

Limited Public Authorisations and Grants

What Bard, Betfair and BNR have in common

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1. Introduction

Governments are increasingly occupied with the allocation, in several policy areas, of the so-called 'limited public rights'. These rights, such as authorisations and grants, for which there are more applicants than the number of available rights are to be granted by the public administration. Typical of these rights is that a limit is determined beforehand to the number of the rights to be allocated. There can be numerous good reasons to do so: the range of emission rights is restricted to protect the environment; the number of pitches on a marketplace is limited because of the physical limitations of the area; the number of exemptions for so-called 'Sunday night stores' is limited in order to safeguard Sunday rest. Limiting the number of available public rights is therefore wise for various reasons, but may simultaneously give rise to a range of legal questions and issues. This can easily be illustrated by means of several recent examples in some key social areas.

Much attention was recently raised when the Dutch Minister of Economic Affairs granted a subsidy of billions of euros to the German company Bard for the construction of two new wind farms in the North Sea, to the disadvantage of the Dutch energy companies, amongst whom Eneco. They considered the tendering procedure to have been conducted improperly: according to them, Bard barely has any service record in this field and would not be able to financially complete the project. To underpin their arguments, the competitors required access to the documents of the successful application of Bard. However, neither Bard nor the minister were keen to release those documents. Litigation had to take place for this issue to be resolved.² Critique on the allocation procedure also arose from the political arena; more than half of the grant was provided under the Crisis and Recovery Act, which specifically aims to boost the Dutch economy. Instead of stimulating (Dutch) innovative techniques, a German company was now incited to supply green energy with existing technologies as cheaply as possible.³ This case could legally subsidise however, as Eneco, NUON and Bard proposed in a joint letter to the Dutch Minister of Economic Affairs, Agriculture and Innovation to grant the remaining budget to Eneco and

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² Cf. i.a. Vz. CBb (Board of appeals for business) 29 July 2010, AB 2010, 303, annotated by Van Rijn van Alkemade.

³ *Aanhangsel Handelingen II* 2009/10, nr. 3273.

NUON, in which case the appeals of the latter two companies against the subsidising of Bard would be revoked.⁴

Much attention has been given to the following example, which concerned a foreign company, Betfair, which wanted to qualify for a limited authorisation but was not granted the opportunity to do so. For years, the practice has existed in the Netherlands of automatic renewal of certain gaming authorisations. As a consequence, Lotto for instance has held the monopoly on organising sports betting since 1961. The Administrative Law Division of the Dutch Council of State,⁵ helped by preliminary rulings of the Court of Justice of the EU,⁶ halted this renewal practice recently because of a conflict with the freedom of establishment; other companies must also be given the opportunity to compete for obtaining these limited rights.⁷ This seems to have undermined the current method of allocation (extension) of limited gaming rights. Coincidence or not, only days before the judgement of the Administrative Law Division, the Justice and Security Secretary of State presented a long awaited memorandum detailing his proposal for a new gambling policy.⁸

Equally sensational in 2003 was the so-called 'Zero Base' allocation of nationwide FM frequencies through a comparative assessment of financial bid. Soon these frequency authorisations will reach the end of their term, which might renew the sensational chapter of frequency allotment. Instead, the Dutch Minister of Economic Affairs, Agriculture and Innovation offered the current authorisation holders, such as Sky Radio and BNR, the opportunity to renew their authorisations for a further six years under the condition that they contribute to the required digitisation of commercial radio.⁹ It is not surprising that this practice meets with objections from potential entrants, who had anticipated entering the radio market in 2011. The incumbent authorisation holders, however, are not entirely positive about this extension either as it will require some of them to pay a substantial amount of money.¹⁰ No doubt this issue will soon be submitted to the court.

Each of these current examples are in their own way part of a development that could be called the *economisation* of administrative law.¹¹ One of the reasons for this economisation is the growing influence of European law which traditionally focuses on competition in the common market. In the area

⁴ Letter of 24 March 2011, annex to *Kamerstukken II* 2010/11, 28982, no. 118.

