

VU Research Portal

De verdeling van schaarse publiekrechtelijke rechten

Wolswinkel, C.J.

2013

document version

Publisher's PDF, also known as Version of record

[Link to publication in VU Research Portal](#)

citation for published version (APA)

Wolswinkel, C. J. (2013). *De verdeling van schaarse publiekrechtelijke rechten: Op zoek naar algemene regels van verdelingsrecht*. Boom Juridische uitgevers.

General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal ?

Take down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

E-mail address:

vuresearchportal.ub@vu.nl

Summary

The allocation of limited public rights

In search of general rules of allocation law

Introduction

Whenever an administrative authority limits the number of public rights available for grant there is an inherent risk that the number of applicants satisfying the requisite criteria may exceed this number of available public rights. Furthermore, in such circumstances of scarcity, the administrative authority should apply an allocation procedure in order to distribute these rights fairly among the applicants. Due to the limited availability of these public rights compared to the demand for those rights, the necessary outcome of this allocation procedure is that one or more applications satisfying the granting criteria must inevitably be (partly) rejected.

These 'limited public rights' can be found in diverse areas of government regulation. Examples include authorisations for the use of radio frequencies, gambling licences, authorisations for the exploration and production of mineral resources, service concessions for public transport and subsidies for the benefit of all kinds of activities, like the production of renewable energy. Despite the material differences between these examples of public rights, they share some common features as to their limited character. First, all limited public rights are characterized by a *maximum* or *ceiling*: the number of available rights or – alternatively – the total volume of these public rights is limited to a maximum. Secondly, as a consequence of this maximum, it is necessary to apply an allocation procedure whenever the number of applicants exceeds the number of available rights. Examples of allocation procedures include allocation in order of receipt of the applications ('first come, first served'), an auction, a lottery, a comparative test ('beauty contest') and a proportional allocation.

Background and central thesis

From a legal point of view, it can be observed that among the different examples of limited public rights, some areas of governmental regulation contain an extensive set of rules applying to the allocation of these rights. This holds, for example, for the grant of authorisations for the use of radio frequencies. For other systems of limited public rights, like gambling licences, specific legislation on the allocation of these rights is lacking. If the set of rules applying to the allocation of a specific limited public right is classified as 'sectoral allocation law', it should be concluded that the volume of this 'sectoral allocation law' varies from limited public right to limited public right.

This research is based on the assumption that – in addition to these specific rules, applying (only) to the allocation of a specific limited public right – general rules of allocation law exist that apply to the allocation of *any* limited public right. Both in national and in European Union (EU) legislation and case law, support for this assumption can be found. For example, the national Trade and Industry Appeals Tribunal (*College van Beroep voor het bedrijfsleven*), being the highest administrative court in the field of economic administrative law, has considered on more than one occasion that from the perspective of legal certainty, the award of a limited authorisation is subjected to ‘strict requirements’. The Court of Justice of the European Union has derived similar requirements from the fundamental freedoms of movement by declaring that the obligation of transparency is a ‘corollary’ or ‘direct consequence’ of the principle of equal treatment. This obligation of transparency requires the concession granting authority to ensure, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the service concession to be opened up to competition and the impartiality of the procurement procedures to be reviewed. According to recent case law, this obligation of transparency does not only apply to the award of service concessions, but to the grant of exclusive authorisations as well. Therefore, the scope of this obligation of transparency has been broadened to certain limited *public* rights as well.

These parallel developments suggest that some rules of allocation law may be considered as a direct consequence of a general legal principle. Once a rule of allocation law can be classified as a *general* rule of allocation law, this rule applies to *any* allocation of limited public rights, irrespective whether this rule has been laid down in specific legislation with regard to these public rights. Instead, in that situation, the applicability of this rule of allocation law follows immediately from the applicability of the general legal principle.

In order to develop these general rules of allocation law, the central question addressed in this research, reads as follows:

Which strict requirements resulting immediately from the legal principles of legal certainty and equality could be imposed on the design of allocation procedures for limited public rights?

The restriction of this research to the principles of legal certainty and equality does not only result from their importance in recent case law on the allocation of limited public rights. The next reason for this restriction is that these principles are particularly useful in the design approach followed in this study, concentrating on the material elements of allocation procedures instead of procedural elements in the process of designing allocation procedures. Finally, these legal principles can be adjusted easily into allocation-theoretic concepts having a prominent place in this research.

As a result of this restriction to merely two legal principles, the possibility cannot be excluded that general rules of allocation law can be derived from other legal principles as well. Neither does the restriction to limited *public* rights imply that these strict requirements would not apply to limited private rights allocated by an administrative authority or body. Instead, the emphasis on the limited charac-

ter of rights in this study seems to justify the hypothesis that the public or private law character of limited rights is less relevant or even irrelevant for the set of general rules of allocation law applying to the allocation of these rights.

