The Allocation of Limited Rights by the Administration: A Quest for a General Legal Theory

Adriaanse, P.C.; Ommeren, F.J. van; Ouden, W. den; Wolswinkel, C.J.

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

CHAPTER 1. THE ALLOCATION OF LIMITED RIGHTS BY THE ADMINISTRATION: A QUEST FOR A GENERAL LEGAL THEORY

1. Introduction

Managing scarcity to serve the public interest is a classic task of government. Whereas economic and political theory have paid much attention to the allocation of scarce goods and rights, until now a consistent and general legal theory of 'the allocating government' has been more or less absent. In fact, the law of public administration 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, individual rights such as authorisations and (financial) claims are available only in a limited quantity. As a result of this limited availability, certain applications for those rights must be denied even though the applicants satisfy all the necessary conditions. In other words, there may not be enough rights available to satisfy all qualified parties.

This idiosyncratic feature of limited rights can be illustrated using a number of examples. First, it is worth mentioning the auctions of the 4G spectrum in several Member States as an example of rights which are scarce for natural reasons. With revenues running up to billions of euros, the financial importance of these frequencies for both the allocating authorities and the bidding undertakings is clear from the outset. In the area of gambling law, an area entirely different from telecommunications law at first sight, scarcity exists as well: in order to ensure the protection of consumers and to combat crime and gambling addiction, many Member States artificially restrict the number of authorisations that are available to be granted. The same holds true for financial grants, although the background is different: in order to restrict expenditure,

* Paul Adriaanse is Associate Professor of constitutional and administrative law at Leiden University and practising lawyer at Justion Advocaten, the Netherlands. Frank van Ommeren is Professor of constitutional and administrative law at VU University Amsterdam, the Netherlands. Willemien den Ouden is Professor of administrative law at Leiden University, the Netherlands. Johan Wolswinkel is Associate Professor of administrative law at Tilburg University, the Netherlands.

1 See e.g. Article 10(5) Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L 376/36 (hereinafter: 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.'

most kinds of financial grants and subsidies are available in limited budget only, both at the European level and at the level of the Member States. Last but not least, we mention the many procurement procedures being performed in order to conclude supply contracts with market parties.

This book seeks to demonstrate the need for a consistent and general theory on the allocation of limited rights by administrative authorities from a legal perspective. Since all these limited rights are usually of great importance to applicants – they represent significant economic value, and it is often not possible for the applicant to perform the intended activities without the requested permit, authorisation or subsidy – decisions concerning the allocation of limited public rights often lead to disputes, for example on the lack of transparency, the selected allocation procedure or the renewal of limited rights to the detriment of new entrants in the market.

Since many limited rights have a European origin or a cross-border impact, the allocation of these rights is subject to a process of Europeanisation and consequent economisation of administrative law.[2] Although European Union law has always been aimed at establishing and ensuring the functioning of an internal market (an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured)[3] over the years the corpus of EU law has extended in volume and detail. Not surprisingly, this offers new possibilities for undertakings and other applicants to contest the allocation of limited rights, even in cases falling outside the (direct) scope of EU law. Arguments derived from European law, be it primary EU law or (specific) secondary legislation, can sometimes be invoked successfully before the national courts in cases where national law offers less protection of the interests of competing applicants, or none at all. By doing so EU law concepts are introduced in disputes in policy fields that have been governed traditionally by national law only.

Furthermore – and more importantly – many of the above-mentioned legal issues are not exclusively linked to a particular policy field, but – on the contrary – seem to be characteristic of *any* allocation of limited rights by administrative authorities. Therefore, solutions to these legal problems may be available not only in the area at stake, but also in other areas that are confronted with limited rights. This calls for a *general* legal theory of the allocation of limited public rights. This view is supported by the fact that both national courts and the Court of Justice of the European Union (hereinafter: CJEU) are increasingly willing – in the absence of specific legislation – to consider the allocation of limited rights in various fields of law under general legal principles, like the fundamental freedoms or the principle of equal treatment. To illustrate this point,[4] reference can be

2 See on the economisation of administrative law also M. Ruffert (ed.), *The Transformation of Administrative Law in Europe*, Sellier European Law Publishers, Münich 2007, p. 24 ff. More in general on the Europeanization of administrative law, see J. Schwarze, *European Administrative Law*, Sweet & Maxwell, London 2006, and H.C.H. Hofmann, G.C. Rowe and A.H. Türk, *Administrative Law and Policy of the European Union*, OUP, Oxford 2011.

3 Article 26 TFEU.

4 For the Dutch context, this point was established during two expert meetings in 2010, followed by a book: F.J. van Ommeren, W. den Ouden, C.J. Wolswinkel (eds.), *Schaarse publieke rechten*, Boom

made to judgments by the CJEU in the field of public procurement,[5] gambling,[6] telecommunications,[7] petrol stations,[8] pharmacies[9] and opticians[10], as well as judgments by national courts in different Member States on issues like limited licences for 'Sunday night stores',[11] gambling,[12] and CO_2 emission allowances.[13]

The search for a general legal theory of limited rights fits in broader thinking throughout the EU and its Member States concerning the development and codification of general principles of law governing composite administration at the European and national level. Using these general principles, gaps can be filled in specific legislation or when legislation is lacking altogether. General principles can also serve as landmarks when developing new legislation. As such, they could even have a harmonising effect. Legal practice will also be aided by a general legal theory since the wheel does not have to be re-invented everywhere, thereby contributing to legal certainty and efficiency. Not only legislatures, administrative bodies and judges, but also the various applicants for limited rights and their competitors will therefore benefit from a general legal theory of this phenomenon. This makes the attempt to arrive at such an overall theory all the more challenging.

In order to support and expand a generalised analysis of the allocation of limited rights from a legal perspective, the following question will be the focus of this introductory chapter and further in the other contributions in this book:

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?

Juridische uitgevers, The Hague 2011. See also C.J. Wolswinkel, 'The Allocation of a Limited Number of Authorisations. Some General Requirements from European Law' (2009) 2(2) *Review of European Administrative Law*, 61; F. Wollenschläger, *Verteilungsverfahren*, Mohr Siebeck, Tübingen 2010; L. Arroyo Jiménez and D. Utrilla Fernández-Bermejo (eds.), *La administración de la escasez*, Marcial Pons, Madrid 2015, and F. Wollenschläger, 'EU Law Principles for Allocating Scarce Goods and the Emergence of an Allocation Procedure. Identifying Substantive and Procedural Standards and Developing a New Type of Administrative Procedure' (2015) 8 (1) *Review of Administrative Law*, 205.

5 Joined Cases C-147/06 and C-148/06, *SECAP and Santorso* [2008] ECR I-3565.

6 Case C-203/08, *Sporting Exchange* [2009] ECR I-4695; Case C-64/08, *Engelmann* [2010] ECR I-8219; Joined Cases C-72/10 and C-77/10, *Costa and Cifone* [2012] ECLI:EU:C:2012:80.

