1

# Optimising Public Interests through Competitive Tendering

## Connecting Limited Rights

JOHAN WOLSWINKEL, CHRIS JANSEN AND FRANK VAN OMMEREN

### 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.