Methodology

The general rules of allocation law to be developed in this research should satisfy two conditions. First, in order to have general applicability, these rules should be derived from and embedded in the general legal principles of legal certainty and equality. Secondly, these rules should fit within the specific allocation context of limited public rights.

In general, the principle of legal certainty requires that rules are clear, precise and predictable as regards their effects, in particular where they may have unfavourable consequences for individuals and undertakings. Focusing on the allocation of limited public rights, this principle of legal certainty would require that every (potential) applicant enjoys a maximum amount of certainty concerning the rules applying to the allocation of limited public rights. In addition, the principle of equality or non-discrimination requires in general that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment can be objectively justified. Focusing on the allocation of limited public rights, this principle would require that applicants for limited public rights be treated in an equal manner as far as they are equal. Where a distinction is made between these (potential) applicants, this distinction should be justified and proportionate within the context of a legitimate allocation objective. This allocation objective can be considered as the *link* between general legitimate objectives and the specific allocation context of limited public rights.

As becomes clear from the general description of these legal principles, both principles can be subdivided into several elements. This study distinguishes four elements in both principles. The principle of legal certainty first contains a formal element, requiring the applicable rules to be clear and unambiguous (objective) and relates to the contents of these rules. Next, this principle contains a material element requiring these rules to be known in advance and therefore predictable. In addition to these two elements, this study considers the principles or aspects of legality and purpose-specificity as part of the principle of legal certainty. The aspect of legality requires unilateral public-law actions of administrative authorities to be based ultimately on a statutory provision, at least if these actions restrict liberties or citizens' rights and remedies. Finally, the aspect of purpose-specificity requires this statutory-based power to be exercised only in order to accomplish the specific purpose for which this power has been attributed to this administrative authority. The principle of equality first requires similar cases to be treated similarly. Next, as far as a distinction is made between like cases, this distinction should be justified by a legitimate objective, which is suitable to attain this objective and is necessary in order to attain this objective – in the sense that this objective cannot be attained by less restrictive measures.

This subdivision of both principles into four aspects respectively is not enough to construct or derive general rules of allocation law from general legal principles. Even if these general legal principles are subdivided into several elements, they should still be translated into rules of allocation law that take into account the specific characteristics of an allocation context and common features involved in every allocation context.

This research relies on the assumption that concepts and results developed in the economic (resource) allocation theory, including (game-theoretic) auction theory, may contribute towards bridging the gap between specific rules of allocation law and general legal principles. Since the central object of economics is the study of the allocation of scarce resources, economic theory may be helpful in translating the general legal principles of legal certainty and equality into requirements applicable in a specific allocation context.

This research analyses results in allocation theory in order to develop general rules of allocation law. The resulting approach combining economic allocation theory with administrative law can be classified as empirical-normative. The approach is normative as far as allocation theory provides arguments as to why a certain rule of allocation law should or could be considered as a general rule of allocation law. Furthermore, this approach is empirical in the sense that specific rules of allocation law, appearing in sectoral areas of government regulation, serve as a starting point to derive general rules of allocation law. This study identifies for several allocation issues a specific allocation rule appearing in a specific area of government regulation, followed by an examination whether this rule can be considered as a general rule of allocation law.

It follows from the above-mentioned methodology that this research has an *explorative* character. This means that many rules of allocation law do not occur as *general* rules of allocation law in legislation and case law. However, by constructing certain rules on the allocation of limited public rights as a direct consequence of general legal principles and therefore as general rules of allocation law, it can be argued that these rules should apply to *any* allocation of limited public rights. Hence, the results of this study can be conceived as a prediction or hypothesis regarding how an administrative court would deliver judgement if confronted with allocation issues as considered in this study.

Allocation framework: public law and allocation theory (part II)

The allocation of limited public rights can be situated at the interface between public (administrative) law and (economic) allocation theory. These two pillars therefore constitute the allocation framework and provide the necessary building blocks for the development of general rules on allocation law.

Public law: the grant of public rights

In this study, the allocation of limited public rights is considered as a specific instance of the grant of public rights in general. In fact, any system of limited public rights can be seen as an extension of a 'regular' system of public rights containing a catalogue of 'regular' refusal and permission criteria. This extension

consists of the introduction of a so-called ceiling, accompanied by an extra ground for denial in addition to the regular refusal (or granting) criteria: a public right is denied whenever the grant of this right would incur the ceiling to be exceeded.

In the second chapter, a general theory on the grant of public rights is developed. In this respect, a public right is defined as a right granted by an administrative authority in the exercise of an exclusive public-law power. Just like rights in general, these public rights can be subdivided in rights with the character of a liberty, like an authorisation, and rights with the character of a claim, like a subsidy. An authorisation is defined as the permission to exercise a certain activity otherwise prohibited, whereas a subsidy constitutes a financial claim towards an administrative authority for the benefit of the enforcer of a certain activity. The grant of any public right can be accompanied by restrictions, limiting the temporal or geographical scope of a public right, and additional obligations, constituting requirements for the holder of the public right apart from his right to exercise a certain activity.