⁵ Afdeling bestuursrechtspraak van de Raad van State, hereinafter ABRvS.

⁶ ECJ 3 June 2010, case C-203/08 (Betfair), *JB* 2010, 171, annotated by C.J. Wolswinkel, *NJ* 2010, 490, annotated by M.R. Mok below *NJ* 2010, 491, *AB* 2011, 17, annotated by A. Buijze and *SEW* 2011, 33, annotated by A.J.C. de Moor-van Vugt. See also P.C. Adriaanse, T. Barkhuysen and S. Van den Bogaert, 'Nederlandse kansspelregulering aan de Europese maat', *NJB* 2010, 1529.

⁷ ABRvS 23 March 2011, *LJN* BP8768.

⁸ Letter of 19 March 2011, *Kamerstukken II* 2010/11, 24557, nr. 124.

⁹ Cf. 'Regeling verlenging en digitalisering landelijke commerciële radio-omroep', *Stcrt.* 2011, 5064.

¹⁰ Sky Radio for example must pay a sum of 20 billion euros for its frequency for non-recent pop music, while BNR news radio does not have to pay at all for its frequency.

¹¹ See about this problem R.J.G.M. Widdershoven et al, *De Europese agenda van de Awb*, Den Haag: Boom Juridische uitgevers 2007, p. 205.

of allocation of limited rights, this Europeanisation appears first and foremost in European procurement law which has acted as a catalyst for the process of standardisation and allocation of limited *public* rights.

The allocation of limited public rights – in compliance with European principles such as equal treatment of applicants and transparent allocation procedures – proposes new problems for the legislative, the executive as well as the judiciary branches. Since many of these problems are not exclusively linked to a particular policy area but rather are typical for *any* allocation of limited rights by the government, we believe there is a need for a general legal approach to the issue of allocation of limited public rights.

In this article we will therefore discuss from a Dutch perspective (i.e. using Dutch legislation and jurisprudence), and on the basis of the three examples mentioned above, some problems that keep recurring in the field of allocation of limited public rights. With this we aim to give new impetus to our earlier first steps in developing a general assessment framework.¹² First, we will explain our definition of the allocation of limited public rights. Secondly, five highly relevant topics for the allocation of limited rights will be discussed, namely the ceiling (section 3.1), the subject of the allocation (section 3.2), the method of allocation (section 3.3), the applicable legal principles (section 3.4) and legal protection (section 3.5). Finally, in our conclusion, we will argue that a general examination of the doctrine of limited public rights is necessary to avoid the threat – under European pressure – of fragmentation of administrative law.

2. Terminology – the allocation of limited public rights

With the term *public rights* we address the rights which are granted by an administrative authority based on its statutory competence to do so. The main types of public rights are the authorisation and the subsidy (both in the broad sense). An *authorisation* in the broad sense covers any decision with which an administrative authority makes an exception to a statutory prohibition or injunction. It concerns various types of government approvals, such as concessions, authorisations (in the narrow sense), waivers and exemptions. A special subcategory of these government approvals are known in the jargon as *tradable permits*,¹³ with the specific property that they are (by definition) transferable: the possessor may transfer this public right to a successor, as with emission rights. As to *subsidies*, an administrative authority has the competence to grant funds by means of a decision. This does not concern government approval but rather government incentives or support. The question whether this difference in legal status – permission versus support – is relevant for the legal norms of the allocation of these types of public rights, will hereafter be discussed.

¹² Cf. F.J. van Ommeren, W. den Ouden and C.J. Wolswinkel, 'Schaarse publieke rechten: naar een algemeen leerstuk', in: *Schaarse publieke rechten*, Den Haag: Boom Juridische uitgevers 2011, p. 17-41. The following second chapter is derived from this publication.

