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CHAPTER 3. THE ALLOCATION OF LIMITED PUBLIC RIGHTS FROM THE PERSPECTIVE OF THE EU LEGISLATOR

1. Introduction

This contribution deals with the allocation of limited public rights by authorities in the EU member states – an issue that touches upon the core business of the EU legislator. On the one hand, the allocation of such rights by public authorities in the member states has the potential to do serious damage to the common market. On the other hand, the proper allocation of such rights could contribute to an efficient allocation of scarce resources and thus to the overall welfare of EU citizens as well as to a host of other EU policy goals. Despite these incentives to regulate, general rules on how member state authorities should allocate limited rights are mostly lacking. Only the allocation of specific rights is regulated in any detail. This contribution explores the reasons the EU legislator has to intervene in the allocation of limited rights by the authorities of the member states, or to refrain from intervening, and addresses the question of whether the EU legislator should adopt a more active approach to the issue. The allocation of limited rights by the EU institutions themselves falls outside of the scope of this contribution.[1]

The role of the EU legislator in the discourse on limited rights has so far been modest. A lot of attention has gone to the Court of Justice, which tends to say interesting things on the matter.[2] But one would certainly expect limited rights to pique the interest of the legislator as

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1 As far as European subsidies are concerned the interested reader is referred to the chapter by Van den Brink in this book.

2 On the award of service concessions see e.g. Case C-260/04, *Commission v. Italy* [2007] ECR I-7083. On the award of licences required to provide services see joined cases C-203/08 and C-258/08, *Betfair/ Ladbrokes* [2010] ECR I04695; Case C-64/08, *Engelmann* [2010] ECR I-8219; Case C-347/09, *Dickinger and Ömer* [2011] ECR I-0000. See C.J. Wolswinkel, 'The Allocation of a Limited Number of Authorisations,' (2009) 2 (2) *REALaw (Review of European Administrative Law)* 61, for a more comprehensive treatment of the status of EU law on the allocation of limited public rights that takes into account both secondary legislation the case law of the Court of Justice.

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well: EU law reflects a very outspoken view on how scarcity is best dealt with. Whether it is goods, services, or the labour and capital needed to produce them, the best way to allocate scarce resources is through a properly functioning, competitive market. It is one of the tasks of the legislator to develop this market, to the benefit of all EU citizens. Limited public rights are problematic in this philosophy, since they are not bought and sold on markets, but granted by public authorities who may have all sorts of nefarious, economically irrelevant reasons for their decisions. The manner in which they allocate resources might deviate considerably from how a perfect market would have done it, and no matter how well their intentions were, this will detract from efficiency. Yet, when we address the issue of limited rights from the perspective of the European legislator, we are confronted with two questions. We must look at the reasons it would have to regulate the allocation of limited rights in a particular manner – and the grating lack of efficiency that may result when the matter is left to the member states may play a role there – but in addition, we must consider whether it has the competence and the capacity to do so. The answers to these questions can vary with the nature of the allocated right, and appear to be responsible for at least some of the variation we see in the regulation of allocation procedures, especially with regard to the level of detail it contains.

In this article I will address i.a. the view of the EU legislator on when it is acceptable to artificially limit the number of public rights that are available, and how the subject of a limited right determines the intensity of EU regulation. I will touch upon how ceilings should be set, on whether there should be special rules for newcomers, and on various other issues that deal with the design of allocation procedures. A word of caution is in order though: the EU-legislator has not regulated these issues in any detail, and high-strung expectations about the insight it provides in these matters should be avoided. Nevertheless, its lack of activity is in itself telling, and attracts attention to a number of important issues with regard to the allocation of limited rights.

Below, I will set out to give an overview of the manner in which allocation procedures can be used to achieve a number of policy goals. I will then proceed to address the extent to which those goals are relevant to EU law. For some of these goals, the EU legislator might want to promote their realisation. For others, it may want to prevent the member states from doing so. After a short discussion of the competence of the EU legislator to achieve both these things, we will look at the manner in which it has regulated the procedures for allocating a number of resources. We will see how the policy goals that can be achieved through the allocation of certain public rights as well as the competence of the EU legislator appear to affect the level of regulation of the allocation procedure. After concluding that the EU legislator usually practices considerable restraint when legislating on the allocation of limited public rights, I will discuss shortly whether the current situation needs to be changed.

2. Allocating Limited Public Rights: What can be Achieved

Limited rights are a versatile tool in the hands of public authorities, both on the national and the European level. This is true both with regard to rights that are naturally scarce

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and those whose scarcity is artificial. The latter category are made scarce for a reason, and the scarcity itself is the effect of a policy choice rather than a given. Once the scarcity of the right has been established, the issue of how the limited right must be allocated is very similar. The value that limited public rights have to policy makers lies in their scarcity. The recipient of a limited right receives something that is of value to him, while others are left empty-handed, and that makes the ability to decide who will get such a right a powerful one. The allocation of limited rights opens the door to nepotism as well as confirmative action, but public authorities can also use more 'neutral' criteria, like first come, first serve, or have lotteries. Such neutral procedures ensure that the rights get allocated, but serve no additional policy purpose.[3] Because limited rights represent economic value, and because their exact value will tend to differ between potential candidates, public authorities also have the option to distribute them in what they think is the most economically efficient way. In other words, they can attempt to give rights to those candidates to whom they have the highest value. Normally, the market is the best way to achieve an efficient distribution of scarce resources: it effortlessly ensures that goods end up with those that value them the most, and that resources are used by those who create the greatest value from them – at least theoretically.[4] By mimicking the allocation that a perfect free market would arrive at, public authorities can ensure that the rights they distribute will contribute the most to the general welfare.[5] Mimicking a perfect market can be done in several ways, but it will always require some mechanism to establish the value a limited right has to potential recipients. One way to determine this is by measuring their willingness to pay for a public right, for example through an auction.[6] After all, the distinguishing characteristic of a market is that it ensures that goods end up with those who are willing to pay the most for them.[7] Alternatively,

3 Provided they are open to everyone, both in legal and practical terms. It is quite possible to design lotteries and first come, first serve systems that in practice result in nepotism. However, if a public authority consciously chooses one of these systems for the allocation of scarce rights, it should be indifferent to who gets the rights, as long as someone gets it.

