7 The Consequences of Administrative Decisions in Regulating Markets with Public Interests: The Effects of Open Norms in Administrative Law

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1 Introduction

In the Netherlands, administrative bodies possess discretion to independently regulate markets that have public functions, such as telecommunications, public transport and electricity sectors. They may intervene in the business activities of licence and concession holders by imposing obligations as conditions attached to the licence or concession, in the context of service provision. The competence of the administrative body to impose such obligations is often based on 'open legal norms', which are legislative provisions formulated so broadly that further interpretation is required before they can be applied to specific situations.[1] This is consistent with a noted development in administrative law literature, whereby legislators increasingly delegate to administrative bodies the task of fleshing out open legal norms, rather than crafting them directly in legislation.[2] While this delegation enables tailored regulation by administrative bodies, private parties may experience uncertainty and ambiguity in consultation and application procedures when applying for the licence or concession, especially when the imposed service-related obligations do not align with their actual business operations in practice.

This chapter seeks to address the following questions: What are the effects of open legal norms on, first, the way administrative bodies use their discretionary power to impose service-related obligations on private parties in regulated markets and, second, on the actions of private parties that must comply with these

1. The term 'open legal norm' is widely discussed in the literature; for an overview, see the contribution by Pool, Strohmaier, Adriaanse and Broekema (Chapter 3) in this volume.
2. The concept of the 'retreating legislator' was first introduced by Struycken (1910), and later analysed in a more modern context by Van Wijk (1974), and subsequently by Van Ommeren (2012).

obligations when obtaining the licence or concession? Additionally, how can empirical research provide insights into how administrative bodies should exercise discretionary power and inform legislative decision-making to shape the statutory framework governing administrative discretion in imposing such obligations? By examining the specific objectives that administrative bodies aim to achieve, the extent to which they can impose obligations, and the experiences of licence and concession holders subjected to these obligations, this contribution highlights the central theme of this volume, 'Towards a Jurisprudence of Consequences'. It emphasises the effects of legislation and explores how empirical research can enhance our understanding of these effects within a legal system, offering insights that legal decision makers can integrate into their reasoning and practices.

This research concentrates on three specific legal areas as units of analysis – telecommunications law, public transport law and electricity law – where government intervention is driven by clear public interests. Based on 26 semi-structured interviews with representatives of government organisations and licence and concession holders, the study examines the effects of open legal norms in the Netherlands and highlights an increase in rule-making by administrative bodies. Alongside this increase in rule-making, the analysis identifies two relevant factors that result from open legislative norms: private parties *share information* with the administrative body on how to serve public interests, and open legislative norms also impact how the administrative body *balances interests* when determining the regulatory framework for service provision by licence and concession holders. Based on the empirical data, this study outlines a legal reflection, incorporating a normative approach grounded in legal principles of good governance, to identify specific focus areas for administrative bodies when imposing obligations on private parties. In this sense, empirical findings can provide practical depth to how administrative bodies interpret and apply legal principles, particularly the principles of due care and proportionality. The findings illustrate how and when administrative bodies conduct (thorough) research, how and to what extent knowledge shared by private parties seeking to obtain a licence or concession is integrated into administrative decision-making, and which factors are considered in the proportionality assessment of potential obligations. Based on the empirical data, this study also examines the role of the legislature by identifying whether additional statutory guidance is needed to clarify the scope of administrative discretion when imposing obligations.

In this chapter, I will first outline the framework of market regulation within which open legal norms exist in Dutch administrative law, including the concept of discretionary power granted to administrative bodies (Section 2). The following section covers the methodology (Section 3). The research is based on two research methods; a legal analysis of the existence of open norms within public transport

law, telecommunications law, and electricity law and an empirical analysis of the handling of these norms by administrative bodies and the responses of licence and concession holders. In the next section the findings of both the legal and the empirical research are described (Section 4). In the subsequent discussion, I address the long-standing debate surrounding the impact of open legal norms, incorporating empirical insights alongside considerations for the administrative body and the potential need for clearer legislative guidelines (Section 5).

2 Analytical Framework

Historically, regulated markets offering essential services, such as electricity and gas, telecommunications, postal services, public transport and mining were predominantly state-owned. At the end of the 20th century, these sectors were privatised, based on the belief that private entities could deliver these services more efficiently (Szyszczak, 2007; WRR, 2012). However, potential market failures have provided governments with a strong justification to intervene in market operations and introduce measures aimed at increasing overall welfare and protecting citizens (De Grauwe, 2020; Kates 2014; Posner, 1974; Wilkeshuis, 2010). In the Netherlands, specifically, a variety of licensing and concession frameworks have been established to regulate certain economic activities in light of the public interest.[3] Examples include frequency licences for mobile telecommunications and electricity supply licences and public transport concessions, which are implemented to improve sectoral governance, address market imperfections and protect consumers.