Although the relevant rules with regard to the grant of public rights may vary along with the nature and content of a public right and with the applicable sectoral legislation, some general rules can be considered as a direct consequence from the principles of legal certainty and equality. With regard to the principle of legal certainty, it is assumed with reference to EU case law that any system of public rights, limited or not, should be based on objective criteria known in advance. This means that the granting criteria should be made public to any potential applicant before submitting an application. An important observation is that this requirement does not hold completely with regard to restrictions and additional obligations accompanying the public right; the contents of these restrictions and additional obligations may depend on the contents of the application itself. Furthermore, it is assumed from the perspectives of legality and purpose-specificity respectively that the power to grant those public rights should have a statutory basis and that this power should be exercised in accordance with the objectives of this system of public rights.

The first consequence of the principle of equality is that all applicants satisfying the criteria to the same extent should be treated equally in the process of awarding or denying the public right: although the administrative authority might have some discretion in granting public rights, this discretion may not be used arbitrarily. Next, since a system of public rights distinguishes between applicants by its granting criteria, this system should be justified by a legitimate objective. In accordance with EU law on the fundamental freedoms, in particular the free movement of services and the freedom of establishment, it is assumed that purely economic or administrative reasons are excluded as legitimate objectives. Apart from the presence of a legitimate objective, any (restricting) system of public rights should be suitable and necessary to attain these legitimate objectives. A measure is defined as necessary if the same objective cannot be attained by less restrictive measures, for example by subjecting the exercise of a certain activity to general requirements instead of individual authorisation.

An interesting result following from this chapter is that the concept of scarcity appears to be relevant without the number of available public rights being limited.

For example, the introduction of an authorisation system with corresponding grant criteria has the effect of limiting the extent to which a certain activity is carried out: not every potential applicant will satisfy these criteria. Another example is the requirement of a statutory basis for the grant of subsidies, thereby preventing administrative authorities from granting subsidies too easily. It can therefore be concluded that a system of *limited* public rights is not always necessary to deal with issues of scarcity.

Allocation theory: the allocation of scarce resources

The second pillar of this research is set out in the third chapter. This chapter contains a description of some elementary concepts and results from economic allocation theory, including (game-theoretic) auction theory.

Any allocation procedure, like an auction or a lottery, consists of an allocation rule. This allocation rule determines which rights are allocated to which participants in the allocation procedure. In turn, this allocation rule consists primarily of an allocation criterion, being the dimension on which applicants are compared with each other. Examples of allocation criteria are the financial bid, the moment of receipt of application, the lottery number, the requested amount of subsidy, etc. In order to facilitate the comparison between applicants, any allocation criterion is accompanied by a scoring rule, indicating the different scores an applicant can obtain on this allocation criterion. If several allocation criteria are used for the allocation of limited public rights, their relative weight can be expressed by (numerical) weighting factors. In addition to this allocation rule, some allocation procedures contain a payment rule. This payment rule determines the price due by a participant in the allocation procedure. For example, the pricing rule can indicate that the highest bidder in the auction should pay his own bid (first price auction) or the second highest bid (second price auction).

Given the divisible or indivisible nature of the rights to be allocated, allocation procedures can be subdivided into priority allocation procedures and divisible allocation procedures. A priority allocation procedure is an allocation procedure ranking the different scores that participants can obtain in the allocation procedure. Hence, an auction is a priority or ranking procedure since the bidder with the lowest possible bid is ranked lower than a bidder with a higher bid. Other examples of such ranking procedures are a 'first come, first served' allocation, a lottery and a procurement procedure, ranking on price and/or quality of the tender. In contrast to these ranking allocation procedures, divisible allocation procedures may award a positive amount (portion) of public rights to every participant in the allocation procedure. Examples of these allocation procedures are a proportional allocation, a (limited) equal or uniform allocation, and a reversed (limited) uniform allocation, being an allocation in which every participant is confronted with the same reduction in relation to his application.

With regard to the allocation properties which an allocation procedure might satisfy, it is useful to distinguish between properties relating to the allocation rule as such and properties relating to the strategic behaviour an allocation rule might induce. With regard to the first category of allocation rule properties, this study distinguishes four subcategories. The first category of allocation properties relates

to the limits of the allocation procedure introduced by the ceiling and can be considered as so-called boundedness properties, like effectiveness and feasibility. The second category of allocation properties relates to symmetry considerations, like equal treatment of equals and impartiality. The third and fourth category relate to so-called monotonicity and additivity properties of allocation procedures (see part III and part IV for the significance of these properties for the allocation of limited public rights).

The above-mentioned category of properties does not pay attention to the strategic behaviour an allocation rule might induce. Such strategic considerations might be that a rational bidder is not willing to bid his own value in an auction if he can obtain this right against a lower bid. Once these strategic considerations are incorporated into the allocation model, some additional allocation properties enter the analysis. The most important property is efficiency, being generally defined as the property that the public right is allocated to the person assigning the highest value to it. Since public rights allow for or stimulate the exercise of a certain activity, the market to which these rights give access, should be taken into account in the definition of efficiency. Under those considerations, an allocation procedure is efficient if it allocates the right to the person who can create the highest welfare surplus with this right for producers and consumers together. This objective of (allocative) efficiency might conflict with other objectives, like revenue maximization.

