1. Determining which values should be regarded as matters of Public Interest and how they should be weighed against other public and against private interests is traditionally considered a matter over which the legal primacy rests with government or public organisations. Indeed the raison d’être of government is the safeguarding and promotion of public values. The legal primacy holds that the (constitutional and formal) legislator is under obligation to uphold the general public interest (and only the public interest) and can, on that basis, articulate specific public interests or public values.\(^1\) Only this legislator has the competence to unilaterally determine these (specific) values and act upon them with (if need be, unilaterally) binding decisions. Other public authorities may only act to serve a (specific) public value and never to determine the general interest, let alone to serve a private interest as key-objective. Private persons or organisations may voluntarily decide to take up safeguarding or promoting a public value as an objective, but they may not by their own desire unilaterally bind others to that end.

2. Under liberalisation this primacy no longer seems to be self-evident. However, from a legal standpoint one may argue that government still holds an overriding systemic responsibility for the public interest, especially through its power of legislation. Thus, even under liberalisation government can unilaterally determine which values or interests are of a public nature and require public safeguards. Surely, what we have witnessed over the last decades is that increasingly public interests are served by private organisations. However, we should consider the following:

- In as far as this is a result of the ‘private desire’ of such an organisation to do so – consider NGO’s – this does not go with any ability to unilaterally bind others. We will leave this type of ‘public-service’ aside;
- In as far as this is the result of privatisation (organisations taking a private form) or of liberalisation (transactions concerning the allocation of public goods and services change from unilateral- to exchange-transactions) we should make a sharp distinction between:
  - cases in which serving a public value is merely a matter of more efficient or effective implementation, but the rules for allocation are not changed – take for instance permit-systems or systems for social security, where private organisations do nothing else than execute existing public legislation (privatisation as privatised implementation). The most ‘trivial’ example is the MOT-test (APK) performed by privately owned garages. Because in such cases the ‘allocation’ of public goods and services remains an exclusive matter of the legislator, public authorities retain supervision and if necessary the right to change rules;
  - cases in which the rules for allocation are changed and left to private/reciprocal transactions, but where the legislator sets certain standards as to the quality of ‘services’ (either with regard to the position of the ‘consumers’ or with regard to third parties or other external effects of these transactions) – ‘regulation’. Take, for instance, the liberalisation of energy-markets and telecommunication. In these cases, apart from upholding fair trade, the public primacy over the particular

\(^1\) The term ‘values’ is used here as to refer to specific interests.
public value('s) is upheld through setting basic 'quality-rules' and the organisation and responsibility over supervision. In some cases supervision may be left to (self-regulating) private parties, but by virtue of a legal declaration, such as the articulation of the involved public value as a specific public interest (if only in terms of a 'task'), the issue remains one that (also) rests in the public realm and governmental intervention remains a possibility;

- cases in which government decides that it no longer holds a responsibility as to the production or protection of a certain (until recently, public) value and it ceases to undertake any action in that regard. The value is now solely in the hand of the private initiative. If the legislator so desires, it may 're-invite' the public stature of this value, but in doing so it will have to account for existing private interests – especially property-rights – in relation to this value (compensation of damage for restoring unilateral rules). In these cases government will generally limit its say to safeguarding rules of fair trade.

- Quite the opposite to privatisation or liberalisation is possible when an issue of public value that was left to the care of Civil Law and private interest (or self-regulation) is (suddenly) brought back into the public realm. A good example is the protection of consumer's rights in transboundary infringements of Communitarian Consumer Law: in the Netherlands a public supervisory authority is introduced, with public law competences, where formerly this was the exclusive domain of private supervisors and Civil Law enforcement. This type of development may be described as publitisation.

Note firstly, that 'system(ic) responsibility' is a legal term used to point out that even in situations were supervision over safeguarding public values is left in the hands of independent or even private supervisors, a state minister may decide to take the initiative to take matters into governmental hands (and if necessary (re-)publitisize).

Note also, that attempts are made to create systems of supervision on the basis of stakeholder legitimacy next to upholding basic public law structures of supervision through regulatory mandate. A major question remains, how such systems can be linked in such a way that the overall responsibility of government over the general public interest is maintained, whilst at the same time there is room for a meaningful interaction amongst stakeholders on safeguarding specific public values.

