

# MECHANISMS FOR WATER ALLOCATION AND WATER RIGHTS IN EUROPE AND THE NETHERLANDS – LESSONS FROM A GENERAL PUBLIC LAW PERSPECTIVE

PROFESSOR DR MARLEEN VAN RIJSWICK

*Director, Utrecht Centre for Water, Oceans and Sustainability Law, Utrecht University\**

This article focuses on the allocation and regulation of water rights. Although there is a general concern about the allocation and restriction of the right to use scarce water resources, there is also a debate regarding the implementation of a public right to water in general and, in particular, the mechanisms that are used to create a transparent allocation regime based on equality. First, an analysis of the various allocation systems at the international, European and national levels is undertaken; these mechanisms are all based on the transboundary river basin water management framework. At the national level, the Netherlands is taken as an example. The allocation of water rights is determined by natural as well as political and legislative factors, all of which have an impact on setting abstraction limits. Different allocation procedures have been developed worldwide according to national water laws and public law in general. It is argued that European and, in particular, Dutch allocation mechanisms need to be developed further, having regard to the special status of water, the protection of ecosystems and to the procedures and principles used in other allocation mechanisms with a view to guaranteeing the sustainable, balanced and equitable use of water.

## 1 INTRODUCTION

The availability of clean water is under pressure on account of climate change, urban development, growing populations and economic development. Much has been written about restrictions on the use of scarce water in arid areas. However, this article looks at this issue from a different perspective, namely whether rights to use water are allocated in the same way as other public rights and, if they are, whether the allocation of water use rights should be approached from a different perspective owing to the special characteristics of water. In other words, can the allocation of rights to use water be made fairer by studying the approaches utilized in other areas of law?

Public rights can be defined as the rights which are granted by an administrative authority based on its statutory competence to do so. As Van Ommeren et al state:

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 legal approach of “the allocating government” has been almost absent. In fact, the law of public administration seems to assume that every party shall be granted a good or right once he satisfies all the conditions for granting. This assumption neglects the fact that in several areas of government regulation, public rights such as authorizations and claims are available only in limited quantity. As a

result of this limited availability, some applications for those rights have to be denied even if they satisfy all granting conditions. In other words, sometimes there are not enough public rights available to satisfy all qualified parties.<sup>1</sup>

After establishing the availability of the water resource for distribution an allocation mechanism has to be chosen. Well known allocation mechanisms are those based on the order of application, the drawing of lots, an auction and the comparative assessment (also called ‘beauty contest’ or ‘tender’). Authors discuss the allocating of public rights within the context of a development that could be called ‘the economization of administrative law’ which is caused – at least in Europe – by the strong influence of European law which traditionally focuses on competition in the common market. This ‘economization’ of administrative law should on the other hand be in compliance with (probably not only European) principles such as equal treatment of applicants and transparent allocation procedures. Van Ommeren et al designed a general assessment framework based on five criteria on which to allocate public rights: the subject of the allocation (in this article water abstraction rights), the assessment of the capacity of the available resource, the method of allocation and the applicable legal principles of proportionality, transparency, equality, objectivity, legal certainty, due diligence and general legal principles of proper or good administration. The last element of the assessment framework concerns legal protection.

This contribution aims to provide insight into the allocation and regulation of freshwater rights within transboundary river basins within the European Union (international and European perspective) and the manner in which they are allocated in the Netherlands (national perspective). A more detailed analysis of this allocation system focuses on whether it achieves the main water management objectives – for example ‘a sustainable, balanced and equitable water use’ – which are outlined in European water law (Water Framework Directive Article 1).<sup>2</sup> Furthermore, the article investigates whether allocation processes take into account the various interests concerned and what possibilities stakeholders have to participate, object and

1 Paul Adriaanse, Frank van Ommeren and Willemien den Ouden (eds) *Allocating Limited Public Authorizations and Claims: General legal rules and principles for the allocation of limited public rights in the EU and its Member States* (Intersentia 2015); Johan Wolswinkel ‘The Allocation of a Limited Number of Authorisations: Some General Requirements from European Law’ (2009) *Review of European Administrative Law* vol 2 nr 2, 61–104.

2 Directive 2000/60 of the Parliament and the Council of 23 October 2000 establishing a framework for Community action in the field of water policy OJ L 327, 22.12.2000 pp 1–73.

\* Professor of European and Dutch Water Law, Utrecht University H.vanRijswick@uu.nl.

appeal, which reveals that there is a lack of opportunity for applicants and competitors to be part of the current water allocation process in the Netherlands.

## 2 WATER – A SPECIAL RESOURCE

Water is not easily comparable with other controlled public rights such as parking permits, subsidies, invitations to tender for government contracts, games of chance or development rights, examples which are often used in the general discussion on the allocation and regulation of public rights. Water is the source of all life and no one can do without a certain amount of fresh, clean water per day. In addition, water is needed for numerous economic activities, including the production of food and generation of power. A totally competitive system for the allocation of rights to use water would fail to take full account of these values of water,<sup>3</sup> which is why water has been granted special status both in international law as well as in European and many national law systems. The EU Water Framework Directive (WFD) states in the first recital:

Water is not a commercial product like any other but, rather, a heritage which must be protected, defended and treated as such.

The implementation of this protection of the resource is detailed in numerous EU directives and statutory provisions. In this context it is important to draw a distinction between the various uses of water. One of the principal functions is the supply of drinking water, which has resulted in the call for a human right to water and which has been laid down in several legal documents.<sup>4</sup> Other sectors where water is important are agriculture, shipping on inland waterways, power generation, fishing, recreation, transport and the discharge of domestic and industrial waste. Freshwater is found in the form of groundwater and surface water. Of the 1.36 billion km<sup>3</sup> of water on the planet, only 2.8 per cent is freshwater and only 1 per cent is suitable for drinking. This quantity has to be shared among approximately 7 billion people.

