1

Optimising Public Interests through Competitive Tendering

Connecting Limited Rights

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1.1 Connectivity in a Fragmented Landscape

1.1.1 A Fragmented Landscape

Making choices is inherent to administrative action. Take the example of governments involved in the procurement of works or services. Every time again, they have to decide which party will get the desired contract and which parties will not.[1] However, making choices is not unique for public contracts.[2] In fact, it is essential to government as such. Which behaviour shall be forbidden and which behaviour shall not? Which infrastructures shall be restored first? Which people or businesses should pay more taxes? Which activities should receive financial support?

Not only do governments have to make choices over and over again, they also have to do so 'in the public interest'. However, getting a grasp of *the* public interest is a difficult exercise. Instead, we can observe a rich variety of public interests, ranging from general concerns such as consumer protection, public safety or compliance with fundamental legal values, to more concrete policy objectives, such as the delivery of vaccines

[1] See Case C-410/14, *Dr. Falk Pharma GmbH* v. *DAK-Gesundheit* ECLI:EU:C:2016:399, paras. 37–38 and 40; and Case C-9/17, *Maria Tirkkonen* ECLI:EU:C:2018:142, paras. 29–31.

[2] Public contracts are understood here in a narrow sense as contracts where public authorities *acquire* certain goods or services. See for this understanding of 'public contracts' in procurement law: Article 1(2) and Article 2(1)(5) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ 2014, No. L94/65.

within the shortest time frame possible. When observing this variety of public interests, governments are faced with an optimisation problem: since it is impossible to realise all public interests involved to the full extent, they need to find the right balance between these interests.

Although making choices is at the very heart of every administrative action, the immediate consequences thereof are nowhere as clear as in those situations where governments[3] award only a limited number of rights to a selected number of private parties. In such circumstances where governments 'allocate limited rights',[4] the decision to award such a limited right to one party implies the exclusion of other parties from obtaining that right. For example, where the government aims at authorising one gambling casino only, it has to make a choice between several applicants if more than one is interested in obtaining that authorisation. Equally, when the government aims at encouraging scientific research in combatting the COVID-19 pandemic, the limited availability of the financial budget will lead to disappointed scholars, even though their ideas might be brilliant. Similarly, where a government aims to commission the restoration of bridges or to sell some real estate, the resulting contract will usually be awarded to one party only.

From a legal perspective, it is striking that this context of scarcity, allocation and choice has been regulated in such a fragmented manner in the European Union so far. Instead of providing for common, overarching rules on making selective choices, EU regulation is characterised by 'right-dependent' frameworks: the set of applicable rules is determined largely by the concrete *type* of limited rights (e.g. public contracts, authorisations, etc.). Thus, the award of public contracts is governed by a rather detailed regime consisting of the public procurement directives,[5] whereas limited authorisations are governed by a distinct legal regime, found either in

[3] We use the terms 'governments' and 'public authorities' interchangeably in this chapter.

[4] Although the use of the term 'limited-issued rights' or – shortly – 'limited rights' is not very widespread, reference is made to this term occasionally in official legal documents. See, for example, the amendments 2 and 11 in the Opinion of the Committee of the Regions on the award of concessions contracts, OJ 2012, No. C391/49.

[5] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ 2014, No. L94/1 (hereinafter: Concessions Directive), Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ 2014, No. L94/65 (hereinafter: Public Procurement Directive), and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, OJ 2014, No. L94/243 (hereinafter: Utilities Directive).

sectoral EU legislation[6] or in transversal legislation such as the Services Directive.[7] For subsidies, the regulatory landscape is even more diffuse with a great variety of subsidy schemes and cooperation mechanisms between EU and national institutions,[8] while sales of public assets by governments have hardly received attention in secondary EU legislation so far.[9]

1.1.2 The Need for Connection

As long as legal scholars and practitioners are only concerned with a certain domain of limited rights (e.g. public contracts, authorisations, etc.), this lack of connection with other, adjacent areas of limited rights is not problematic. However, for several reasons, there is a strong need for a connecting approach that transcends existing legal demarcations between limited rights.

First and foremost, there is the need for coherence in the allocation of limited rights. Admittedly, each type of limited rights has its own characteristics which may justify the application of different rules. At the same time, however, the allocation of limited rights is not only governed by sector-specific or 'right-specific' rules but also by general legal principles, such as the principles of equal treatment and legal certainty and the market freedoms of the Treaty on the Functioning of the European Union (TFEU). These general principles force us to examine which meaning is given thereto in the context of scarcity, allocation and choice, irrespective of the type of limited rights at issue. A well-known example thereof is the development regarding the obligation of transparency in the case-law of the Court of Justice of the European Union (hereinafter:

[6] See, for example, Directive 94/22/EC of the European Parliament and of the Council of 30 May 1994 on the conditions for granting and using authorisations for the prospection, exploration and production of hydrocarbons, OJ 1994, No. L164/3 (hereinafter: Hydrocarbons Directive).

[7] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ 2006, No. L376/36 (hereinafter: Services Directive).

[8] Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No. 1296/2013, (EU) No. 1301/2013, (EU) No. 1303/2013, (EU) No. 1304/2013, (EU) No. 1309/2013, (EU) No. 1316/2013, (EU) No. 223/2014, (EU) No. 283/2014, and Decision No. 541/2014/EU and repealing Regulation (EU, Euratom) No. 966/2012, OJ 2018, No. L193/1 (hereinafter: Financial Regulation).

[9] See most explicitly the Commission Communication on State aid elements in sales of land and buildings by public authorities, OJ 1997, No. C209/3, which has been replaced by the Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ 2016, No. C262/1.

ECJ). Where this obligation has mainly evolved under Article 49 and 56 TFEU with respect to concession contracts (and prior under the procurement directives with respect to public contracts),[10] this obligation also applies to (exclusive) authorisations. The reason therefore is that the effects of such an exclusive authorisation on undertakings established in other Member States and potentially interested in that activity are the same as those of a service concession contract.[11]

Following this first point, looking beyond the domain of a certain type of limited rights can be fruitful in order to identify and solve existing gaps with regard to the award of that type of limited rights. In cases where the applicable 'right-dependent' regulation does not provide for an answer on certain allocation issues, solutions may be available in other domains of limited rights. For example, the provision in the Concessions Directive on the duration of concessions[12] has not been the result of simply copy-pasting a similar provision in the Public Procurement Directive, but has been inspired by the ECJ's case-law on authorisations and the provisions on duration in the Services Directive.[13]

Finally, the legal arrangements that we encounter in practice cannot always be reduced to a single type of limited rights, but have a hybrid nature. An example of this hybridity can be found in the context of subsidies, where a (unilateral) grant award decision is complemented by a written grant agreement.[14] Likewise, the Public Procurement Directive has conflict rules for so-called mixed contracts that fall within different legal regimes.[15] The ECJ's case-law also gives examples where some parts of a legal arrangement are subject to a specific legal regime, whereas other parts are not. In those circumstances, case-law has to develop its own conflict rules.[16] This

[10] Case C-87/94, *Commission of the European Communities* v. *Kingdom of Belgium* ECLI:EU:C:1996:161, para. 54.

[11] Case C-203/08, *Sporting Exchange Ltd* v. *Minister van Justitie* ECLI:EU:C:2010:307, paras. 46–47.

[12] See Article 18 Concessions Directive.

[13] See for a detailed analysis: C. J. Wolswinkel, 'The Magic of Five in the Duration of Concessions: Refining Corollaries in the Concessions Directive', in Grith Skovgaard Olykke and Albert Sanchez-Graells (eds.), *Reformation or Deformation of the EU Public Procurement Rules* (Cheltenham: Edward Elgar Publishing, 2016), pp. 318–342.

[14] See, e.g., Article 201 Financial Regulation.

[15] See Article 3 Public Procurement Directive.