By granting a licence or concession through an administrative decision, the administrative body makes an individual exception to a general prohibition. This framework results in a dependency of private parties on obtaining the licence or concession necessary to carry out the activities to which the granted right pertains. Conversely, administrative bodies are dependent on private parties to deliver essential services and thereby serve public interests after these parties have obtained the required licence or concession and become holders. These interests can include safeguarding consumers against excessive prices or unfavourable conditions, ensuring high-quality and accessible infrastructure, and promoting the efficiency and reliability of essential services.[4]

Since the government retains ultimate responsibility for safeguarding public interests, it imposes service-related obligations on private parties through

3. See also Parliamentary Documents II 1999/2000, 27 216, nr. 3; Parliamentary Documents II 2001/2002, 27 216, nr. 12.
4. See the report of both the SER (2010) and the WRR (2000) regarding the concept of public interests.

administrative decisions granting the necessary licence or concession. Administrative bodies derive their authority to formulate regulations and exercise their power from sector-specific legislation (Van Ommeren & Huisman, 2013). However, when imposing obligations, these bodies are dependent not solely on their formal powers but also on the degree of latitude the legislature has allowed in the exercise of those powers (Duk, 1988; Huisman & Jak, 2019; Schlössels, 1998).[5]

By granting decision-making discretion, the legislature partially relinquishes its primacy over the exercise of certain powers. There are various reasons for the legislature to introduce open norms into the law, from which this discretion arises (Klap, 1994). The presence of open norms can, for example, be attributed to the inherent difficulty of anticipating all potential conditions, as well as the evolving nature of public interests, thus avoiding the need for constant legislative amendments. Aside from the impracticality of specifying all possible factual scenarios in the law, such specificity is also not always desirable. The discretion granted to administrative bodies allows them to actively respond to societal and economic developments. Discretion enables the administrative body to adopt a tailored approach and to engage in broader policymaking, providing the flexibility and efficiency to establish its own standards and to implement necessary market regulation measures (Schlössels & Albers, 2023).

In exercising its discretionary power, the administrative body has to consider the legal consequences of a decision and is required to weigh relevant interests when determining the substance of its decision (Klap, 2007). Particularly in the context of market regulation, the content of the obligations imposed should account for the interests of the private parties involved, as these entities must be able to ultimately deliver an essential service to the public. Gathering and considering the interests of these private parties ideally ensures that administrative decisions align with practical realities and fundamental legal principles, including the principle of due care, which requires that administrative bodies carefully investigate the relevant facts and weigh the affected interests, and the principle of proportionality, which dictates that obligations imposed on private parties must be suitable, balanced, and must not exceed what is necessary to achieve the intended public interest objectives (Van Wijk et al., 2014).

5. See several case law examples such as ABRvS (Administrative Jurisdiction Division of the Council of State) 23 August 2017, ECLI:NL:RVS:2017:2234; ABRvS 20 September 2017, ECLI:NL:RVS:2017:2552; ABRvS 1 November 2017, ECLI:NL:RVS:2017:2942; ABRvS 22 November 2017, ECLI:NL:RVS:2017:3233.

3 Data & Methodology

This study conducts both classical/doctrinal legal research and empirical legal research. Classical legal scholarship describes and reconstructs positive law based on legal sources, particularly statutes and case law (Smits, 2016; Tjong Tjin Tai & Verbruggen, 2022). By employing empirical methodologies, the results not only demonstrate how obligations are shaped within legal frameworks but also reveal their practical effects in the 'real-world' context (Bijleveld, 2019), highlighting the 'jurisprudence of consequences' by revealing the effects of legal decisions. Ideally, these findings can help legal decision makers refine legal reasoning for future obligations in similar regulatory contexts.

This study focuses on the consequences of sector-specific legal frameworks, including public transport law, telecommunications law and electricity law. These sectors were selected as case studies (Gerring, 2007; Yin, 2009) due to the presence of a clearly defined public interest in the provision of essential services, as well as the mutual dependency between the government and private parties in promoting those interests. The empirical component of this study is based on 26 semi-structured interviews conducted with subject-matter experts. Participants were recruited via email invitations, using a combination of the researchers' professional networks, publicly available profiles and snowball sampling methods. Informed consent was obtained before the interviews were conducted. Table 1 shows the legal domains and the organisations with which the interviews were conducted.