Further, one of the most important features of fresh surface water is that it frequently flows in rivers that cross national and administrative boundaries. This, therefore, is the reason for a *river basin* being the framework for water management both at international,<sup>5</sup> European<sup>6</sup> and national level. A river basin management approach calls

for a distribution of rights to abstract water among states that share a river basin. Traditionally, the distribution of rights to use a scarce resource is controlled at state level and by local authorities within the states.

Water rights can be characterized as private or as public rights. Both forms are known within Europe.<sup>7</sup> In the Netherlands rights to water use are considered to be regulated public rights as in most other European countries.<sup>8</sup> Regulation by the state enables water use rights to be allocated according to the available quantity and quality of water and distributed among states and individuals and according to the particular use or activity.

There are two reasons why the allocation of rights to abstract water needs to be regulated. In the first place freshwater itself is scarce.<sup>9</sup> This calls for action both at the international, European and national level so as to ensure equitable distribution among the various parties. One of the objectives of the WFD, for example, is to provide a framework for the protection of water, thereby contributing to '(...) the provision of the sufficient supply of good quality surface water and groundwater as needed for sustainable, balanced and equitable water use' (Article 1(e), 1st indent). Secondly, sustainable management of the natural resource – water – requires that the resilience of the ecosystem has to be protected. Undermining this resilience through excessive abstraction will result in a water system no longer able to function properly – ie drastically reduced or inadequate for the abstraction of drinking water, for agricultural and industrial use or for shipping on inland waterways. The ecological value of water also needs to be protected. All this requires government regulation to establish controls to water use in all sectors and to develop effective allocation mechanisms appropriate for the available resource. Thus the allocation system and distribution mechanisms are the result of both natural conditions and government action.

## 3 PLANNING OF ALLOCATION AND DISTRIBUTION OF WATER RIGHTS

European and national authorities generally control the allocation of water rights in line with a phased plan, which can be deduced from both European and national water law (here the Netherlands is taken as an example). In the first phase the competent authority (EU or national legislator) makes a political choice as to the level of protection to be adopted – ranging from a control sufficient to protect the natural resource from over use to a weaker control

3 P Hellegers 'Water, the most valuable asset' Inaugural address, Wageningen University 2011.

4 For example, in the International Covenant on Economic, Social and Cultural Rights (1966) and recognized as a fundamental right by the General Assembly of the United Nations (A/RES/54/175) as well as being described in *General Comment No 15 on the Right to Water*, adopted in 2002 by the Committee of Economic, Social and Cultural Rights; see H Smets (ed) *The right to safe drinking water and sanitation in Europe/Le droit à l'eau potable et à assainissement, sa mise en oeuvre en Europe* (Académie de l'eau, Editions Johanet Paris 2012); H F M W van Rijswijk, A M Keessen 'Legal Protection of the Right to Water in the European Union' in F Sultana, A Loftus (eds) *The Right to Water: Politics, Governance and Social Struggles* (Earthscan London 2011) pp 123–38.

5 For example in the (for the EU) important UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Bulletin of Treaties (*Trib*) 1992, 199).

6 In the Water Framework Directive and the Floods Directive (Directive 2007/60 of the European Parliament and of the Council of 23 October 2007 on the assessment and management of flood risks, OJ L 288 6 November 2007 p 27 et seq).

7 M G Quesada 'Water and Sanitation Services in Europe. Do Legal Frameworks provide for 'Good Governance'? UNESCO Centre for Water Law, Policy and Science, University of Dundee 2010.

8 H F M W van Rijswijk, H J M Havekes *European and Dutch Water Law* (Europa Law Publishing Groningen 2012); J Dellapenna, J Gupta (eds) *The Evolution of the Law and Politics of Water* (Springer Dordrecht 2009); W de Visser, C Mbazira (eds) *Water delivery: public or private?* (Cahierreeks Staats – en bestuursrecht, Universiteit Utrecht, Centrum voor Omgevingsrecht en –beleid/NILOS) Utrecht 2006. The fact that water management and administration is seen as a public responsibility does not mean to say that this responsibility cannot be carried out using private law resources.

9 The Netherlands currently has enough fresh water although problems of scarcity arise at certain times of year, particularly in sandy soils, and more frequently due to salination in the coastal areas and the effects of climate change. During the summer it is regularly forbidden to use fresh water or groundwater for agricultural purposes.

allowing overexploitation.<sup>10</sup> This decision by public authorities as to how to allocate and distribute water rights creates an artificial, or legal environmental space.

The concept of environmental space is often defined as the amount of any particular resource that can be consumed by a country without threatening the continued availability of that resource, assuming that everyone in the world is entitled to an equal share. Within a river basin or within a state the concept can be used to establish the available quantity and quality of freshwater so that rights (environmental or water) can be granted to legitimate users. Examples can be found in international law, in European water directives and in national legislation. European legislation and regulations, and in particular the WFD, give Member States a large amount of policy freedom provided they do not exceed the boundaries of the general purpose of Article 1 WFD (a sustainable, balanced and equitable water use) and the specific environmental objectives of Article 4 WFD which requires, amongst other things, that Member States shall protect, enhance and restore all bodies of groundwater, and ensure a balance between abstraction and recharge of groundwater (Article 4(1)(b)(ii) WFD).