[16] See, for example, Joined Cases C-145/08 and C-149/08, *Club Hotel Loutraki AE and Others* v. *Ethnico Symvoulio Radiotileorasis* and *Ypourgos Epikrateias and Aktor Anonymi Techniki Etaireia (Aktor ATE)* v. *Ethnico Symvoulio Radiotileorasis* ECLI:EU:C:2010:247, paras. 59 and 63, combining the privatisation of a public undertaking with the procurement of services and works.

hybridity is also visible with regard to services of general economic interest: where Member States are free to adopt a system of exclusive rights, financial compensation or a combination thereof, the different types of limited rights (exclusive rights or financial compensation) turn out not to be separated worlds, but heavily connected.[17]

This hybridity also comes to the fore when we compare classifications under domestic law with classifications under EU law. The ECJ's case-law shows multiple examples where domestic categorisations do not coincide with categorisations used in EU law. For example, in *Promoimpresa*, the ECJ held that Italian 'concessioni' for tourist beach activities did not classify as concession contracts under the Concessions Directive, but as authorisations under the Services Directive.[18] Reversely, Italian 'concessioni' for organising games of chance were not considered as licences, but as service concession contracts.[19] In other words, legal arrangements that are classified as an authorisation or a concession in some legal regime could classify as another type of limited rights (or a mixed type) in another legal regime.

1.1.3 *The Bridging Function of Competitive Tendering*

Despite all the differences between public contracts, authorisations, subsidies and (government) sales,[20] the need for *choice* is the common denominator once these rights are limited in number. Such limitation implies the need for allocation, but not necessarily for competition. However, recent developments in both legislation and case-law show

[17] See, for example, Article 3(1) of Regulation (EC) No. 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos. 1191/69 and 1107/70, OJ 2007, No. L315/1, as amended afterwards (hereinafter: PSO Regulation): 'Where a competent authority decides to grant the operator of its choice an exclusive right and/or compensation, of whatever nature, in return for the discharge of public service obligations, it shall do so within the framework of a public service contract.'

[18] Joined Cases C-458/14 and C-67/15, *Promoimpresa srl and Others* v. *Consorzio dei comuni della Sponda Bresciana del Lago di Garda e del Lago di Idro and Others*, ECLI:EU:C:2016:558, para. 47. For more detail, refer to C. J. Wolswinkel, 'Concession Meets Authorisation: New Demarcations Lines under the Concessions Directive?' (2017) 12 *European Procurement & Private Partnership Law Review* 396–407.

[19] Case C-260/04, *Commission of the European Communities* v. *Italian Republic* ECLI:EU:C:2007:508, para. 20.

[20] We refer to '(government) sales' to indicate that the government is selling certain public assets to private parties. In case of public contracts, by contrast, the government is acquiring certain goods or services from private parties (see footnote 2).

an increased preference for 'allocation through competition'. Admittedly, the developments on this issue are not entirely in sync across the different limited rights we envisage: where the obligation to call for competition has been familiar to public contracts for decades already,[21] this obligation is relatively new to authorisations.[22] Nonetheless, it goes without saying that allocation through competition has evolved into the default option in the allocation of limited rights. In short, the dominating idea is that a competitive procedure between interested parties will enable governments to put 'their' rights in the hands of those who value them most while at the same time enabling them to realise other public interests than value for money.

This book aims to provide an integrative approach to limited rights by putting central the issue of 'competitive allocation' or 'competitive tendering'[23] as the connecting topic between limited rights. By doing so, competitive tendering can also function as a starting point for the analysis of other rules on the allocation of limited rights, for example, on the duration of these rights or on the contents of the award criteria. Competitive tendering is understood here broadly as an (administrative) decision-making process where potential candidates are invited to express their interest in obtaining a limited right. Resorting to competitive tendering may offer possibilities to (better) achieve certain public interests, but it may also be detrimental to achieving other public interests. Since the legal choices made to realise competition differ across limited rights, it is essential to map these differences in order to understand the different trade-offs in the balancing of public interests involved.

The central question we aim to answer in this book is how the applicable legal framework impacts the realisation of different public interests through competitive tendering. The perspective we have in mind is that of a public authority faced with a limited number of rights available for grant. This 'allocating authority' has a certain level of administrative discretion, dependent on the choices that have been made by the competent legislatures. These choices, together referred to as the legal framework, cover primary EU law (Treaty on European Union (TEU) and TFEU), secondary EU legislation, domestic legislation and

[21] See already Article 12 of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts, OJ 1971, No. L185/5.

[22] See in this direction Article 12 of the Services Directive as well as Case C-203/08, *Sporting Exchange Ltd* v. *Minister van Justitie* ECLI:EU:C:2010:307.

[23] The terms 'competitive allocation', 'competitive tendering' and 'competitive procedure' will be used interchangeably throughout this chapter. For more detail on this terminology, see Section 1.2.3.

delegated rule-making. At each of these rule-making levels, choices are made on how to award limited rights in a competitive way and therefore on how to pursue or reconcile different public interests. These choices can be very general, merely prescribing the principles the allocating authority should take into account, but can also be quite specific, thereby further limiting the authority's discretion in selecting an allocation procedure or in determining the steps to be taken in an allocation procedure. But irrespective of their rule- or principle-based character, such legal constraints usually address only one or a few public interests, thereby leaving the other interests unaffected. Thus, the allocative choices made at these rule-making levels determine the discretion left to the allocating authorities in pursuing different public interests. In other words, the allocative choices made at the different rule-making levels and the discretion left to the allocating authority are two sides of the same coin.

The underlying aim of this book project is to identify general legal patterns (or the lack thereof) in the regulation of the allocation of limited rights. First of all, this exercise is indispensable for legal scholars in deepening their theoretical understanding of the allocation of limited rights as a distinct field in (EU) administrative law. Besides, this analysis also helps legal practitioners to look beyond their distinct fields of law (procurement law, subsidy law, etc.) by offering them concrete examples and instruments from adjacent types of limited rights.

In order to structure the current landscape of limited rights and to facilitate further (legal) comparison, we use this introductory contribution to present an overarching analytical framework. This framework consists of three elements. First, we introduce terminology and categorisations that are capable of transcending existing (legal) demarcations in the allocation of limited rights (Section 1.2). Next, we argue that the issue of which public interests are pursued in the allocation of limited rights, is a fruitful lens to unite and compare insights from different subfields of limited rights (Section 1.3). Finally, while reflecting upon the role of the legal framework in optimising public interests through competitive tendering, we propose three dimensions of legal comparison that enable the differences across the limited rights to be highlighted and explained (Section 1.4). The resulting framework is the point of departure for this book, the set-up of which will be further sketched in Section 1.5. In this section, we will also discuss the main overarching results that follow from the interplay between the different parts and chapters of this book. We conclude by pointing out some research directions that should further close the gap between different types of limited rights (Section 1.6).

1.2 Building Blocks for a Connecting Approach towards Limited Rights

1.2.1 *Different Avenues for Categorising Limited Rights*

Limited-issued rights – or shortly, limited rights – have in common that the number (or amount) of rights available for grant is limited to a maximum.[24] If the number of applicants or interested parties exceeds this number of available rights, public authorities face a *choice* between these applicants. This element of choice (selection) is distinctive for limited rights in comparison with other, non-limited rights.[25]

The notion of 'limited rights' is absent in EU legislation. However, the notion of 'exclusive and special rights' in Article 106(1) TFEU comes close to this notion. In *Pawlak*, the ECJ reiterated that a State measure may be regarded as granting a special or exclusive right within the meaning of Article 106(1) TFEU 'where it confers protection on a limited number of undertakings and which may substantially affect the ability of other undertakings to exercise the economic activity in question in the same geographical area under substantially equivalent conditions'.[26] The element in the ECJ's reasoning on the *limited* number of protected undertakings is essential to our understanding of limited rights. In fact, the concept of 'exclusive and special rights' in Article 106 TFEU introduces a subcategorisation of limited rights based on the *size* of the restriction by distinguishing between one (exclusive) right on the one hand and two or more (special) rights on the other hand.

Limited rights can also be categorised in other ways. The best way to get a better idea of the characteristics of limited rights and the regulation

[24] See already on this definition of 'limited rights': P. C. Adriaanse, F. J. van Ommeren, W. den Ouden and C. J. Wolswinkel, 'The Allocation of Limited Rights by the Administration: A Quest for a General Legal Theory', in P. C. Adriaanse, F. J. van Ommeren, W. den Ouden and C. J. Wolswinkel (eds.), *Scarcity and the State I: The Allocation of Limited Rights by the Administration* (Cambridge: Intersentia, 2016), pp. 9–10.

[25] Case C-410/14, *Dr. Falk Pharma GmbH* v. *DAK-Gesundheit* ECLI:EU:C:2016:399, para. 38: 'It is therefore apparent that the choice of a tender and, thus, of a successful tenderer, is intrinsically linked to the regulation of public contracts by that directive and, consequently, to the concept of "public contract" within the meaning of Article 1(2) of that directive.' See also on this characteristic of selectivity: R. Caranta, 'The Changes to the Public Contract Directives and the Story They Tell about How EU Law Works' (2015) 52 *Common Market Law Review* 391–460, at 447–448.