Table 1 Number of Organisations by Legal Domain

	Rail Transport	Electricity	Telecommunications	Total
Government Bodies	6	2*	2*	10
Licence and Concession Holders	5*	8 (including an industry association)	3*	16
Total	11	10	5	26

**In these sectors, all parties were interviewed.*

Table 1 shows that the 26 represented entities consist of 10 government bodies and 16 licence and concession holders. The government bodies in the electricity and mobile telecommunications sectors are the Ministry of Economic Affairs and the Authority for Consumers and Markets (ACM) or the Dutch Authority for Digital Infrastructure (RDI). In these domains, the ACM and RDI are also the authorities responsible for issuing licences on behalf of the ministry, although the ACM also holds independent powers in the electricity supply sector. In the rail transport

sector, five administrative bodies are involved: the Ministry of Infrastructure and Water Management and four provinces, with an additional (independent) regulator, the ACM. The ministry and the provinces are responsible for granting concessions in this domain.

The table indicates that, for *rail transport,* all active market participants were interviewed, although not all administrative bodies participated. The response level of administrative bodies in this market reached 62.5%. Nevertheless, the representativeness and validity are higher because most administrative bodies collaborate on railway policy. As a result, the participating administrative bodies were able to provide insights into concession awards conducted jointly with other administrative bodies. *Electricity supply* remains incomplete, as only seven licence holders and one industry association were interviewed, representing a response rate of 10.7%. This low response rate is attributable mainly to non-responsiveness or claims of limited availability due to other commitments. Although the interviewed parties may not provide a comprehensive view of the sector, the participating licence holders are diverse in terms of company size and years of market activity. Finally, in *mobile telecommunications*, all active parties were interviewed, ensuring the highest level of representativeness and validity within this legal domain.

The individuals interviewed for this research were selected because they are considered experts in their respective fields. For the purpose of this study, an expert is defined as an authority within a particular domain who possesses deep knowledge on a specific subject (Meuser & Nagel, 2009). The interviews were conducted with both policymakers and legal professionals within administrative bodies, operating at both central and provincial levels, as well as with professionals such as managers and advisors employed by concession and licence holders active in 2021 in the sectors of mobile telecommunications, electricity supply and rail transport. Given that some interviews were conducted in groups, a total of 13 experts from administrative bodies and 20 experts from concession and licence holders participated. These group settings were organised at the request of the interviewees.

The semi-structured interview questions addressed several topics, including the process for establishing obligations by administrative bodies and the rationale behind specific policy decisions. Licence and concession holders were asked about the extent to which they feel involved in the process of formulating obligations and whether their input, in their view, leads to adjustments.

During the coding of interview transcripts, no predetermined code list was applied; instead, the codes were derived inductively from the interview data.

The data was analysed thematically in several phases (Braun & Clarke, 2006). For this study, relevant themes included 'underlying reasons for the imposition of obligations', 'support for the imposition of obligations' and 'the involvement of licence and concession holders in formulating obligations'. In the initial phase, interview transcripts were coded in detail, resulting in a large volume of codes. In a subsequent phase, these codes were merged into overarching categories by examining the similarities and differences between them. Codes or code groups that appeared across multiple sectors and that were deemed significant were identified as 'relevant factors.' They include 'information sharing' and 'balancing of interests.' These factors are treated more elaborately in Section 4, where they are linked to the identified themes and examined sectors. This analysis helps uncover patterns that contribute to clarifying and interpreting the existing legal frameworks. Ultimately, these insights can provide a foundation for further theoretical development regarding the regulation of markets through legislation and subordinate regulation.

4 Results

This section presents the findings of the empirical-legal study based on the three selected case studies. It begins with the findings from the classical legal analysis of the types of open norms present in authorising statutes and the corresponding powers granted to administrative bodies (4.1). This is followed by both a legal and an empirical analysis of how the administrative bodies navigate these norms in practice through specific policy choices (4.2). Finally, the empirically identified effects of open norms and the administrative body's legal actions based on them are examined in relation to the actions of licence and concession holders (4.3).

4.1 Open Norms in Statutes

When permitted by legislation, administrative bodies have the authority to develop and implement their own regulatory policies with the aim of safeguarding the public interest that justified the introduction of the licensing or concession system. The extent to which the administrative body can exercise this discretion depends on the specific legal basis and the statutory requirements that the conditions imposed by the administrative body must meet. Three variants of statutory provisions granting administrative bodies the authority to impose conditions on a licence or concession are identified.

4.1.1 Fixed Statutory Provision

The legislature has established specific obligations that *must* be attached to granted licences or concessions, binding the administrative body to these requirements without the authority to deviate from them. This binding framework is partly

evident in rail transport concessions and electricity supply licences, where certain obligations are prescribed by statute. For instance, within the electricity supply sector, national statutes require the reliability of electricity provision and consumer protection, with the details of these obligations elaborated by administrative bodies in subordinate regulation.[6] The rail transport sector has binding national statutes that address subjects such as fare regulation, punctuality and the involvement of consumer organisations.[7] Nevertheless, administrative bodies retain discretion in regard to how these subjects are operationalised – for example, how punctuality is enforced – and may impose more specified conditions on the concessions or licences.