The initial allocation (part III)

In order to develop general rules of allocation law, it may be considered useful to distinguish between initial allocations and re-allocations. In a so-called *initial* allocation, a participant is placed in a position similar to that of other participants. In particular, there are no incumbent parties enjoying any advantage from the fact that they have previously held these limited public rights. This situation of a 'natural' level playing field implies that there is no need for additional, asymmetric provisions in the allocation design. Therefore, the analysis of the design of this initial allocation procedure is not complicated by additional elements in the allocation design.

Any systematic analysis of the allocation problem splits this problem into three elements: (i) the supply side (chapter 4), (ii) the demand side (chapter 5) and (iii) the encounter between supply and demand (chapter 6). Although these elements are dealt with separately in the third part of this study, it should be emphasized beforehand that there is a strong level of interaction between these three elements.

Supply side: ceiling

Any allocation problem of *limited* public rights starts with the introduction of a maximum or ceiling. This maximum limits the number or volume of public rights available for grant.

From the perspective of legal certainty, it is first submitted that the establishment of a maximum of available public rights should be made public by means of unambiguous language to any potential applicant prior to the actual submission

of applications. The *ratio* behind this advertorial requirement is that, as allocation theory shows, knowledge of this maximum may influence the applicant's submission decision. Besides this ceiling, the 'volume' of the individual public rights to be granted should be made public in advance to the maximum extent. Ideally, this would mean that all constituting elements of these rights, including restrictions and additional obligations, are made public prior to the submission of applications, except for the elements depending on the outcome of the allocation procedure. With regard to the effects of a ceiling, it is submitted that every applicant should assume that his application would be rejected if awarding his application would imply that the ceiling would be exceeded. This amounts to assuming that any allocation procedure satisfies the property of feasibility. However, a potential applicant cannot assume that any allocation procedure is effective in the sense that *all* limited public rights will be granted in circumstances of scarcity. Whether a distinct statutory basis is required for the administrative authority's power to establish a maximum depends on the meaning of that maximum in relation to the (regular) granting criteria of the system of public rights. As long as this maximum is merely a way of circumscribing the administrative authority's discretion in applying the regular granting criteria, no such distinct basis is required. However, in that situation, the objectives pursued by this maximum should follow the objectives underlying the regular granting criteria of the system of public rights. Once this maximum functions in addition to these regular granting criteria and therefore creates an *extra* denial ground, this maximum constitutes a separate restriction in addition to the system of public rights. In those circumstances, it is argued that the power to establish a maximum should be based on a distinct statutory basis.

With regard to the principle of equality, it is first submitted that a maximum can be objectively imposed upon applicants and therefore treats every applicant equally. However, it follows from the nature of a maximum that it creates an additional distinction *within* the category of applicants satisfying the regular granting criteria. In order to be so justified, two specific allocation objectives are identified that may legitimate a maximum as long as these objectives can be connected with some general legitimate objective: (i) the limitation of a certain activity and (ii) the territorial distribution of a certain activity. The underlying allocation objective is decisive for the evaluation of the suitability of a maximum: once territorial distribution of a certain activity is the central allocation objective, the attainment of this objective cannot be guaranteed merely by establishing a maximum of public rights. With regard to the number of available rights, special rights (implying two or more rights to be granted) are preferred to exclusive rights (implying one right to be granted) and divisible rights are preferred to indivisible rights as long as the concerned activity can be exercised effectively by any holder of a (small) public right. With regard to the contents and size of the limited public rights, it is submitted from the perspective of equality that limited public rights should be granted for a *limited* period, since the grant of a limited public right for an unlimited period would unnecessarily restrict the concurring applicants' opportunities to compete for this right. The same may hold for the absence of other restrictions that could limit the scope of a limited public right.

Demand side: submission and admittance of applicants

Establishing a maximum of public rights does not necessarily entail the need to apply an allocation procedure. By modifying the regular granting criteria, the administrative authority can introduce several elements into the design of the allocation procedure in order to limit the number of applicants admitted to the allocation procedure. This research describes this method of pre-allocation for three elements, being (i) the introduction a cap, (ii) the lack of any invitation to submit applications and (iii) the raising of the admittance thresholds following from the regular granting criteria.

First, a (uniform) cap limits the number of rights an individual applicant can obtain in the allocation procedure. Hence, a cap introduces an individual upper bound or ceiling for each applicant. This cap is a new restriction in addition to the (general) ceiling. Since this cap might influence the behaviour of applicants when making a submission, it is a necessary part of the allocation design that should be made public in advance to potential applicants. Furthermore, such a cap, even though it applies to all applicants uniformly, should be justified by a legitimate allocation objective, like the need for a balanced allocation or an optimal use of the resource concerned.