[26] Case C-545/17, *Mariusz Pawlak* v. *Prezes Kasy Rolniczego Ubezpieczenia Społecznego* ECLI:EU:C:2019:260, para. 43.

thereof is to consider specific examples of limited rights in specific sectors. This 'sector-based' approach is also followed in several pieces of EU legislation. A good example thereof is the public service obligation (PSO) Regulation on public passenger transport services by rail and by road.[27] Other well-known examples include the Hydrocarbons Directive,[28] the Postal Services Directive[29] and the EU Electronic Communications Code.[30] Although applicable to a specific sector only, it is interesting to note that such sectoral regulation more than once acknowledges the existence of different types of limited rights that might sometimes overlap. For example, the PSO Regulation states explicitly that where a competent authority decides to grant the operator of its choice an exclusive right *and/or* compensation, of whatever nature, in return for the discharge of PSO, it shall do so within the framework of a 'public service contract'.[31] Furthermore, this regulation states explicitly that a 'public service contract' may also consist of a decision adopted by the competent authority taking the form of an individual legislative or regulatory act.[32] Thus, a limited right in the context of the PSO Regulation clearly has different appearances. The Hydrocarbons Directive, adopted already in 1994, defines an 'authorization' broadly as any law, regulation, administrative or *contractual* provision or instrument issued thereunder by which the competent authorities of a Member State entitle an entity to exercise, on its own behalf and at its own risk, the exclusive right to prospect or explore for or produce hydrocarbons in

[27] Regulation (EC) No. 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos. 1191/69 and 1107/70, OJ 2007, L315/1.

[28] Directive 94/22/EC of the European Parliament and of the Council of 30 May 1994 on the conditions for granting and using authorisations for the prospection, exploration and production of hydrocarbons, OJ 1994, No. L164/3.

[29] Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of community postal services and the improvement of quality of service, OJ 1998, No. L15/14.

[30] Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast), OJ 2018, No. L321/36.

[31] Article 3(1) PSO Regulation.

[32] Article 2(i) PSO Regulation. In the context of transfers of undertaking, even (governmental) asset sales can be involved in the award of contracts for public passenger transport services. See Case C-172/99, *Oy Liikenne Ab* v. *Pekka Liskojärvi and Pentti Juntunen* ECLI:EU:C:2001:59 and more recently Case C-298/18, *Reiner Grafe and Jürgen Pohle* v. *Südbrandenburger Nahverkehrs GmbH and OSL Bus GmbH* ECLI:EU:C:2020:121.

a geographical area.[33] Again, the limited right at issue can have different appearances. Finally, where public contracts are at the very heart of public procurement law, the Public Procurement Directive (as well as its predecessors) is aware of the possible entanglement of public contracts with unilateral instruments, as it excludes public service contracts from its scope whenever these contracts are awarded by a contracting authority to another contracting authority on the basis of an 'exclusive right' which they enjoy pursuant to *a law, regulation or published administrative provision* which is compatible with the TFEU.[34]

This sector-based approach shows us that we should not restrict our attention to either unilateral instruments (e.g. licenses) or bilateral (contractual) instruments of public authorities when analysing limited rights. At the same time, the restricted scope of this sectoral legislation can act as a barrier to adopting a broader, cross-sectoral perspective on the issue of competitive tendering. In that sense, the development towards adopting more horizontal EU legislation, such as the public procurement directives and the Services Directive, which apply beyond the scope of a specific sector, can function as a catalyst for adopting a broader view on the allocation of limited rights. But even this transversal legislation is still usually restricted to specific *types* of limited rights.

1.2.2 A Right-Oriented Approach: Types of Limited Rights

Our challenge here is to develop a common understanding that allows us to connect different types of limited rights. Since we aim to adopt a legal perspective on the issue of competitive tendering of limited rights, we cannot ignore existing demarcations in EU law. Let us start with the Concessions Directive (2014/23/EU) to identify several types of limited rights. This relatively new legal instrument is a very useful starting point, as this directive pays ample attention to the relationship between concessions and adjacent legal arrangements, which we will discuss here (Figure 1.1).

First of all, concessions can be contrasted with *public contracts* (as defined in public procurement law). These public contracts, which are

[33] Article 1(3) Hydrocarbons Directive.

[34] Article 11 Public Procurement Directive. For more details on the origins of this provision, refer to C. J. Wolswinkel, 'Article 11: Service Contracts Awarded on the Basis of an Exclusive Right', in Roberto Caranta and Albert Sanchez-Graells (eds.), *Commentary on the Public Procurement Directive (2014/24/EU)* (Cheltenham: Edward Elgar Publishing 2021), pp. 112–125.

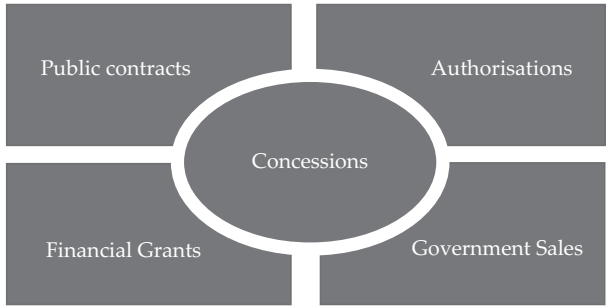

Figure 1.1 Limited rights.

characterised by the *acquisition* of certain goods or services by public authorities,[35] have always dominated the regulatory landscape of limited rights within EU law. Starting with separate directives for works, supplies and services in the 1970s and 1990s, the Public Procurement Directive (2014/24/EU) currently contains a general legal framework for the procurement of works, supplies and services. Both public contracts and concessions are contracts for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the provision and the management of services[36] to one or more economic operators. The relevant difference is that the consideration of a concession consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment, whereas the consideration of a public contract is payment only.[37]

Secondly, concessions can be contrasted with *authorisations*. The Services Directive (2006/123/EC) defines an authorisation as any (formal or implied) decision from a competent authority, concerning access to a service activity or the exercise thereof.[38] Both the Concessions Directive and the ECJ's case-law make clear that these authorisations have to be

[35] See Article 1(2) Public Procurement Directive: 'Procurement within the meaning of this Directive is the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities [. . .].'

[36] For convenience, this provision of services includes the execution of works and the supply of products here.

[37] Article 5(1) Concessions Directive and Article 2(6) Public Procurement Directive.

[38] Article 4(6) Services Directive.

distinguished from concessions,[39] although the dividing line is not always clear and unambiguous.[40] While selectivity or choice is certainly not characteristic of each authorisation scheme,[41] the Services Directive introduces some specific provisions on limited-issued authorisations.[42]

The third type of rights that can be contrasted with concessions is that of *public facilities*. The most prominent example of this category is financial grants (subsidies), but also other forms of access to public facilities *in natura* (e.g. access to high school or university)[43] are part of this type. Again, the recitals of the Concessions Directive make clear that these grants should not be considered as concessions.[44] Unlike public contracts and authorisations, general EU legislation on the distribution of public facilities in general and subsidies in particular is lacking. To some extent, the EU Financial Regulation provides guidance for a generalised approach as it contains a separate title on the award of grants (next to public contracts).[45]

Finally, concessions are contrasted with the *disposal of public assets* by sale, lease or otherwise. The Concessions Directive states that those

[39] Recital 14 Concessions Directive. See also recital 57 of the Services Directive:

> The provisions of this Directive relating to authorisation schemes should concern cases where the access to or exercise of a service activity by operators requires a decision by a competent authority. This concerns neither decisions by competent authorities to set up a public or private entity for the provision of a particular service nor the conclusion of contracts by competent authorities for the provision of a particular service which is governed by rules on public procurement, since this Directive does not deal with rules on public procurement.

[40] For more detail, refer to Wolswinkel, 'Concession Meets Authorisation', 403–405.

[41] See also recital 13 Concessions Directive.

[42] In particular, the Services Directive distinguishes between the situation where the number of available authorisations is limited by overriding reasons related to the public interests ('artificially limited authorisations'; Article 11) and the situation where the number of available authorisations is limited because of the scarcity of available natural resources or technical capacity ('naturally limited authorisations'; Article 12). For more details, see C. J. Wolswinkel, 'The Allocation of a Limited Number of Authorisations: Some General Requirements from European Law' (2009) 2 *Review of European Administrative Law*, 2, 61–104.