¹³ In the line of the MDW-reports under this title (cf. *Kamerstukken II* 1999/2000, 24 036, no. 149 and 182), see also D.W.P. Ruiter, 'Verhandelbare publieke rechten', *NTB* 2001, p. 277-287, and F.J. van Ommeren, 'Verhandelbare rechten van publiekrechtelijke herkomst. Twee MDW-rapporten', *RegelMaat* 2002, p. 138

When are these public rights *limited*? As mentioned in the introduction, a public right is limited if there are more applicants than available rights. This definition suffices if an applicant desires or is able to acquire only one right. If an applicant however can acquire more rights, it is not the number of applicants but the total amount of applications which is of interest. Generally speaking, a *limited public right* exists if the sum of the number of applications exceeds the number of available public rights. Scarcity is therefore a relative notion that binds supply and demand.

Rights can only be limited if the number of permits that can be granted is limited in advance. Only then situations can arise where the total volume of applications exceeds the number of available rights. Limited public rights thus imply a maximum – in other words a *ceiling* – to public rights. A ceiling indicates the maximum number of rights that can be granted (within a given period).¹⁴ The extent of this ceiling is not in all cases revealed, as will be shown later.

When rights are limited, they should be allocated. This *allocation* may imply that each of the applicants are granted a part of these rights, or alternatively that certain applicants are granted one or more rights while others receive nothing. The outcome of the allocation depends on the chosen *allocation procedure*. The choice of a particular allocation procedure in turn should depend on the objectives that are intended with the allocation. Inherent to any allocation of limited public rights however, is the rejection factor: not every party can be completely satisfied. The allocation of one application implies a rejection of another application. This feature implies that an allocation decision by its nature is a dispute triggering one. Parties are simply not inclined to believe the allocation was fair if they did not receive what they sought for because the rights were given to another, especially given the fact that those rights often represent a (very) significant financial value.

3. A test of a general and systematic approach

3.1 The ceiling

A concrete allocation issue occurs only when the demand for public rights exceeds the supply of those rights. In other words: an allocation issue presupposes a ceiling. Therefore it must be assessed whether a ceiling should be set and, if so, at what level the ceiling should be set.¹⁵

Regarding the determination of a ceiling, from a perspective of legal certainty, it is explicitly determined that a ceiling for subsidies should be set by or pursuant to statutory provisions (see e.g. section 4:25 (1) of the Dutch General Administrative Law Act¹⁶). A subsidy ceiling brings about that a subsidy should be denied if by granting it the subsidy ceiling would be exceeded. Similar provisions for

¹⁴ For the definition of a permit ceiling, see F.J. van Ommeren, *Schaarse vergunningen. De verdeling van schaarse vergunningen als onderdeel van het algemene bestuursrecht*, oration VU University Amsterdam, Deventer: Kluwer 2004, p. 2 and 24. See also section 4:22 Awb: 'the maximum amount available during a given period for the provision of subsidies under a given statutory regulation'.

¹⁵ Without any doubt, the scope of a certain right, for example the frequency to which the permit applies or the (maximum) amount of the subsidy also is of importance.

¹⁶ In Dutch 'Algemene wet bestuursrecht', hereinafter Awb.

authorisation ceilings are lacking but the same line of reasoning should be followed: an authorisation ceiling with an imperative ground for refusal would have to be based on legal provisions.

From the subsidies chapter in the General Administrative Law Act one cannot make up *in which* cases a subsidy ceiling should be set. This competence is left to a special legislator. Nevertheless, to control public expenditure a subsidy ceiling is established in most cases. The size of this ceiling is mainly determined by budgetary considerations and political policy priorities; for instance the subsidy ceiling for offshore wind energy amounts to over 5.3 billion euros. Sometimes the size of the ceiling in authorisation policies is determined by the limited availability of the matter that the usage license relates to. The starting point, given the limited availability, will then be to make the number of available authorisations as large as possible. This principle resulted in a ceiling of nine national FM authorisations in the 'Zero Base' allocation in 2003. In other cases however, the starting point is to minimise the number of available permits, preferably to one. Such an 'exclusive authorisation' has been accepted in jurisprudence for several gambling games, as it simplifies control over the authorisation holder and in addition avoids competition between authorisation holders.¹⁷ Each ceiling therefore needs its own justification, which should be evaluated in the light of European non-discrimination requirements; justified by imperative reasons of overriding public interest, suitability and necessity.¹⁸

