The Allocation of Limited Rights by the Administration: Developing a General Legal Theory by Comparison

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Paul Adriaanse, Frank van Ommeren,
Willemien den Ouden and Johan Wolswinkel (eds)

Scarcity and the State II

Member State Reports on the Allocation of Gambling Licences, Radio Frequencies and CO_2 Emission Permits

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EDITORS' PREFACE

This book is the result of a Europe-wide exploration of building blocks for a consistent and general legal theory on the allocation of limited rights by administrative authorities. The idea of an international book project on this theme was launched at an inspiring international conference, organised by researchers from the Departments of Constitutional and Administrative law of Leiden University and VU University Amsterdam, the Netherlands. The project has been realised with the help of many researchers from various EU Member States. This book contains the national reports on the allocation of gambling licences, radio frequencies and CO_2 emission permits in seven EU Member States: France, Germany, Greece, Italy, the Netherlands, Romania and Spain. Other contributions deal with the subject from a general perspective, as well as from an EU law perspective and a comparative law perspective.[1] Together, all these contributions have resulted in a valuable and interesting collection of legal scholarship, which sheds light on various complex issues concerning the allocation of limited rights by administrative authorities. We sincerely hope that, based on these building blocks, further research in this field can be carried out. We wish to thank all the authors for their efforts and contributions to this book project.

Paul Adriaanse, Frank van Ommeren, Willemien den Ouden and Johan Wolswinkel
Leiden/Amsterdam, November 2015

[1] See P. Adriaanse, F. van Ommeren, W. den Ouden and J. Wolswinkel, *Scarcity and the State I. The Allocation of Limited Rights by the Administration*, Intersentia, Antwerp 2016.

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Paul Adriaanse, Frank van Ommeren, Willemien den Ouden and Johan Wolswinkel*

1. THE ALLOCATION OF LIMITED RIGHTS BY THE ADMINISTRATION: DEVELOPING A GENERAL LEGAL THEORY BY COMPARISON

1. Introduction

Managing scarcity to serve the public interest is a classic task of government. Within (almost) all jurisdictions, however, administrative law seems to assume that every party shall be granted a good or right once it satisfies all the necessary conditions.[1] This assumption neglects the fact that in several areas of government regulation, for example radio spectrum management, gambling regulation or the EU ETS (Emissions Trading System), individual rights such as licences or permits are available only in a limited quantity. As a result of this limited availability, these 'limited' rights are *scarce*: some applicants should be denied a right, even if they satisfy all necessary conditions

Despite the fact that these limited rights occur in many different areas of government regulation, the legal issues related to the allocation of these rights are not always exclusively linked to a particular policy field. Instead, some of the most important legal issues, e.g. on equal treatment and transparency, seem to be characteristic of *any* allocation of limited rights by administrative authorities. Therefore, solutions to these legal issues might be available not only in the area at stake, but also in other areas confronted with the allocation of limited rights.

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1 See e.g. Article 10(5) Directive of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36 (Services Directive): 'The authorisation shall be granted as soon as it is established, in the light of an appropriate examination, that the conditions for authorisation have been met.'

What is more, legal issues on the allocation of limited rights are not restricted to certain EU Member States. Actually, since many of these limited rights have a European origin or a cross-border impact, the allocation of these rights is subject to a process of Europeanisation.

This is clearly illustrated by the case-law of the Court of Justice of the European Union (CJEU), covering allocation issues both in different areas (gambling, pharmacies, radio frequencies, etcetera) a*nd* in different EU Member States.

This widespread occurrence of allocation issues both in different areas of government regulation a*nd* in different EU Member States calls for a *consistent* and *general* legal theory on the allocation of limited rights. This legal theory should identify allocation rules and principles that apply in *any* allocation of limited rights, while at the same respect (other) allocation rules that are exclusively linked to a certain limited right, e.g. a gambling licence, or a certain allocation procedure, e.g. an auction, because of the inherent characteristics of that right or that procedure.