4.1.2 Objective-driven Statutory Provision

The legislature outlines the objectives and general conditions for imposing requirements in the legislation without explicitly stating how the objectives that led to the regulation in a particular sector should be achieved. In the case of the mobile telecommunications sector, the administrative body is empowered through national statutes to establish obligations that align with the statutory objectives and fall within the established parameters. These parameters are detailed in subordinate regulation as subjects, allowing administrative bodies to impose obligations in concretising decisions of general scope, such as those aimed at the efficient use of frequency spectrum or setting standards for services and technologies.[8] The administrative body retains decision-making discretion to draft obligations for licence holders and to decide the content, level of detail and specific wording of the obligations, provided they adhere to the defined objectives and parameters.

4.1.3 Open Statutory Provision

The legislature has not specified the exact conditions or constraints that should apply but has merely established *that* conditions may be imposed, without explicitly specifying the nature of those conditions or the objectives they are intended to achieve. This framework is partly evident in the rail transport sector and electricity supply sector, where administrative bodies may impose additional conditions in subordinate regulations or individual concessions,[9] alongside those already prescribed in statutes or (higher) regulations.

6. According to Art. 95b, Electricity Act 1998 (see also Parliamentary Documents II 2003/04, 29 372, nr. 3, p. 4) and Arts. 2 and 3 of the Decision on Electricity Supply Licence for Small Consumers of 8 May 2011, nr. WJZ / 3003019.
7. Art. 32(2), Passenger Transport Act 2000.
8. See also Art. 3.14(2) of the Telecommunications Act, in conjunction with Art. 17 Frequency Degree 2013.
9. See Art. 95e of the Electricity Act 1998 and Art. 32(1), Passenger Transport Act 2000.

4.1.4 Interim Conclusion

The legal sectors examined demonstrate that the legislature grants administrative bodies the authority to draft subordinate regulations elaborating and interpreting statutory provisions to decide which obligations should apply to licence and concession holders or to decide how these obligations should be formulated. When statutory provisions merely specify the subjects or parameters to which the conditions may relate, such conditions are considered 'open', allowing the administrative body to interpret and shape these obligations. However, as shown previously, there are multiple forms of statutory authority and resulting in administrative discretion, leaving administrative bodies with guidelines of varying specificity regarding the content of obligations that can or must be imposed. This discretion includes the authority to impose additional obligations through subordinate regulations or individual conditions attached to licences and concessions, even if these are not derived explicitly from the law.

4.2 The Policy Choices of the Administrative Body

Since open norms exist in different forms, granting administrative bodies discretionary powers to formulate and impose conditions, the next question is how administrative bodies exercise their discretion in establishing regulations and exercising their powers. This question is examined using both classical legal research methods and empirical methodologies. First, a general trend concerning the increase in regulatory measures will be discussed, followed by an analysis of the specific obligations imposed on a sectoral level based on open legal norms.

4.2.1 An Emerging Trend

The legal analysis of sector-specific legislation reveals that the objectives for imposing regulations in all the studied sectors are framed by the legislature – either in statutory provisions or in explanatory memoranda – in broad terms, such as consumer protection, reliable service delivery and the promotion of quality and sustainability.[10] Based on these objectives in the *rail transport* and *mobile telecommunications* sectors, a noticeable trend has emerged: more rules and increasingly stringent and extensive obligations have now been imposed in both subordinate regulations and within individual concessions as compared to the beginning of this century. This shift, observed by comparing older regulations with newer frameworks, shows that administrative bodies are increasingly imposing

10. For the objectives of legislation in the sectors studied, see the letter from the minister regarding a reliable energy supply – *Supply and Delivery Security of Energy*, and also Parliamentary Documents II 2002/03, 29 023, nr. 1; *Nota Mobiele Communicatie 2019*; and for the rail transport concession, see *Nota Mobiliteit 2004*, p. 50, and more recently: Parliamentary Documents II 2012/13, 29 984, nr. 384, p. 2; Appendix 3 to Parliamentary Documents II 2019/20, 29 984, nr. 899.

more obligations on licence and concession holders.[11] This trend was not only identified in legal texts but was also corroborated by both administrative bodies and private parties during the interviews.

4.2.2 *Studied Sectors*

The obligations in the *electricity supply* sector mandate the provision of a service and refer to statutory provisions. However, they do not impose such significant obligations as to prevent licence holders from delivering their own products or services. The legal and empirical research indicates that licence holders in this sector retain relatively greater freedom to conduct their activities as they see fit, provided they comply with statutes and subordinate regulations regarding which conditions may (or may not) be imposed on end-consumers, what information must be shared with end-consumers, and ensuring that end-consumers are not refused by the electricity provider.[12]

In contrast, the obligations in the *rail transport* and *mobile telecommunications* sectors have evolved beyond merely ensuring a minimum level of service, increasingly focusing on improving the quality of networks. Obligations related to the deployment of newer, faster technologies over a broader range, the provision of more comfortable transportation options, and the use of sustainable practices are examples of this trend. While these obligations align with the objectives of the sector-specific legislation, the legal and empirical findings show that they are no longer concerned with merely ensuring minimum service delivery but are now focused specifically on how the service is performed, thereby limiting the operational freedom of licence and concession holders. When asked why the administrative bodies impose such obligations, the response received points to political objectives or the belief that the same level of quality would not be achieved otherwise.