[43] Case C-73/08, *Nicolas Bressol and Others* and *Céline Chaverot and Others* v. *Gouvernement de la Communauté française* ECLI:EU:C:2010:181.

[44] Recital 12 Concessions Directive: '[. . .] the mere financing, in particular through grants, of an activity, which is frequently linked to the obligation to reimburse the amounts received where they are not used for the purposes intended, does not fall under the scope of this Directive.'

[45] See in particular Title VIII of the Financial Regulation.

arrangements do not classify as concessions if the State or contracting authority establishes only general conditions for the use of these resources 'without procuring specific works or services'. Although choice or selectivity is also present in situations where the public authority decides with whom it concludes a contract for lease or sale (and with whom not accordingly),[46] the distinct feature between these sale or lease arrangements and concessions (or public contracts) is that the public authority acts as a seller, not as a buyer.[47]

Given the similarities between these different legal arrangements, especially when the available number is limited to a maximum, it is tempting to unite them under the umbrella of 'limited rights'. However, we should not neglect the inherent differences between these types of limited rights. In this sense, the more general legal debate on the multi-faced meaning of 'rights' has direct implications for our approach to 'limited rights' as a subset thereof. It is especially the American legal scholar Wesley Newcomb Hohfeld who can be credited for the criticism that the notion of 'rights' is sometimes used too easily, thereby providing for incorrect instances of analogous or deductive reasoning.[48] While the aim of this book is not to give a full characterisation of limited rights following Hohfeld's conceptualisation of rights (in privileges (permissions), claims, powers and immunities), his criticism forces us to apply analogous reasoning with regard to limited rights carefully. What is more, his disentanglement of the notion of 'rights' makes us aware that the limited rights we observe in practice do not always fit one to one in our theoretical legal concepts. Instead, the limited rights that we observe in (legal) practice do usually combine elements of different concepts. Well-known legal figures such as 'authorisations', 'grants' and 'public contracts' are often compounds of the theoretical legal concepts of 'permissions' and 'claims' as defined by Hohfeld.[49] In other words, limited rights are hybrid concepts in themselves more than once. For example, public contracts combine a (monetary) *claim* against the State

[46] Recital 15 Concessions Directive.

[47] See explicitly C-451/08, *Helmut Müller GmbH* v. *Bundesanstalt für Immobilienaufgaben* ECLI:EU:C:2010:168, para. 41: '[. . .] such a [public works] contract requires that the public authority assume the position of purchaser and not seller.'

[48] W. N. Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16–59.

[49] See also Adriaanse et al., 'The Allocation of Limited Rights by the Administration', p. 29: 'Allocation of complex legal positions that comprise both rights and duties, obligations or charges'.

Table 1.1 *Limited rights*

	'Buying State'	*'Selling State'*
Bilateral	Public contracts	Government sales
Unilateral	Subsidies	Authorisations

with an *obligation* for the economic operator to provide a service to the State.[50] The grant of an authorisation, which could be considered a *permission* in itself, can go hand in hand with a monetary claim of the State, in particular if the number of authorisations is limited and these limited authorisations are granted by means of an auction. Thus, how we categorise limited rights depends on the perspective that we adopt. For example, privatisation could be equated with authorisation in the sense that the State acts in its selling capacity, disposing of something, while both public procurement and subsidisation assume that the State spends money to private parties in order to acquire something for the public interest. At the same time, authorisation and subsidisation could be grouped together as unilateral decisions, vested in public law, whereas public procurement and privatisation assume a bilateral process where public authorities act in their contracting capacity (see Table 1.1). Thus, the relevant dividing lines between limited rights are constantly moving.

1.2.3 Allocation and Competition

Whenever the number of applicants exceeds this limited number of rights available for grant, public authorities have to choose who gets what. In other words, limited rights cannot be granted easily to everyone, but have to be *allocated*, which assumes a choice to be made between applicants. Competition, however, is not a necessary consequence of limitation and allocation. However, once rights are limited, public authorities can use competition to allocate these rights. They can transform the administrative decision-making procedure into a contest with winning and losing candidates who compete with each other.

In this project, we understand 'competitive tendering' in a very broad sense as any decision-making process in which candidates can compete

[50] See C. E. C. Jansen, 'Allocation of Limited Rights from a European Public Procurement Law Perspective', in Adriaanse, Van Ommeren, Den Ouden and Wolswinkel, *Scarcity and the State*, pp. 252–253.

with one another in order to obtain the limited rights available for grant. The element of competition presupposes that these candidates are aware that they are competing with one another. Thus, competitive tendering always starts with an invitation for competition to potential candidates for the limited rights at stake. Although as a default option this invitation will be made public and generally accessible, the invitation could also be sent to a limited group of potential candidates. If only one potential candidate is addressed, there is no situation of competitive tendering. Admittedly, one could argue that there is indirect competition in the sense that if the candidate does not meet the authority's needs, the authority can address other candidates. However, direct competition where candidates are aware that they are competing with one another is lacking here.[51]

The term 'tendering' is less familiar outside the domain of public procurement law. Within the context of public procurement, 'tendering' has a specific meaning.[52] When the term 'tendering' is used outside this context, it is usually an equivalent to a 'beauty contest' as opposed to other allocation procedures, such as the auction. In as far as this notion of 'tendering' may cause some misunderstanding, it is also appropriate to refer to a 'competitive procedure' or 'competitive allocation' here.

In our broad definition of 'competitive tendering' or 'competitive procedure', the distinct element with other (non-competitive) decision-making procedures is the call for competition, which makes potential candidates aware that they are competing with one another for limited rights. To put it somewhat differently, it does not matter on the basis of what criterion the public authority makes its choice, as long as this choice has been preceded by some call for competition. Thus, allocation procedures such as a lottery or a 'first come, first served' allocation can also be included in this notion of competitive procedure, provided a call for competition has preceded this allocation procedure. This broad definition does not aim to exclude a more narrow understanding of competitive tendering in certain domains of limited rights. Instead, it is highly useful to make explicit several understandings of competitive tendering across limited rights by starting with the most general understanding thereof. Thus, what may count as non-competitive tendering in

[51] Jansen, 'Allocation of Limited Rights from a European Public Procurement Law Perspective', p. 241.

[52] Article 2(11) Public Procurement Directive defines a tenderer as an economic operator that has submitted a tender.

one domain of limited rights (e.g. authorisations) may count as competitive tendering in another domain (e.g. public contracts). For example, in some domains, allocation on a 'first come, first served' basis or allocation after a lottery are not included as competitive procedures, whereas such allocation procedures are included as being competitive in other domains. As a consequence, it is necessary to take into account non-competitive tendering as the logical counterpart of competitive tendering: whether or not competitive tendering is able to *optimise* the public interests involved also depends on the issue of how competitive tendering performs in comparison with the alternative of non-competitive tendering.

The broad definition of 'competitive procedure' adopted in this project fits with the approach taken in EU legislation. The PSO Regulation on public passenger transport services, for example, defines 'direct award' as the award of a public service contract to a given public service operator 'without any prior competitive tendering procedure'.[53] However, this regulation remains silent on the question of what competitive tendering entails. In the Public Procurement Directive, the publication of a call for competition is the constituent element to guarantee competitive tendering in the award of public contracts.[54] When it comes to adequate publicity with respect to limited authorisations, the requirement of transparency is also imposed to facilitate competition.[55] Thus, a broad definition of competitive tendering focussing on transparency prior to the allocation of limited rights seems useful for analysing the balancing of public interests across different types of limited rights.