In order to support and expand a generalized analysis of the allocation of limited rights from a legal perspective, the following question underlies both this book and its counterpart:[2]

> *What rules and principles are relevant for a consistent and general legal theory on the allocation of limited rights by administrative authorities in the EU and its Member States?*

In order to answer this central question, several approaches can be adopted. We identify three approaches as particularly fruitful in this respect, which we will sketch shortly in Section 2. In Section 3, we will pay specific attention to the merits of a so-called 'bottom-up' approach, which is characterised by a comparison both between areas of government regulation and between EU Member States. Section 4 contains some concluding remarks.

2. Legal Approaches

2.1. Conceptual Approach

The first approach, which should precede any other legal approach to allocation issues, is a conceptual one. This conceptual approach takes account of the specific characteristics of, on the one hand, the 'resources' that are to be allocated, *i.e.* rights awarded by administrative authorities, and, on the other hand, allocation procedures facilitating a relative comparison of applicants. The resulting conceptual framework might facilitate *any* legal system, either at the EU level or at the national level, to adopt general rules and principles on the allocation of limited rights.

2 P. Adriaanse, F. van Ommeren, W. den Ouden and J. Wolswinkel (eds), *Scarcity and the State I. The Allocation of Limited Rights by the Administration*, Antwerp, Intersentia, 2016.

With the term 'rights' we designate individual rights granted by an administrative authority, such as authorisations or financial grants (subsidies). These rights are limited if they are available in a limited quantity only. Therefore, limited rights presuppose a *maximum* – often referred to as a *ceiling* – indicating the maximum number of rights that can be granted (within a given period). As indicated by the several Member State reports in this book, there may be numerous reasons for administrative authorities to set such a ceiling: it may result from scarcity of natural resources or from 'artificial' reasons, whereas allocating authorities might pursue their own interests as 'necessary side-effects' as well. Several characteristics of limited rights are particularly relevant for the allocation of these rights, such as their *duration* and their *tradability*.

Whenever the total number of applicants exceeds the number of available rights, these limited rights are 'scarce'. In those circumstances, limited rights have to be granted by means of an *allocation procedure*. An *allocation* is understood as the resulting award of *limited* rights to individual applicants, thereby excluding other applicants from obtaining these rights. There are several allocation methods or procedures that can be applied by an administrative authority, such as allocation in order of receipt of the applications ('first come first served'), a lottery, an auction, a comparative assessment ('beauty contest') or a proportional division. Characteristic of any of these allocation procedures is that these procedures have a *relative* character: applications are compared with each other by means of one or more allocation criteria.

When analysing the allocation of limited rights, attention should not be restricted to the 'initial' allocation only. For example, another very important issue is whether limited rights that have been granted by means of an allocation procedure can be modified, extended or renewed afterwards without applying a new allocation procedure. Besides, after the expiry of limited rights, the re-allocation of these rights raises the question whether new entrants should be put at an advantage *vis-à-vis* incumbents or not.

Finally, it is worth emphasizing the legal form of the allocation. This legal form refers to the public or private form in which the limited right at stake is granted. Although a limited right will usually be granted unilaterally, it is sometimes necessary that the other (receiving) party agrees with this grant and that there is some kind of bilateral or multilateral legal form to express this reciprocity. Public contracts in this broad sense are conceptualised very differently in separate EU Member States. However, these varying legal forms should not prevent us from identifying the specific allocation context of limited rights, irrespective of their public or private form.

2.2. Top-Down Approach: A Perspective from EU Law

Considering the relationship between the EU level and the level of the Member States in more detail, we distinguish two opposites of approaches: a top-down approach and a bottom-up approach. In the *top-down* approach, we examine the influence of EU law on the design of allocation procedures. Therefore, the relevant question becomes: Which

elements of a general legal theory on the allocation of limited rights follow from European Union law? This *top-down* approach highlights the guiding role of the European institutions, including the Court of Justice, in the development of general requirements on the allocation of limited rights. This guidance may vary in its general or specific character, depending on the question whether these EU requirements apply to a particular area of government regulation (e.g. telecommunications law, gambling law) or have a more general scope (e.g. services).