4.3 *The Impact on Actions of Licence and Concession Holders*

When obligations affect the business operations of licence and concession holders, certain factors become particularly relevant for private parties and their interaction

11. Compare the concession for the main rail network 2025-2033 with the Rail Transport Concession 2005-2014, and, for example, Arts. 3, paras. 1, 3 and 4 of Appendix 1 to the Decision of the State Secretary for Economic Affairs and Climate Policy of 6 March 2020, nr. WJZ/20062913, concerning the choice of auctioning instrument for mobile communication licences in the 700, 1,400 and 2,100 MHz bands and the determination of the licences to be auctioned (*Stcrt.* 2020, 13729) compared to the Regulation of the Minister of Economic Affairs, Agriculture, and Innovation of 22 December 2011, nr. WJZ/10146523, concerning the application and auction procedure for licences for frequency space in the 800, 900 and 1,800 MHz bands for mobile communication applications (*Regulation on Application and Auction Procedure for 800, 900, and 1800 MHz Licences*).
12. See, among others, Art. 95b(1), 95c, 95lc, 95k and 95m of the Electricity Act 1998.

with administrative bodies. This section addresses two factors that were clearly evident from the interviews in all three sectors empirically studied. These include the *sharing of* (*market*) *information* by private parties with administrative bodies and the *balancing of interests* by administrative bodies when determining the regulatory framework for the business activities of private parties. Based on these factors, several patterns have been identified between the themes and the sectors studied.

4.3.1 Sharing of Information

Across *all sectors*, privatisation in the past century has enabled the interviewed licence and concession holders to accumulate considerable knowledge and experience in regulated markets. The holders expressed a willingness to actively share this information with administrative bodies through consultations, meetings and review sessions, recognising their societal role in providing essential services and their interest in improving the content of the obligations and ensuring their alignment with practical realities. A recurring pattern is the misalignment of expectations regarding the use of shared market information. Administrative bodies rely on market information to shape regulatory decisions, yet discrepancies in how both parties perceive its relevance and application can lead to tensions.

In the *electricity supply* sector licence holders note that opportunities for information exchange have become less frequent and more formalised in recent years. Conversely, administrative bodies claim to provide sufficient opportunities for licence holders to provide input on the content of the obligations, revealing a mismatch in expectations between the parties. In the *mobile telecommunications* and *railway transport* sectors, licence and concession holders also indicated that existing opportunities during the rule-making process to influence obligations regarding how services must be delivered to end-consumers have limited impact. It is primarily in cases of identifiable errors that the interviewed licence and concession holders say they can successfully advocate for adjustments by the administrative body during the rule-making process.

As a consequence of imposing obligations, interviews indicate that licence holders in the *electricity supply* sector may provide incomplete information, while concession holders in the *rail transport* sector may strategically withhold information to avoid the imposition of (even) stricter conditions. There is a notable lack of trust on both sides, and as a result, the administrative body may fail to gather all relevant market information and insights, which are crucial for ensuring that the conditions imposed are appropriately aligned with practical realities.

4.3.2 Balancing of Interests

Administrative bodies in *all sectors* actively seek to regulate the activities of licence and concession holders to address market imperfections, manage wealth

distribution and safeguard public interests, including consumer protection and ensuring the highest possible quality and accessibility of services and products. Interviewed administrative bodies in the *mobile telecommunications* and *rail transport* sectors express the view that such public interests would not be adequately served without the imposed obligations. While administrative bodies impose conditions to ensure the protection of public interests, licence and concession holders across *all sectors* emphasise the need for flexibility to decide how the regulated activities are carried out. This flexibility would enable them to operate efficiently and innovatively, thereby contributing positively to public interest objectives.

In the *electricity supply* sector, licence holders reported limited scope for implementing innovative approaches to delivering public services when such innovations conflict with legislative provisions. Although the administrative body acknowledged the potential value of such innovations, it emphasised that these proposals could not be accommodated due to the potential risk of conflicting with statutory and subordinate regulatory provisions. In the *mobile telecommunications* sector, the balancing of interests by the administrative body in determining the content of obligations appears more pronounced, as it has greater discretion to define specific obligations than in the *electricity supply sector.* However, licence holders in the *mobile telecommunications* expressed concerns that the imposed obligations are not always suitable and necessary. They argued that during consultations, they proposed alternative measures that would still serve public interests with regard to matters such as quality, safety, affordability and equal treatment of end-consumers. In such cases, however, the administrative body determined that its own approach to safeguarding the public interest was more appropriate than the alternatives suggested by these licence and concession holders. Similarly, in the *rail transport* sector, several concession holders noted that they did not understand why certain conditions existed. They perceived that administrative bodies adhered to their own policies and that too many demands were being imposed, limiting their ability to conduct activities in what they believed to be a more effective manner.