From the level of the ceiling follows how many applicants actually qualify for allocation of a limited public right. This is not to say that applicants missing out in the allocation procedure are forever banned from obtaining this limited right. It is possible that the limited right is tradable, so that a newcomer would still be able to acquire a limited right. The transfer of a limited right then leads to *reallocation*.¹⁹ The possibility of transfer is one of the arguments for the renewal of FM authorisations: new entrants, by means of transfer, could still acquire a limited right.²⁰

Furthermore, the duration of the limited right is of importance for potential applicants. Precisely because a permit allocation system with a ceiling allows only a limited number of parties to conduct certain activities, and considering the proportionality principle, the disadvantages of rejection of applicants and parties entering the market should be minimized. The general rule appears to follow from EU law that limited authorisations should be granted for a certain period of time, and that indefinite

¹⁷ Cf. ABRvS 14 March 2007, *AB* 2007, 212, annotated by J.H. Jans and ABRvS 14 May 2008, *LJN* BD1483, para. 2.15.8.

¹⁸ For more on this topic see Services Directive section 11 and 12, as well as C.J. Wolswinkel, 'Diensten tussen frequenties en kansspelen. Contouren van een Europees kader voor het verlenen van een beperkt aantal vergunningen', *SEW* 2009-7/8, p. 287-299, and C.J. Wolswinkel, 'The Allocation of a Limited Number of Authorisations. Some General Requirements from European Law', *Review of European Administrative Law* 2009/2, p. 61-104.

¹⁹ See on the transition of permits in general: C.L. Knijff, *Rechtsopvolging bij vergunningen. De mogelijkheid en wijze van overgang van vergunningen naar bestuursrecht en privaatrecht*, Deventer: Kluwer 2003.

²⁰ See the memorandum on the introduction to the recent amendment to the Frequency Act., *Stb.* 2011, 88, p. 5.

authorisations are only possible in exceptional cases.²¹ The limited duration of the right also makes eventual *reallocation* possible.

3.2 Subject of allocation

By speaking of the subjects of the allocation procedure we refer to both the administrative authority responsible for allocating limited public rights, as well as the potential recipients. Remarkably, although formally it is the government who decides on allocation, the reality is often more complicated. Without denying the importance of careful market consultation the influence of interested parties on the allocation decisions sometimes can be questioned. For instance, the intention to extend current FM authorisations was formulated in extensive consultation with the market participants. Furthermore, the aforementioned proposal of Bard, Eneco and NUON to grant the remaining budget for offshore wind energy to Eneco and NUON is a curious form of market involvement in the decision making of the administrative authority. In addition, it is quite common in subsidy practice that the competent administrative authority does not actually independently decide on the allocation of limited funds, as subsidies (e.g. for innovative activities, culture, or scientific research) are divided on the basis of reports from external experts whose opinion in principle appears to be decisive. While there may be good reasons for deciding on the allocation of limited rights in consultation with others or at a certain distance – such as a lack of own (allocation) expertise, a need for support or independence due to financial interests in government and the desire to remain substantively at a distance – it does create certain risks to let external consultants play an important role in these procedures, as they may have an interest of their own in the outcome of the decision.²²

The potential *recipients* of the limited rights very much depend on the type of right that is to be allocated and which allocation procedure is selected. Based on the legislation adopting an allocation procedure, applicants must often meet various specific criteria. In some cases such criteria limit the circle of potential applicants/recipients beforehand to such an extent that the outcome of the allocation is practically thus determined.²³ Unlike procurement law, in which *inter alia* the proportionality principle is applied,²⁴ such a division is not standardized by clear principles in public law.