While this top-down approach identifies several legal concepts of EU law as being relevant for (a consistent approach to) the allocation of limited rights,[3] it shows at the same time that the guidance provided for by EU law should not be overstated. In other words, Member States are not entirely bound by EU law in the ways they limit the number of rights available and they allocate these limited rights. Consequently, Member States still enjoy an (extensive) amount of discretion as to the design of allocation procedures for limited rights.

2.3. Bottom-Up Approach: A Comparative Perspective

In the absence of exhaustive and crystallised top-down EU regulation with regard to the allocation of limited rights, there is a need for a complementary *bottom-up* approach as well. This bottom-up approach aims to identify common principles or rules to the allocation of limited rights that apply in the absence of or in addition to EU law. This approach requires a *comparative* view on the subject-matter and aims at identifying some *ius commune*[4] or best legal practices. Since comparative law is above all a method of gaining knowledge, it enriches and extends the 'supply of solutions' and enables to find a 'better solution' to a concrete allocation problem.[5] Additionally, comparative law might contribute to a unification of allocation rules and principles to be implemented by national legislatures.[6]

3. Dimensions of Comparison

3.1. Two Dimensions

The purpose of this book is to contribute to the development of a consistent and general legal theory on the allocation of limited rights. For this purpose, we find it useful to distinguish *two dimensions* within our comparative bottom-up approach. In the first place, it is useful to analyse several areas of public regulation confronted with the allocation of limited rights. The aim of this sectoral comparison is to identify similarities

3 Into more detail, see part II of *Scarcity and the State I. The Allocation of Limited Rights by the Administration.*

4 J. Schwarze, *European Administrative Law*, London, Sweet & Maxwell 2006, p. 93.

5 See in general Schwarze 2006, p. 78.

6 See in general Schwarze 2006, p. 79–80.

and differences across these areas that may contribute to common rules or principles on the allocation of limited rights. In the second place, within these particular areas of public regulation, it is useful to compare Member States' practices with each other concerning their use of discretion as left by EU law. This bottom-up approach therefore serves to identify a common, though minimal, legal core of allocation rules, while respecting Member States' discretion in the allocation of limited rights.

3.2. Comparison between Areas of Government Regulation

With regard to the first dimension of comparison, it is useful to distinguish between limited rights with regard to their 'degree of Europeanisation', *i.e.* the extent to which the allocation of these rights is subject to (specific) EU law. At one end of this sliding scale, there are limited rights which are entirely governed by EU law and therefore leave no room for discretion to Member States. An example of this is the granting of subsidies by EU institutions in the case of 'direct management'. At the other end of this scale, there are limited rights that lack any connection with relevant EU rules, e.g. national authorisations or subsidies without any cross-border impact.[7] In the absence of any boundaries imposed by EU law, the allocation of such limited rights is to be guided by national legal rules and principles. In between these extremes, there are many other examples of limited rights. Within this book, three examples of limited rights have been selected on the basis of their degree of Europeanisation: CO_2 emission permits (allowances), radio frequencies and gambling licences.

As regards the allocation of CO_2 emission allowances, EU legislation has governed the EU Emissions Trading System intensely from its very start. Nonetheless, there are still new tendencies towards a more centralised allocation of allowances, e.g. the uniform prescription of the auction as the allocation procedure to be applied. Moreover, the relevant EU legislation provides for one uniform auction platform which facilitates the allocation of emission allowances at an EU-wide level. As a direct consequence, Member States seem to have little discretion anymore as to the design of the allocation procedure, although EU legislation contains some exceptions to these uniform rules for specific EU Member States.[8]

A similar development towards a more centralised regulatory framework seems to be taking place in the area of radio spectrum management. Currently, the grant of individual 'rights of use' for radio frequencies is governed by a set of directives, known as the 'new common regulatory framework'. These directives still leave Member States considerable discretion as to their choices in the limitation and allocation of these individual rights. Consequently, Member States are allowed to make diverging choices, for example on the

7 EU law provisions on the fundamental freedoms do not apply to situations where all the relevant facts are confined within a single Member State. Cf. Case C-245/09, *Omalet* [2010] ECR I-13771, para. 12.