4 The conclusion that markets lead to optimal efficiency is subject to a lot of conditions. Competition must be perfect, information must be complete, people must act rational, and there may be no externalities. In practice, these conditions never apply. R. Cooter and T. Ulen, *Law and Economics* (ed.), Pearson/Addison-Wesley, Boston 2004, p. 38. The argument that the market is the best means to allocate resources remains forceful though, mostly because we have no alternative means to determine how much people value things. See F. von Hayek, *The Road to Serfdom*, Routledge, London 1944, pp. 42–43 for a particularly elegant rendition of the argument. R. Cooter and T. Ulen, *Law and Economics*, 6th ed., Pearson/Addison-Wesley, Boston 2011, p.19. My purpose in this paper is not to argue with free market theory though. Suffice to say that many policy makers have embraced the idea that the market is the best means to allocate resources, at least in principle, including the EU.

5 Although one can argue that there is a market for limited rights, with public authorities being the suppliers and parties interested in acquiring the rights being the demand side, such a market does not come close to the perfection of the theoretical model. There is no competition on the supply side, often only limited competition on the demand side, information is far from complete, and actors will not necessarily act like one would expect from homo economicus.

6 Designing an auction in a way that accurately measures candidates' willingness to pay is quite the challenge though. E. Maasland, *Essays in Auction Theory,* dissertation, University of Tilburg, 2012, pp. 27, 30, 33, 63.

7 Cooter and Ulen 2012, p. 19.

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public authorities can attempt to assess the added value that a candidate will produce when the right is awarded to it. This will require it to design a comparative test to assess the merits of the plans that candidates have to make use of the public right, akin to the best value for money criterion used in procurement law.[8]

Although generally speaking markets produce the most efficient results, they do not always function perfectly,[9] and public authorities might want to design allocation procedures in a way that corrects these failures. Indeed, liberal authors traditionally hold the view that the state should only act to take care of a certain matter if the market fails, and then only if it has the ability to perform better than the admittedly flawed market.[10] If public authorities adhere to this adage, and design their allocation procedures to improve on the outcome produced by a failing market, efficiency is still the goal. The difference is that public authorities try to improve upon the outcome of the market rather than that they only try to copy it. Allocation procedures can help to circumvent market failures in a number of ways. If in a particular market producers need public rights to be able to make their product – like radio stations need frequencies to be able to make programmes – it will be difficult to enter the market for newcomers. Competition will be imperfect[11] and existing market players may be able to gather rent, a premium on market inefficiencies that does not represent any added value.[12] Public authorities that allocate such rights can try to gather this rent for themselves. This requires a procedure where rights are sold by public authorities, such as an auction.[13] Another way to tackle the problem of limited competition is to divide rights over a relatively large number of market actors. By making sure there are a sufficient number of players on the supply side, the public authority can promote a competitive market, whereas when they allow one player to buy all available rights, they create a monopolist who can then proceed to charge monopoly prices to his customers. Public authorities can also design allocation procedures in a way that enables or actively promotes newcomers to enter a market. They will be most likely to attach importance to this when the performance of current market players is unsatisfactory. The possibility of new entrants in a market is necessary to ensure competition, to keep prices low and quality high and to ensure innovation.[14] If any of these things appear to be lacking, new players can give an impetus to the market.

All too ambitious public authorities should restrain their enthusiasm though. Neither mimicking the market nor correcting its failures is easy. The market in practice falls

[8] See the chapter by Jansen.

[9] Cooter and Ulen 2012, pp. 39–42.

[10] R. Posner, *Economic Analysis of Law*, 6th ed., Aspen Publishers, New York 2003, p. 50.

[11] Normally, new entrant will be attracted to a market where prices are high and profit margins larger than usual. The increase in supply will cause prices to fall until they reach the normal level. R. Cooter and T. Ulen 2012, p. 28. If entry is difficult, this mechanism will fail.

[12] See, D.M. Ricci, 'Fabian Socialism: A Theory of Rent as Exploitation,' (1969) 9 (1) *Journal of British Studies,* 105, 106, who uses the straightforward formulation that rent allows one to get something for nothing.

[13] Maasland 2012, p. 10, 94.

[14] Cooter and Ulen 2012, p. 28.

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short of realising efficiency, but governments should not assume they can do better. How could they, with their limited knowledge and resources, establish the value of goods and services any better than the market can?[15] To illustrate the difficulty in figuring out how to design an allocation procedure I refer to Maasland, who shows in detail how complicated it is to properly design an auction procedure that will answer the government's needs. Also noteworthy is that the proper design will in part depend on the specific characteristics of a market, which can vary through time and place.[16] This means there is no one right way to auction these rights, but that procedures must be designed for a specific case to maximise their contribution to the realisation of public policy goals. Details like the number of rounds in which to bid or whether and when the number of participants in auction is announced before the bidding take place can have a great impact on the outcome of the procedure.