²¹ See for example section 11 and 12 Services Directive. For an exception see: ABRvS 14 maart 2007 AB 2007, 212, annotated by J.H. Jans (Holland Casino). Also in environmental law it is getting clear how 'perpetual rights' may hinder or even prevent spatial initiatives of newcomers. See about this: N.S.J. Koeman, *Een wereld te winnen. Enkele beschouwingen over de toekomst van het omgevingsrecht*, Amsterdam: Vossius Press 2010, p. 8.

²² See for instance ABRvS 24 March 2010 (Theatercompagnie), AB 2010, 137, annotated by W. den Ouden, JB 2010, 119. See extensively on the 'concullega' (amalgamation of competitor and colleague in Dutch): M.J. Jacobs en W. den Ouden, 'Verdeling van schaarse subsidiegelden. De rol van adviseurs, in het bijzonder concullega's, bij de verdeling van subsidies in een tenderprocedure', in: *Schaarse publieke rechten* 2011, p. 216-229.

²³ Thus, only authorisation holders of FM frequencies qualify for a license for digital broadcasting; and based on the subsidy regulation 'House for democracy and rule of law' (*Stcrt.* 2010, no. 13842) only the House for democracy and rule of law Foundation can receive grants.

²⁴ Cf. C.E.C. Jansen, 'De geregleerde aanbesteding van overheidsopdrachten en de verdeling van schaarse publieke rechten: een vergelijking', in: *Schaarse publieke rechten* 2011, p. 309-311.

The role of new entrants deserves special attention. Although limited rights are in theory also accessible to new entrants, in practice there appear to exist many obstacles so that limited rights are more difficult to obtain for this group than for parties who are beneficiaries already. Formulating (effective) policy to allow competition for newcomers appears to be rather difficult in practice. Part of the problem is the eagerness of the administrative authorities to collaborate with parties with whom they have established a trusting relationship in the past. This almost automatically puts new entrants in a disadvantaged position as government has not yet been able to do business with them.²⁵ If the government however does collaborate with a newcomer, as was the case with energy company Bard which was granted a subsidy of millions of euros, it is bound to be criticised as well. It is understandable that the authorities prefer to cooperate with experienced partners; in procurement law certain requirements of levels of experience are often laid down already. In practice, authorities are even thinking of setting up a comprehensive system of 'past performance', which however has also stirred debate.²⁶

Combining the assessment of experience with the prevention of nepotism remains a challenge for governments when allocating limited rights. From this perspective, an interesting case is the developments concerning the allocation process of authorisations for mobile communications, which should be allocated amongst applicants again in 2013. The proposed scheme²⁷ reserves specific low frequency authorisations for new entrants which will make it possible for them to compete with established parties. This approach stands in stark contrast to the treatment of new entrants when applying for an arts grant for instance; if the subsidy allocation fund cannot find the time to visit their performance, the administrative judge will find this method 'not unreasonable' so that the quality of their performance may be assessed without visiting the show.²⁸ It is understandable that in such cases it is not very probable that subsidies will be granted. A significant disparity in treatment of newcomers can be noted here; in one case they are being supported with special arrangements, in other cases they are procedurally disadvantaged. This difference is difficult to explain and should be contemplated from a general perspective.

3.3 Method of allocation: the procedures

When, according to their number and scope, public rights are qualified as limited public rights, there are different methods of allocation that can be applied. In this regard, the commonly used allocation procedures are:

²⁵ Cf. Van Ommeren 2004, p. 76.

²⁶ See for instance C.H.N.M. Petit, 'Past en Present Performance', *TBR* 2010/143, p. 772. On the assessment of suitability requirements to general legal principles, see: E.H. Pijnacker Hordijk, G.W. van der Bend & J.F. van Nouhuys, *Aanbestedingsrecht*, Sdu Uitgevers 2009, p. 316.

²⁷ See the currently consulted *Regeling aanvraag- en veilingprocedure vergunningen 800, 900 en 1800 MHz* (Regulation application and auction procedure authentications 800, 900 and 1800 MHz).