8 See into more detail the chapter by A. Rønne in *Scarcity and the State I. The Allocation of Limited Rights by the Administration*.

treatment of new entrants versus incumbents and on the allocation procedure to be applied. However, recent developments in EU legislation on radio spectrum management show increasing attempts for further coordination and harmonization of the use of radio spectrum. This might restrict Member States' discretion in the future when it comes to the design of the allocation procedure.[9]

Gambling law, finally, is not governed by secondary EU law. Consequently, the grant of limited gambling licences is governed by primary EU law only, in particular the freedom to provide services and the freedom of establishment. Given this rather general legal framework, it should not be surprising that Member States are allowed to make diverging choices with regard to the limitation and allocation of gambling licences, e.g. by maintaining legal monopolies or by introducing limited authorisation schemes with minimal geographic distances between establishments. Nonetheless, Member States' discretion is not unlimited, as the CJEU has made clear in many judgments in the last decade.[10]

3.3. Comparison between EU Member States

It follows from this first dimension of comparison that Member States enjoy various degrees of discretion when allocating limited rights. The following question, then, is how Member States use their discretion within a specific area of regulation. This is the topic of the second dimension of comparison, *i.e.* between EU Member States. Given the existence of more or less discretion with regard to the design of allocation procedures, this comparison between EU Member States may generate interesting and fruitful insights for an optimal design of allocation procedures or a least 'a better solution' for allocation problems. Moreover, this comparison may be helpful in identifying a common set of allocation rules and principles that apply in any allocation procedure, irrespective of the area of public regulation and the Member State concerned.

With regard to this comparison between EU Member States within three specific areas of law, this book contains reports on allocation practices in seven EU Member States: France, Germany, Greece, Italy, the Netherlands, Romania and Spain.[11] This selection does not only provide a rich variety of allocation practices, but also allows taking into account the different legal traditions that might be relevant from a conceptual point of view. Moreover, these Member State reports illustrate whether national legislatures or administrative courts are prepared to derive inspiration from other areas of law in developing rules on the allocation of limited rights.

9 See into more detail the chapter by G. Oberst in *Scarcity and the State I. The Allocation of Limited Rights by the Administration.*

10 See into more detail the chapter by S. Van den Bogaert and A. Cuyvers in *Scarcity and the State I. The Allocation of Limited Rights by the Administration.*

11 The only Member State report lacking in this book is a report on gambling law in Italy, since this Italian legislation has been described already quite abundantly in the CJEU's case-law on this matter.

4. Concluding Remarks

This book with Member State reports aims to contribute to the development of a consistent and general legal theory on the allocation of limited rights by administrative authorities. A fruitful way to achieve this objective is to adopt a 'bottom-up' approach. This approach seeks to compare allocation practices both between different areas of government regulation and between several EU Member States. In fact, this bottom-up approach can be characterised as the necessary 'closer' in our search for relevant allocation rules and principles: as far as general rules in EU law on the allocation of limited rights are lacking, 'best performances' derived from practices in different Member States or specific areas of law, may be helpful in optimising the authorities' discretion with regard to the allocation of limited rights.

This book provides for a comparison between three areas of law confronted with limited rights (CO_2 emission permits, radio frequencies and gambling licences) and seven EU Member States. The resulting matrix can be considered a useful starting point to develop a more complete picture of the allocation of limited rights in different areas of EU law and in different EU Member States. In particular, by considering these three kinds of limited rights as specific points on a sliding scale, other limited rights could be compared with these examples as well. By doing so, it is not only possible to identify best practices in other areas of law, but also to develop general principles that reappear in any allocation of limited rights, irrespective of the sector-specific legislation and irrespective of the Member State at issue. These principles may contribute to the development of a consistent and general legal theory on the allocation of limited public rights. Thus, in order to finetune the 'scarcity' perspective to administrative law further and further, comparative exercises on the allocation of limited rights, both between areas of law and between Member States, are worth continuing.