Since it is assumed that (limited) public rights are granted upon application, a next opportunity in the allocation design to limit the size of demand is to refrain from an invitation to submit applications. However, such a complete lack of any call for competition does not comply with the principle of equality (and the resulting obligation of transparency), since this principle requires a degree of advertising sufficient to enable the public right to be opened up to competition and the impartiality of allocation procedures to be reviewed. Hence, a general rule of allocation law can be assumed, requiring that all potential applicants should be invited to submit applications, if necessary after the receipt of the first application. Any deviation from this general rule should therefore be justified by a legitimate allocation objective, like the absence of potential competing applicants (or equally, the uniqueness of the applicant) or extreme urgency in the grant of a limited public right. Since an allocation procedure involves an extra comparison between applications, which can be avoided if only one party applies for this limited public right, such a direct award might be suitable for an immediate grant. However, it should still be explained why an immediate grant cannot be achieved by following an allocation procedure after a (restricted) invitation to submit applications.

The third way of limiting the number of applicants relates to the *admittance* stage in the allocation procedure: only applicants satisfying the regular granting criteria can be admitted to the *allocation* stage of the allocation procedure. By raising the score an applicant should at least obtain on these admittance criteria, the administrative authority can reduce the number of applicants satisfying the granting criteria and thereby the number of applicants admitted to the allocation procedure. Instead of raising the admittance threshold, a system of pre-selection could be used in order to limit the number of applicants admitted to the allocation stage. Pre-selection means that the number of applicants to be admitted is limited to a maximum in advance. It is submitted in this study that the administrative authority's power to choose a certain allocation procedure, might imply the power

to set some additional or increased admittance criteria provided that these criteria facilitate the execution of the allocation procedure, for example the criterion that the application should be submitted within a limited submission period.

After this stage of pre-allocation, an allocation procedure should be applied if and only if the number of (admitted) applicants exceeds the number of available public rights. However, competition considerations might urge the allocating authority to refrain from executing the allocation stage of the allocation procedure, for example if the number of admitted applicants is too small in order to guarantee effective competition. Again, this possibility of refraining from applying an allocation procedure should be made public in advance and unambiguously to all potential applicants. The same holds if an applicant has to pay his bid even if the number of applicants does not exceed the number of available rights. Without advertisement of a deviating rule applying to the evaluation of scarcity, any potential applicant may assume that an allocation procedure is applied if and only if the number of (admitted) applicants exceeds the number of available public rights.

Demand meets supply: the allocation itself

The core element in the design of an allocation procedure for limited public rights is the allocation stage, in which demand meets supply. The application of an allocation procedure is necessary whenever the number of applicants exceeds the number of available public rights.

With regard to the principle of legal certainty, different elements of the allocation procedure should be distinguished. The main element is the allocation criterion, being the dimension along which the several (admitted) applicants are compared to each other. It is submitted in this study that this allocation criterion should be made public to all potential applicants before the submission of applications. The allocation-theoretic rationale behind this requirement is that the contents of the allocation criterion may influence the submitting or bidding behaviour of applicants. The requirement to specify the scoring rule and possible weighting factors does not seem to be an immediate consequence of the principle of legal certainty. Instead, scoring rules and weighting factors contribute to (more) legal certainty about the application of the allocation criterion or the allocation rule, without the allocation criterion necessarily being insufficiently objective if prior advertisement of these elements of the allocation rule is absent.

Furthermore, the principle of legal certainty raises the question whether an administrative authority is free in its choice of allocation procedures. This question is mainly relevant if existing legislation does not prescribe a certain allocation procedure. This study introduces a distinction between so-called universal or objective-neutral allocation criteria and objective-oriented allocation criteria. With regard to universal allocation procedures, like a lottery of allocation in the order of receipt of the applications, it is argued that such an allocation procedure can be chosen as long as this choice does not conflict with existing legislation. This conflict might happen if legislation excludes the application of a certain allocation criterion. The choice for objective-oriented allocation procedures, like an auction or a comparative test on quality, should always conform to specific objectives of the system of limited public rights.

If several applicants obtain equal scores on a certain allocation criterion and it is desirable that all rights are allocated, the application of a subsidiary allocation criterion is necessary in addition to the above-mentioned primary allocation criterion (or set of allocation criteria). It follows from national case law that the requirements with respect to this subsidiary allocation criterion seem to be less strict than the corresponding requirements with respect to the primary allocation criterion. First, the power to choose a primary allocation procedure implies the power to choose a subsidiary allocation procedure, so no distinct statutory basis is required for the choice of this subsidiary allocation procedure. Next, if this subsidiary allocation procedure has not been made public to the potential applicants prior to the submission of applications (including bids), there is one ‘natural’ allocation procedure, being the lottery, that can still be applied as a necessary specification of the primary allocation procedure.