This pattern highlights a fundamental challenge in regulatory decision-making: administrative bodies must balance public interest objectives with the operational realities of licence and concession holders, yet these actors feel that their perspectives are not fully considered, contributing to a climate of mistrust. As a result, tension arises over how obligations are formulated and whether they provide sufficient flexibility for market actors to meet regulatory goals most effectively.

5 Discussion

The findings highlight recurring patterns regarding the establishment of obligations, the nature of the obligations, and their impact on licence and concession holders, providing practical depth to how administrative bodies interpret and apply the legal principles of due care and proportionality. The following legal reflection draws on these principles to assess how empirical insights can enhance our understanding of how the law operates in practice and to identify key focus areas for the legal reasoning of decision makers, based on the studied sector-specific legislation and the actions of administrative bodies. First, two considerations are highlighted for administrative bodies when formulating obligations: (1) the importance of knowledge-sharing and effective communication with the parties involved, as part of the principle of due care, which requires administrative bodies to gather and assess all relevant facts and interests and (2) the need of conducting a thorough proportionality assessment of the obligations to be imposed (5.1). Thereafter, the role of the legislature will be discussed, specifically in regard to how empirical insights can inform whether additional statutory guidance is needed to clarify the scope of administrative discretion in imposing obligations related to service delivery and in determining and prioritising specific public interests (5.2).

5.1 Considerations for Imposing Obligations

5.1.1 Knowledge-Sharing and Effective Communication

A cornerstone of effective market regulation is that governments must possess adequate expertise before deciding to intervene in markets that have public functions (Van Damme, 2017). To acquire this expertise, the administrative body has to conduct thorough market and other types of research, employing methods such as public hearings and (market) consultations (Hoekema et al., 1998; OECD, 2003; Shipley & Utz, 2003) and collaborating with relevant parties to gather accurate information or strengthen its internal capacities, thereby addressing existing knowledge gaps (Baarsma, 2010).[13] The empirical results show that licence and concession holders seem to possess the necessary knowledge, but this information must be effectively communicated to the administrative body. Although some sectors legally mandate the application of these methods, and while administrative bodies stated that they are already conducting such research, challenges related to practical implementation emerge in regard to how

13. See Art. 3:2 Dutch General Administrative Law Act (Awb). That the administrative body has an active duty to investigate is also evident from case law (see e.g., ABRvS 5 July 2023, ECLI:NL:RVS:2023:2590, *JOM* 2023/313). The more significant the decision is for the legal position of the interested party, the more certain the administrative body should be of its case (ABRvS 15 February 2023, ECLI:NL:RVS:2023:579, *JOM* 2023/68).

administrative bodies assess, interpret and integrate market information into decision-making. Interviews reveal that licence and concession holders expect more interaction with administrative bodies, believe that regulatory research could be improved, and argue that their input should be given greater consideration to ensure that conditions align more closely with operational realities.

As effective compliance with conditions begins at the policy formulation stage (Simon Thomas, 2022), this empirical research highlights the importance of engaging with licence and concession holders when drafting these conditions, as they are, ultimately, the parties required to comply with them. While these holders may have strategic incentives for shaping obligations, legal decision makers must acknowledge that bridging the gap between policy and practice is essential in order to ensure that obligations are both effective and enforceable. Simultaneously, more involvement would offer licence and concession holders the opportunity to seek clarification on the meaning of specific conditions, thereby reducing uncertainty that exists in practice and fostering broader support for regulatory measures (Harlow & Rawlings, 2009; Stoter & Huls, 2003). The empirical insights suggest that a more consultative approach in drafting regulations could help administrative bodies refine the legal reasoning underpinning obligations, improving both their precision and enforceability.

5.1.2 The Proportionality of Obligations

In administrative law, the principle of proportionality requires that adverse effects on one or more stakeholders resulting from an administrative decision must not be disproportionate to the objectives that the decision seeks to achieve.[14] This includes ensuring that obligations imposed by the administrative body are necessary and cause minimal harm (Schlössels, 2022).[15] Furthermore, when multiple options are available to achieve the desired outcome in the public interest, the administrative body should choose the most suitable and least burdensome method for the licence or concession holder.[16] The requirements of suitability and necessity are in legal literature often linked to the efficiency or effectiveness of a measure (Buijze, 2009). However, this study reveals that the subjective nature of these concepts allows administrative bodies considerable discretion, raising the question of whether obligations imposed truly reflect an optimal balance between legal requirements and practical feasibility.