Limited rights are more than just tools to improve efficiency. They can also present public authorities with a means to gain revenue.[17] They can sell the rights. They can even create artificial scarcity and then attempt to make money from that, e.g. by limiting the number of licences available to super markets for Sunday openings and selling them to the highest bidder. Artificial scarcity can also be used to restrict a harmful activity, or one that is harmful in large quantities, such as the running of gambling joints or CO_2 emissions. This goal is achieved by setting a proper ceiling, and the design of the allocation procedure need not be affected by it. Alternatively, public authorities can try to reduce the harmfulness of an otherwise necessary activity by awarding rights to the least harmful candidate or candidates. This requires artificial scarcity, and thus a ceiling, but also requires a procedure to select the candidate who is best able to reduce harm, or in other words, has low costs associated with reducing harm. In the long run, such policies may result in innovations that limit the harm associated with the activity even further.[18]

Allocation procedures can also be used to favour certain groups, and as said they offer an opportunity for both nepotism and confirmative action. This allows them to be used for a wide range of policy goals. Subsidies for innovative entrepreneurs could be awarded to women only. Access to radio frequencies could be reserved for stations that cater to the needs of certain minorities. Disabled and elderly people could be given priority when dividing parking licences. Such measures necessarily detract from efficiency. The innovation subsidy will not go to a male entrepreneur, even if his innovations would

[15] R. Posner, *Economic Analysis of Law*, 6th ed., Aspen Publishers, New York 2003, p. 50 argues that governments should refrain from acting if they are not sure they can improve upon the outcome achieved by the market, even if they know this outcome is less than efficient.

[16] Maasland 2012.

[17] Maasland 2012, p. 92.

[18] C. Kettner, A. Köppl and S. Schleicher, 'The EU Emission Trading Scheme: Insights from the First Trading Years with a Focus on Price Volatility', *WIFO Working Papers no. 368*, 2010, argue that the lack of real scarcity under the first phase of the European emission trading system resulted in a lack of incentives to invest in technologies to lower emissions. High prices on the other hand would have provided such an incentive.

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contribute much more to society. The minority station might take the frequency of a potentially highly successful radio station that would have been able to generate triple the advertising income and would have many more listeners. But even though these approaches may not be the most efficient way to allocate resources, they can certainly be justified. A particularly ill-advised strategy on the other hand, is to use limited rights to favour one's own nationals. Although such a policy would initially give domestic players a competitive edge, and benefit the national economy at the expense of that of other countries, in the long run those other countries are likely to retaliate by favouring their own domestic industries.[19] Eventually, all economies will suffer. Even if all countries know that this is true, it unfortunately still makes sense for a state to favour its domestic industry. If other states do not favour their domestic industry, they are the only state that does so and it will benefit their domestic industry. If other states discriminate as well, their economy will suffer less if they favour their domestic industry than if they are the only state that does not. Hence, states are confronted with a coordination problem: even if they agree to act in their mutual benefit and refrain from supporting their domestic industries, there is always an incentive to be the first, and hopefully the only one, to break the agreement. To prevent this from happening, a neutral third party should oversee their behaviour.[20]

So, although discrimination against non-nationals is not the best of ideas, public authorities can still use allocation procedures for a variety of purposes. They can try to achieve an efficient allocation of the public rights they must divide. They can try to create competitive markets. They can try to enable newcomers to enter a market. They can favour particular groups. They can try to make money from selling off public rights. They can try to reduce the harm associated with certain activities. They can even try to favour their domestic industries at the expense of foreign economies, although the attempt is probably doomed to fail. But although allocation procedures can contribute to all these things, the different goals are not necessarily compatible. Maximising the revenue gained through an auction requires a different kind of auction than creating a competitive market for example, because suppliers would be willing to pay most for a monopoly.[21] Likewise, maximising efficiency is at odds with confirmative action. Public authorities will need to set their priorities and design a procedure accordingly. To maximise the contribution that an allocation procedure can make to the policy goals the public authority has settled on, it has to design the specifics of the procedure taking into account the current circumstances on the market as well as the nature of the right. It is clear then that limited public rights are a versatile policy tool, and any legislator worth his salt should show a keen interest in them. They are also a delicate tool: although public

19 H.W. Friederiszick, L.H. Röller and V. Verouden, 'European State Aid Control: an economic framework' in P. Buccirossi (ed.), *Handbook of Antitrust Economics*, MIT Press, Cambridge Mass. 2007, explain the mechanism in the context of state aid, but it is valid for all measures that favour domestic undertakings at the expense of foreign ones.

20 Friederiszick et al. 2006.

21 Maasland 2012, p. 92 shows that auctioneers may elect to select only a happy few to ensure they collect enough revenue.

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authorities can achieve many things through the way in which they allocate limited rights, the details in the design of their procedure will determine whether they succeed.

