s. 584

<sup>139</sup> Proba samfunnsanalyse; Virkning av arbeidsrettede tiltak for personer med nedsatt arbeidsevne, Rapport 2011-02, p. 3



## 7.2 The interests of the community and the protection of the individual's fundamental rights

Although the Norwegian Constitution § 110 does not give the individual an unconditional claim to employment, my discussion in chapter 4 on the strength of the constitutional protection of the right to work has, nevertheless, shown that this provision clearly imposes a duty on the State to take necessary steps, as soon as possible, to ensure that everyone is protected from unemployment. At the same time, the State has a margin of appreciation in deciding how to regulate the exercise of this right so that both the general interest of the community and the protection of the individual's fundamental right may be safeguarded.

There can be little doubt that the Norwegian State has implemented both legislative, administrative, budgetary and judicial measures to ensure the safeguarding of the right to work. As demonstrated in chapter 1, Norway is among the OECD-countries that spend the most public funding on various labour market programmes and benefits for unemployed people.<sup>140</sup> Furthermore, NAV administers extensive welfare regulations that entitles any person that seeks or needs assistance from a NAV office to find employment the right to an assessment of his or hers need for support, an assessment which may result in the initiation of a labour market programme.

As an outset, then, it seems fair to say that the human rights obligations concerning the right to work are, generally, taken well care of in Norway. Maybe because of this relatively extensive support for unemployed people provided by the Norwegian State it has become too easy, however, not to continually question whether new laws, regulations or administrative decisions are aligned with the constitutional and international human rights obligations concerning this right.

That administrative decisions have to take into consideration the constitutional protection of the right to work is clearly demonstrated through a 2008 decision by the Sivilombudsmannen.<sup>141</sup> The case in question concerned the administrative agency's duty pursuant to the Public Administration Act § 17 to clarify the case before an administrative decision is made.<sup>142</sup> The administrative agency had rejected an application from the complainant of the issuing of an ID-card, allowing access to a secure zone in the airport. If not granted the ID-card, the complainant would be forced to decline a job-offer at the airport. The Sivilombudsmannen concluded that the clarification of the case had been inadequate on the part of the public administration.

In his decision, the Sivilombudsmannen emphasises that the possibility for the individual to make a living through his or hers work is considered a fundamental asset in Norwegian society, and that the State's duty to facilitate this is grounded in the Norwegian Constitution § 110, as well as in the International Covenant on Economic, Social and Cultural Rights article 6. The extent of the duty to clarify a case before making a decision that is pivotal to an individual's possibility to work, the Sivilombudsmannen states, will therefore have to be interpreted in light of the State's constitutional obligations.

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<sup>140</sup> NOU Arbeidsrettede tiltak 2012:6

<sup>141</sup> Somb-2007/1398. The Ombudsman investigates complaints from citizens who believe they have suffered an injustice or an error on the part of the public administration.

<sup>142</sup> LOV-2017-06-16-63

### 7.3 A fair balance?

The assessment of whether a decision pursuant to § 19 (4) of the Public Procurement Regulation violates the individual's protection of the right to work in the procurement of labour market programmes will, as accounted for in chapter 3 on legal sources and methodology, have to be determined by applying the fair balance principle.

The assessment of the lawfulness of § 19 (4) implies verifying whether this provision affects the core content of the right to work pursuant to § 110 of the Norwegian Constitution, or if this freedom can still be exercised otherwise. As demonstrated in chapter 4, a core obligation pursuant to article 6 of the Covenant on Economic, Social and Cultural Rights is to pay special attention to *“the inclusion in working life of disadvantaged and marginalized individuals and groups”* and *“to move as expeditiously and effectively as possible towards the full realization of article 6.”*<sup>143</sup>

As for the core obligation concerning disadvantaged and marginalized individuals and groups, the labour market programmes are often targeted at such individuals and groups. The labour market programmes Assessment and Follow-Up, which were procured by NAV Rogaland in the 2015/2016 and 2019/2020 procurement processes, are two examples in this respect. Assessment is available for *“persons on long-term sick leave who wish to re-enter the labour market”* and who need *“extra assistance for to chart or test the participants work capabilities,”* whereas Follow-up is available for *“those who are in need of personal assistance to gain or keep suitable employment, and need extensive placement and follow-up assistance.”*<sup>144</sup>

As for the core obligation of moving as expeditiously and effectively as possible towards the full realization of article 6, there is a risk that a poorer quality labour market programme is not as effective in strengthening the participant's possibility to find and sustain employment. Worst case scenario is that a poorer quality programme program results in a lengthened unemployment period for the individual, with reduced possibility of entering or returning to working life.