7 Case C-375/11, *Belgacom* [2013] ECLI:EU:C:2013:185.

8 Case C-384/08, *Attanasio Group* [2010] ECR I-2055.

9 Joined Cases C-570/07 and C-5712/07, *Blanco Pérez and Chao Gómez* [2010] ECR I-4629.

10 Case C-539/11, *Ottica New Line* [2013] ECLI:EU:C:2013:591.

11 See for example the Judgment of the Dutch Trade and Industry Appeals Tribunal of 24 August 2012, *Vomar Voordeelmarkt B.V., AB* 2012, 373.

12 See for example the Judgment of the Austrian *Landesgericht Linz* of 23.01.2008, *Engelmann*, with reference for a preliminary ruling from the Court of Justice (see Case C-64/08, [2010] ECR I-8219).

13 See for example the Judgment of the Regional Court of Lazio, II-bis, 3313/2010, *Soc. Columbian Carbon Europa vs. Ministry of Environment.*

This introductory chapter is structured as follows. After demonstrating the need for a consistent and general legal perspective to the allocation of limited rights by administrative authorities in addition to economic and political theory (Section 2), we elaborate on the legal approaches that can be adopted in order to disentangle the phenomenon of limited rights (Section 3). We then go on to identify three approaches that are useful in this regard: a conceptual approach, a top-down approach and a bottom-up approach. The *conceptual* approach aims to distinguish the general elements characterising any allocation of limited rights (Section 4). The *top-down* approach addresses the relevance of EU law for (general) rules and principles on the allocation of limited rights (Section 5). Finally, the *bottom-up* approach takes a reverse perspective by focusing on the ways Member States use the freedom left by EU law to regulate the allocation of limited rights in several areas of government intervention (Section 6). In these three sections, we outline the relevance of the various chapters in this book as 'building blocks' for a general legal theory on the allocation of limited rights in the EU and its Member States. In the concluding remarks (Section 7), we reflect briefly on this theory and the next steps to be taken.

2. Economic, Political and Legal Issues

The allocation of limited rights by administrative authorities can be analysed using several academic disciplines.[14] When focusing on the aspects of 'allocation' and 'scarcity', the allocation of limited rights falls firstly within the scope of economics. In his seminal *Essay on the Nature & Significance of Economic Science*, Robbins defined economics as the science which studies human behaviour as a relationship between ends and scarce means which have alternative uses.[15] This definition perfectly fits our subject matter: since only a limited number of rights is available to be granted, the number of applicants may exceed this number of rights as a result of which these rights have alternative recipients. Several branches of economic theory deal explicitly with the allocation of scarce resources, like resource allocation theory and auction theory.[16] However, since economic theory used to claim to be neutral with regard to the ends of allocation,[17] the question concerning which allocation principles should guide the allocation remains, at least partly, an open question in economics.

This question has been debated in philosophical and political theories on distributive justice, addressing the issue of which allocation principles, like efficiency, merit or need, should be decisive in the allocation of scarce resources.[18] These philosophical theories, like the approach in economic theory, usually abstract from the specific (legal) context

14 For more detail, see C.J. Wolswinkel, 'An Allocation Perspective to Public Law: Limited Public Rights and Beyond' (2014) 5 *Law & Method*, DOI:10.5553/REM/.000004.

15 L. Robbins, *An Essay on the Nature & Significance of Economic Science*, MacMillan, London 1952, p. 16.

16 See for example M.C.W. Janssen (ed.), *Auctioning Public Assets. Analysis and Alternatives*, Cambridge University Press, Cambridge 2004.

17 Robbins 1952, p. 24.

18 At a local level, see with further references for example J. Elster, *Local Justice. How Institutions Allocate Scarce Goods and Necessary Burdens*, Russell Sage Foundation, New York 1992.

for a particular allocation of scarce resources and therefore do not take into account existing legal constraints on the design of allocation mechanisms.

In contrast to economics and distributive justice theory, such a pre-eminent role for scarcity and allocation issues seems to be lacking in law, at least in administrative law. To put it somewhat simplistically, as mentioned in the introduction, the 'default' legal approach to granting rights is that public authorities should grant a right whenever an applicant meets the conditions necessary to be granted that right. This does not mean that legal doctrine is totally unaware of the phenomenon of limited rights. In particular – and not surprisingly – there is a huge branch of law & economics literature with regard to public regulation, including monopoly regulation and public franchising. It is worth emphasising that Coase's founding articles on law & economics, 'The Federal Communications Commission' (1959) and 'The Problem of Social Cost' (1960),[19] addressed in particular the use of pricing mechanisms by administrative authorities for the allocation of scarce resources (broadcasting frequencies and pollution rights).[20] In recent literature on law and economics, this explicit attention to market mechanisms on the allocating of scarce resources is still clearly present.[21] However, because of the *instrumental* approach in literature on law and economics and the strong emphasis on law as a *tool* for public regulation,[22] there is hardly any attention for the more doctrinal issue of how the allocation of these limited rights should be incorporated into a consistent and general legal framework. Shifting our perspective from an instrumental function of law to a more *protective* one,[23] focusing on the protection of individual citizens' interests and – conversely – the need for proper or sound administration, the literature remains even more silent, at least with respect to fundamental *legal* principles that should guide the allocation of limited rights and thereby give due care to the interests of market parties.

This chapter therefore aims to address relevant *legal* questions in order to establish general allocation rules and principles and to identify best legal practices applying to any allocation of limited rights. The resulting legal framework should be fitted into the classic, 'non-limited' part of administrative law in order to create a coherent and consistent system of legal protection, applying to any granting of rights by administrative

19 R.H. Coase, 'The Federal Communications Commission' (1959) *The Journal of Law & Economics*, 1, and R.H. Coase, 'The Problem of Social Cost' (1960) *The Journal of Law & Economics*, 1.

20 However, it was not until the nineties of the previous century that the auctions of broadcasting frequencies took place in the United States. See J. McMillan, 'Selling Spectrum Rights' (1994) *Journal of Economic Perspectives*, 145.

21 See for example R. Posner, *Economic Analysis of Law*, Aspin Publishers, New York 2007, 47–48.

22 See for example A.I. Ogus, *Regulation: Legal Form and Economic Theory*, Hart Publishing, Oxford 2004, p. 214 and 318, distinguishing from an instrumental point of view between 'prior approval' licences (*i.e.* 'non-limited authorisations') and 'public franchises' ('limited authorisations').

23 See for this distinction between the instrumental and the protective function of law: W. van den Burg, 'The expressive and communicative functions of law, especially with regard to moral issues' (2001) *Law and Philosophy*, 34, with reference to Dworkin's distinction between principle and policy (R. Dworkin, *Taking Rights Seriously*, Cambridge University Press, Cambridge 1978, p. 22).

authorities. At the same time, this framework functions in addition to literature on law and economics, and economic and philosophical insights on the allocation of limited rights, and thereby contributes to a profound and multidisciplinary analysis of the phenomenon of limited rights.