1.3 Optimising Public Interests: A Legal Perspective

1.3.1 A Wide Range of Public Interests

To answer the central question of how the applicable legal framework impacts the realisation of different public interests through competitive tendering, it is also necessary to have a more or less shared understanding of 'public interests'. In general, public interests can be understood as a subset of social interests. Where interests are social whenever their promotion is desired by society as a whole, a public interest only arises

[53] Article 2(h) PSO Regulation.
[54] Article 26(1) Public Procurement Directive.
[55] Case C-203/08, *Sporting Exchange Ltd* v. *Minister van Justitie* ECLI:EU:C:2010:307, para. 41.

if the government takes up the promotion of a social interest in the belief that this interest will otherwise not be realised properly. Adopting social interests as public interests therefore means that the government makes it an *aim* of its policy to promote that interest.[56] Since we focus on governments allocating limited rights, we restrict our attention to 'allocation-oriented' public interests. Therefore, we understand a public interest specifically as any interest that a government aims to promote when *allocating* limited rights.[57]

Which public interests do we have in mind when focussing on the allocation of limited rights? The field of public procurement is a very useful starting point for identifying 'allocation-oriented' public interests. Sue Arrowsmith identifies eight different public interests involved in public procurement: (1) value for money, (2) achieving additional policies, (3) opening of markets, (4) equal treatment, (5) fair treatment, (6) integrity, (7) accountability and (8) efficiency of the process.[58] In this introductory chapter – and in the book as such – we take this approach in public procurement as the starting point for our analysis, but add three other public interests that seem to play a more distinct role in the allocation of other types of limited rights: (9) satisfying 'inherent needs', (10) safeguarding fundamental rights and (11) transparency.

While the resulting set of eleven allocation-oriented objectives seems rather heterogeneous, it is possible to cluster them. First of all, we have the public interest of satisfying the needs inherent to a certain type of limited rights. This public interest of 'inherent needs' adheres to the inherent characteristics of types of limited rights, for example acquiring something in the case of public contracts or permitting an activity in the case of authorisations. Next, we can cluster five 'output-related' interests, all relating to the outcome of the allocation procedure: value for money,

[56] Netherlands Scientific Council for Government Policy, *Safeguarding the Public Interest: Summary of the 56th Report* (The Hague: Scientific Council for Government Policy, 2001), pp. 12–13.

[57] Having in mind the perspective of an allocating authority acting within the boundaries set by the applicable legal framework, some public interests will be considered a constraint rather than an aim when awarding limited rights.

[58] For a more detailed discussion of these public interests involved in the allocation of limited rights by public procurement, we refer to Chapter 2, Section 2.3, and to S. Arrowsmith, 'Public Procurement: Basic Concepts and the Coverage of Public Procurement Rules', in S. Arrowsmith (ed.), *Public Procurement Regulation: An Introduction* (Nottingham: EU Asia Inter University Network for Teaching and Research in Public Procurement Regulation, University of Nottingham, 2011), pp. 1–32 at pp. 4–19.

achieving additional policies, opening of markets, safeguarding fundamental rights and integrity. As opposed to this set of output-related objectives, we identify a set of five 'process-related' interests: equal treatment, fair treatment, transparency, accountability and efficiency of the process.[59]

While neither this inventory of public interests nor its categorisation is set in stone, we use this introductory chapter to reflect upon the specific role that the legal framework fulfils in the pursuit of these public interests when public authorities allocate limited rights. To that end, we make use of the public management theory of Mark Moore on creating and recognising public value.[60]

1.3.2 *Towards a Strategic Triangle for Allocating Limited Rights*

According to Moore, governments (and in particular public managers within those governments) should focus on creating *public value*. The core idea is that public authorities are responsible for using the powers entrusted to them to achieve the maximum public value possible in the particular context in which they find themselves. At first sight, *public value* could be considered as the achievement of collectively valued or desired social outcomes. This conception of 'public value', however, does not only focus on achieving 'social justice' for the society as a whole, but also on the idea of 'client satisfaction', with clients being understood here as the *direct* beneficiaries of government services.[61]

The resulting framework takes both the complex and the dynamic conditions into account that public authorities are confronted with. These conditions are complex in the sense that public authorities are held responsible for producing and protecting many different kinds of value, while they are also dynamic in the sense that public interests change over time. For those reasons, it is insufficient for governments to focus on the creation of public value only. Instead, there are three dimensions which have to be balanced to align them successfully:[62]

[59] This inventory of eleven allocation-oriented public interests has also been communicated to the authors of the chapters of this edited volume in the author guidelines.

[60] M. H. Moore, *Creating Public Value* (Cambridge, MA: Harvard University Press, 1995) and M. H. Moore, *Recognizing Public Value* (Cambridge, MA: Harvard University Press, 2013), p. 101 ff.

[61] Moore, *Recognizing Public Value*, pp. 59–60.

[62] Ibid., p. 102.

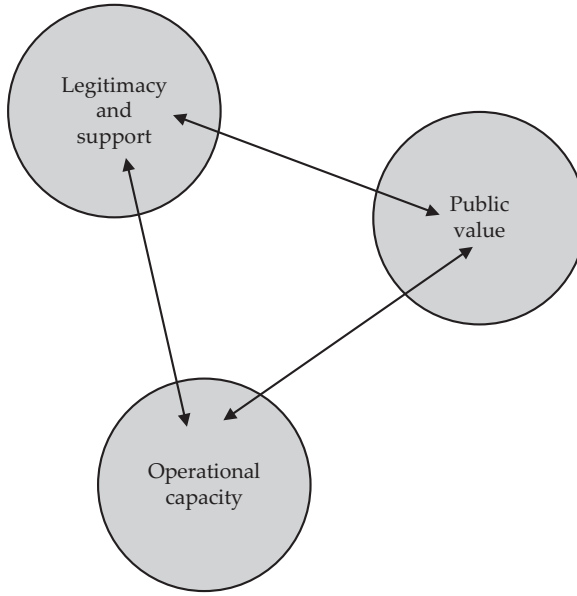

Figure 1.2 Strategic triangle.

1. a conception of public value that public authorities could produce using the assets entrusted to them;
2. sources of legitimacy and support for that vision of public value; and
3. operational capacity they would need to materially produce the envisioned public value.

The analytic framework developed to guide that effort is known as the strategic triangle (Figure 1.2).[63]

1.3.2.1 Public Value

The first part of this strategic triangle is the creation of public value in the aforesaid sense of combining socially desired outcomes with client satisfaction. Public authorities[64] should be explicit about the dimensions of public value they intend to produce. These dimensions of public value can be derived primarily from the authority's mission. The mission of a public authority, whether established by tradition, statute, professional

[63] Figure derived from ibid., p. 103.
[64] While Moore refers to public agencies (ibid., p. 53), we apply this strategic triangle to any public authority faced with the allocation of limited rights.

aspiration or informal agreement, embodies a collective conception of the purposes for which the authority exists and how it ought to behave in trying to achieve those purposes. Dependent on the authority at issue, we can think of a wide range of public purposes, such as public health, climate and sustainability, public housing, spatial planning, public education, telecommunication, public transport, employment opportunities, culture, and so on. However, in addition to this idea of mission achievement, three other dimensions of public value can be distinguished: unintended positive consequences, client satisfaction and justice and fairness. Side effects of an authority's behaviour that are not part of its existing mission can still contribute to the creation of public value. Client satisfaction embraces the idea that public authorities sometimes contract individually with certain individuals ('clients'), whereas the social outcomes (whether intentional or unintentional, positive or negative) defined above are ultimately enjoyed or endured by the collective public.[65] Justice and fairness, finally, complement the perspective of effectiveness and efficiency that is inherent to private organisations: once a public authority engages state authority, justice and fairness in both operations and outcomes become just as important as efficiency and effectiveness in achieving outcomes and satisfying clients.[66]

Once we apply this broad understanding of public value to the specific context of a public authority allocating limited rights, it is obvious that this understanding covers a wide variety of allocation-oriented public interests defined. First of all, the so-called satisfaction of inherent needs fits with the authority's mission. This interest combines the characteristics of the limited right at stake with the underlying public purpose. For example, the need inherent to public procurement is to acquire something in order to promote some public interest; the 'inherent' objective of sale is to dispose of something, again in the interest of some public purpose. The 'inherent' objective of licensing as such is to permit some activity under certain conditions. From a more general perspective, the licensing scheme as a whole has a different aim, like limiting how often or where a harmful activity is performed, or making the performance of such activities subject to control, for example in the interest of consumer protection or public safety. In other words, the aim of authorisation is to restrict *and* permit in the interest of some public purpose. Finally, the

[65] Ibid., p. 36.
[66] Ibid., p. 42 and pp. 55–56.

'inherent' objective of subsidising is to stimulate some desirable activity by a financial incentive.