In the Netherlands the established allocation regime and the policies pursued and legislation implemented by the competent authorities are also based on Article 21 of the Constitution,<sup>11</sup> and on the Water Act.<sup>12</sup> The administration has a large degree of freedom in policy-making and is subject to only marginal review by the administrative courts,<sup>13</sup> and judicial influence inevitably differs from case to case. The emphasis in judicial review thus tends towards maintaining unrestricted policy-making on the part of the administration at the expense of equitable distribution and allocation of water rights and the protection of legitimate interests incorporated in the legislation.

The second phase relates to the establishment of general legislative objectives. European objectives for water management can be found in particular in Articles 1 and 4 of the WFD (see above). No specific provision is given for the protection of the available amount of surface water. In the Netherlands, Article 2.1(1) of the Dutch Water Act sets out the national objectives for water management. These are to prevent and, where necessary, limit flooding, swamping and water shortage, while simultaneously protecting and improving the chemical and ecological quality of water systems and allowing water systems to fulfil societal functions. These general objectives are detailed in more concrete, quantitative norms that determine the available scope for the use of water.

Only recently has the EU broadened the scope of its environmental legislation from source-based regulation (ie prevention of pollution or damage at source – no end-of-pipe solutions) to include the rational and sustainable use of natural resources. Source-based regulation theoretically

disregards an allocation system; increasingly, however, the effects-based trail of environmental policy and international agreements in which national maximums are fixed for given emissions, is reducing the exclusive use of source-based regulations. It has become evident through practical application that implementing effects-based obligations does not provide an entirely satisfactory solution. The principal objection in this respect is that the principle of ‘first come, first served’ allows too little policy control, produces ineffective cost measures and the consequences of ‘when it’s gone, it’s gone’ can sometimes be unacceptable. Little fundamental thought has as yet been given to the legal instruments for the allocation of environmental user or polluter space and its relationship with the source-based standards.

#### 4 INTERNATIONAL AND EUROPEAN ALLOCATION MECHANISMS

Management of transboundary water courses in Europe at international, European and national level is shaped by an area-specific approach, so called river basin management. For European river basins the UNECE Water Convention (Treaty of Helsinki),<sup>14</sup> is most important. The Convention has been implemented by the European Union under the WFD and the EU Floods Directive, while in the Netherlands river basin management is based on the Water Act and the regulatory regime specified in the Water Authorities Act.

The characteristic feature of European water directives is that the general purpose in a directive is further specified by the attainment of a given status. For the WFD this means for example attaining ‘good status’ of groundwater and surface water with the aim, amongst others, of achieving a sustainable, balanced and equitable water use. On the international level parties are obliged to ensure that transboundary waters are used in a reasonable and equitable way, taking into particular account their transboundary character, in the case of activities which cause or are likely to cause transboundary impact (Helsinki Convention Article 2). Article 1 of that Convention defines ‘transboundary impact’ as follows.

any significant adverse effect on the environment resulting from a change in the conditions of transboundary waters caused by a human activity, the physical origin of which is situated wholly or in part within an area under the jurisdiction of a Party, within an area under the jurisdiction of another Party. Such effects on the environment include effects on human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction among these factors; they also include effects on the cultural heritage or socio-economic conditions resulting from alterations to those factors.

To achieve this goal allocation mechanisms are needed.<sup>15</sup> Van Kempen, amongst others, states that although a reasonable and equitable use is one of the main goals for

10 A M Keessen, J J H van Kempen, H F M W van Rijswijk, J Robbe and C W Backes ‘European River basin districts: are they swimming in the same implementation pool? Different approaches to the transposition of the Water Framework Directive’ *Journal of Environmental Law* (2010) vol 22 no 2 pp 197–222.

11 Bulletin of Acts, Orders and Decrees (Stb) 1983 70.

12 Bulletin of Acts, Orders and Decrees (Stb) 2009 107.

13 In most cases the Council of State’s Administrative Jurisdiction Division.

14 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Helsinki 17 March 1992.

15 J J H van Kempen ‘Europees waterbeheer: eerlijk zullen we alles delen?’ (European water management: fair sharing for all? An analysis of the European river basin approach in light of transboundary water pollution between Member States) (dissertation Utrecht University, Bju, The Hague, 2012).

transboundary water management stemming from international water law, in the European Union water legislation it is not clear what a reasonable and equitable use or distribution actually means. The concept is not defined in legislation nor in jurisprudence. He suggests using criteria set by the UN Watercourses Convention<sup>16</sup> (Article 6) to further develop allocation and distribution mechanisms within the system of EU water law. Article 6 mentions the following 'factors relevant to equitable and reasonable utilization' that may be useful for further development of EU water law in this respect:

1. Utilization of an international watercourse in an equitable and reasonable manner [. . .] requires taking into account all relevant factors and circumstances, including:
  - (a) Geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;
  - (b) The social and economic needs of the watercourse States concerned;
  - (c) The population dependent on the watercourse in each watercourse State;
  - (d) The effects of the use or uses of the watercourses in one watercourse State on other watercourse States;
  - (e) Existing and potential uses of the watercourse;
  - (f) Conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect;
  - (g) The availability of alternatives, of comparable value, to a particular planned or existing use.

...

The weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors. In determining what is a reasonable and equitable use, all relevant factors are to be considered together and a conclusion reached on the basis of the whole. The distribution should be implemented after consultations in a spirit of cooperation between the states involved and laid down in agreements.