3. Legal Approaches

Above all, it is necessary to introduce general terminology that will facilitate a generalised analysis of the allocation of limited rights by administrative authorities. This 'conceptual' approach[24] precedes any other legal approach to limited rights that aims to develop a consistent and general legal theory on this matter. The 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, the allocation procedures facilitating a relative comparison of applicants. Thus, this conceptual approach should be followed in close connection with similar definitions in economic theory and theories of distributive justice. 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.

Next, considering the relationship between the EU level and the level of the Member States in more detail, two opposite approaches can be distinguished: 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 systems, both at an EU level and at a national level. Therefore, the relevant question becomes: Which elements of a general legal theory on the allocation of limited public rights follow from European Union law?[25] This approach highlights the guiding role of the European institutions, including the Court of Justice, in the development of requirements applying to the allocation of limited rights. This guidance may vary in its general or specific character, depending on the question whether it applies to a particular area of policy regulation (e.g. telecommunications law, gambling law) or has a more general scope (e.g. services). Thus, it should be emphasised that this top down approach is not restricted to a deductive exercise starting with the general principles of EU law, but may also cover more specific allocation rules resulting from EU law.[26]

In the absence of exhaustive and crystallised top-down regulation with regard to the allocation of limited rights, there is a need for a 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 regulations. This inductive approach, which is complementary to the top-down approach, requires a *comparative* view on the subject matter and aims at identifying some *ius commune* or

24 This conceptual approach is identical to the analytical approach adopted by Arroyo and Utrilla in their chapter to this book.

25 In fact, legal rules may result from other supranational sources as well, e.g. the European Charter on Human Rights. See the chapter by den Ouden and Tjepkema.

26 This top-down approach overlaps with the constitutional approach of Arroyo and Utrilla as far as allocation rules are derived from general principles of EU law.

best legal practices.[27] We find it helpful to distinguish two dimensions within this bottom-up approach. In the first place, it is useful to analyze several areas of public regulation with limited rights (e.g. telecommunications law, gambling law and subsidy law) with the intention of identifying similarities and differences across these areas that may contribute to common rules or principles. 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.

In the following sections, the implications of these three approaches are sketched briefly by highlighting some general developments and pointing out some important findings in the other chapters to this book. In fact, these three sections show that these approaches should go hand-in-hand. Therefore, the three parts of the book follow the three distinctive approaches identified above, but only to a certain extent.

4. Conceptual Approach: Definitions and Characteristics

Right from the outset, it is necessary to introduce some uniform terminology on the subject matter in order to have a clear understanding of limited rights. To explain this phenomenon accurately, it is useful to make a conceptual distinction between (i) the object of allocation (*the 'what' question*), (ii) the method of allocation (*the 'how' question)* and (iii) the legal form of the allocation (*the 'form' question*). The advantage of these conceptual distinctions is that they generate general tools to explain the essential features of the allocation of limited public rights. Moreover, these distinctions could prevent us from some rather complicated misunderstandings.

4.1. Object of Allocation: Limited Rights

Let us first address the object of allocation. In other words: how do we conceptualise the notion of limited rights? An answer to this question also offers a first glimpse of the scope of this book. With the term 'rights' we designate individual rights granted by an administrative authority. These 'public' rights can be subdivided into two main categories: 'authorisations' and 'claims'.[28]

An 'authorisation' covers any administrative decision creating an individual exception to a statutory prohibition or injunction. It concerns various types of government approvals that exist in legal practice, such as licences or permits. As an overarching characteristic, all these approvals imply a permission from an administrative authority to engage in a certain (usually economic) activity which is otherwise prohibited.

27 See more extensively on the emergence of European administrative law through comparative method: J. Schwarze, *European Administrative Law*, Sweet & Maxwell, London 2006, p. clxxxi ff and 76 ff.

28 For this distinction in general see R. Alexy, *A theory of constitutional rights*, OUP, Oxford 2002, p. 133 ff.

Claims result from administrative decisions awarding rights to a *positive* act of an administrative authority.[29] The main types of claims are financial grants (subsidies) on the one hand and governmental commissions on the other. Financial grants or subsidies of an administrative authority do not merely concern government approval but rather governmental incentives or support. Governmental commissions, by contrast, create a claim for a private party against the commissioning government to something in return for the supply of goods and services. Usually this reciprocity or consideration consists of payment, but this reciprocity may also consist of the right to exploit these goods or services.

The next issue is what we mean by *limited*. Stripped of most of the complexities, (public) rights are limited if they are available in a limited quantity. 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). There may be numerous reasons for administrative authorities to set such a ceiling: it may result from scarcity of natural resources, like the radio spectrum or mineral resources, but can also be inspired by legitimate 'artificial' reasons, like consumer protection or public order. Of course, it should also not be neglected that allocating authorities might pursue their own interests as 'necessary side-effects', like collecting extra revenues.

At this point, it should be stressed that the governmental task of managing scarcity is not restricted to the allocation of limited rights. For example, the government can assign alternative modes of use to several parts of a certain scarce resource (e.g. radio spectrum) in order to balance the various interests involved in the use of this resource *without* introducing a (*limited*) authorisation scheme.

Several characteristics of limited rights are relevant for the allocation of these rights. The first aspect to be highlighted is the *duration* of rights. Exactly because a ceiling allows only a limited number of parties to conduct certain activities, the disadvantages of the rejection of applications and the prevention of parties entering the market would be 'eternal' if these limited rights were granted for an indefinite period.

Next, it is important whether these limited rights are *tradable* or not.[30] If rights can be transferred,[31] applicants missing out in the allocation procedure are not banned forever from obtaining this limited right. This transferability of rights is especially appealing when these rights represent a significant financial value, which is often the case with rights that are available in a limited number only.

In sum, the object of allocation raises a number of issues that are relevant for the allocation of limited rights, *inter alia* (i) when may or should the number of public rights be limited, (ii) how are these limitations constructed legally and (iii) does it make any

29 Alexy 2002, p. 120, describes claims as 'rights to something'.

30 See e.g. the chapters by Wolswinkel and Adriaanse in this book.

31 Some limited rights are known in the jargon as 'tradable permits', with the specific feature that they are (by definition) transferable: the possessor may transfer this right to a successor, as in the case of emission rights.

legal difference, which subject (e.g. radio frequencies, CO_2 emissions or gambling activities) these limited rights concern? Answering these kinds of questions with regard to the object of allocation might be a first step in the development of a consistent and general legal theory on the allocation of limited rights.