²⁸ ABRvS 15 December 2010, *AB* 2011, 87, annotated by W. den Ouden.

- based on the order of entry, with or without waiting;
- drawing of lots;
- auction; and
- comparative assessment (also called 'beauty contest' or 'tender').²⁹

Typical of each of these allocation procedures is that applications are compared using one or more allocation criteria. With allocation in order of entry it is decisive which application was received first by the allocation board, while in case of an auction the applicant with the highest financial bid determines the outcome. The comparative assessment functions in this context as a residual category in which all kinds of allocation criteria can be included.

Which allocation procedure is selected depends on the goals of the authorisations or subsidy system in combination with the characteristics of the allocation procedure. The draw is often used where applications proved to be equivalent in other allocation procedures, while the auction under circumstances can lead to an efficient outcome. In the allocation of FM frequencies – because of the general social, cultural or economic importance – the comparative assessment was chosen in which the programmatic intentions and the business plan of the applicants were involved. In the allocation of subsidies for offshore wind energy, with regard to cost efficiency of the subsidy, allocation by means of ranking was chosen (comparative assessment) and the ranking determined by the amount per kWh that an applicant needs in addition to the basic electricity price to be able to generate wind power profitably: the lower this amount per kWh, the higher the application is ranked. In fact, this is a 'reverse auction'.

For selecting an allocation procedure it furthermore matters how much freedom of choice the administrative authority is granted by the relevant regulations. At one extreme, the highest legislator has already laid down the method of allocation so that the allocating administrative authority can only apply this allocation procedure. At the other extreme, there is no regulation at all that could limit the choice of allocation procedures, so that the governing body seems to have maximum choice. In this regard the allocation procedure takes different forms. For instance, section 3.3 (4) of the Dutch Telecommunications Act offers different possible allocation procedures for frequency authorisations, viz. based on order of entry, through a comparative assessment, or by means of an auction. In the Frequency Decree, based on the Telecommunications Act, the allocation procedure to be applied is determined and specified by means of application criteria. In subsidy law, the choice of method of allocation of limited subsidies is left to a special legislator: by or pursuant to statutory legislation not only the ceiling but also the method of allocation is determined (section 4:26 (1) of the General Administrative Law Act). Usually a special legislator leaves the decision to a lower legislator. For example, the Decree on stimulating sustainable energy production (SDE decree), which is based on the Framework Act of Economic Affairs subsidies and forms the direct basis for the Offshore wind energy Regulation from 2009, offers a choice of two allocation procedures: based on the order of entry or based on the order of classification. Unlike

²⁹ Van Ommeren 2004, p. 9.

the Frequency Decree, the SDE decree does not explicitly prescribe which procedure should be applied and when, so that the minister is free to choose.

In some cases even the law does not give any guidance as to how limited authorisations should be allocated. This is the case in the Dutch Gambling Act. Such a law, which does include a ceiling but remains silent as to the method of allocation, is actually incomplete in terms of democratic legitimacy and legal certainty. It is therefore a significant improvement that in the recently published gambling memorandum the intention is expressed to include a provision in the Gambling Act on the method of allocating limited gambling authorisations.³⁰

Besides from the above mentioned methods of allocation, there also exists the (no less important) possibility of prolonging the once allocated public rights. As a result of prolongation, newcomers who will reckon with the limited duration of public rights might (once again) not be able to compete for these rights. Prolongation of limited rights must therefore always be carefully motivated; in our opinion automatic prolongation is out of the question. What is more, bringing up the argument of imperative reasons of overriding public interest, such as the necessity to switch from analogue to digital techniques for prolonging FM authorisations,³¹ does not suffice. From the perspective of proportionality certain extra measures might be necessary to prevent the current authorisation holders from profiting from prolongation, e.g. by obliging them to pay a certain amount of money.