However, under European law there are no criteria for an equitable and sustainable distribution of freshwater among the various countries sharing a river basin which could be taken as guiding principles, nor is there a proper distribution or allocation mechanism for use between Member States. Allocation and distribution are not regulated. For allocation at the *national level* the WFD requires control of abstractions within the general objectives of the directive as described above. It is for the Member States to establish a water allocation process and grant rights to abstract water, for example by way of licences or permits. The 2012 Review of River Basin Management Plans (RBMP1) (reviewed every six years under the WFD) exposed the fact that national water allocation mechanisms still need to be improved in many States. This presents a problem. Although the WFD contains the obligation for Member States to collaborate, to draw up transboundary river basin management plans together and to confer with each other and exchange information in order to be able to meet the goal of a sustainable, balanced and equitable use within the entire river basin, it does not stipulate the criteria or allocation mechanisms on the basis of which the water is to be distributed among the States. This can result in an unbalanced and non-equitable distribution of water use rights between various States and create problems for States in meeting the objectives of the directive.

16 Convention on the Law of the Non-navigational Uses of International Watercourses 1997, Adopted by the General Assembly of the United Nations 21 May 1997.

The implementation of obligations under European directives rests in principle on the individual Member States. But due to the transboundary nature of water the objectives can only be attained if the various parties involved (Member States) collaborate within a river basin, reaching agreements on the distribution and, if necessary, the regulation of water abstraction rights. This has for example been carried out for distribution of the waters of the river Meuse, the Rhine and the Scheldt.<sup>17</sup> And under European water law this collaboration is mandatory; however, there is no provision for an obligation to give other Member States warning if permitted use is exceeded or disasters occur.

In spite of the importance of working together strikingly little has been developed in European law in respect of allocation mechanisms or criteria that may be used to regulate the distribution of water rights between States. Member States can make use of treaties, new or existing, or adopt informal methods of collaboration, in order to agree the transboundary allocation, distribution and regulation of water rights, but making use of international treaties does not release Member States from their individual obligation to meet the objectives of a directive. The nature of the relationship between European directives and international treaties is unclear; nor is it clear how agreements between States should be formulated and which courts will decide on disputes or claims of misuse of the resource.<sup>18</sup>

In coordinating the allocation of rights it is important, particularly for the smaller transboundary water courses, that States collaborate at regional level as well as implementing the WFD, although the directive does not impose an obligation to do so. Collaboration of this kind can be established across borders, on the basis of a bilateral treaty, for example, or can take place within EU border regions.<sup>19</sup> The European Grouping for Territorial Cooperation (EGTC) could facilitate cooperation at community level; but stronger institutional cross-border water management needs to be enshrined in European law on account of the discrepancy between river basin management and the individual responsibility of Member States to attain the WFD objectives.

Agreements for transboundary river basin management between States can be enforced in a number of ways. Disputes concerning the interpretation or application of European law are heard before the European Court of Justice. Otherwise international arbitration is an obvious option, which is also applicable where the interpretation or application of an international treaty such as the Helsinki Convention is concerned to which not only the Member States but also the European Union is a party.<sup>20</sup>

17 J Robbe, H F M W van Rijswijk 'Legal instruments for the allocation and regulation of fresh water' Utrecht University 2011 (in Dutch) <http://ucwos.rebo.uu.nl>.

18 E Hey, H F M W van Rijswijk 'Transnational water management' in O Jansen, B Schöndorf-Haubold (eds) *The European Composite Administration* (Intersentia 2011) pp 227–49.

19 H F M W van Rijswijk, H K Gilissen and J J H van Kempen 'The need for international and regional transboundary cooperation in European river basin management as a result of new governance approaches in EC water law' *ERA Forum* vol 11, 2010 no 1 pp 129–57.

20 Case C–459/03 *Commissie v Ireland* [2006] I-04635 (MOX plant).

The Water Framework Directive (like the Floods Directive) provides for arbitration and mediation by the European Commission. Member States can request the Commission to act as mediator. Although the directive obliges the Commission to respond, it cannot make a binding decision, because the directive makes no provision for this. On the other hand the Commission can decide that the conflict gives cause for initiating treaty infringement proceedings before the Court of Justice, but given the fact there are no criteria for the allocation and distribution of water rights it is not clear what the Court could then rule on. Member States can initiate treaty infringement proceedings against each other, but they seldom feel the need to do so.

Another possibility lies in allowing national authorities to take legal action in another Member State, for example in a dispute concerning the granting of a permit for water abstraction. Although the Court expressly suggested this in *Banks*,<sup>21</sup> it did not impose an obligation on States to make cross border legal action possible under national law. The question thus arises as to whether in any given instance it is the central or the local authorities which have access to the courts and the answer will depend in particular on the national procedural law of the Member State in question. In the Netherlands foreign local authorities in principle have the same access to the courts as Dutch parties.

Under the Aarhus Convention local authorities may have more opportunities to gain access to the courts in all EU Member States and in the courts of other state parties to the Convention if they can demonstrate that they have a sufficient interest or that a right has been infringed. However, unlike environmental organizations, local authorities do not have a privileged position, so access to justice before the administrative courts in another country is not necessarily certain.<sup>22</sup>

## 5 ALLOCATION AND REGULATION OF ABSTRACTION RIGHTS IN THE NETHERLANDS

The object of the allocation of water rights is the sustainable, balanced and equitable use of natural resources. Once the strategy of a balance between abstraction and recharges of groundwater, which also ensures that the drinking water supply is the top priority has been established at European level,<sup>23</sup> distribution of the available water resources between legitimate claimants and the granting of rights can follow.