4.2. *Allocation Procedures*

Scarcity is a relative notion that binds supply and demand. Thus, whenever the total number of applicants exceeds the number of available rights, these limited rights are called scarce. In those circumstances of scarcity, limited rights have to be granted by means of a so-called *allocation* procedure. Following this terminology, an *allocation* is understood as the resulting award of *limited* rights to individual applicants, thereby excluding other applicants from obtaining these rights.[32]

There are several allocation methods or procedures of allocation that can be applied by an administrative authority. The allocation procedures commonly used are:[33]

- the order of receipt of the applications ('first come first served');
- the drawing of lots;
- an auction;
- a comparative assessment (also called 'beauty contest' or 'tender');
- a proportional division.

This list of allocation procedures is not meant to be exhaustive. For example, it is sometimes useful to distinguish public procurement as a separate allocation procedure, because it is the most regulated and detailed procedure to allocate limited rights.[34] Nonetheless, as indicated by Jansen in this book, public procurement may be classified either as an auction or as a comparative assessment dependent on the applicable 'award criteria'.

Anyway, characteristic of any of these allocation procedures is that these procedures have a *relative* character: applications are compared by means of one or more allocation criteria. For example, in the case of allocation in order of receipt of applications it is decisive which application was received first by the awarding authority. However, in the case of an auction, the applicant with the highest financial bid determines the outcome. Consequently, each allocation procedure has its own characteristics.

32 In this respect, there is no uniform terminology. Instead, a wide variety of terms and definitions can be distinguished. In the area of radio spectrum policy, e.g., frequency distribution to several services (broadcasting, mobile communications, etcetera) is called 'allocation', where the subsequent frequency distribution to individual undertakings is called 'assignment' (Article 1 ITU Radio Regulations 2012).

33 See into more detail the chapter by Oberst in this book.

34 Elster 1992, p. 67 ff.

See the chapter by Van Ommeren.

When considering the allocation of limited rights, attention should not be restricted to the so-called 'initial' allocation. For example, if the initial allocation has been accompanied by a waiting list, limited rights that have been withdrawn afterwards, will be granted to the initially unsuccessful applicants. Moreover, an important issue is whether rights that have been granted can be modified, extended or renewed without applying a new allocation procedure. In particular, in relationship to the duration of limited rights mentioned above, the issue of prolongation turns out to be highly relevant: as a result of prolongation, newcomers who will reckon with the limited duration of limited rights, might (once again) not be able to compete for these rights in the future. Finally, after the expiry of limited rights, these rights become available again to grant, provoking the debate whether new entrants should be put at an advantage *vis-à-vis* incumbents.

Thus, in addition to the issues raised by the object of allocation, a generalised analysis of the allocation procedure provokes a number of additional questions, e.g. (i) when should limited rights be allocated by a competitive method, (ii) what kind of objective allocation criteria are used in order to prevent favouritism and nepotism, and (iii) how can the equal treatment of long-established parties and newcomers be ensured? Whereas general or uniform answers to these questions should not always be expected, differences between allocation procedures should still be justified by some consistent legal theory on the allocation of limited rights.

4.3. Legal Form

Apart from the object and the procedure, the legal form of the allocation should be distinguished. The legal form of an allocation refers to the public or private form in which the limited right at stake is granted. Generally, administrative authorities grant public rights by unilateral single case decision-making or by a contract. Although a public right will usually be allocated 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. In particular, this kind of agreement – a bilateral or multilateral "public" contract – is needed when the administrative authority lacks the power to grant the public right unilaterally. "Public" contracts in this broad sense, i.e. contracts of which at least one of the parties is a public authority,[35] are conceptualised very differently in several EU Member States: in some jurisdictions, these public contracts are understood to be administrative agreements under public law while in other jurisdictions as civil law contracts.[36]

35 This definition of public contracts includes, but does not coincide with the definition of 'public contracts' in Article 1(2)(a) Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L 134/114: 'contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services'.

36 See R. Noguellou and U. Stelkens (ed.), *Droit comparé des Contrats Publics. Comparative Law on Public Contracts*, Bruylant, Bruxelles 2010.

Although this is not necessarily the same in every legal system, a certain kind of limited right does not automatically imply a certain allocation procedure, nor does a certain kind of allocation procedure imply a certain legal form. For example, a licence is more than once issued on a first come first served basis, but can be subject to an auction as well. Licences are often issued unilaterally, but sometimes it is necessary that the licence is accepted by the other party to have legal force. Similarly, the allocation procedure of a comparative assessment ('beauty contest') can result in both a unilateral decision and a (public) contract. Nor can we equate every governmental commission with a public contract, because not every governmental commission has a bilateral nature. The same holds for the public procurement procedure: most often, this allocation results in a bilateral public contract, but this is not necessarily the case; the public procurement procedure may also be used in the case of unilateral decision-making.[37]

Therefore, in addition to the questions raised by the object of allocation and by the allocation procedure, it is necessary to address issues relating to the legal form of the allocation, e.g. (i) does EU law prescribe a preferred legal form of limited rights, (ii) which judge (civil, administrative or otherwise) has jurisdiction with regard to the various legal forms of limited rights, and (iii) to what extent do the various legal forms of limited rights entail specific problems of legal protection? These issues on the legal form of the allocation already mark the need for a comparison between EU Member States (below Section 6), as different legal systems might result in different answers.

4.4. Reflection

Part I of this book shows first of all the merits of a conceptual approach. In this respect, as Arroyo and Utrilla make clear in their chapter, the use of clear 'allocation' terminology is necessary to unveil the typical characteristics of an allocation of limited rights. Moreover, uniform terminology should be preferred as much as possible, although differences in terminology might be justified. This allocation terminology facilitates the analysis of the importance of general principles of law for the identification of specific allocation rules. Arroyo and Utrilla illustrate this with their constitutional approach to limited rights, characterised by the deduction of normative findings from a set of higher principles which operate as structural building blocks of a legal system for the allocation of limited rights.

[37] See explicitly 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 [2007] OJ L 315/1: whereas the competent authorities are required to award public service contracts on the basis of a *competitive tendering procedure* (Article 5(3)), these public service contracts are defined as 'one or more legally binding acts confirming the agreement between a competent authority and a public service operator to entrust to that public service operator the management and operation of public passenger transport services subject to public service obligations'. Depending on the law of the Member State, this contract may also consist of 'a decision adopted by the competent authority *taking the form of an individual legislative or regulatory act*' (Article 2(i)) (emphasis added by the authors).

In legal practice, however, there is still much work to be done. Buijze notes that the EU legislature does not contribute to the allocation of limited rights with a detailed set of general allocation rules. The EU legislature has more than one reason to be interested in the allocation of limited rights, *i.e.* the proper functioning of the internal market and the potential of limited rights as an instrument to give effect to EU policy within the environmental or the social domain for example. As a result, EU law does respect the fact that the allocation of limited rights can also serve other (general) objectives than efficiency and competition within the internal market. However, the question *how* these objectives are being pursued, is primarily a matter of the Member States; EU law provides only guidance with some 'broad principles', for example on subsidiarity and proportionality. While it is far from easy to determine what these broad principles require in practice, more detailed rules at the EU level are not the solution according to Buijze. Instead, the national legislature should address this issue.