In the allocation stage, the principle of equality is relevant at two separate levels. The first level concerns the execution of an allocation procedure. At this level, an allocation-theoretic analysis of allocation procedures provides for two relevant properties, being equal treatment of equal scores and impartiality. Equal treatment of equal scores requires that applicants with equal scores are given the same portion in the allocation (in case of divisible allocation procedures) or ranked at the same level (in case of ranking allocation procedures). Impartiality entails that an exchange of the scores of applicants would result in an exchange of their shares or portions in the outcome of the allocation. In other words, impartiality implies that the identity of applicants does not matter in the allocation procedure. It is submitted that any allocation procedure should satisfy this property of impartiality and – as a logical consequence – the property of equal treatment of equal scores.

Any allocation procedure, by its very nature, distinguishes between applications by ranking them in accordance with an allocation criterion. Therefore, the principle of equality requires with regard to the choice of an allocation procedure that this choice should be justified by a legitimate allocation objective. These legitimate allocation objectives can be subdivided into objectives relating to the execution of the allocation procedure, e.g. equal treatment of applicants, and objectives relating to its outcome, like an efficient allocation or an optimal use of resources. Arguments as to whether an allocation procedure is (not) suitable to attain these objectives may be derived from an allocation-theoretic analysis of this allocation procedure. With regard to the necessity of allocation procedures, EU case law provides for an argument that objective-oriented allocation procedures are to be preferred to universal or objective-neutral allocation procedures.

Variations on the initial allocation (part IV)

The allocation context in the third part of this study assumes an ideal and stable allocation context in which every potential applicant finds himself in an equivalent position. However, real-life allocation problems can be far more complicated. Therefore, the fourth part of this study deals with some variants on the initial allocation as analyzed in the previous part of this study.

These variants include (i) modifications to the allocation design during the execution of the allocation procedure (chapter 7), (ii) modifications in the allocation outcome during the currency of limited public rights (chapter 8) and (iii) re-allocation (chapter 9).

Modifications during the allocation procedure

The first category of modifications relates to the stage of execution of the allocation procedure, so the stage between the submission of applications and the decision regarding success or otherwise of these applications. Following the general structure of any allocation problem, these modifications can relate to the supply side, the demand side or the allocation itself. The strict requirements developed in this chapter are considered as a direct consequence of the principles of legal certainty and equality together.

Relevant modifications on the demand side consist of the admittance of an additional participant to the allocation procedure or the improvement of the bid of an existing participant after the submission period. In both situations, the position of the initial applicants cannot be improved by such an amendment of the allocation context. Therefore, it is submitted as a general rule of allocation law that it is forbidden to admit an extra participant or accept an improved bid *after* the submission stage of the allocation procedure, *unless* the allocation design provides explicitly for the possibility to amend applications *and* the nature of the allocation procedure does not resist this amendment possibility. Under the latter circumstances, any participant can incorporate this possibility of later amendment in his bidding behaviour.

These amendments or modifications *after* the submission stage should be distinguished from modifications *during* the submission stage. There are no general objections to modifications of this latter kind, since, instead of amending a submitted application, an applicant may also submit a new application during the submission stage and in this way prevent the suffering of any theoretical disadvantage. However, in case of allocation in order of receipt of the applications ('first come, first served'), modifications may lead to improved applications without necessarily adjusting their ranking order. This holds if an amendment to an application does not alter (lower) the registered moment of receipt of the (incomplete) application. Therefore, if it is considered undesirable that applications or bids are changed without the ranking order between applications being changed, the allocation design should exclude this amending possibility or provide for a lower position in the ranking for any amended application.

Amendments in the allocation model on the supply side concern the size of the ceiling (maximum) and the volume of the public rights to be allocated. Any general rule of allocation law with respect to these amendments should be understood against its counterpart discussed in the fourth chapter, being the requirement that the ceiling should be made public to all potential applicants before the submission stage or at least before the actual submission of an application. Given this requirement, the corresponding requirement would be that a ceiling should not be amended to the detriment of existing applicants. Some areas of government

regulation have the rule that the reduction of a ceiling cannot be imposed upon existing applications. Apparently, this rule assumes that any reduction will prejudice current applications. Therefore, if this rule is generalised to a general rule of allocation law, it is implicitly assumed that the allocation procedure satisfies the allocation-theoretic property of resource monotonicity, being the property that a ceiling reduction will never favour any existing applicant. Apparently, any allocation procedure should satisfy this allocation property.

With regard to an amendment to the allocation rule, it should first be emphasized that any amendment favouring one applicant will prejudice another applicant, at least if the allocation procedure is effective and allocates all rights available for grant. Therefore, amendments to the allocation procedure seem to be excluded after the submission stage; at best, the administrative authority can supplement or give concrete form to the chosen allocation procedure without amending it. As far as amendments to allocation procedures occur in the submission stage, they can still be imposed to potential applications but not to applications already submitted.