Given that public authorities acquire or dispose of something or that they regulate an activity by licensing or subsidising, they can impose additional conditions on the allocation of the limited right at stake, for example by imposing requirements on employment, sustainability, and so on. These public interests are called 'additional' or 'subsequent' as they can only be taken into account *after* the initial choice has been made to award a specific type of limited rights. The use of the word 'additional' does therefore not express any form of hierarchy, but merely indicates some form of sequencing. Unlike the satisfaction of inherent needs, pursuing these additional policies – also called 'horizontal policy objectives'[67] – is less clearly linked to the authority's mission. It seems more appropriate to consider the achievement of additional policies as a socially desired outcome situated somewhere between the authority's mission and unintended positive consequences, whereas so-called necessary side effects, which have also been recognised in the ECJ's case-law,[68] clearly link to this latter category of unintended positive consequences of administrative action.

Allocation-oriented public interests such as safeguarding fundamental rights, integrity, equal treatment and fair treatment could also be considered as contributing to public value from the dimension of fairness and justness. This is perhaps less evident for the public interest of transparency, which is often conceived of as instrumental – as a means to an end, for example to ensure equal treatment or to increase economic performance and market efficiency[69] – but can also be considered as an intrinsic value of its own. In particular, transparency could be understood as a public interest relating to 'client satisfaction': the competing economic operators who are directly involved in the allocation process should have access to all relevant information, both *ex ante* and *ex post*. Accountability, finally, has a more ambiguous character in the strategic triangle since it combines the three dimensions of this triangle: the necessity of accountability for the allocation of limited rights forces

[67] See Chapter 2, Section 2.3.

[68] See, e.g., Case C-258/08, *Ladbrokes Betting & Gaming Ltd* and *Ladbrokes International Ltd* v. *Stichting de Nationale Sporttotalisator* ECLI:EU:C:2010:308, para. 28, referring to revenues as 'an incidental beneficial consequence'.

[69] A. Buijze, *The Principle of Transparency in EU Law* (Utrecht: Utrecht University, 2013), p. 35 ff.

public authorities to define concretely the dimensions of public value they create, helps them to mobilise support and legitimacy and guides them in using operational capacity to produce the desired effects.

1.3.2.2 Legitimacy: A Legal Framework

The second part of the strategic triangle is that of legitimacy and support. It is here that our legal perspective on the allocation of limited rights enters the scene. Although Moore distinguishes several sources of legitimacy, we focus on one of them: the law, as produced by the legislature (legislation) and courts (case-law).[70] These institutions (as well as other institutions, such as the media or interest groups) make external demands for accountability of public authorities. Since the external actors demanding accountability are the same as those who can authorise public action, authorisation and accountability are two sides of the same coin. In fact, authorisation is what gives legitimacy and support to a new public value proposition.

Thus, new legislation or a development in case-law authorises and guides allocating authorities in the choices they make in the design of their allocation procedure. In other words, since the legislature and courts act as the authorising environment for allocating authorities, the legal framework these external actors produce for allocating authorities functions as authorisation for their behaviour. From a legal perspective, this authorisation can take different forms. An important distinction is that between rule-based and principle-based regulation. Rule-based regulation lays down concrete rules public authorities should comply with when allocating limited rights. Principle-based regulation, either in legislation or in case-law, requires public authorities to act in accordance with some general legal principles without stipulating the exact meaning of those principles in a particular allocation context.

1.3.2.3 Operational Capacity: Efficiency and Effectiveness

The third and final part of the strategic triangle is about operational capacity, which is needed to materially produce the envisioned public value. Since public value cannot be realised without sufficient operational capacity, public authorities should constantly have attention for developing and directing operational capacity to achieve desired social outcomes.[71] This operational capacity not only should be conceived as the

[70] Moore, *Recognizing Public Value*, p. 115, refers to these institutions as 'formal overseers'.
[71] Ibid., p. 120.

use of public authorities' own assets but also includes the operational capacity this authority is able to purchase or to receive from society otherwise.

Whereas the relationship between operational capacity and public value is clear, it is equally important to highlight the dynamics between, on the one hand, legitimacy and support and, on the other hand, operational capacity. The legal framework, acting as an authorising environment, provides for assets to produce public value. These assets are not restricted to financial assets (money), but do also cover 'State authority'. More than considering operational capacity in itself, operational capacity should be considered in terms of a 'value chain' that links inputs of public resources (money and authority) into a production system consisting of public policies, programes, procedures and activities that produce transactions with clients and, ultimately, create some socially desired outcome. In the context of the allocation of limited rights, this means that allocation-oriented public interests such as value for money, opening of markets and efficiency of the process should not be seen as exclusively associated with this dimension of operational capacity, but should be taken into account when creating public value and assessing the costs thereof.[72]

The law also has a role to play when including 'operational' public interests such as effectiveness and efficiency in an authority's mission. By incorporating these interests into the applicable legal framework, legislators and courts highlight the importance of taking these interests into account. Thus, even though it can be highly debated whether efficiency and effectiveness are economic values that belong to the operational part only,[73] the law can act as an authorising environment to take these interests into account. Considering the authorising role of the law in more detail, rule-based action has arguably an efficiency element of its own, since it decreases the chance for arbitrariness when public authorities use their authority to create public value. However, the drawback of this approach is that allocating authorities lose sight of the underlying public interests, while totally neglecting other public interests that have not been touched upon in the legal framework.

[72] Ibid., p. 42.

[73] See two different approaches: T. Bingham, *The Rule of Law* (London: Allen Lane, 2010), not considering efficiency as an essential characteristic of the 'rule of law' versus J. Jowell, 'The Rule of Law and Its Underlying Values', in Jeffrey Jowell and Dawn Oliver (eds.), *The Changing Constitution*, 6th ed. (Oxford: Oxford University Press, 2007), p. 5 ff., considering efficiency as part of the 'rule of law'.

1.3.3 *Towards a Public Value Account in the Allocation of Limited Rights?*

As mentioned before, the starting point of our analysis is that of a public authority allocating limited rights within the boundaries of the applicable legal framework. For several reasons, the public management theory of creating public value is a helpful tool to reflect upon the role of this legal framework as an authorising environment for the allocating behaviour of public authorities.

First, from the perspective of the allocating authority, this legal framework should be seen as an element of legitimacy for its allocating behaviour. Thus, where the legal framework stipulates the mission of an authority and confers well-defined powers for predetermined purposes to pursue that mission, the authority can adapt its behaviour to this framework. By contrast, where the legal framework remains silent about the dimensions of public values that allocating authorities should produce or where it does not provide for the legal instruments to act accordingly, these authorities either stick to 'outdated' interests they were always assumed to pursue or take into account new, 'foreign' interests, for which they will be held accountable. For example, as long as EU procurement legislation had not addressed the question of whether contracting authorities could include additional policies in their procurement procedures (e.g. on 'green procurement'), they were often reluctant to do so. Similarly, where the legislature or case-law is explicitly prescribing some form of competitive tendering, it is clear for allocating authorities (at least to some extent) how they should act. By contrast, in the absence of such a clear-cut obligation, allocating authorities will continue to struggle with the question of whether they are obliged to organise some form of competitive tendering.

Secondly, the strategic triangle and the corresponding need to account for the creation of public value show that allocating authorities should strive for compliance with the law as such.[74] While both the legal framework and the available operational capacity have to be taken into account by allocating authorities, these dimensions are not the public values being produced. Instead, the concept of the strategic triangle is an invitation or even an incentive to make explicit the various public

[74] See Moore, *Recognizing Public Value*, p. 179, referring to the example of the Minnesota Department of Revenue, which stated 'compliance with tax law' as its envisioned public value.

interests involved in the allocation of limited rights. These different dimensions of public value, ranging from pursuing its mission or additional interests to respecting fundamental rights and equal treatment, can all be included in a so-called public value account, which can unveil the ongoing balancing of public interests.

Thirdly, it is important to stress that such a public value account does not assume any hierarchy between the various public interests involved. Thus, where in so-called green public procurement protection of the environment or climate is considered to be a secondary goal (with value for money being the primary one), this goal is primary in the allocation of emission permits (with value for money being a secondary one). The framework on the creation of public value, however, has a more neutral character: labels such as 'primary' and 'secondary' are considered to be irrelevant since they depend on the chosen perspective. Instead, the public value account offers a tool for allocating authorities to focus on various public interests, distinguish between them and report on them in order to create public value. It does, however, not prescribe *how* these public interests should be balanced against each other, but is a *condition sine qua non* to reflect upon this trade-off. In the absence of such a public value account, it is hard to unveil the balancing of public interests taking place.