As to this role of the national legislature, Van Ommeren points out that in order to be fruitful, any such legislative attempt should balance between principle-based regulation and rule-based regulation. While several principles have shown to be very powerful in the regulation of the allocation of limited rights, rule-based legislation remains necessary. In particular, this rule-based regulation should take into account key features of the allocation of limited rights, such as the power to set a ceiling, the choice between allocation procedures and the (limited) duration and transferability of limited rights. Moreover, the national legislature should make explicit its allocation objective, thereby completing the wide range of discretion left to it by the EU legislature.

The idiosyncratic features of limited rights also come to the fore with regard to questions of judicial protection. First of all, disappointment is inherent to any allocation of limited public rights: the award of one application implies the rejection of another. Consequently, allocation decisions have a dispute-triggering character: parties are not inclined to consider an allocation procedure as being fair, when they did not receive what they applied for because the available rights were issued to another party. Another relevant characteristic for many allocation procedures is the phenomenon of 'phased decision making'. As a result, there are usually several moments for interested parties to seek legal protection. It should not be surprising that if the allocation procedure takes longer, it becomes more difficult for a judge to intervene. In this regard, Wollenschläger states that allocation procedures do not follow the classic bipolar citizen-state paradigm on which many rules and institutions of administrative law are based. The multipolar paradigm that is necessary instead to capture the allocation of limited rights, poses a challenge to legal doctrine and jurisprudence. For example, the need for so-called 'stability' of allocation decisions, ruling out their ex-post repeal once allocation procedures have been executed, results in the substitution of ex-post remedies by preventive or prospective remedies, on the one hand, and in the complete exclusion of primary legal remedies (annulments of allocation decisions) with a limitation to secondary legal remedies (damages) on the other hand.

In sum, the conceptual approach sketched above provides for the tools necessary to unveil the peculiar characteristics of the allocation of limited rights within the domain of (administrative) law. The resulting legal concepts can be used in both a top-down

approach and a bottom-up approach, as these concepts abstract from the particular allocation context.

5. Top-Down Approach: EU Law Perspectives

5.1. *Introductory Observations*

Many of the current legal issues on the allocation of limited rights have been influenced, in one way or another, by developments in EU law. In order to elaborate on this point, it is useful to distinguish several levels of EU regulation. While some allocation rules apply to *EU institutions* only, EU law may also prescribe specific rules for the allocation of limited rights by *Member States*. Between those two extremes, several kinds of intermediate forms of influence of EU rules and principles can be traced with regard to allocation issues in the Member States or, in a wider perspective, in the European composite administration.[38] Below, we will outline some important developments in EU law that we regard as being most relevant to a generalised approach to allocations of limited rights, both at EU level and at national level.

5.2. *Allocation at EU Level*

Several limited rights are granted by EU institutions. Examples include the granting of subsidies and the award of public contracts by the European Commission, but also limited authorisations that have been awarded occasionally at an EU level.[39] Currently, the most relevant provisions on these so-called 'EU limited rights' are laid down in the Financial Regulation[40] and the corresponding Delegated Regulation of the Commission.[41] The chapter by Van den Brink describes accurately how the allocation of EU subsidies has evolved during the most recent 'programme periods' of the EU. In particular, the current Financial Regulation and the corresponding Delegated Regulation contain rather specific provisions on allocation criteria, in particular prescribing the tender procedure as the allocation procedure to be applied. The impact of EU law on the allocation of limited subsidies can be characterised as a manifestation of a sliding scale:

38 See on composite administration O.J.D.M.L. Jansen and B. Schöndorf-Haubold (eds.), *The European Composite Administration*, Intersentia, Antwerp 2011; A. Von Bogdandy and Ph. Dann, 'International Composite Administration: Conceptualizing Multi-Level and Network Aspects in the Exercise of International Public Authority' (2008) *German Law Journal*, 2013; H.C.H. Hofmann and A.H. Türk (eds.), *Legal Challenges in EU Administrative Law*, Edward Elgar, Cheltenham 2009.

39 See for the award of frequencies for mobile satellite services at an EU-wide level the chapter by Oberst in this book.

40 Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 [2012] OJ L 298/1 (hereinafter Financial Regulation).

41 Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union [2012] OJ L 362/1 (hereinafter Delegated Regulation).

whereas until recently, the rules of the Financial Regulation covered 'direct administration' by EU institutions only, the current rules include 'shared management' by national authorities as well,[42] although it is still unclear what this extension means exactly for national authorities when allocating (European) subsidies. Although there is still a difference in regulatory intensity as to the granting of subsidies *vis-à-vis* the award of public contracts,[43] both the granting of subsidies and the award of public contracts are governed by some general budgetary principles, e.g. the principle of sound financial management (including the principles of economy, efficiency and effectiveness[44]) and the principle of transparency, which may shed particular light on the allocation of these categories of limited rights.[45]

Outside the scope of the Financial Regulation, European administrative law is constantly changing as well. Relevant in this respect is the European Parliament resolution concerning a Law of Administrative Procedure of the European Union.[46] This resolution requests the Commission to submit a proposal for a regulation on a European Law of Administrative Procedure, which should apply to the Union's institutions, bodies, offices and agencies ('the Union's administration') in their relations with the public.[47] According to this resolution, the intended regulation should at least include the principle of equal treatment and non-discrimination and the principle of transparency. However, the regulation may even include more detailed general provisions on the allocation of limited rights, as the ReNEUAL Model Rules on EU Administrative Procedure show.[48]

It follows from the developments described above that *spillover* effects to allocations of limited rights by administrative authorities in Member States should not be excluded. As for the Financial Regulation, one can assume that these rules influence national subsidy practice as well, given the fact that national authorities executing national subsidy schemes are often selected to implement European subsidy schemes as well, while (partly) using the same procedural rules for both tasks. Therefore, these rules, though directed towards the EU institutions may serve as a starting point for the design of allocation procedures by Member States in order to comply with fundamental principles of equal treatment and transparency. Likewise, the European Parliament has emphasised that a European Law of Administrative Procedure could strengthen a

42 Article 59(1) Financial Regulation.

43 The rules on procurement are laid down in title V of the Financial Regulation, the rules on grants are to be found in Title VI.

44 Article 30 Financial Regulation.

45 With regard to budgetary matters, this obligation of transparency is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the budgetary authority. Cf. Article 31 Financial Regulation. According to the General Court, this principle of transparency, because of its *fundamental* nature, applied to the procedure for awarding grants from the Community budget even although the applicable Financial Regulation of 21 December 1977 did not mention this principle expressly (Case T-297/05, *IPK International* [2011] ECR II-1859, para. 123).