3.4 Legal principles and the allocation

Recent Dutch jurisprudence in the field of administrative law states that when a limited authorisation will be granted, the administrative authority is to inform the interested parties properly and in advance about the availability of the authorisation and the allocation procedure to be followed, so that all the interested parties can compete for the authorisation.³²

In (European) procurement law a similar regulation exists which states that the contacting authority must treat all entrepreneurs equally and in a non-discriminatory way; and to be transparent in their procedures.³³ This transparency obligation includes, according to the jurisprudence of the Court of Justice of the EU, the commitment of the contacting authorities to guarantee every potential applicant a suitable degree of openness, so that their right of competition is unaffected and the contract award can be screened as to its impartiality.³⁴ Since the renowned *Betfair* case the this transparency obligation is also applicable to the allocation of limited *authorisations*.

³⁰ *Kamerstukken II* 2010/11, 24557, no. 124, p. 5.

³¹ For this a separate basis was recently created in section 9 of the Dutch Frequency Resolution (*Stb.* 2011, 88).

³² 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).

³³ Cf. Public Contracts Directive (2004/18/EG) section 2, and the following jurisprudence.

³⁴ See, amongst others, the following cases: ECJ 7 December 2000, case C-324/98, *NJ* 2001, 387 (Telaustria), para. 62; ECJ 13 November 2008, case C-324/07 (Coditel Brabant), para. 25; ECJ 13 April 2010, case C-91/08 (Wall), para. 36.

The Court of Justice of the EU does allow some margin for exceptions. This transparency obligation does not apply for “a public operator whose management is subject to direct state supervision or a private operator whose activities are subject to strict control by the public authorities”.³⁵ According to the Administrative Law Division of the Council of State however, none of the current authorisation holders (Lotto and SGR) comply with any of the two exceptions, which finally disqualifies the Dutch non-transparent method of authorisation allocation. The Minister of Justice (at present the secretary of state of Justice and Security) is not free to allocate or prolong The Lotto's or SGR's authorisations without a prior call for competition.³⁶

The outcome of the *Betfair* case does raise the two following questions: will the scope of the transparency obligation be stretched out even further and become applicable to other limited public rights, and will the Dutch administrative judiciary be willing to base the obligation to place a call for competition directly upon the (European) transparency obligation?

The scope of the obligation to create competition capacity has not yet become clear. It is, for example, questionable whether it is applicable in the case of subsidy granting. On one hand, the subsidies chapter in the General Administrative Law Act mentions as a general rule that the announcement of the subsidy ceiling must be followed by an announcement of the allocation method to be applied.³⁷ On the other hand however, it is explicitly permitted to grant incidental budget subsidies without a specific legal ground.³⁸ In practice this often leads to situations where, without having mapped the demand for subsidies for certain activities and without having informed all potentially interested parties about the availability subsidies, a subsidy is granted to a party with whom the administrative authorities have already cooperated for years. This can possibly lead to problems, but no jurisprudence on this topic is available yet.³⁹

It seems to us of importance that a subsidy, unlike an authorisation, is not strictly necessary to conduct certain activities. Theoretically, financing be sought elsewhere and the parties can still proceed as they planned. The reality is obviously more complicated; a lot of the subsidised projects could not have been executed without financial support from the government, often because their subsidised competitors are able to offer their products on the market for a lower price. Hence it will probably not be possible for Eneco (without the proposed compromise) to compete in a meaningful way with Bard in the field of 'green energy' provision. There is no European jurisprudence available (yet) on the topic of allocation requirements of national subsidies, but there are indications in European law that the European subsidy granting authorities consider themselves bound to the transparency obligation and the non-discrimination principle. These legal rules are explicitly stated applicable in the European Financial

³⁵ *Betfair*, para. 59.

³⁶ ABRvS 23 March 2011, LJN BP 8768.

³⁷ Section 4:26 Awb.

³⁸ Section 4:23 (3), subsection c and d Awb.

³⁹ Cf. ABRvS 20 October 2010, JB 2011, 3, annotated by Jacobs, in which the Administrative Law Division of the Dutch Council of State seems not inclined to stress the right on competition for subsidies.