### 5.1 Distribution mechanisms

In the Netherlands the distribution and licensing of abstraction rights is governed largely according to the priorities list and permitting regime laid down in the Water Act (sections 2.9 and 6.6 respectively) A third instrument

is the National Water Plan, laid down at national, provincial and water authority level<sup>24</sup> and which implements the EU river basin management plans and the programme of measures.<sup>25</sup> The Plan is drawn up under section 4.1 of the Water Act and section 4.1 of the Water Decree<sup>26</sup> by the ministers of Infrastructure and the Environment (I&E) and Economic Affairs (EA). Section 4.7 of the Water Decree stipulates that the National Water Plan must state which national waters are suitable for the 'abstraction of drinking water'. Provincial Executives draw up regional plans which also are part of the implementation of EU river basin management plans and programmes of measures showing which regional waters can be used as drinking water.<sup>27</sup> The regional water plan also shows the other functions of the regional waters.<sup>28</sup> The Water Act allows additional functions to be allocated in the management plans of the central government and the water authorities.<sup>29</sup> The designation of functions to waters (shipping, drinking water, bathing water, water for industrial uses and energy plants, agricultural use etc) in particular is of importance in the allocation and distribution of abstraction permits, as the function not only determines which objectives apply to specific waters and how these objectives will, through the adoption of measures, be achieved, but also who are the appropriate claimants to the use of the water.

The plans therefore lay down how the water will be distributed among the various activities, but this is implied rather than clearly stated. It has to be deduced from the combination of objectives and function allocation how the water will be distributed.

Stakeholders are allowed to participate in the preparation of the plans, a right that emanates directly from European water directives and the directives that implement the Aarhus Convention. However, there is no specific procedure providing for public participation and no access to the administrative courts to bring a challenge to the adoption of plans.

### 5.2 Permits

For certain abstractions a permit is required. Under section 6.4 of the Water Act a permit is required for the abstraction of large quantities of groundwater, the competent authority being the Provincial Executive. For smaller amounts of groundwater the competent authority is the regional water authority. Abstractions from a body of surface water require a permit from the minister of I&E or the water authority (Water Act s 6.5). Only in times of (potential) shortage does the list of priorities (below) overrule permit holders' rights.

Reviewing a permit application for conformity with the statutory grounds for refusal is seen as a permitted distribution criterion. The question is whether in that case the obligations that are taken into account in the distribution of other public rights (other than water) also apply; namely

21 Judgment of the ECJ of 30 March 2000, Case C-178/97 *Banks* [2000] ECR I-2005.

22 A M Keessen, J J H van Kempen and H F M W van Rijswick 'Transboundary river basin management in Europe: legal instruments to comply with European water management obligations in case of transboundary water pollution and floods' *Utrecht Law Review* 2008 pp 35-56.

23 EFD and European Commission 'Strategy on Water Scarcity and Droughts' Brussels 18 July 2007, COM (2007) 414 def, Article 4 lid 1 sub b-ii.

24 Water Act pt 4, Water Decree pt 4 (Bulletin of Acts, Orders and Decrees (Stb) 30 November 2009, 548). See van Rijswick, Havekes (n 8).

25 WFD art 3.

26 Bulletin of Acts, Orders and Decrees (Stb) 30 November 2009, 548.

27 Water Decree s 4.12(1)(b).

28 Water Act s 4.4(2)(a).

29 *ibid* s 4.6(2)(b).

an obligation arising under the principle of proportionality to create the possibility for competition and a distribution procedure<sup>30</sup> and the obligation arising under the precautionary principle and the principle of proper administration to inform the various stakeholders of the possibility of participating in this distribution.<sup>31</sup>

In the Netherlands water abstraction permits are granted on a 'first come first served' basis and, notably, have no time limit. It can be argued that a distribution system based on the order of receipt of the application meets the requirement that a procedure should contain a competitive element.<sup>32</sup> This procedure is not deemed to be inconsistent with the principle of legal certainty or the precautionary principle.<sup>33</sup> However, the fact that abstraction permits are granted on a permanent basis and remain in force for the permit holder's legal successors<sup>34</sup> means they differ significantly from many other allocated public rights, where the permit is often issued for a fixed term only, so that in the next round further and new applications can be made. Conditions and restrictions can be attached to the permits and contravening the conditions is prohibited.<sup>35</sup> The granting of permits is further subject to the normal requirements of administrative law based on the General Administrative Law Act (GALA) and principles of good governance.<sup>36</sup>

There is also a regime of general rules applicable to a large number of users where a permit is not required so long as the users notify their water use to the competent authorities. If conditions attached to a permit are supplanted by a general regulation under the Water Act (which is possible for many activities in the water sector), the general regulation will take into account the current norms and objectives. Once the general regulation is in force, everyone has equal rights in the sense that if the authorities have carried out the obligation to give notice of a general regulation, anyone can avail themselves of the resource to an equal degree. Customized regulations can be imposed if compliance with the norms and objectives so requires, with the result that there can be a certain number of individual cases within the regime of general rules.

The Water Framework takes the approach that cost recovery for water services is an important instrument to contribute to a sustainable, balanced and equitable water use. Allocation is certainly not equal. Dutch citizens pay for drinking water in proportion to their consumption but for water used for other purposes there is no direct relationship between the amount of water used and the tax levied by the water authorities. However, the Dutch financial arrangements are such that not all water services are paid for. Use of waters managed at the state level is

free of charge,<sup>37</sup> for example the use of freshwater in agriculture for irrigation or watering cattle and the use of a body of water for shipping. The recent judgment of the European Court of Justice in a case against Germany seemed to approve this approach as the Court ruled that Member States have wide discretion in how they recover the cost for water services (Article 9 WFD).

### 5.3 The list of priorities

The Water Act contains a list of priorities for the distribution of freshwater in the event of a drought. Section 2.9(1) stipulates that the social and ecological priorities that will determine the distribution of the available surface water in the event or threat of a water shortage is to be laid down by administrative order as stipulated in the Water Decree. Under subsection 2 further rules can be brought in by administrative or provincial order regarding the priority list and that they may also be applied to the distribution of groundwater. Section 2.1 of the Water Decree details the list of priorities; those listed in the last two categories can be further specified at regional or provincial level.