46 European Parliament resolution concerning a Law of Administrative Procedure of the European Union of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union (2012/2024(INL)).

47 See further P. Craig, 'A General Law on Administrative Procedure, Legislative Competence and Judicial Competence' (2013) *European Public Law*, 503.

48 For more detail, see the chapter by Van Ommeren.

spontaneous convergence of national administrative law and thus strengthen the process of integration.[49]

5.3. *Allocation by Member States*

EU law may, either by way of specific rules or by general principles, directly influence the allocation of limited rights by Member States' authorities, irrespective of whether these limited rights have a national or a European origin. With regard to limited rights with a national origin, like gambling licences, Member States will 'only' have to respect basic EU principles while designing their authorisation scheme and taking allocation decisions. The key issue is how these basic EU principles should be translated into more specific allocation rules. This issue will be considered separately below for public procurement law, internal market law and competition law (including State aid), although these areas overlap each other in practice.

5.3.1. Public Procurement Law

Both chronologically and analytically, public procurement law might be a very useful starting point to explore the possibilities for a generalised legal theory on the allocation of limited rights. While starting in the 1970s with some (general) requirements on the award of public contracts,[50] the 1990s showed not only a modernised and detailed update of the old directives,[51] but also an extension of these rules to public contracts for the provision of services.[52] The adoption in 2004 of one general directive on the award of public contracts seemed to complete this process of generalisation,[53] but the recent adoption of a new directive on the award of public contracts[54] and a separate Concessions Directive[55] show that the process of generalisation and fine-tuning is an ongoing process.

49 European Parliament resolution concerning a Law of Administrative Procedure of the European Union of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union (2012/2024(INL)).

50 Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts [1971] OJ L 185/5, and Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts [1977] OJ L 13/1.

51 Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts [1993] OJ L 199/54, and Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts [1993] OJ L 199/54.

52 Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts [1992] OJ L 209/1.

53 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L 134/114. A special directive has been adopted for procurement procedures of entities operating in the water, energy, transport and postal services sectors: Directive No 2004/17/EC [2004] OJ L 134/1.

54 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 [2014] OJ L 94/65.

55 Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts [2014] OJ L 94/1.

Despite the appeal to extrapolate the extensive set of public procurement rules to other areas of limited rights, Jansen points out in his contribution that allocation rules cannot be fully understood without their particular context. In the case of public procurement law, this particular context is determined by public contracts. These public contracts consist of 'payment rights' that are awarded to market parties as consideration for the supply of goods or services. In this regard, it is necessary to keep in mind that the specific two-fold objective of the EU rules in the field of public procurement has always been to ensure the free movement of services and the opening up to undistorted competition in the Member States.[56] Consequently, only in as far as other areas of limited rights have these objectives in common, the rules on public procurement might be a useful starting point to develop a more general and consistent theory on the allocation of limited rights.

To illustrate this tendency of extrapolation *and* its restrictions,[57] the Court's case-law on the obligation of transparency is illuminating. Within the public procurement directives, rather detailed rules on transparency and advertising have always played a prominent role in order to guarantee potential tenderers equal opportunities to win the tender. However, the CJEU has held that a similar obligation of transparency applies – as a corollary of the fundamental freedoms in general (Articles 49 and 56 TFEU) and the principle of equal treatment in particular – outside the scope of public contracts as well, first to service concessions (2000)[58] and recently to limited authorisations (2011). According to the CJEU, this obligation of transparency is a 'mandatory prior condition' of the right of a Member State to award to an operator the exclusive right to carry on an economic activity, irrespective of the method of selecting that operator, since the effects of an exclusive licence on undertakings established in other Member States and potentially interested in that activity are the same as those of a service concession contract.[59] However, although this obligation of transparency excludes the absence of any call for competition,[60] it does not require an invitation to tender as prescribed by the public procurement directives. Instead, it is sufficient in case of limited authorisation schemes that the criteria of these schemes are *sufficiently advertised*.[61]

With regard to legal protection, public procurement law plays a similar catalysing role. The remedies directive in public procurement law seeks to combine the need for effective and rapid remedies in procurement procedures with general EU principles of

56 Case 26/03, *Stadt Halle and RPL Lochau* [2005] ECR I-1, para. 44; Case C-454/06, *Pressetext Nachrichtenagentur* [2008] ECR I-4401, para. 31.

57 Into more detail on the relationship between public contracts, concessions and limited authorisations, See C.J. Wolswinkel, 'From public contracts to limited authorisations and vice versa. Exploring general award requirements from the EU Court's corollary approach' (2015) 24 (5) *Public Procurement Law Review*, 137.

58 Case C-324/98, *Telaustria and Telefonadress* [2000] ECR I-10745, paras. 61–62.

59 Case C-203/08, *Sporting Exchange* [2009] ECR I-4695, para. 47, and Case C-64/08, *Engelmann* [2010] ECR I-8219, para. 53.

60 Case C-458/03, *Parking Brixen* [2005] ECR I-8585, para. 50.

61 Case C-203/08, *Sporting Exchange* [2009] ECR I-4695, paras. 51–55.

effective legal protection, effectiveness and equivalence.[62] Solutions found in this area of law may inspire more general reflections on legal protection issues concerning the allocation of limited rights.

5.3.2. Internal Market Law

The fundamental freedoms of movement, especially the freedom to provide services (Article 56 TFEU) and the freedom of establishment (Article 49 TFEU) have proven to be very important in the regulation of the allocation of limited rights, in particular limited authorisations. This holds first of all for sector-specific directives that have been adopted in order to facilitate the freedoms of service provision or establishment in a particular area. These directives identify limited authorisation schemes as a *separate* category of authorisation schemes with an additional set of requirements.[63] However, limited authorisation schemes have also been evaluated under the general provisions of the TFEU. However, as the chapter by Hatzopoulos unveils, what matters for the CJEU is the impact on the freedom of movement. Consequently, the dividing line between non-limited and limited authorisations has not always been drawn very clearly by the CJEU, just like the line between public contracts, concessions and (limited) authorisations. Moreover, this chapter gives rise to the conjecture that important EU 'principles' like the principle of mutual recognition, cannot be applied one-on-one in the case of limited authorisation schemes, as mutual recognition of authorisations might thwart a limited authorisation scheme in a Member State.

Whereas we saw already in Section 4 that the EU legislature does not seem to contribute much to the development of detailed rules on the allocation of limited rights, the role of the CJEU seems to be expanding. First of all, case law has made clear that a ceiling should be considered a restriction to the freedom of movement *additional* to the restriction following from a prior authorisation scheme as such: an undertaking satisfying all other granting criteria may be refused an authorisation with single reference to this limitation.[64] In order to be justified, this limitation should comply with the general requirements of non-discrimination, justification by an overriding reason of public interest, suitability and necessity. Although the exact relevance of these requirements in practice is far from clear when it comes to a limitation of the number of available authorisations, Wolswinkel shows that the CJEU seems to be increasingly prepared to translate the general requirements of suitability and necessity into more specific allocation rules to evaluate the allocation of limited rights. However, it would go too far to derive a general hierarchy between allocation procedures from the fundamental

62 Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts [2007] OJ L 335/31.