The Covenant does not, however, entitle the individual to an optimal quality in the steps taken to ensure the realization of the right to work; it requires the State to satisfy a *“minimum essential levels of each of the rights covered by the Covenant.”*<sup>146</sup> As long as the individual in need of a labour market programme is offered such a programme, and the programme provides a sufficient level of quality, then the freedom can still be exercised otherwise. The act of offering users in some lots a poorer quality programme is, I believe, an interference with the protection of the right to work. The interference cannot, however, be deemed unlawful.

When it comes to the assessment of the proportionality of the interference, more specifically the assessment of the legitimate aim of the measure, Directive 2014/24/EU contains an explicit aim to facilitate the participation of SMEs in public procurement, as the participation of SMEs is considered pivotal in securing the positive effect of higher competition for public contracts, leading to better

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<sup>143</sup> E/C.12/GC/18, 6 February 2006, General comment No. 18 Article 6 of the International Covenant on Economic, Social and Cultural Rights para. 20

<sup>144</sup> <https://www.nav.no/en/home/benefits-and-services/relatert-informasjon/assessment> and <https://www.nav.no/en/home/benefits-and-services/relatert-informasjon/follow-up>

<sup>146</sup> E/C.12/GC/18, 6 February 2006, General comment No. 18 Article 6 of the International Covenant on Economic, Social and Cultural Rights para. 31

value for money. Facilitating the participation of SMEs by means of limiting the number of lots that may be awarded one tenderer is a measure adopted in the general interest, and therefore legitimate.

As for the appropriateness of the measure, a decision to limit the number of lots that may be awarded one tenderer will not only enable SMEs to participate in the competition, but also ensure that the contracting authority awards a contract to more than one tenderer. In theory, then, more than one SME may be awarded a contract. The measure is also suited to ensure supplier reliability and future competition as there will, inevitably, be more than one supplier in the market. In this respect, the measure may be deemed both effective and adequate to achieve its purpose.

I believe that the strength of this argument relies, however, on there being an actual risk that future competition and supplier reliability of labour market programmes will be negatively affected if this measure is not adopted. As for the procurements of Assessment and Follow-up, the procurement protocols received from NAV Rogaland and NAV Trøndelag for the 2019/2020 procurement processes of Follow-up shows that Rogaland had a total of 17 tenderers in the competitions, whereas Trøndelag had 24; this is in spite of this measure not being used in the 2015/2016 procurement processes. This is not sufficient data to conclude that this will always be the case for all labour market programmes. It can be argued, nevertheless, that the risk of not having a sufficient level of competition or being able to secure the supplier reliability of labour market programmes, is low.

When it comes to the necessity of the measure, I believe I have shown through my discussion in chapter 5 that there are a number of measures available to the contracting authority that are suited to promote the participation of SMEs in the procurement of labour market programmes. The measure pursuant to § 19 (4) is, however, the measure that most efficiently secures that more than one tenderer is awarded a public contract. I believe, nevertheless, that the contracting authority may facilitate the awarding of a contract to more than one tenderer by changing the design of the competitions. Instead of only dividing the contracts into lots based on geographical considerations, the contracting authority could also target some labour market programmes at employment seekers with specific needs, something which may increase the chance of there being more diversity in the tenderers. Furthermore, the SMEs may avail themselves of the possibility of joint tendering and subcontracting pursuant to § 16-11 (1) and 19-2 (2), measures that will also secure the presence of more than one supplier.

The final assessment in the fair balance test, is the assessment of whether the contested measure has managed to strike a fair balance between the demands of the public or general interest, and the protection of the individuals fundamental rights. It seems to me that this final question is answered by asking if there is a reasonable proportionality between the advantages of limiting the number of lots that may be awarded one tenderer, and the disadvantages that this measure implies for the individual. Although this may be a bold statement, I believe that this question will have to be answered negatively.

Given that the number of suppliers for labour market programmes is high enough to secure future competition and supplier reliability, as shown in my NAV case-study, I can see no advantages of limiting the number of lots that may be awarded one tenderer. The disadvantage for the individual of being offered a poorer quality labour market programme may, on the other side, be considerable. Worst case scenario is that a poorer quality programme is detrimental to the individual's possibility of finding and sustaining employment.

The limiting of the number of lots that may be awarded one tenderer in the procurement of labour market programmes clearly demonstrates a tension between the demands of the general interest of society, and the requirement to protect the individual's fundamental right to work. These are, of course, both legitimate concerns. When the advantage of applying this particular measure is even uncertain, as there is only a possibility that the abandoning of this measure will affect future competition and supplier reliability, then the fundamental right of the individual must weigh more heavily. The general principle of equality laid down in the Norwegian Constitution § 98, which states that all people are equal under the law and that no human must be subject to unfair or disproportionate differential treatment, strengthens this argument, as the applying of this measure weakens the constitutional protection of ensuring that all individuals and groups of people are allowed to participate in working life.