3. EU Law and the Allocation of Limited Public Rights

Limited rights are relevant to all jurisdictions, but perhaps even more to the EU legislator, due to its focus on the internal market. The EU legislator is concerned with many things, from monetary policy to agriculture to gender equality and human rights. Originally though, the EU was an economic project, and the purpose of creating a common European market has shaped much of what it has done, and of what it is doing. The internal market is a strong force in European law, as well as a reason to take legislative action, as reflected in Article 26 TFEU, which assigns the Union the task to adopt measures with the aim of establishing or ensuring the functioning of the internal market. The internal market, one without barriers to intra-community trade, is not a goal in itself though. It is to lead to prosperity for all EU citizens, and is believed to lead to a higher standard of living, harmonious economic development, and to promote closer relations between the member states.[22] The belief that a properly functioning market leads to an efficient allocation of resources, and to welfare for all, is reflected both in provisions that prohibit interference in that market, like the free movement rules and the prohibition of state aid, and the competition rules, that aim to prevent the market failures of monopoly and oligopoly.[23]

When we keep in mind how limited rights can be used, or, from the EU perspective, abused, the relevance of those rights for EU law becomes clear. In the previous paragraph we saw that the allocation of limited rights can have an effect on the internal market. It can either help that market to function more smoothly, or interfere with it. From the perspective of the internal market, allocation procedures that mimic the market or aim to correct market failures resulting from limited competition are to be valued positively. Allocation procedures that favour particular groups are suspect, because they interfere in the functioning of the common market. However, it is well-established that such interferences may be justifiable. Allocation procedures that favour the nationals of one of the member states are anathema to EU law. Artificially induced scarcity is a trade barrier, and may be problematic under the free movement rules, but again, such barriers may be justifiable.[24] Legislation that aims to ensure the functioning of the internal market would thus be either legislation that attempts to prevent that allocation procedures hamper the internal market or that clarifies when such allocation procedures are justifiable, or legislation that promotes allocation procedures that work in concert with

[22] See P. Craig and G. De Búrca, *EU Law: Text, Cases and Materials,* 4th ed., Oxford University Press, Oxford 2007, pp. 10–11.

[23] Craig and De Búrca 2007, p. 11.

[24] See also Wolswinkel 2009, p. 65, who qualifies artificially limited authorisations as quantitative restrictions in the meaning of Article 28 EC, now Article 34 TFEU. However, authorisation systems as such already qualify as a restriction of one of the treaty freedoms, p. 69.

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the internal market to achieve an efficient allocation of resources. Additionally, there might be legislation on when artificial scarcity is acceptable.

On the other hand, although these matters are relevant for EU law, not all of them need to concern the legislator. We already know that barriers to the free movement of goods, services, labour and capital are in principle prohibited under primary EU law. We know that exceptions to this prohibition can be justified under the Treaty or under the rule of reason. Likewise, discrimination of non-nationals is already prohibited. Allocation procedures that favour domestic candidates thus violate primary EU law.[25] We already know, thanks to the Court of Justice, that allocation procedures have to comply with the principles of equal treatment, transparency, and objectiveness to ensure that they do not disturb the market.[26] Still, not all issues have been resolved: it is not always clear what is required in concrete cases to ensure compliance with those principles. If the legislator would draw up more detailed rules, it could bring an end to a lot of insecurity.

As with any legislator, the EU legislator can consider allocation procedures for limited rights to be a policy instrument in the hands of the EU institutions, which can use them to correct market failures or achieve a number of other goals in the fields of social, cultural, or environmental policy. This can provide an additional incentive to regulate allocation procedures when doing so can contribute to the realisation of some other policy goal, in addition to concerns for the market.

4. The Competence of the EU Legislator

The allocation of limited rights is an important policy tool that is both versatile and delicate. Allocation procedures can work in concert with the common market, or they can interfere with its proper working. Especially allocation procedures that favour nationals have the potential to do serious harm to the internal market. The EU legislator, whose goal it is, i.a., to increase the overall welfare of European citizens through the completion of the internal market, clearly has reasons to regulate such procedures. This holds true for all procedures that have the potential to affect the internal market, and more so for those procedures that can be used to accomplish policy goals that fall under the competence of the EU. But even though the EU may want to legislate about the allocation of limited public rights, this does not necessarily mean it has the competence to do so. Its powers are limited by the principle of conferred powers, so that it can only legislate on an issue if the Treaties confer the power to do so.[27] Even when the EU has the power to legislate on a given subject, it is still bound by the principles of subsidiarity

[25] For an overview of the obligations that must be complied with when allocating limited rights that follow from primary EU law, see F. Wollenschläger, 'EU Law Principles for Allocating Scarce Goods and the Emergence of an Allocation Procedure' (2015) 8 (1) *Review of European Administrative Law* 205, 256.

[26] E.g. Case C-496/99, P *Succhi di frutta* [2004] ECR I-3801; Case C-470/99, *Universale Bau* [2002] ECR I-11617; Case C-458/03, *Parking Brixen* [2005] ECR I-8612.

[27] Article 5(1) TEU.

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and proportionality.[28] This means that in fields where the EU shares its competence with the member states, it may only act if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.[29] In addition, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.[30]

The shared competences that the principle of subsidiarity applies to can be found in Article 4(2) TFEU. Clearly, the issue most relevant here is the internal market, but the EU also shares with the member states the competence to regulate on the environment, and on social policy. Since the allocation of limited rights has the potential to disturb the functioning of the internal market as well as to enhance it, the competence of the EU legislator is a given. In addition, it would be competent to legislate on limited rights for other purposes, such as environmental protection or the emancipation of vulnerable groups. That does not mean it gets a free pass to do as it pleases though. Because we are talking about shared competences, the member states can pass legislation on these subjects as well, and because the principle of subsidiarity applies, the EU can only regulate if national regulation is insufficient and the EU legislator can improve on the situation. Because it is also bound by the principle of proportionality, the EU legislator should practice restraint when legislating on the allocation of limited rights. Allocation procedures are an important tool for the public authorities in the member states, and detailed regulation on the EU level will rob them of a useful policy instrument. Thus, EU law should not be so restrictive that the member states are hampered in their ability to make policy in those areas that fall under their competence, provided their goals are justifiable and their means proportionate.