Focussing in particular on competitive tendering, the underlying idea behind the choice for a competitive tendering procedure is its presumed capacity to achieve certain public interests. To an increasing extent, both legislatures and courts require public authorities to use some form of competitive tendering. From the perspective of the different public interests involved, there is no guarantee in advance that competitive tendering is the most ideal procedure to realise public interests; perhaps these public interests could be better served by a non-competitive procedure. Therefore, when assessing the merits of competitive tendering on the basis of a public value account, we should not lose sight of the ability of non-competitive procedures to create public value in a particular context.

1.4 Regulating Competitive Tendering: Dimensions of Comparison

1.4.1 The Unique Stages of Competitive Tendering

Following Moore's theory on strategic public management, we should consider the legal framework as an instrument used by external institutional actors (legislature, courts) to steer public authorities' behaviour

in creating public value. With our focus on the allocation of limited rights, we should reflect in more detail upon the specific 'points of support' that the legal framework – as an authorising environment – offers to allocating authorities. In order to unveil whether and, if so, how the legal framework supports public authorities in dealing with the different public interests involved, it is necessary to distinguish between the different stages involved in the allocation of limited rights.

First, there is the *limitation* of the number of rights available for grant. In some cases, limitation and creation of government rights will almost go hand in hand. If the government has something (for sale) or needs something (to buy), the size of this demand or supply will be inherently limited. For example, if the government needs a certain amount of materials (computers, etc.) to fulfil its public tasks, it will conclude a public contract with a market party delivering this amount of materials (assuming it will not produce these materials itself). In other cases, however, there is no limitation *in advance* to the number of rights available for grant. In those cases, the creation of the right, for example by introducing a licensing or a subsidy scheme, should be distinguished from the limitation of that right: while the mere creation of some right does not need to imply a quantitative restriction, a limitation to the number of available rights allows for capacity restrictions.

Only once some government right has been (created and) limited does the stage of *allocation* come into play: an allocation procedure needs to be designed and applied resulting in a selection of winning applicants. Governments can choose among different allocation procedures with their own characteristics, such as an auction, a beauty contest, a lottery and a first come, first served mechanism. As said before, it is at this stage of allocation where competition enters the scene. However, it occurs more than often that legislative attention is restricted to the stages of creation and limitation only, thereby offering public authorities administrative discretion (or lack of guidance) when designing and applying the allocation procedure.

Even in cases where the legal framework has addressed the allocation stage in more detail, it should be noted that the allocation of limited rights is only a prelude to the stage where these rights can be enjoyed by the receiving party: once a limited right has been granted, the legal relationship between the public authority and the holder of that right is only to start (perhaps with the exception of sales). This *execution* stage, however, cannot be seen in isolation from its prior stages. Even where the legal framework is silent about this relationship, it is necessary to

underline that the choice for competitive tendering can, for example, affect the duration of the right and the possibility of making amendments to the initial agreements during the execution stage. Thus, regulating competitive tendering is not only about regulating the allocation stage *stricto sensu*, but extends to prior and subsequent stages that are affected by the choice for competitive tendering and the way public interests are pursued.

1.4.2 The Interplay between EU Law and Domestic Law

As soon as public authorities allocate limited rights, the applicable rules of the 'allocation game' should be clear, both for the allocating authority and for the competing applicants.[75] What is less clear, though, is who should set these allocation rules. Is it a matter of discretion for the allocating authority or should the legislator provide legal guidance for the allocating authority? And even if the amount of discretion left to the allocating authority should be reduced by the legislator, is this up to the EU legislator or to the domestic legislator? This relationship between competent legislators is complex. For example, the ECJ ruled in *Sintesi* that the abstract and general fixing by the national legislature of a single criterion for the award of public works contracts deprives the contracting authorities of the possibility of taking into consideration the nature and specific characteristics of such contracts, taken in isolation, by choosing for each of them the criterion most likely to ensure free competition and thus to ensure that the best tender will be accepted.[76] In other words, the European legislator prohibited the national legislator from providing more support (or constraints) in the choice of the allocation procedure. In other cases, however, the EU legislator leaves it deliberately to the

[75] Case C-496/99 P, *Commission of the European Communities* v. *CAS Succhi di Frutta* ECLI:EU:C:2004:236, para. 111:

> [. . .] all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner, to make it possible for all reasonably informed tenderers exercising ordinary care to understand their exact significance and interpret them in the same way, and to circumscribe the contracting authority's discretion and enable it to ascertain effectively whether the tenders submitted satisfy the criteria applying to the relevant procedure.

[76] Case C-247/02, *Sintesi SpA* v. *Autorità per la Vigilanza sui Lavori Pubblici* ECLI:EU:C:2004:593, para. 40.

domestic legislator to determine which allocation procedures public authorities are allowed to use.

Undoubtedly, European Union law plays an important role in regulating the allocation of limited rights.[77] This holds in particular for internal market law and to a lesser extent for competition law. Thus, the domestic legislator is bound by the legal constraints defined by EU law. The intensity of constraints provided for by EU legislation differs across limited rights. For example, with regard to the award of public contracts and concession contracts, the EU legislator has adopted monetary thresholds below which the EU public procurement directives do not apply.[78] By contrast, when regulating service authorisations under the Services Directive, the EU legislator has removed any requirement of cross-border interest. As a consequence, the allocation regime of the Services Directive does also apply to limited authorisations in purely internal situations.[79] These dynamics between EU and domestic law have immediate consequences for the institutional actors that allocating authorities should focus on when exercising their discretion in awarding limited rights.

1.4.3 Rule-Based and Principle-Based Regulation

Finally, irrespective of the different stages involved in the allocation of limited rights and irrespective of the competent legislator, there is the issue of *how* this legislator should authorise and steer public authorities' allocating behaviour. When we take EU law as the starting point of this legislative process and the allocation rules to be applied as the end point, there needs to be a transformation of 'principles' enshrined in (primary) EU law into concrete allocation rules in a regulatory process starting at EU level and ending at some domestic level. While not referring to allocation issues in particular, the market freedoms (principles) of the TFEU imply some general 'allocation principles', such as equal treatment of tenderers and transparency, as the ECJ's case-law shows. These principles can be further concretised, with more specific allocation rules being derived from these principles (e.g. on the duration of limited rights). However, there is

[77] See Chapter 8 of Van de Gronden.
[78] Article 4 of the Public Procurement Directive and Article 4 of the Concessions Directive.
[79] Joined Cases C-360/15 and C-31/16, *College van Burgemeester en Wethouders van de gemeente Amersfoort* v. *X BV* and *Visser Vastgoed Beleggingen BV* v. *Raad van de gemeente Appingedam* ECLI:EU:C:2018:44.

an inherent limit to this process of transforming general legal principles into concrete allocation rules: not every concrete rule on the allocation procedure can be considered a direct consequence of some general legal principle.[80] Thus, such a concrete rule should be codified separately to be applicable. In particular, if the EU legislator limits itself by referring to general principles only, then the domestic legislator could define more concrete rules under the umbrella of these general principles. But even at the level of EU legislation itself, the different types of limited rights show different legislative choices. For example, whereas the Public Procurement Directive describes five kinds of procedures in more detail, the Services Directive merely requires an impartial and transparent selection procedure.[81] Ultimately, the resulting degree of discretion for the allocating authority in choosing the applicable allocation rules and therefore in pursuing public interests will be the result of all these legislative choices, made by the EU and the domestic legislator.

1.5 Introducing the Book

1.5.1 A Transversal Research Project

The analytical framework that we have outlined above in Sections 1.2, 1.3 and 1.4 to study the allocation of limited rights as a *general* phenomenon in public law has been the point of departure for the research project ending up in this edited volume. Based on two expert meetings hosted by the Centre for Public Contract Law & Governance of the Vrije Universiteit Amsterdam, we have decided to adopt a two-stage approach to studying the allocation of limited rights in a transversal way. First, we have asked experts in different subfields of administrative law to characterise 'their' limited right and to give an 'account' of the way public interests are pursued and balanced against each other, either by competitive tendering or not. To that end, we have selected four types of limited rights: public contracts (*Sue Arrowsmith*), licences (*Ferdinand Wollenschläger*), subsidies (*Jacobine van den Brink*) and government sales (*Roberto Caranta* and *Benedetta Biancardi*). Without being the only limited rights that can be envisaged, these four rights can be considered

[80] See Case C-95/10, *Strong Segurança SA* v. *Município de Sintra and Securitas-Serviços e Tecnologia de Segurança*, ECLI:EU:C:2011:161, para. 42, where the ECJ held that a broad approach to the applicability of the principle of equal treatment could lead to the application of essential provisions of a directive to contracts not covered by that directive.