14. See Art. 3:4 (2) Awb.
15. And in case law ABRvS 2 February 2022, ECLI:NL:RVS:2022:285. According to the Division, the framework outlined in this judgment applies to all *Awb* decisions with policy discretion.
16. Parliamentary Documents II 1988/89, 21 221, nr. 3. See also ABRvS 4 november 2020, ECLI:NL:RVS:2020:2607.

Empirical legal research can challenge normative assumptions about effectiveness (See Dez's contribution in this volume). The studied cases demonstrate that licence and concession holders in the rail transport and mobile telecommunications sectors have expressed concerns that the conditions imposed are not always feasible, well considered, or efficient, suggesting that less burdensome methods were available. This raises the question of whether certain obligations fail to meet proportionality standards in practice.[17] However, meeting the proportionality requirements is challenging, as it cannot always be conclusively determined that the public interest would be equally well served by less burdensome obligations (Gerards, 2007).

To meet the proportionality principle – and in light of the empirical findings on how obligations are imposed in practice – this study emphasises that, for regulatory obligations to be effective, it is essential in the context of market regulation that administrative bodies conduct thorough research, justify their decisions in terms of efficiency or effectiveness, carefully explore alternatives, and ensure that government restrictions serve a legitimate purpose without unnecessarily hindering innovation. In adherence to the principle of proportionality and justification, and to safeguard both the quality and the effectiveness of obligations, administrative bodies must explicitly indicate how alternatives were explored, which interests were weighed, and to what extent licence and concession holders were involved in the process. This study emphasises that if the administrative body chooses to adhere to its own approach, it should convincingly explain why these conditions are considered essential for safeguarding the public interest, why this approach is deemed the most effective, and why licence and concession holders would otherwise fail to deliver services of comparable quality.[18]

5.2 A More Directional Approach in Legislation?

A further consideration is whether legislation should provide more specific guidelines for administrative bodies in regulating markets. As interviews only reflect practical experiences, they do not automatically necessitate statutory reforms (Niemeijer & Ter Voert, 2024). However, they do provide insights into how statutory and regulatory frameworks function in practice, revealing how

17. See also the case law of the Court of Justice of the European Union (CJEU), which has established that it may be sufficient for a measure to be considered 'not superfluous' (CJEU 12 January 2006, C-504/04).
18. Cf. CBb (The Trade and Industry Appeals Tribunal) 20 December 2022, ECLI:NL:CBB:2022:821, AB 2023/38, with commentary by C.J. Wolswinkel, para. 4.2, where it was cleared that restricting the competition requires the administrative body to carefully prepare such a decision and provide a robust justification. See on the principle of justification regarding the introduction of a licensing requirement: ABRvS 3 maart 2021, ECLI:NL:RVS:2021:461, and on the justification for certain conditions, for example ABRvS 7 juni 2017, ECLI:NL:RVS:2017:1520.

conditions based on open norms are established and applied. These empirical insights can, in turn, enhance legislative reasoning by identifying ambiguities in existing statutory provisions and highlighting areas where additional statutory guidance could strengthen legal certainty.

The legal analysis in the studied sectors reveals that legislation articulates public interests in broad, open-ended terms, granting administrative bodies significant discretion in formulating obligations. Empirical findings suggest that this broad discretion may contribute to uncertainty and, in some cases, subordinate overregulation, raising concerns about whether the statutory framework provides sufficient legal clarity regarding the scope and limits of administrative authority. Instead of relying on general objectives that justify the imposition of obligations, a more structured statutory framework – such as a clearly defined set of legal grounds for imposing conditions – could provide greater certainty and consistency in regulatory decision-making. By explicitly defining specific public interests in legislation or explanatory memoranda, the legislature could establish clearer boundaries for administrative decision-making, explicitly outlining which interests should be considered, prioritised and weighed when imposing conditions.

This study further reveals that the legislature employs different statutory approaches – specifying the obligations themselves, outlining their content or establishing general parameters that indicate the permissible subjects for conditions. While these statutory provisions provide administrative bodies with a framework for formulating obligations within subordinate regulations and allow for flexibility in adapting conditions to specific contexts, empirical analysis of how administrative bodies navigate these frameworks in practice offers unique insights. This study reveals the distinct effects of different statutory provisions and underscores the importance of empirical research in assessing their impact on subordinate regulations and licence and concession holders, as well as determining whether statutory objectives are effectively achieved.