63 See for example Directive 94/22/EEC 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 [1994] OJ L 164/3.

64 Joined Cases C-570/07 and C-571/07, *Blanco Pérez and Chao Gómez* [2009] ECR I-4629, paras. 54–61.

freedoms, as such a hierarchy would be liable to restrict the fundamental freedoms even more.

The Services Directive, which applies to almost all services, gives no reason to assume such a general hierarchy either. Nonetheless, it is worth emphasising that this directive contains some general provisions on limited authorisation schemes, in particular with regard to the need for a transparent and impartial selection procedure and to the duration of limited authorisations. With regard to duration, the general rule is that limited authorisations – in *contrast* with non-limited authorisations – should be granted for a *limited* period of time.[65] Although several other allocation issues remain unanswered in the Services Directive, e.g. the tradability of limited authorisations, this directive endorses at least the need for *and* the possibilities of a generalised theory of the allocation of limited rights.

Both the CJEU in its case-law under the fundamental freedoms and the EU legislature in the Services Directive seem to worry most about discrimination of new entrants. This is not surprising, as new entrants will usually be undertakings from other Member States, as a result of which discrimination of new entrants amounts to discrimination on grounds of nationality, which affects the cornerstone of the fundamental freedoms. Interestingly, the chapter by Den Ouden and Tjepkema shows that the ECHR seems to give more weight to the interests of current holders of limited rights, usually incumbent parties *vis-à-vis* the interests of new entrants, at least if (limited) authorisations are withdrawn and subsequently re-allocated. Thus, the legal regime of Article 1 First Protocol on protection of property might give rise to the development of additional rules on the allocation of limited rights, supplementary to, or even conflicting with, the allocation rules deriving from the EU fundamental freedoms of movement.

5.3.3. Competition Law (Including State Aid Law)

Apart from internal market law and the fundamental freedoms of movement, competition law may be relevant for the allocation of limited rights. First, according to Article 106(1) TFEU, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties – in particular the prohibition of discrimination on grounds of nationality[66] and the rules on competition[67] – in the case of undertakings to which Member States grant *special or exclusive* rights. Since limited rights (might) classify as special or exclusive rights, this Treaty provision seems to cover limited rights in particular. Although the granting of limited rights does not as such result in abuse, for example, by one or more undertakings of a dominant position within (a substantial part of) the internal market,[68] it should be realised that such an abuse might occur more

65 See the Articles 11 and 12 Services Directive. For more on these provisions in the Services Directive: C.J. Wolswinkel, 'The Allocation of a Limited Number of Authorisations. Some General Requirements from European Law' (2009) 2(2) *Review of European Administrative Law*, 61.

66 Article 18 TFEU.

67 Articles 101 to 109 TFEU.

68 Article 102 TFEU.

easily in the case of limited rights. In order to avoid such an abuse, the CJEU has emphasised the need for 'equality of opportunity', which may have important consequences for a consistent design of allocation procedures *over time*, apart from the need for transparent allocation procedures at a specific moment.

The need for transparency has also emerged in the area of State aid law.[69] Although the well-known criteria applying to the classification of measures as State aid, do not refer to allocation issues explicitly, this area cannot be neglected when developing a general legal theory on the allocation of limited rights. For rights which are fully or partly regulated by EU law, the possible influence of the EU State aid rules may follow explicitly from the applicable EU legal framework, as is for example the case for emission rights[70] and European subsidies.[71] But also by lack of such explicit reference in EU legislation, or when limited rights are not regulated by EU legislation, the State aid rules will have to be taken into account when allocating these rights. According to consistent case law of the CJEU, the concept of State aid 'embraces not only positive benefits, such as subsidies, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, therefore, without being subsidies in the strict sense of the word, are similar in character and have the same effect'.[72] Thus, this broad interpretation of State aid may cause the allocation of limited rights to come within the realm of State aid law. In fact, a variety of allocation scenarios can come within the scope of State aid, e.g. free allocation of rights instead of selling or auctioning them,[73] over-allocations of tradable rights, allocations based on discretionary powers without objective criteria or based on preferential terms for certain undertakings or sectors[74] and allocations of comparable limited authorisations with different fees.[75] Adriaanse shows, however, that it is still hard to draw some general conclusions from the CJEU's case-by-case approach. The 2014 draft Commission Communication on the definition of State aid law may provide more guidance in this respect, emphasising the need for transparent and competitive allocation procedures in order to *prevent* State aid. In sum, it can be concluded that State aid law is still waiting for a hallmark judgment on the allocation of limited rights.

At the same time, Adriaanse shows that State aid law sheds some interesting light on issues of legal protection. If a measure qualifies as State aid, a whole proactive set of rules,

69 Article 107 and further TFEU.

70 See para. 49 of the preamble of Directive 2009/29/EC of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community [2009] OJ L 140/63.

71 See Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 [2006] OJ L 2010/25. In the same way the proposal from the Commission to amend this regulation (COM (2013) 246 final).

72 See Case C-73/11 P, *Frucona Košice a.s v. Commission*, ECLI:EU:C:2013:32, para. 69.

73 See Case C-279/08 P, *Commission v. The Netherlands* [2011] ECR I-7671.

74 See A.T. Seinen, 'State aid aspects of the EU Emission Trading Scheme: the second trading period' (2007) 3 *Competition Policy Newsletter*, pp. 100–105.

75 See Case C-431/07 P, *Bouygues and Bouygues Télécom v. Commission* [2009] ECR I-2665.

procedures and powers enters into force.[76] The following procedure, during which the Member State concerned is not allowed to put its proposed measures into effect, may take at least a few months. Especially in allocation procedures on limited rights, in which different parties with parallel or opposite interests often have an interest in an early outcome, this delayed decision-making may cause problems. However, breaching the procedural State aid rules could cause even bigger problems, since unlawfully granted State aid plus interest may have to be recovered from the beneficiaries, and damages might have to be paid. The rigorous case law of the CJEU in this respect limits the opportunities for recipients of unlawful State aid to oppose recovery.[77] Simultaneously, the CJEU's case law offers opportunities for competitors of State aid recipients to rely on directly effective EU law provisions before national courts in order to appeal against unlawful State aid.[78] In the search for general rules and principles underlying the possibilities for legal protection when allocating limited rights, this State aid case law has to be taken into account.