1. Guaranteeing flood protection and averting irreversible damage;
2. Public utilities, with drinking water having the highest priority as far as delivery reliability is concerned, followed by the power supply, likewise as far as delivery reliability is concerned;<sup>38</sup>
3. Small-scale high-grade use, prioritized as follows:
  - a. temporary sprinkler irrigation of capital-intensive crops,
  - b. processing industrial process water, and
  - c. the quality of water in urban areas;
4. Other needs, with the following order of priority: shipping, agriculture, natural environment (other), industry, water recreation, inland fishing, drinking water (for the other needs) and energy (for the other needs), and finally
5. 'Other interests'.

### 5.4 Comment

To summarize, a number of allocation and permitting systems are in place: namely, plans, permits, general rules and a statutory list of priorities. In the case of the plans the criteria on which distribution is based are not clear, nor is the procedure (how distribution takes place), nor how nor the various interests involved are weighed up against each other. The publication of plans does mean that shortage

30 *ABRvS* 18 July 2007, *AB* 2007 302, with note Jans (Schindler) re the Gaming Act (*Wet op de kansspelen*).

31 *CBB* 3 June 2009, *AB* 2009, 373, annotated by C J Wolswinkel (Swiss Leisure Group).

32 *CBB* 28 April 2010, *AB* 2010, 186, annotated by Wolswinkel (Pierik and Meeson).

33 *Vzgr. CBB* 31 March 2010, *AWB* 10/84; *LJN* BL9683 (Dirk van den Broek Deventer).

34 *Water Act* s 6.24.

35 *ibid* s 6.20. A restriction can also be one on the term of validity.

36 *ibid* s 6.16 states that in principle s 3.4 of the General Administrative Law Act and s 3.12 of the Environmental Management Act apply.

37 See P E Lindhout, H F M W van Rijswijk 'The effectiveness of the principle of recovery of the costs of water services jeopardized by the European Court of Justice' *Journal for European Environmental & Planning Law* 12 (2015) 78–92; see P E Lindhout 'Cost recovery as a policy instrument to achieve sustainable and equitable water use in Europe and the Netherlands' (Utrecht University, PhD Thesis, March 2015); P E Lindhout 'Application of the cost recovery principle on water services in the Netherlands' (*JEEPL* 10.4 (2013) 309–32; P E Lindhout 'A wider notion of the scope of water services in EU water law: boosting payment for water related ecosystem services to ensure sustainable water management?' *Utrecht Law Review* (2012); R Brouwer 'Payments for Ecosystem Services: Making Money Talk' (Inaugural speech VU, Amsterdam 2010).

38 At European level highest priority is given to the drinking water supply, but given the vulnerability of the Netherlands to flooding it is not strange that, because of the guarantee of flood protection in the Netherlands, the safety interest heads the list of priorities.

and distribution are made known, but it is questionable whether this meets the requirements which in general are applicable to the allocation of public rights. Van Ommeren et al refer to Dutch jurisprudence in the field of administrative law where it is confirmed that when an allocation process is planned, the administrative authority should inform the interested parties in advance about the availability and procedure of the allocation so that all the interested parties can compete for the permits.<sup>39</sup>

Under the Public Contracts Directive<sup>40</sup> the contracting authority must be transparent in its procedures and treat all applicants equally without discrimination. This obligation includes, according to the jurisprudence of the Court of Justice, a commitment on the part of the authorities to guarantee every potential applicant an appropriate degree of openness, so that the applicant's right of competition is unaffected and the contract award can be screened as to its impartiality.<sup>41</sup> This duty of transparency also applies to the allocation of controlled authorizations. It is important in this context that decisions are based upon the principles of proportionality, due diligence and good or proper administration, and also the principle of legal certainty should the allocation procedure change.

However, although these principles play an important role in other sectors they are not apparent in Dutch administrative law and the allocation of water rights. Application of these principles could help to achieve the aim of sustainable, balanced and equitable water use. A system based on restricted participation in planning procedures and restricted access to the courts, would appear to be less well developed. As it is, the granting of permits to the 'first come, first served' and on a permanent basis until the available 'environmental space' has been fully utilized, protects existing rights and prevents the creation of a competitive market place where new entrants can apply.

### 5.5 Redistribution of water rights

Despite the fact that in the Netherlands permits are in principle granted on a permanent basis, various strategies exist for amending a distribution scheme or for the re-allocation of permits. However, it is questionable whether these strategies for achieving redistribution are aimed at enabling a form of competition or will contribute to the aim of sustainable, balanced and equitable water use. Re-allocation can be made in the interests of similar companies, but can also be made for different types of activities, for example, a redistribution between agriculture and drinking water supply, or between industry and agriculture on the one hand and nature on the other.

New policies, properly communicated through inclusion in the water plans can change the allocation process, such as restricting the granting of permits for groundwater abstractions for low-grade use, such as irrigation in the agricultural sector. Many Dutch provinces have opted for

this policy after it became clear that the dwindling amount of clean groundwater was in need of protection. Groundwater abstractions are now only granted for high-grade use such as for drinking water. When new policies have been communicated to all interests well in advance no compensation has to be paid.

A more radical step is the amendment, supplementation or revocation of existing permits under section 6.22 of the Water Act.<sup>42</sup> There are a limited number of reasons under Dutch water law on the basis of which a permit can or must be amended, supplemented or revoked. A permit can be revoked if it has not been used for three years. The competent authority will revoke a permit:

- at the request of the permit holder,
- in the event of facts or circumstances which result in the activities for which the permit was granted no longer being considered permissible, bearing in mind the objectives of the Water Act,
- if a treaty or decision of an international organization so necessitates.