If the legislature determines that statutory objectives are not being achieved effectively or seeks to improve legal certainty and clarity based on observed effects, it could explicitly define essential obligations to be incorporated into licence and concession conditions or determine whether specific sectors would benefit more from objectively driven statutory provisions – while providing a clearly formulated rationale for such legislative choices. Alternatively, the legislature could assess whether a statutory framework that combines general parameters with minimum requirements would provide clearer and more effective guidelines for regulating markets with public functions. While this study does not advocate codifying all potential licensing conditions in legislation – recognising that excessive codification may hinder administrative bodies from accommodating

innovative proposals from licence and concession holders, as can potentially occur in the electricity supply sector – it does recommend that the legislature consider exploring these options, carefully balancing the need for clear guidance with the flexibility required to adapt to sectoral developments and practical realities.

6 Conclusion and Final Remarks

Through obligations attached to licences and concessions, administrative bodies aim to safeguard certain public interests via market regulation. The central questions addressed in this contribution focused on the effects of open legal norms on the way administrative bodies use discretionary power to impose obligations on private parties in regulated markets, and, furthermore, on the actions of private parties that must comply with these obligations in the context of service provision. Additionally, the question was how empirical research can contribute to providing insights into how administrative bodies should exercise discretionary power, and how it can inform legislative decision-making to shape the statutory framework governing administrative discretion in imposing obligations. The answers to these questions offer insights into whether and how legal decision makers can use empirical legal research to identify key focus areas for improving legal reasoning.

This research examined three specific sectors – electricity supply, mobile telecommunications and rail transport – where government intervention is driven by clear public interests and where legislation across all sectors grants administrative bodies varying degrees of discretion through open legal norms, allowing them to establish their own conditions for market regulation. The findings on the various legislative provisions across these sectors underscore the broader theme of a 'jurisprudence of consequences', specifically in the context of rulemaking by administrative bodies as legal decision makers. The empirical research highlights the practical effects of various statutory frameworks and demonstrates that administrative bodies utilise the discretion provided by the legislature to further specify the content of conditions and impose additional obligations through subordinate legislation and individual licence and concession conditions, aiming to serve specific public interests. In two sectors, the administrative body seems to be increasingly imposing conditions, thereby limiting the operational freedom of licence and concession holders. This shift has sparked a debate in practice about whether the administrative body should be setting such detailed requirements and the extent to which it can impose such significant obligations.

This contribution sheds light on the challenges revealed through empirical research concerning information sharing by licence and concession holders and the balancing of interests by administrative bodies. When significant obligations

limit the operational freedom of licence and concession holders, compelling them to invest and operate differently from the way they would in the absence of such obligations, empirical findings give practical depth to how administrative bodies interpret and apply legal principles and emphasise the importance of stakeholder involvement in formulating these conditions. Such findings highlight the importance of the need for administrative bodies to carefully balance relevant interests, align policies with practical realities, acquire practical knowledge, explore alternatives and consider less restrictive means to safeguard public interests. These steps require administrative bodies to conduct thorough research into 'real-world' conditions to assess the potential effectiveness of their measures and to provide a well-reasoned justification for considering the chosen approach suitable, balanced, and necessary. This approach is relevant not only for the studied sector-specific legal frameworks but also for broader regulatory contexts where governments can impose significant obligations on private parties without explicit statutory bases. Consequently, this legal-empirical study contributes a generalisable ELS approach to assessing the impact of legislative and regulatory frameworks and leverages empirical insights to enhance the suitability of those frameworks.

An empirical study such as this inevitably has limitations. While it would be ideal to make definitive recommendations to legislatures and administrative bodies guaranteeing that specific approaches in formulating statutory provisions and in administrative decision-making would improve the content of obligations and communication among involved parties, this cannot be conclusively asserted based on the methods and findings of this research. The empirical results reflect the perspectives and experiences of specific parties, influenced by their background and motives. This does not imply that these perspectives are universally applicable or free from competing interests. As such, the empirical findings must be interpreted with caution, regarding both their content and significance. Moreover, the proposed considerations are based largely on expectations derived from legal and empirical findings. To confirm the effects of potential changes in administrative or legislative actions, further legal and empirical research would be necessary – not only by academics but also by legal decision makers themselves – when formulating obligations.

This chapter provides insight into whether the trend of legislative retreat – a development that has been ongoing for some time – warrants further attention, and, if necessary, reconsideration to provide more clarity and certainty for administrative bodies and licence and concession holders regarding which interests may be served by conditions and what conditions may be imposed and within what parameters. While the complete elimination of open norms is not advocated here – due to the advantages they can offer – this empirical-legal

study highlights the role of the legislature in assessing the effects of these open norms and determining whether statutory objectives are effectively achieved in practice. By integrating empirical insights into legislative decision-making, statutory frameworks can be refined to ensure that administrative bodies operate within clearer boundaries, ideally, reducing uncertainty that persists in practice regarding the scope and limits of their discretion to impose obligations on licence and concession holders.

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