3. At the same time liberalisation presents us with a shift from public law to private law arrangements for the production and allocation of public goods and services. Although privatisation may in theory be followed by (renewed) publitisation, or public law constraints, clearly once a shift to private law has been brought about, public primacy isn't easily upheld or restored.

- Especially as property rights over sources and facilities for production and delivery come to rest with private parties and transactions over goods and services are of a private law nature, public law restrictions may no longer be merely a matter of iustitia distributiva.

  This is to say that once privatisation has set in, the rule of iustitia commutativa may apply with regard to expropriation – with considerable cost (think, for instance, of the position of share-holders). To escape such costs government will have to consider interventions that apply equally to more than one sector and may thus escape the duty to compensate (fully).

- Furthermore, even under the concept of systemic regulatory dominance, government may find that its legislative primacy may prove less effective and efficient than the residual and presumptive rights held under possession (in terms of private property or eminent domain).

  This is to say that on the basis of 'public property', when safeguarding and/or promoting a public value rests with public office(s), a change in standards with regard to the protection or allocation of such values – in other words a redefinition thereof – may be accommodated within that office. Take for instance the debate on CEO-bonuses in recently privatised companies: as part of public office salary-restraint is a
matter of public service, once privatised it’s a matter of free-competition and setting limits will require additional regulation. In other words, as long as the definition of public values is ‘porous’ or apt to further evolve (due to technological or societal innovation), the decision to privatise should not be taken lightly. Once privatised, un(der)specified interests or values may be assumed to be of a private nature (rather like residual or presumptive rights).

Note, the proposed introduction in The Netherlands, of a so-called ‘societal enterprise’, as a new type of organisation, to be seen (perhaps) as a ‘panacea’ for enhancing social responsibility, without the immediate need to overregulate certain dynamic public sectors. This touches on the quest for an alternative for privatisation, in cases where a greater autonomy (from politics) is deemed necessary to efficiently and effectively deliver certain public services (such as in case of education, health-care/cure and housing), but without the risk of having to ‘immerse’ the privatised organisations in regulation.

4. From a legal standpoint the primacy over Public Interest is also influenced by Europeanisation. On the one hand European integration, especially the creation of an internal market, requires of national governments that they actively promote privatisation and liberalisation. At the same time European integration sets important limits over the possibilities of governments to enter into ‘joint ventures’ with private parties (as infringements of the rules on state-aid) and also over the possibilities of private parties to enter into self-regulatory arrangements (as they may be in conflict with the prohibition of cartels). So, in wondering who’s in charge, we also have to consider multi-level actors and multi-level limitations!

To begin with, we need to realise that although ‘Europe’ promotes privatisation & liberalisation, at the same time there may be a ‘European problem’ if promoting and safeguarding public values is construed by public-private partnerships or supervisory structures that rest on public-private cooperation or cooperation between private stakeholders. The requirements of the internal market (fair competition), and the ‘EU-view’ on the separation between state and market may severely restrict such arrangements.

5. Thus, European Law sets a multi-level boundary for Public Law dominance of government and for private law market (self)regulation and clearly influences (or even dominates) the domestic attempts of finding the right balance for the determination of public values nationally. This points at the fact that increasingly ‘Europe’ and especially the European Commission has a say in supervision with regard to adherence to public values. On the one hand this may be due to supervisory agencies on the European level, carrying the powers to unilaterally influence ‘play’ within member states. On the other hand, more and more national supervisors are expected to play a part in European networks to which either the European Commission or a European supervisory agency is a party. This involvement may, either through formal or informal competences, amount to (effectively) binding recommendations being articulated by the Commission or European Agency or even the exercise of a right to veto. Clearly, such interventions may interfere with member state’s attempts to create their own systems of supervision (for the sake of public values) in privatised or liberalised markets.

6. The above remarks aim to raise debate on some legal issues regarding the relation between liberalisation and balance between Public Law and Private Law regimes with regard to the determination of the Public Interest. Furthermore, these remarks aim to emphasise that there is a need for debate on the European influence over member states’ choices on the Public Law - Private Law divide and on balancing the determination of public interests or values.

This contribution merely attempts to point at some of the legal issues involved and to debate their relevancy.