#### 7.4 The consequence of a violation of § 110

The constitutional provisions serve as legal barriers. New legislation must, therefore, stay within the limits of the Norwegian Constitution.<sup>149</sup> The constitutional provisions are also relevant in the interpretation of laws and regulations,<sup>150</sup> something which was illustrated through the case from the Sivilombudsmannen, to which I referred to earlier in this chapter.

Regardless of whether a constitutional provision acts a legal barrier there is, when interpreting laws and regulations, an obligation to seek to find a solution that is aligned with the principles of the Constitution. In cases where the contested provision leaves room for more than one possible interpretation there is an obligation, then, to interpret the provisions so that it is in harmony with the constitutional right or obligation. The challenge with § 19 (4) of the Public Procurement Regulation is not, however, that this provision is unclear. It is rather a question of this provision, when being applied in the procurement of labour market programmes, not being aligned with the constitutional protection of the right to work.

One particular feature of the obligation pursuant to § 92 of the Constitution to respect and ensure human rights, is the Norwegian Supreme Court's right and duty to set aside or interpret narrowly any legal provision that proves to be contrary to the Norwegian Constitution, in particular as to constitutional rights and freedoms of individuals. In setting a provision aside, the Supreme Court "*limits itself to cutting the provision's normative power in the particular case.*"<sup>151</sup> The ground-breaking judgment in this respect is Grev Wedel Jarlsberg v. Marinedepartementet from 1866. In this judgment the Norwegian Supreme Court for the first time publicly declared that the Court would not apply any law as far as the law was found to be in conflict with the Norwegian Constitution.<sup>152</sup>

If an individual, in a case of being offered a labour market programme of poorer quality as a result of an effort to facilitate the participation of SMEs, *did* instigate legal proceedings with a claim that State legislation or practice is in breach with § 110, and the Court found that § 19 (4) is in violation of the constitutional protection of the right to work, this would imply that § 19 (4) would have to be set aside as for the procurement of the specific labour market programme. Moreover, such a ruling

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<sup>149</sup> NOU: 2009: 14, para 25.5.1

<sup>150</sup> *Ibid.* para. 25.5.3

<sup>151</sup> Supreme Court Justice dr. Arnfinn Bårdsen, Norwegian Supreme Court: *The Norwegian Supreme Court as the Guardian of Constitutional Rights and Freedoms* ("Norway in Europe, Centre for European Law, Oslo 18<sup>th</sup> September 2017), p. 3

<sup>152</sup> *Ibid.* p. 4

would inevitably propel a change in the Public Procurement Regulation, as § 110 may then serve as a basis for legal proceedings in similar cases.

## 8. Conclusion

### 8.1 Introduction

The purpose of my thesis has been to discuss what legal dilemmas may arise when facilitating the participation of SMEs in the procurement of labour market programmes; programmes that are essential tools in fulfilling of the State's constitutional obligation to protect the individual's right to work. Moreover, I have aimed to clarify whether § 110 of the Norwegian Constitution imposes a legal barrier as to what measures the contracting authority may make use of in the effort to facilitate the participation of SMEs in the procurement of such programmes, and to determine what will be the consequences of such a limitation. I have also asked the question of whether the aim in Directive 2014/24/EU to facilitate the participation of SMEs has sparked a change in NAVs procurement practice regarding the procurements of labour market programmes.

### 8.2 Findings

Although § 110 does not give the individual an unconditional claim to employment, my discussion has shown that the provision clearly imposes a duty on the State to take necessary steps, as soon as possible, to ensure that everyone is protected from unemployment.

Being subject to the public procurement regulations, the procurement of labour market programmes is not exempt from the aim of Directive 2014/24/EU to facilitate the participation of SMEs in public procurement. The reality of this has been demonstrated through my NAV case-study.

As my discussion has shown, the procurement regulations allow for several options that may facilitate the participation of SMEs in the procurement of labour market programmes. The application of these measures in the procurement of labour market programmes demonstrate, however, a tension between the demands to increase competition by means of facilitating the participation of SMEs, and a requirement to protect of the individual's right to work by ensuring the necessary stability, continuity and quality of performance in the delivery of these programmes.

My discussion has furthermore shown that the procurement of health- and social services, to which classification the procurement of labour market programmes belongs, is subject to both a higher EU-threshold and a more lenient set of rules within the public procurement regime. This strongly indicates that the need to ensure quality and continuity for the individual user of a labour market programmes is pivotal, and therefore weighs more heavily than other considerations, such as the inclusion of SMEs.