Thinking back to the policies that can be pursued through the allocation of limited rights, I would argue that one issue falls clearly within the competence of the EU, without further arguments needed. This is of course the prevention of member states adopting the beggar-thy-neighbour approach. Because national governments will always have an incentive to adopt this policy, the prevention of the destructive cycle of discrimination is best done at the EU-level.

As regards the other policy goals that public authorities may pursue through allocation procedures, the matter is less clear. Although the EU is competent to further improve the internal market, and to regulate on social and environmental issues, the argument that these matters are better regulated at the EU level than at the national level cannot be made in general. The EU legislator will always be competent to regulate the allocation of limited rights in a way that promotes the functioning of the internal market, but it can only do so when it notices a problem that the member states are unable to

28 Article 5(1) TEU.

29 Article 5(2) TEU. See also A. Buijze, 'Shared regulatory regimes through the lens of subsidiarity: Towards a substantive approach' (2014) 5 *Utrecht Law Review* 67, 79.

30 Article 5(3) TEU.

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resolve. If there is no existing shortcoming, the EU legislator cannot act.[31] Whether it can act to realise policy goals that are not directly related to the internal market will depend both on whether it is competent in respect of the subject of a particular right as well as on its ability to identify an existing shortcoming that the member states fail to resolve. Because allocation procedures can serve so many different goals, some of them simultaneously, all of them justifiable, and because the design needed to accomplish these goals will in part depend on local circumstances, the starting point perhaps should be to give member states some space to make their own choices. Much will depend on the specific rights, and the purposes that are to be served by their allocation.

5. EU Legislation on the Allocation of Limited Public Rights

Based on the previous paragraph, one would expect to see some variety in the manner in which the allocation of limited rights is regulated. Across the board, one would expect to see an emphasis on regulation aiming to ensure non-discrimination. In particular areas, where more far-reaching EU interference can be justified, we may see more detailed regulation with specific aims. Below, I will shortly address the regulation in the fields that take centre stage in part III of this book: gambling licences, CO_2 emission permits, and radio frequencies – or at least, the division of scarce resources under the telecom directives. In addition, and because regulation on gambling licences is in fact non-existent, I will discuss the services directive.[32]

5.1. Gambling Licences and the Services Directive

The case law of the Court of Justice on the issuing of gambling licences has provided much input for the debate on limited public rights.[33] However, the judgments of the Court have been based on primary EU law, in particular Article 57 TFEU and the principles of equal treatment and transparency.[34] The legislator has not contributed much to this debate.[35] Indeed, gambling licences fall outside of the scope of the Services Directive, which is otherwise concerned with issuing licences to provide services. Because gambling is a sensitive area, where member states try to balance public health, public security, and economic interests, while trying to battle money laundering and the like, the restraint of

[31] J. Wuermeling, 'Draft Constitution of the European Union: the new division of competences,' in H.J. Blanke and S. Mangiameli (eds.), *Governing Europe Under a Constitution*, Springer, Berlin 2006, p. 298, 302.

[32] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36.

[33] See the chapter by Van den Bogaert and Cuyvers in this book.

[34] See Betfair/Ladbrokes cited above. Note though that the Court leaves ample room to the member states to decide on the exact details of the procedure, as long as they comply with the principles of equal treatment and transparency.

[35] This will probably not change soon. The Commission concluded there is no support for EU-wide regulation of the issue. Commission Communication of 23.10.2012, 'Towards a comprehensive European framework for online gambling,' COM 2012 (596) final.

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the legislator is perhaps understandable: the obligation to observe primary EU law is in itself enough to ensure that discriminatory practices are prohibited. The exact manner in which to achieve this, and how to reconcile it with the other policy goals the member states may have in regulating their gambling markets, is perhaps best left to national governments.

The Services Directive, which aims to further open up the internal market for services, does contain a specific regime for limited rights. Article 12 is concerned with the situation where the number of authorisations available for a given activity is limited. The procedure for the selection of candidates must provide full guarantees of impartiality and transparency, including, in particular, adequate publicity about the launch, conduct and completion of the procedure. Paragraph 2 prohibits authorisations for an unlimited period as well as automatic renewals, as well as any other advantage conferred on a service provider whose authorisation has just expired as well as any person having any links with that provider. This provision goes a bit further than merely ensuring non-discrimination or equal treatment, since it explicitly promotes competition amongst service providers. Nevertheless, member states are free to reconcile this purpose with other policy goals, since allocation procedures may, according to paragraph 3, take considerations of public health, social policy objectives, the health and safety of employees or self-employed persons, the protection of the environment, the preservation of cultural heritage and other overriding reasons relating to the public interest into account.

The Services Directive goes slightly further than only preventing discrimination, since it obliges the member states to promote competition – something they are not obliged to do when issuing gambling licences.[36] In addition, it gives rules about publicity, although these do not tell us much we did not already know. All in all, it remains very general, and the Directive leaves it to the member states to design specific allocation procedures. The legislator has not availed itself of the opportunity to specify in any detail what compliance with the principles developed in the case law requires.

Article 12 of the Services Directive refers only to situations where the number of authorisations is limited because of the scarcity of natural resources or technical capacity.[37] The Directive gives no extensive answer as to when artificial scarcity is allowed, and only limited guidance on how procedures to allocate artificially scarce rights should be designed. Artificial scarcity is certainly an option. The case law of the Court of Justice makes it clear that justifications for such a policy can exist, recital 62 of the preamble to the Services Directive ensures Article 12 does not prevent member states from limiting the number of authorisations for reasons other than scarcity of natural resources or technical capacity, and Article 11(1)b of the Services Directive makes explicit reference to the situation in which the number of authorisations is limited by an overriding reason relating to the public interest.