Modifications of the allocation outcome

After the initial grant of limited public rights the resulting outcome does not have to remain unchanged during the (limited) duration of these public rights. Instead, several intermediate modifications in the resulting allocation might occur. Three examples of these modifications are analyzed in this study, being the renewal, the extension and the transfer of limited public rights.

The immediate consequence of the renewal of a limited public right is that concurring potential applicants are deprived of the opportunity to compete for this right during the renewal period. Therefore, this renewal amounts to an additional restriction for these concurrent applicants to obtain the public right. The same holds true for an extension of limited public rights, for example by extending the geographical scope of an authorisation or the amount of a subsidy. Again, such an extension limits the opportunities of concurring applicants to compete for (the extension of) this limited public right, given that the ceiling as such remains unchanged. Finally, a transfer of a limited public right modifies the initial outcome of an allocation procedure because of a change in the identity of the holder of the public right. However, unlike a renewal or an extension of limited public rights, the possibility of transferring limited public rights (with permission of the administrative authority) creates additional opportunities for competing applicants to obtain a limited public right. Therefore, the prohibition to transfer a limited public right can be regarded as an additional restriction to obtain this right and should therefore be justified separately.

With regard to these modifications during the allocation, a twofold general rule of allocation law can be developed as an immediate consequence of the principles of legal certainty and equality together. The deciding factor is whether the possibility of an intermediate amendment of the allocation outcome has been part of the initial allocation procedure. If this is the case, any potential candidate could have incorporated this knowledge on renewal, extension or transfer in his bidding behaviour. However, if the amendment relates to a 'decisive element' in the outcome of the initial allocation procedure, for example if the amendment concerns

an element relating to the applied allocation criterion, then it seems impossible to allow for this modification of the allocation, even if the allocation design provides for this possibility. In those circumstances, it should be concluded that the nature of the amended element opposes this modification of the allocation.

Inversely, if the possibility of an intermediate amendment of the allocation outcome has not been part of the initial allocation procedure, then this amendment is not allowed if it has a so-called 'material character'. With reference to procurement law, this research defines an amendment of a limited public right as material if the amended element, had it been part of the initial allocation procedure, would have allowed for another outcome of the allocation procedure. However, even if an amendment can be classified as material, this does not exclude renewal or extension under all circumstances: any lack of call for competition might be justified, for example if there are no other potential applicants for this renewal or extension. In all other circumstances, a renewal or extension should be justified by an additional legitimate allocation objective, like the need for a simultaneous allocation, and be suitable and necessary to attain this objective.

Re-allocation

The final variant discussed in this study concerns the re-allocation of limited public rights. A re-allocation occurs whenever (comparable) limited public rights have been allocated in the past and these rights are allocated again. Such a re-allocation is a variant on the initial allocation in at least two different aspects. The first aspect relates to the choice of the re-allocation procedure as such: should the re-allocation procedure be identical to the initial allocation procedure? If yes, this would imply, for example, that the re-allocation of limited public rights should take place by means of an auction whenever the initial allocation took place by means of an auction. The second aspect concerns the treatment of applicants in relation to each other: should the re-allocation procedure, unlike the initial allocation procedure, distinguish between incumbents and new entrants?

With regard to the choice of the re-allocation procedure as such, the question arises whether this re-allocation procedure should be identical or comparable to the initial allocation procedure, given the comparable character of these limited public rights. It is submitted in this study that an obligation to apply a comparable allocation procedure in case of re-allocation, cannot be regarded as an immediate consequence of the principle of legal certainty or the principle of equality. In fact, the principle of legal certainty merely requires that any allocation procedure should be made sufficiently public to potential applicants considering the submission of an application under *this* allocation procedure. Therefore, the requirement that an administrative authority should apply a comparable allocation procedure is an *additional*, but non-essential requirement in order to guarantee legal certainty. Neither does the principle of equality require the application of a comparable allocation procedure in case of re-allocation. In fact, the principle of equality merely requires that holders of limited public rights have equivalent positions in economic terms in the sense that they have equal opportunities at the market to which the limited public rights give access. This economic equivalence may not necessarily be achieved by the application of a comparable allocation procedure. Hence, there

is no general rule requiring the application of an allocation procedure that is comparable to the initial allocation procedure in the case of re-allocation.

With regard to the differences between applicants in case of re-allocation, especially between incumbents and new entrants, the first observation from allocation theory is that the allocation design as such may ignore or mitigate these differences. Therefore, not every asymmetry between applicants necessitates the introduction of asymmetric elements in the allocation design, like a (partial) exclusion of incumbents (and reservation for new entrants), an individual cap or a bidding handicap. Next, it is important from the perspective of legal certainty that the application of asymmetric measures should be made public before the submission stage of the re-allocation of limited public rights, at least to the applicants confronted with these measures. However, it is not necessary to advertise the possible applicability of asymmetric measures prior to the *initial* allocation of limited public rights. In fact, any potential applicant should realize that a re-allocation of limited public rights might give rise to asymmetric measures in the allocation design. The power to include these asymmetric measures in the allocation design may be based on a specific statutory provision or be implied by a power to include another, more restrictive asymmetric measure in the allocation design. From the perspective of equality, it is submitted that there is no general obligation to include asymmetric elements in the allocation design. However, the lack of any asymmetric element in this design may render the allocation procedure unsuitable to attain the legitimate allocation objectives underlying the re-allocation.