Applying the fair balance test developed by the European Court of Human Rights (ECHR), I have looked at one particular measure available to the contracting authorities that may increase competition and facilitate the participation of SMEs; the measure pursuant to § 19 (4) of the Public Procurement Regulation of limiting the number of lots that may be awarded one tenderer. I have argued that the constitutional duty on the State pursuant to § 110 imposes a legal barrier that prevents the use of this measure in the procurement of labour market programmes. My analysis rests, finally, on the argument that there is not reasonable proportionality between the advantages of limiting the number of lots that may be awarded one tenderer, and the disadvantages that this measure implies for the individual. The consequence of such a conclusion is that § 19 (4) has no be set aside in the procurement of labour market programmes, thus no longer being an available option for the contracting authorities.

The topic and research question of this thesis remains under researched and discussed in Norwegian labour and procurement law. My findings suggests setting aside a provision in cases where the policy objective of allowing for SME participation in procurement processes clashes with the constitutional protection of the individual's right to work. Such a claim may not yet find basis in case law because of the scarcity of rulings concerning the strength of the constitutional protection pursuant to § 110.

Furthermore, the constitutional protection of § 110 has not been prevalent in the political discourse on unemployment. This does not, however, render my argument less valid. Such lack of discussion probably rests on the fact that there is broad political consensus in Parliament that full employment is an overall objective, and that the State shall use both financial and political means to achieve this objective. I believe there is still, therefore, considerable uncertainty as to the legal effect of § 110. This is also why I have chosen to end my thesis with a *de lege lata* consideration, which I will present in the following.

### 8.3 A duty to work?

The Norwegian Constitution § 110, first paragraph, *second* sentence states that those who cannot themselves provide for their own subsistence have the right to support from the state.<sup>155</sup> This provision in the Constitution entails an obligation on the State to provide a social security system. The Norwegian welfare state rests, however, on the condition that adult people capable of work provide for themselves and their families. The social security system is, therefore, subsidiary to self-support.<sup>156</sup>

The 1948-proposal for the amendment of the Norwegian Constitution § 110, as discussed in chapter 3 of my thesis, spoke of both a *duty* and a *right* to work. What was primarily discussed during the debate following the proposal was the right to work. The argument put forward concerning the duty to work was that the State already had the necessary legal regulations to instigate a duty to work if the nation was faced with a serious crisis. As for people who in regular times simply did not want to work, the Vagrant Act was designed to meet this challenge, it was argued.<sup>159</sup> Moreover, the duty to work was considered to be strong both morally and legally.<sup>160</sup>

The reality today is that the majority of the State welfare-benefits are compensations for lost income, and entails a condition that the applicant has had an income that exceeds a certain yearly minimum. In the case of people being unemployed there is, furthermore, a condition that the receiver of the benefit contribute actively in the process of finding or returning to work.<sup>162</sup> This includes having to accept appropriate labour market programmes initiated by NAV.<sup>163</sup>

It may be bold to argue that § 110 first paragraph, first sentence imposes a legal barrier as to what measures the contracting authority may make use of in the effort to facilitate the participation of SMEs in the procurement of labour market programmes. Full employment is, however, an overarching political objective, and the labour market programmes are essential tools in the labour market policy to meet the strong social expectation that people provide for themselves, and to prevent the social and financial consequences for both society and the individual should he or she fail to do so. If unemployed people in some lots are *de facto* discriminated by means of not receiving the

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<sup>155</sup> LOV-1814-05-17; "Den som ikke selv kan sørge for sitt livsopphold, har rett til støtte fra det offentlige".

<sup>156</sup> Asbjørn Kjønstad, Aslak Syse og Morten Kjelland, *Velferdsrett I: Grunnleggende rettigheter, rettssikkerhet og tvang*, Gyldendal Juridisk, 6th ed. 2017, p. 405

<sup>159</sup> Løsgjengerloven, Lov 31. mai 1900 nr. 5 om Løsgjængerer, Betleri og Drukenskap

<sup>160</sup> Innst. S. nr. 220 (1954) s. 584

<sup>162</sup> LOV-1997-02-28-19

<sup>163</sup> LOV-2004-12-10-76 §§ 16 and 17

best labour market programme available, thus having their possibility of finding and sustaining employment reduced in order to advance other political goals, this would, I believe, be difficult to sustain publicly.

A change in the Public Procurement Regulation that disallows the use of § 19 (4) in the procurement of labour market programmes will secure that the individual user of a programme gets the best offer available. This would create better harmony between the political aim to achieve full employment, and the duty to provide a social security system for those who are unemployed. The aim to facilitate the participation of SMEs and to secure supplier reliability of labour market programmes, can be supported by an alternative design of the procurement, in which a better balance is found between meeting the public procurement objectives and protecting the individual's right to work.

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