[36] The Court of Justice leaves this option open in its *Betfair* judgment.

[37] See Wolswinkel 2009, p. 84–87 for an extensive treatment of the relation between technical or natural scarcity and artificial scarcity under the Services Directive.

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Limited authorisation schemes of this kind do not fall under the scope of Article 12, but they must still comply with a number of requirements. Article 9 provides that member states can only require that service providers have an authorisation for providing a particular service when such schemes are not discriminatory and are justified by an overriding reason relating to the public interest. Such authorisation schemes must moreover be proportionate, meaning that the objective cannot be attained by a less restrictive measure. Because a limited number of authorisations is more restrictive than the requirement to have an authorisation as such, the justification for such a system will need to be convincing. Allocation procedures for artificially limited rights will also have to comply with Article 10 of the Directive, meaning they must be non-discriminatory, justified by an over-riding public interest, proportionate, clear and unambiguous, objective, made public in advance, and transparent and accessible. In addition, according to Article 15, member states must examine any quantitative restrictions to the provisions of services that exist in their national legal systems, and ensure that they are non-discriminatory, necessary and proportionate. These broad criteria offer slightly more wiggle room to the member states than those in Article 12. In particular the obligation to issue limited authorisations for a limited period of time does not seem to apply. Whereas Article 12(2) prohibits authorisations for an unlimited period and automatic renewals in situations of natural scarcity, Article 11 allows for an exception to the obligation to issue authorisations for an unlimited period of time if a limited number of authorisations are available because of an overriding reason related to the public interest.

5.2. CO_2 Emission Permits

In the case of CO_2 emission permits, matters are quite different. In this field, we find detailed regulation on how the member states should allocate rights,[38] and the EU reserves some competences in relation to the procedure for itself. I will not discuss the procedure for allocating emission rights in great detail, others have already done that.[39] Rather, I will attempt to illustrate the relation between the level of detail of the Regulation and the goal the EU legislator was trying to achieve in combination with its competence to do so in the face of the inability of the member states to tackle this issue.

The EU has a shared competence when it comes to environmental protection. It is 'to preserve, protect and improve the quality of the environment, to contribute towards protecting human health, and to ensure a prudent and rational utilization of natural resources,' subject to the principle of subsidiarity.[40] Thus, the EU can only act if this goal cannot be achieved at the national or local level, and if it is itself better able to achieve it. With regard to CO_2 emissions, there is a broad consensus that individual nations are ill-

[38] Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community [2009] OJ L140/63 and Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC [2003] OJ L275/32.

[39] See the chapter by Rønne for a more comprehensive overview of the CO_2 emission trading system.

[40] P.P. Craig, *EU Administrative Law,* 2nd ed., Oxford University Press, Oxford 2012, p. 11.

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suited to resolve this problem. The EU legislator itself promotes the view that the reduction of CO_2 emission levels that it has committed to under the Kyoto protocol can only be achieved through a scheme operated with the highest possible degree of economic efficiency and on the basis of fully harmonised conditions of allocation within the Community.[41] The solution the EU has chosen, a Union-wide system of emission rights trading, most certainly needs to be created on the EU level. As I will argue below, the member states are probably unable to reach the desired reduction on their own, if only because they have a powerful incentive to give too many emission rights to their own nationals. Thus, it is only proper that the EU sets the ceiling. However, the manner in which they must allocate the rights given to them is also heavily regulated to ensure that the necessary reductions are achieved in the most efficient manner possible. Hence, the primary goal of reducing emissions is married expertly to the all-pervasive concern for an efficient market. The goal of the Directive is to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner,[42] and the manner in which emission rights must be allocated must create this efficiency.

The member states have significantly less freedom to design their own procedures. The EU sets the ceiling, and determines the level of emissions for each country.[43] This is a textbook case of a competence that is better exercised at the supranational level. If member states are to set emission levels themselves, they will be tempted to free ride and set the emission levels for their national industry too high. They know this will matter little if all others comply. The impact of their transgression on the total level of emissions will be limited, they will still profit from the lower emission levels, and their national industry gains a competitive edge. If others do not comply, they will not want to hamper their national industry by imposing restrictions on them that will do no good anyway, because other member states retain high emission levels. So, independent of the behaviour of all the others, member states will have an incentive to set the emission level too high. This danger is not merely theoretical, as shown by the first periods of emission trading.[44] Because there were too many emission rights to begin with, their price was low, and the trading system did not really work. The EU legislator had good reasons to be convinced it was acting in compliance with the principle of subsidiarity when attributing the power to set the ceiling to the Commission.

The allocation of emission rights is regulated as well, and should take place through a fairly complex system of grandfathering cum auction. In addition, rights are tradable. The EU legislator has decided on auctioning as the basic principle for allocation, because 'it is the simplest, and generally considered to be the most economically efficient system.' It should 'eliminate windfall profits and put new entrants and economies growing faster than average on the same competitive footing as existing installations.'[45] The manner in

41 Para. 15 of the preamble to Directive 2009/29/EC.
42 Directive 2009/29/EC, para. 1 of the preamble.
43 Directive 2009/29/EC Article 9.
44 Kettner et al. 2010, p. 1.
45 Directive 2009/29/EC, para. 15 of the preamble.