Concluding remarks

The central question in this research was which strict requirements could be imposed on the design of allocation mechanisms for limited public rights in view of the legal principles of legal certainty and equality. In this respect, requirements are to be classified as strict if they go beyond the 'regular' requirements imposed on the grant of public rights in general. These strict requirements therefore relate explicitly to the limited availability of public rights and to the need to allocate these limited public rights by means of an allocation procedure. Although the several 'strict requirements' or general rules of allocation law developed in the previous parts of the study are not meant to be exhaustive, they allow for some general considerations on the nature of these general rules of allocation law.

Some general rules of allocation law may be regarded as a logical extension of similar requirements applying to the grant of public rights. For example, the general rules of allocation law developed in this study from the perspective of legal certainty require that different elements of the allocation procedure (ceiling, allocation rule, payment rule and cap) are objective and made public in advance to all potential applicants. The same holds true for the importance of the principle of equality for the design of allocation procedures: the general criteria of a legitimate aim, suitability and necessity that can justify any unequal treatment are applied to new and additional restricting elements in the allocation design.

Other general rules applying to the design of allocation procedures for limited public rights are the result of a 'reverse approach' compared to the grant

of non-limited public rights. This can be explained by the limited availability of public rights. As a result of this limited availability, the interests of concurring parties to compete for these public rights should be balanced against the interests of the holder of this public right.

Finally, it should be observed that the developed general rules of allocation law are not always easy to apply. For example, the answer to the question whether the outcome of an allocation can be modified during the duration of a limited public right depends on the question whether the possibility to modify this allocation has been part of the initial allocation procedure. Therefore, the developed general rules of allocation law primarily urge the administrative authority to make explicit all relevant elements of the allocation model and to give consistent reasons for choices made in the design of the allocation procedure.

The *general* character of the rules of allocation law developed in this research is to be found in their applicability (i) to varying kinds of limited public rights and (ii) to varying kinds of allocation procedures. In this way, these general rules of allocation law apply, irrespective of the specific contents of a certain public right. This means that these rules apply to a limited authorisation as well as to a subsidy that is available in limited amount. However, it cannot be excluded that the specific nature and object of public rights asks for further refinement in the application of allocation law. Secondly, these general rules of allocation law apply, irrespective of the chosen allocation procedure. Nevertheless, this study shows that some allocation issues give rise to separate or additional requirements with regard to specific allocation procedures. Apart from the fundamental distinction between ranking allocation procedures and divisible allocation procedures, allocation in order of receipt may ask for additional provisions. Similarly, the same applies to a procurement procedure, the immediate result being that not every procurement rule can be generalized and transposed to other allocation procedures.

From a broader perspective, this area of general (public) allocation law can be considered as a sub-area of general administrative law. In this respect, it should be mentioned on the one hand that limited public rights may occur in *any* specific legal area and are therefore suitable to be applied generally. On the other hand, it should be observed that these rules of allocation law do not apply to any grant of public rights: only if the number of public rights available for grant is limited to a maximum, these rules become relevant. The general character of this sub-area is therefore ambiguous.

As long as the developed general rules of allocation law are considered as an immediate consequence of the principles of legal certainty and equality, codification of these rules is not a necessary condition in order to apply these rules to some allocation of limited public rights. However, codification of these rules might clarify the exact contents and scope of these rules for potential applicants and thereby contribute to more legal certainty for and equality between potential applicants for limited public rights. Furthermore, a more far-reaching codification of rules of allocation law may be desirable in order to restrict the administrative authority's freedom in designing allocation procedures for limited public rights, without

every codified rule being a direct consequence of a legal principle. Nevertheless, irrespective of this codification, an administrative authority allocating limited public rights should always comply with general rules of allocation law being a direct consequence of the principles of legal certainty and equality. Therefore, it is recommended in this research that administrative courts develop general rules of allocation law within a univocal and consistent framework by giving reasons for the classification of some requirement of allocation law as an immediate and logical consequence of a legal principle. Given the exploratory character of this research, it is to be awaited whether the developed general rules of allocation law will filter through to legislation and case law. In that respect, it remains possible that some general rules of allocation law should be adapted or specified or that other elements than the principles of legal certainty and equality underlie a certain rule of allocation law.

In short, the systematic analysis in this study shows that the allocation of limited public rights, by their very nature, may give rise to specific questions that are unfamiliar to the grant of non-limited public rights. These specific allocation questions give rise to new 'strict requirements' extending or even deviating from general rules on the grant of public rights. Therefore, the allocation of limited public rights deserves separate attention in the field of administrative law.