A permit will only be revoked if amending or supplementing it will not suffice or the conditions and restrictions attached to the permit are no longer appropriate.<sup>43</sup> The withdrawal of existing permits is usually accompanied by financial compensation, as laid down in the Water Act. These decisions are usually the result of new scientific understanding, new case law or new policy. Changes in the status of water bodies can also be a reason for amending a permit, such as when periods of drought lead to low water levels or, under the regime of general rules, the appropriate abstraction levels from a water body may well be exceeded because no individual assessment of the users' conformity with norms and objectives – the criterion for distribution – has taken place. Perhaps it could also be argued that this refers to the revocation of wrong decisions, such as when permits have to be revoked because it appears too much was permitted to be able to meet the objectives. However, this reasoning ignores the fact that many of the reasons for failing to comply with the norms do not lie with the parties that hold a permit, namely diffuse sources of pollution and the activities covered by a regime of general rules. Merely revising permits would dump the charges of this incorrect decision-making disproportionately in the laps of the permit holders. It may be that an assessment, or lack of assessment, led to a decision inconsistent with European law. Changing circumstances can also lead to the revocation of permits. Den Ouden argues that in cases where circumstances have changed the primary decision was not unlawful and that for this reason the powers of administrative bodies to be able to revoke permits should be defined conservatively or should be subject to stricter standards. From the point of view of legal certainty much can be said in favour of this, but from the perspective of achieving water management objectives and an equitable allocation of water rights I have my doubts.

39 See *CBb* 3 June 2009, *AB* 2009, 373, annotated by C J Wolswinkel (Swiss Leisure Group) and *CBb* 28 April 2010, *AB* 2010, 186, annotated by C J Wolswinkel (Pierik and Meson).

40 See Public Contracts Directive (2004/18/EG) s 2.

41 See, amongst others, the following cases, Case C-324/98 ECJ 7 December 2000 NJ 2001, (Telaustria) para 62; Case C-324/07 (Coditel Brabant) ECJ 13 November 2008 para 25; Case C-91/08 (Wall) ECJ 13 April 2010 para 36.

42 See also W den Ouden 'De intrekking van begunstigende beschikkingen door bestuursorganen, Eens gegeven blijft gegeven? (The revocation of favourable decisions by administrative bodies, Once given, given forever?)' in T Barkhuysen, W den Ouden and J E M Polak (eds) *Bestuursrecht harmoniseren: 15 jaar Awb (Harmonizing administrative Law: 15 years of the General Administrative Law Act)* (BjU The Hague 2010) pp 689-715.

43 Water Act s 6.22(3).

One possibility would be to issue permits for a fixed term rather than on a permanent basis, which would also allow for increased competition. Section 6.26 of the Water Act stipulates *inter alia* that section 8.22 of the Environmental Management Act (EMA) applies *mutatis mutandis* to water permits. Section 8.22 EMA (implementing the European Industrial Emissions Directive) contains the so-called duty to update permits. The competent authority is required to check on a regular basis whether, given the *technical possibilities for protecting the environment* and developments relating to *the quality of the environment* the permit is still adequate. It is important here to note that under section 7.14 of the Water Act a general compensation regime has been established.<sup>44</sup> The same duty to update applies *mutatis mutandis* to the general rules.

## 5.6 Comment

Under the Dutch Water Act the possibilities for revoking, amending or supplementing a permit are limited. For example, a permit cannot be amended or revoked at the request of a third party, which excludes any possibility of increasing the number of water users and achieving a redistribution of water use rights. The main reason for supplementing or revoking a permit is to achieve the objectives of the Water Act. Given the way in which section 6.22 is formulated, it does not seem possible for existing permits to be amended or revoked and new permits granted to applicants; thus an amendment of the Dutch Water Act is recommended in order to achieve more competition between legitimate claimants and in the end a sustainable, balanced and equitable water use.

All in all it seems in particular that a change of policy, together with a tightening up or revocation of existing permits offers the best opportunities for redistributing existing water rights. However, Dutch administrative courts will not easily accept the revocation of incorrect decisions if the grounds for revocation are not those stipulated in the Water Act. As we know, if no more space is available for expansion within the current norms and objectives, neither the Water Act nor the EMA offer direct possibilities for re-allocation and the acceptance of new claimants to water use.

In recent years a study has been conducted into the question of whether a system of tradable water rights could be introduced in the Netherlands (and in Flanders and Belgium) alongside or instead of the permitting regime.<sup>45</sup> From an economic perspective negotiable water rights seem to be a rational choice,<sup>46</sup> but given the special value of water, with a certain amount having to be available for every person and for various functions, and the

44 See, for the Dutch compensation regime under the Water Act: Willemijn van Doorn-Hoekveld 'Compensation in flood risk management with a focus on shifts in compensation regimes regarding prevention, mitigation and disaster management' *Utrecht Law Review* vol 10 Issue 2 May 2014 pp 216–38.

45 A Jolink 'Legal implications of introducing economic instruments in the field of European and Dutch water management' (Utrecht University 2010); P de Smedt, F Maes 'Naar een markt voor verhandelbare lozingsrechten? (Towards a market for tradable discharge rights?)' (Maritiem Instituut Universiteit Gent) [www.steunpuntmilieubeleidswetenschappen.be](http://www.steunpuntmilieubeleidswetenschappen.be).

46 P Holdemond, M Thobani 'Tradable water rights, a property rights approach to resolving water shortages and promoting investment' (The World Bank, Policy Research Working Paper July 1996).

fact that this trade would need to fit into river basin management plus the high cost of setting up and maintaining a market system of this kind, the option is for the moment not being taken up in the Netherlands.