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which auctions should be organised is further defined in a separate regulation adopted pursuant to Article 10(4).[46] More detailed rules are probably quite welcome to the member states, who see themselves confronted with the task of designing auctions that ensure that operators, in particular any SMEs covered by the Community scheme, have full, fair and equitable access, that all participants have access to the same information at the same time and that participants do not undermine the operation of the auction, that the organisation and participation in auctions is cost-efficient and undue administrative costs are avoided, and that access to allowances is granted for small emitters.[47] The EU legislator has also addressed the issue of new entrants. It decided to harmonise this issue 'in order to maintain the environmental and administrative efficiency of the Community scheme,' and 'to avoid distortions of competitions and the early depletion of the entrant's reserve.'[48]

As said, the EU legislator justifies these fairly intrusive rules with the argument that the only way in which the Union can meet its obligations under the Kyoto agreement is to reduce emissions in as efficient a manner as possible. If the goal is to be achieved at all, there is only one way of doing it: the Directive's way.

5.3. Radio Frequencies and the Electronic Communication Directives

As regards the division of radio frequencies, the EU legislator is once again practicing restraint.[49] Deciding on the best way to allocate these resources is not a simple feat, as evidenced by some of the other contributions in this book. EU law provides only limited guidance. Article 9(1) of the Framework Directive[50] requires that the allocation and assignment of radio frequencies for electronic communication services are based on objective, transparent, non-discriminatory and proportionate criteria. The details are not expanded upon in the Directive. Likewise, Article 5(2) of the Authorization Directive[51] requires that rights of use of radio frequencies to providers of radio or television broadcast content services shall be granted through open, transparent, and non-discriminatory procedures, and if the number of rights of use to be granted for radio frequencies is limited, again these rights should be granted on the basis of selection

[46] Commission Regulation (EU) No. 1031/2010 of 12 November 2010 on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances pursuant to Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowances trading within the Community [2010] OJ L302/2.

[47] Directive 2009/29/EC Article 10(4).

[48] Directive 2009/29/EC para. 16 of the preamble.

[49] See the chapter by Oberst in this book for a more detailed treatment of the allocation of radio frequencies.

[50] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) [2002] OJ L 108/33.

[51] Directive 2003/87/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services [2003] OJ L 108/21.

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criteria which must be objective, transparent, non-discriminatory and proportionate.[52] They must also take into account the achievement of the objectives mentioned in Article 8 of the Framework Directive, i.e.: promoting competition in the provision of electronic communications networks, electronic communications services and associated facilities and services; contributing to the development of the internal market; and promoting the interests of the citizens of the EU. The inclusion of these elements that must be taken into account when designing an allocation procedure means the telecom Directives go a little further than the Services Directive. When allocating frequencies, service obligations, or authorisations, public authorities must heed the goals of creating competition, promoting the internal market, and promoting the interests of the citizens. The latter point includes ensuring that all citizens have access to electronic communication services at a reasonable price.[53]

If the Member States decide to impose universal service obligations as per the Universal Service Directive,[54] the addressee of the obligations must be assessed in an open, transparent and non-discriminatory procedure. This obligation is commemorative of the principle of transparency as it has been developed in public procurement law and in relation to service concessions.

The allocation of radio frequencies and other scarce resources under the telecom Directives has to take different objectives into account, and must balance social interests against the interest in having a competitive internal market. In this respect it is not so different from the allocation of emission rights. The difference in the manner in which the allocation procedure is regulated is significant though. The telecom Directives only provide a number of principles that must be observed, and a number of goals that must be taken into account. It is left to the member states to balance these goals, or at least to determine what procedures are best suited to achieve those goals in their national market. There is not one right way in which to achieve a goal that is shared by the Community as a whole. Instead, the EU legislator shows restraint, and allows the member states to adapt allocation procedures to their national circumstances. The reason for the restraint practiced by the EU legislator can be found in the principle of subsidiarity. The telecom Directives, like most EU regulation, attempt to improve the functioning of the market. In addition, they aim to ensure that all EU citizens have access to reasonably priced communication services. The latter goal differs from the reduction of CO_2 emissions: there is no evident reason why it cannot be accomplished at the national level, without the EU legislator stepping in to give detailed rules about how it should be done.

52 See also Article 4(2) of Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services [2002] OJ L249/21 (the Competition Directive) which requires such decision to be based on objective, transparent, non-discriminatory and proportionate criteria.

53 See para. 4 of the preamble to the Framework Directive, as well as the Universal Service Directive.

54 Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) [2002] OJ L108/51.

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Nor would anyone make the argument that the only way to achieve a basic level of service provision is through a flawless, optimally efficient, EU-wide market. Indeed, the tenet of the telecom Directives appear to be that the EU legislator recognises that the member states are better able to assess the circumstances on their national markets, and to determine what concrete measures best serve the purposes of the Directives.[55]

6. Conclusions

We have seen that the allocation of limited rights is a versatile and delicate policy tool. Limited rights can be used to achieve a variety of policy goals, some of them laudable, some of them less so. Public authorities can distribute limited rights in a manner that contributes to the overall efficiency of the economy and maximises welfare, or to the resolution of market failures. They can use them to stimulate the economic development of vulnerable groups or as a trade barrier against foreign undertakings, or they can simply sell them to earn money. A number of these goals can be achieved simultaneously, others conflict. Whether and to what extent a particular allocation procedure contributes to the realisation of a given policy goal will depend on the details of its design as well as the circumstances on the market.

The EU legislator has two reasons to be interested in the allocation of limited public rights. First, allocation procedures can interfere with the proper functioning of the market, especially when rights are awarded pursuant to discriminatory criteria. Second, the EU legislator may want to use limited rights as an instrument when it is trying to give effect to EU policy. In either case, it is limited by the principles of conferred powers, subsidiarity and proportionality. It may only enact legislation on a particular subject when the competence to do so has been given to it in the Treaties. It can only use this competence when the member states fail to resolve an issue on the national level, and when it can provide a better solution than they can. Even so, its legislation cannot go any further than is necessary to achieve that particular goal. The most important competence in regard to limited public rights is the EU's power to legislate on the internal market. However, environmental protection and social issues, areas where it also shares legislative competence with the member states, can be relevant as well.