6. Bottom-Up Approach: Comparative Law Perspectives

The top-down approach adopted in the previous section shows, on the one hand, that several legal concepts of EU law are relevant for (a consistent approach to) the allocation of limited rights, but, on the other hand, that the limitations resulting from EU law should not be overstated. In other words, even if spillover effects of more detailed provisions in EU law are certainly not to be excluded, Member States are not entirely bound by EU law in the ways they limit the number of rights available and how 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.

These conclusions mark the need for a *comparative* view in addition to the top-down approach followed in the previous section. This bottom-up approach completes our search for relevant rules and principles for a general legal theory on the allocation of limited rights: 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 a certain limited right.

In order to facilitate the identification of best practices under a comparative bottom-up approach, we distinguish two levels of comparison. First, it is useful to distinguish between several 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 in the case of 'direct management' (Section 5.2). At the other end of

76 Article 108 TFEU.

77 Case C-24/95, *Land Rheinland-Pfalz v Alcan Deutschland Gmb* [1997] ECR I-1591.

78 Case C-39/94, *Syndicat français de l'Express international (SFEI) and others v La Poste and others* [1996] ECR I-3547.

this scale, there are limited rights that lack any connection with relevant EU rules, e.g. limited rights with regard to rules on business opening hours[79] or national authorisations or subsidies without any cross-border impact.[80] 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, like the principle of legal certainty or the principle of due care.[81]

In addition to this *first* level of comparison between sector-specific areas of law, the *second* level of comparison is that of the Member States: how do they use their discretion within a sector-specific area of law? Given the existence of more or less discretion as to the design of allocation procedures, a comparison between countries may generate interesting and fruitful insights for an optimal design of allocation procedures.

Within this book, as to the first dimension of comparison, three kinds of limited rights have been selected on the basis of their degree of Europeanisation: emission allowances, authorisations for the use of frequency space and gambling licences. With regard to these three areas of law, reports on allocation practices in seven Member States have been collected: France, Germany, Greece, Italy, the Netherlands, Romania and Spain.[82] 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.

As regards the allocation of emission allowances, the overview chapter by Rønne shows clearly the intensity of EU legislation that has governed the EU Emissions Trading System from its very start. It is worth pointing out that this regulatory framework has been adopted to pursue environmental objectives rather than to ensure the functioning of the internal market. Nonetheless, there are still new tendencies towards a more centralised allocation of allowances. One example is 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.

A similar development towards a more centralised regulatory framework for the allocation of limited rights seems to be taking place in the area of radio spectrum management. Currently, this area is governed by a set of directives, known as the 'new common regulatory framework', which still leaves room for Member States to make

79 These rules classify as selling arrangements falling outside the scope of the free movement of goods (Article 34 TFEU). Cf. Joined Cases C-401/92 and C-402/92, *Tankstation 't Heukske and Boermans* [1994] ECR I-2199, paras. 12–14, and especially Joined Cases C-69/93 and C-258/93, *Punto Casa and PPV* [1994] ECR I-2355, paras. 12–14.

80 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.

81 See the chapter by Van Ommeren in this book.

82 See the accompanying book P. Adriaanse, F. van Ommeren, W. den Ouden and J. Wolswinkel (eds.), *Scarcity and the State II. Member State Reports on Gambling Licences, Radio Frequencies and CO_2 Emission Permits*, Intersentia, Antwerp 2016. 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 numerous cases of the CJEU in the last decade. For more detail, see also the chapter by Van den Bogaert and Cuyvers in this book.

their own choices in the allocation of individual rights of use for radio frequencies. However, Oberst sketches several recent developments in the EU regulation of spectrum management that might foster further harmonisation. At the same time, this area of law still shows diverging choices between Member States, for example on the treatment of new entrants versus incumbents. After all, it seems that – as a paradox – more detailed regulation at EU level does not necessarily imply a restriction of the regulatory choices of the Member States.

In the absence of any secondary legislation, the area of gambling law, by contrast, 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 authorisations, 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. In this respect, Van den Bogaert and Cuyvers show that the CJEU is prepared to tighten up when applying the general requirements of suitability and necessity: gambling activities that are subject to a limited authorisation scheme, should be restricted in a consistent and coherent manner in order to avoid hypocrisy in the allocation policy.

The first contours resulting from the description of these three areas of law are a useful starting point to develop a more complete picture of the allocation of limited rights in different areas of EU law. In particular, by considering these three kinds of limited rights as specific points on a sliding scale, other limited rights[83] 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 States. These principles may contribute to the development of a general legal theory on the allocation of limited public rights in addition to the elements resulting from the top-down approach.

7. Concluding Remarks

This introductory chapter to the book *Scarcity and the State* seeks to demonstrate the need for a consistent and general legal theory on the allocation of limited rights by administrative authorities. In this regard, we have started from two fundamental assumptions. First, EU law plays an important role in the allocation of limited public rights, both at EU level and at national level. Secondly, all EU Member States deal with the allocation of limited public rights in various policy fields. In order to identify allocation rules and principles facilitating a general legal theory of the allocation of limited rights in the EU and its Member States, we have elaborated on these two

83 Examples include the granting of authorisations for exploring and producing hydrocarbons, the award of rights of use with regard to water as a scarce resource and the grant of concessions for public transport.

assumptions by way of a threefold approach: a conceptual perspective, a top-down (EU law) perspective and a (comparative) bottom-up perspective.

From this introductory analysis we can conclude that although several legal concepts of EU law appear to be relevant for (a consistent and general theory of) the allocation of limited rights, and tendencies of harmonisation can be observed in particular fields of law, the guidance provided by EU law should not be overstated. Influences from EU law occur in different ways, but are fragmented rather than structured. In some areas of law, European institutions or national authorities should comply with specific allocation rules explicitly provided for, whereas in other areas influence comes along the lines of the basic TFEU provisions on the internal market and competition. In other words, Member States are not entirely bound by EU law in the ways in which they limit the number of rights available and how they allocate these limited rights. Having said that, spillover effects from more detailed provisions are certainly not to be excluded. Moreover, this introductory analysis makes clear that a *consistent* analysis of the allocation of limited rights does not necessarily entail the application of the same *uniform* set of rules to all allocation issues. Instead of generalising without any restraint specific allocation rules applicable in certain policy fields or certain Member States, the particularities of each allocation context may limit the possibilities for expansion.

In more general terms, we submit that the scarcity perspective provided for by the allocation of limited rights offers new and surprising insights; not only into allocation topics, but also into other traditional topics of administrative law, for example legal protection or mutual recognition. While transparency is an essential focal point within this scarcity perspective, this chapter demonstrates that allocation concerns more than just transparency.

It is clear that the lens provided by this scarcity perspective, needs to be polished even further. To that end, the comparative exercises on the allocation of limited rights, both between areas of law and between Member States (as well as between Member States and the EU), are worth continuing within legal *academia*. What is more, however, both the legislature and the judiciary can play an important role in developing a general legal theory on the allocation of limited rights that takes into account the peculiar characteristics of these rights.