## 5.7 Legal protection against allocation decisions

When does a stakeholder have any influence on the way in which the rights to abstract water are allocated and what does this influence consist of? Is it involvement in a political-administrative process, public participation in planning or legal protection in the classical sense? From the preceding sections it can be concluded that stakeholders in the Netherlands have few opportunities to apply for a permit during a re-allocation of permits, or to bring the matter before the administrative courts. They are of course able to engage at the planning stage, as required under the WFD and Dutch law, but this is not the same as legal protection before the courts which is under Dutch law only available where individual decisions affect private parties.

### 5.7.1 Challenges to administrative decisions

It could be thought desirable that it should be possible to challenge in the courts the allocation mechanisms and the norms and objectives set by the legislature. However, no legal protection is available under Dutch administrative law against generally binding regulations. There is no system in place for challenging water plans either.

### 5.7.2 Administrative legal protection in the case of permit granting

For permit holders and other parties with a direct interest (but not third parties), the only possibility of challenging a decision on allocation or distribution in the administrative courts is when a permit is granted, tightened up or revoked or customized regulations are imposed. Stakeholders can request the water authority for a redistribution of permits but the Water Act provides only a limited number of grounds on which a permit can be revoked or tightened up. A re-allocation of permits is not one of them, even if proposed new permits do conform with the obligation to be compatible with the objectives of the Dutch Water Act. And the principal (and only acceptable) reason to review the grant or revocation or revision of a permit is its compatibility with the objectives of the Dutch Water Act. Allocation and rights that do not meet the requirements of a sustainable, balanced and equitable water use, or are not in conformity with general legal principles governing the allocation of other public rights do not appear to be a reason for amending or revoking permits or granting new ones if new permits are incompatible with these objectives.

### 5.7.3 Civil law protection

In the Netherlands if no legal protection is available via the administrative courts, a matter can always be brought before the civil courts. The civil courts, however, have as yet little experience in reviewing water plans, general rules and amendments or revocations of water permits. Criteria for the review of these administrative instruments by the civil courts need to be developed. A principle such as a balanced and equitable allocation of water use rights does not yet exist as a rule of law, but could be fleshed out on the basis of existing rules of law that have been



developed for the allocation of other public rights such as, for example, the obligation to create room for competition, a duty to furnish information for potential candidates, and the provision of a clear and coherent procedure which takes into account principles such as legal certainty, proportionality, proper administration and equality.

## 6 CONCLUSIONS

There is no rule of law either in European or in Dutch law which stipulates that water abstraction rights must be distributed in a sustainable, balanced and equitable way, other than that it is a general aim of the European Water Framework Directive. Under the current European or national legal system it is not clear which rule of law is being infringed in the case of damage to, of misuse of water resources. Nor are there any requirements to provide for adaptation to environmental change in the existing allocation mechanisms. It is true that everyone is equally entitled to use water, but that does not necessarily make a permit system such as the one set out in the Dutch Water Act unlawful. The norm of 'an equitable distribution of water abstraction rights' could be fleshed out on the basis of existing rules of law such as those developed for the distribution of other public rights. It has been suggested that there is an obligation to ensure competition, information and create a clear and coherent procedure for allocation. However, a link is needed with the principles of legal certainty, proportionality, transparency, proper decision-making and equality.

A substantive review criterion for a sustainable, balanced and equitable distribution of water rights can be deduced from the requirements for river basin management plans under the WFD. These have been implemented in the Netherlands in the various water plans as these must show the actual pressures to which water is subject, who or what is causing them and the degree to which those involved contribute to the financing of water services. It can be deduced from the plans, therefore, whether the benefits and burdens of water management have been distributed equally and proportionately among the various users.

Decisions concerning systematic allocation should be based upon a proportional distribution of burdens. However, this principle needs to be further developed and a link made with the system laid down in the WFD, which

requires a relationship to be established between actual water quality, desired water quality, the various sources of pollution and the obligation to tackle the sources of pollution on the basis of monitoring data. This system is backed up by the obligation to ensure an equitable and proportionate distribution of the costs of controlling the various sources of pollution. The following criteria can apply to the establishment of a 'proportional distribution of the costs':<sup>47</sup>

- the contribution made by the sector or target group to the problem as a whole, its relative development over time and the reductions achieved in the past;
- the degree to which competition is affected;
- feasibility and practicality of measures;
- costs;
- effects on other policy fields: for example, other environmental themes and safety.

With the systematic distribution and redistribution of water rights, account should also be taken – as is partially done in emissions trading systems – with the need to set aside a reserve for newcomers. The allocation system should be revised to include equality and transparency, not on the basis of 'first come, first served' which prejudices new applicants, and with rights granted for a fixed term. Under the present system of allocation, rights to abstract water are not distributed in a sustainable, balanced and equitable way, nor effectively or proportionately.

The lack of flexibility of the current system makes the management of water shortages, should they occur, problematic and also restricts the application of wider criteria to the granting of permits, such as generally desired environmental goals, the economic and social costs and benefits. The authorities' reluctance to provide possible compensation under the Dutch legal system is for the moment exerting an unwelcome influence on the redistribution of water rights. The rule of law and legal certainty (which protects existing rights) play an important part. If the principle of a proportional distribution (reasonable and equitable) was embedded in the allocation mechanism, it would open up a competitive application process for water abstraction permits and lead to increasingly sustainable management of the resource. This principle needs to be further elaborated in European as well as Dutch water law.

47 See Chris Backes, H F M W van Rijswick 'Effective environmental protection: towards a better understanding of environmental quality standards in environmental legislation' in Lena Gipperth, Charlotta Zetterberg 'Miljörättsliga perspektiv och tankevärdor' Vänbok till <?> Jan Darpö, Gabriel Michanek (Iustus Förlag AB Uppsala 2013) pp 19–50.