Because limited public rights have economic value, their allocation invariably has the potential to affect the internal market. Thus, the EU legislator is always competent. From the perspective of the internal market, there is one worst way to allocate limited rights: they should never be used to favour nationals over non-nationals. Not only do such practices interfere with the market at the expense of non-nationals, in the long run they

[55] The downside of this approach is that the completion of the internal market is delayed. The Commission has issued a proposal for a new regulation to finally realize a single market for electronic communication services. Proposal Com 2013 (627) of 11.09.2013 for a Regulation of the European Parliament and of the Council laying down measures concerning the European single market for electronic communications and to achieve a connected Continent. However, the guidance provided on how to allocate limited rights remains scarce.

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are also harmful to the national economy itself. In other words: they do not achieve their goal, and the economy of the EU as a whole suffers from such practices. Because national authorities have an incentive to engage in these practices despite their destructiveness, the competence of the EU legislator to resolve this issue is a given. However, discriminating against non-nationals is already prohibited in primary EU-law. The Courts have played an important role in applying this principle to the allocation of limited rights, and the role of the legislator in this respect has been modest.

The internal market benefits most from one particular way of allocating limited rights. The 'best' way to allocate rights, when by 'best' we mean most efficient, is to give them to those candidates who value them the most, measured by their willingness to pay, or their ability to generate profit from them. Such a division mimics the one a perfect market would arrive at, is the most efficient, and therefore best in terms of general welfare. But although the internal market points in the direction of allocation procedures that emphasize efficiency and contribute to competition, EU law does respect the fact that the allocation of limited public rights can also serve other goals, and these goals have to be balanced against the interest in efficiency. These goals may be relevant to the EU as a whole, but they might as well vary between member states. Even when the goals are clear, the manner in which an allocation procedure works out will in part depend on the circumstances of what might well be a national or regional market, and the member states will often be better able to decide on how to design allocation procedures in the manner that achieves these goals best than the EU. In accordance with the principle of subsidiarity, the EU legislator leaves these tasks to the member states and only steps in when he deems primary EU law to be insufficient for some reason.

Even when there is additional regulation, this will often be general. The Services Directive and the telecom Directives suffice for the most part with identifying a number of principles that allocation procedures must comply with. The Services Directive contains a small number of slightly more concrete obligations, and the telecom Directives identify a number of goals that must be taken into account when designing allocation procedures. Even so, the exact details of the procedure are left to the authorities of the member states. Again, although the EU legislator prescribes a number of goals that must be taken into account, it appears to recognise that national authorities are in a better position to balance these goals, or at least to assess the relevant circumstances on their national markets that would warrant this allocation procedure or that.

The EU legislator does not contribute much on the issue of artificial scarcity. Limiting the number of public rights that are available is allowed under EU law, although such limitation will have to comply with a number of criteria. The EU legislator has not provided much detail on when a system like that will be justifiable. It does recognise the usefulness of artificial ceilings, as evidenced by its use of them in the field of emission trading. Indeed, CO_2 emissions show us that the EU legislator will take it upon itself to set an appropriate ceiling if it feels the member states themselves are unable to do so.

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Occasionally, the EU legislator does provide detailed regulation. Emission rights are once again a prominent example. Here, the EU legislator argues that the only way to realise sufficiently low emission levels is through the relatively uniform system it has imposed. It has taken firm decisions on what it considers the most efficient way to allocate these rights, and has expanded considerable time and energy on designing detailed rules that auctions must comply with. I would argue that the importance of such regulation for the allocation of rights that do not fall under its scope is fairly limited. The emphasis on efficiency is only justified because it is required to achieve environmental goals, not because an efficient internal market is in itself a requirement, and the rules for the design of the auction procedure depend on the particular right involved and the characteristics of the market for that right. Neither the demand for highly efficient procedures nor the design details that are to achieve this efficiency can be easily transferred to other fields. I expect the approach where the EU legislator practices restraint and leaves it to national authorities to assess which allocation methods will get the best results given the circumstances they observe will usually be the wiser.

Unfortunately, such an approach does little to resolve the current confusion resulting from the case law on limited rights. Although I firmly believe that the member states should cherish the relative freedom they enjoy to design allocation procedures in a manner that allows them to pursue their own policies, as long as they comply with certain broad principles, I also know that it is far from easy to determine what these broad principles require in practice. When one sees the time and energy that is expended to design an auction to divide radio spectrum, it is hard not to doubt the ability of small local authorities to design allocation procedures that successfully merge the requirements from EU law with their own policy objectives. More detailed rules on the EU level are not the solution though. They would diminish the flexibility of allocation procedures, and hence member states' ability to pursue their own policy goals, as well as their ability to adapt procedures to local circumstances to maximise their contribution to both their own goals and those of the EU. I see two alternative solutions. First, the issue could be addressed by the national legislator. This would allow for some adaptation to local circumstances, but would still diminish flexibility. Alternatively, the Commission could issue guidelines on one or more basic procedures that comply with EU law, and that provide a safety net to public authorities that are at a loss as to how they should design an allocation procedure. That way, public authorities that do not have the resources to design a procedure from scratch could just pick one of the safe procedures, and rest assured that even though they have not optimised their procedure, at least they are complying with EU law.

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