[81] See Article 12 Services Directive.

the most important ones, especially from a regulatory perspective, also because legislation on the allocation of limited rights is currently compartmentalised along these four types. What is more, all these limited rights have different intensities of legal frameworks in EU and/or domestic law, which also sheds light on the question of how the applicable legal framework impacts the pursuit of public interests by means of a competitive allocation of limited rights. In characterising 'their' limited rights, the experts have followed a uniform questionnaire, which we have drafted such as to facilitate comparison between limited rights.[82] The chapters in Part I of this book provide for these characterisations of different types of limited rights, starting with public contracts given its impact on other legal subdomains.

Next, we have asked other legal scholars to use these contributions as building blocks for transversal contributions in which they compare the different limited rights on a particular dimension described in the previous sections. *Steven Van Garsse* and *Ilenia Vandorpe* compare the different contributions by focussing on the differences between the limited rights involved to provide some insights into the possibilities and impossibilities of the idea of a common allocation mechanism (cf. Section 1.2.2). *Johan Wolswinkel* takes another point of departure, by comparing the different contributions as to the public interests involved (cf. Sections 1.3 and 1.4.1). *Johan van de Gronden* discusses the impact of EU law in regulating limited rights, with a particular interest in services of general economic interest (cf. Section 1.4.2). *Anoeska Buijze* analyses how one particular public interest, the multifaced concept of transparency, relates to other public interests in the context of competitive allocation and takes shape across the different limited rights (cf. Sections 1.2.3 and 1.3.1). Finally, *Chris Jansen*, *Rianne Jacobs* and *Frank van Ommeren* reflect upon the dynamics between rule-based and principle-based regulation across limited rights (cf. Section 1.4.3). Together, these transversal contributions form Part II of this book.

1.5.2 *Overarching Observations: Concept, Context and Challenges*

Where the aim of this edited volume is to overcome the legal fragmentation characterising the allocation of limited rights by public authorities,

[82] For this reason, the chapters in Part I of this book have a similar structure.

the different contributions to this volume show that this comparative view has added value to the legal analysis of the allocation of limited rights. We present our overarching observations in three steps here.

First, the book enriches our understanding of the *concept* of 'competitive allocation of limited rights'. Where limited rights can be defined quite straightforwardly as government rights that are available in limited amounts only, the characteristics of different types of limited rights vary greatly. For example, the decision to limit the number of rights attracts a lot of separate attention in the case of licensing, but is considered a given when public contracts or sales are concerned.

In addition, the book also makes clear that the concept of 'competitive tendering' or 'competitive allocation' is perceived differently across different types of limited rights. Although for every limited right discussed in the book there is a tendency to consider allocation by competition as the default rule, this notion of competition is operationalised differently. In the context of public contracts, competition has been operationalised in different procedures, which all aim to establish some form of competition. With regard to sales, State aid law seems to consider an unconditional bidding procedure as the only viable way to sell State assets in accordance with State aid law. As far as subsidising is concerned, there is also a tendency, especially at the EU level, to restrict competitive tendering to beauty contests, thereby ruling out the application of a lottery or a first come, first served mechanism. In case of limited licensing, competitive allocation does not seem to be restricted to a particular allocation procedure in advance. Thus, even the allocation of a licence on a first come, first served basis is not excluded in advance to be of a competitive nature, thereby allowing for a rather broad understanding of competition, which is almost equivalent to the transparency requirement.

Our second set of general observations relates to the *context* of the allocation of limited rights. In this regard, it should be stressed first that legal scholars should not be obsessed solely with the legal rules applicable to the allocation of a certain type of limited rights, but also with the objectives or public interests underlying these legal rules. In this regard, it is striking that Arrowsmith shows how the (detailed) rules on the procurement of public contracts reflect the continuous struggle to reconcile different public interests involved in the allocation of limited rights. As far as licensing or subsidising is concerned, this contextual approach, taking into account the underlying public interests involved, seems less developed, whereas State aid law seems very hesitant about incorporating (other) public interests in the process of selling public assets. At this

point, those other subfields could learn from public procurement law how to make the balancing of public interests explicit.

Once we take into account this broader context of the allocation of limited rights, our attention shifts from the issue of whether certain legal rules have been complied with, to the issue of how the allocation of limited rights contributes to the realisation of public value. This focus on what Mark Moore would call the 'public value account' of limited rights does not nullify the legal perspective in the allocation of limited rights. On the contrary, a 'public value account' recognises explicitly the legal framework as an authorising environment to pursue public interests involved in the allocation of limited rights.

This context of realising public interests introduces new *challenges* for a legal approach to the allocation of limited rights. First, legal scholars and practitioners should pay attention to the public interests underlying the applicable rules. In particular, they should be aware of the trade-off between public interests that takes place when setting allocation rules, but also when interpreting general principles. Only by incorporating these public interests, can they establish to what extent the applicable legal framework functions as an authorising environment to create public value. Second, legal scholars and practitioners should be willing to consider other limited rights than the limited rights they are acquainted with. Even though the ultimate goal of the comparative approach in this book is not to harmonise the applicable allocation regime across all limited rights, taking notice of the (competitive) allocation of other limited rights can serve as an important source of inspiration. In some cases, there may be good reason to apply a legal rule that has been developed for another limited right. In other cases, however, the characteristics of the limited right at stake might oppose an analogous application of an 'allocation rule'. In those cases, legal scholars should try to justify that divergent application by the characteristics of the different limited rights. Third, legal practitioners should not only pursue process-related interests, such as equal treatment or transparency, but also be explicit about the output-related interests involved in the allocation of limited rights. In fact, the default rule to allocate limited rights through competitive and transparent tendering urges public authorities to make explicit in advance which output-related interests they pursue. At the same time, it is clear from several contributions in this book that the currently applicable legal framework, in particular the EU State aid regime, does not allow for sufficient flexibility in pursuing different output-related interests, such as additional policies. Thus, a final

challenge this book entails is to reflect upon the applicable legal frameworks and their relationship to different public interests. One example thereof is the need to modernise State aid law in order to incorporate other public interests than value for money in the process of selling public assets. Another example is the returning question of whether the public interest of the opening of markets, which underlies the market freedoms of EU internal market law, has a similar impact as far as the interpretation of equality principles in domestic law is concerned. The answer to this question will determine whether similar requirements flow from domestic law as compared with EU law as far as the allocation of limited rights is concerned.[83]

1.6 Concluding Remarks: Towards a *ius distributiva commune*?

Limited rights occur in different areas of government intervention in different appearances. These differences between limited rights, further strengthened by the applicability of different legal regimes, may obscure the commonalities and similarities that public contracts, limited licences, financial grants and government sales have. What is necessary, therefore, is a common language that allows for a comparative examination of the allocation of different types of limited rights.

This book contributes to the development of that common language and shows that the legal frameworks for different limited rights are slowly but surely converging. This does not mean, however, that the allocation of each limited right should take place in the same way. On the contrary, the similarities between the different rights in being available in limited quantity only and being subject to general legal principles should be weighed against the differences between the different types of limited rights and their respective legal frameworks. Thus, this book calls for a continuous effort to analyse to what extent a certain limited right is similar to another limited right when addressing the question of whether some legal rule reflecting the balancing of public interests for a certain type of limited rights could also apply to other types of limited rights.

Inspired by the extensive set of rules developed in the context of public procurement law, at least some common core of 'allocation law' has

[83] See C. J. Wolswinkel, F. J. van Ommeren and W. den Ouden, 'Limited Authorisations between EU and Domestic Law: Comparative Remarks from Dutch Law' (2019) 25 *European Public Law* 559–586.

emerged, clearly indicating that the allocation of other limited rights is no longer a matter of administrative discretion from the side of public authorities. Instead, these allocating authorities should be aware that the allocation of limited rights is subject to general legal principles that need to be contextualised when being applied to allocation issues, requiring a level playing field with equal opportunities. In particular, the obligation to organise competition has evolved into the default rule for allocation for (almost) every limited right, even though public authorities enjoy a lot of discretion in organising that competition. That being said, the trade-off between the different public interests involved turns out to be a dynamic one, not only between but also within limited rights. This volume aims at contributing to a better understanding of those dynamics.