Regulation.⁴⁰ European subsidy programs to which the Regulation is not applicable also often include provisions that seem to be inspired on these rules. Such provisions for instance state that the possibility to apply for a European subsidy must be given broad publicity, while the selection criteria must be announced in advance, and that the motivation of the decision to grant a subsidy must meet certain requirements.⁴¹

The scope of the obligation to create competition capacity and to provide the information necessary is determined, among others, by the legal basis of this obligation. It is not yet completely clear on which legal principle the Dutch judiciary will base this obligation for the administrative authorities. In the jurisprudence on the topic of allocating limited gambling authorisations – and for instance also in jurisprudence on limited permits for ‘Sunday night stores’ based on the Dutch Regulation on store opening times – the legal principles of *proportionality*⁴², *due diligence* and *careful motivation*⁴³ take a prominent position; in cases that concern changing the allocation procedure the principle of *legal certainty*⁴⁴ is also of importance.

It is remarkable that especially the principles of *equality*, *objectivity* and *transparency* are not (yet) part of the basis for the legal norm that, for the interested parties, it should be clear (announced) in advance if there is a permit available and which procedure is to be followed. What makes this noteworthy is the fact that in legal areas that are not directly under the influence of European law these legal principles typically normalise the allocation procedures. For example, in the allocation of limited frequency permits the principles of transparency, objectivity, non-discrimination and efficient allocation among parties are the basis for the regulation of the allocation procedures.⁴⁵ An interesting question is therefore whether the step that has been taken in the *Betfair* case will persuade the national administrative judiciary to base the obligation of the administrative authorities to call for competition on the European transparency obligation.

One must not forget that the aim of the requirements of objectivity and transparency is to achieve legal equality and legal certainty.⁴⁶ These are *methodical* principles that aim at promoting equal and fair chances for every interested party within the competition. It is not certain whether the transparency principle is a *general* principle of good administration as it first and foremost applies to limited public rights. For the transparency principle to be regarded a general principle of good

⁴⁰ Section 109 of the Council Regulation (EC, Euratom) no. 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities.

⁴¹ See for instance Commission Regulation 1828/2006, section 5 (on the structural funds), O.J. 2006 L 371.

⁴² ABRvS 18 July 2007, AB 2007, 302, annotated by J.H. Jans (Schindler).

⁴³ CBb 3 June 2009, AB 2009, 373, annotated by C.J. Wolswinkel (Swiss Leisure Group).

⁴⁴ CBb 8 januari 2010, AB 2010, 73, annotated by Sewandono; JB 2010, 75, m.nt. C.J. Wolswinkel (AH Heemstede).

⁴⁵ CBb 26 April 2007, LJN BA3858 (SLAM!FM).

⁴⁶ In jurisprudence of the ECJ it is explicitly considered that transparency obligation ‘results’ from the equal treatment principle and the prohibition of discrimination (cf. i.a. *Betfair* para. 39).

administration⁴⁷ it is, according to us, necessary that the added value of this 'principle' in comparison to the current general principles of good administration is made sufficiently clear.

3.5. Legal protection

In the beginning of this article we already stated that conflicts can easily arise concerning the allocation of limited public rights; to allocate a limited right to one party inevitably results in disappointment and often financial disadvantage of another party. Unsurprisingly then, many allocation decisions are being contested at the administrative court. It seems, according to the jurisprudence, that a few classic problems concerning the application of administrative procedural law of the General Administrative Law Act manifest themselves especially in cases considering the allocation of limited public rights.⁴⁸

The fact that an interested party who is dissatisfied with the outcome of an allocation procedure must contest several decisions at once forms an important bottleneck; not only does he have to contest his own rejection decision, but also the granting decisions of the other parties. A good example in this context is the course of events in the award of an offshore wind energy subsidy to Bard; Eneco contested Bard's granting decision as well as the announcement that Eneco's own application would take longer to be processed. Betfair too contested its rejection as well as the allocation to Lotto. The aim of contestation in those cases is to prevent the allocation of a right to another party from gaining legal force. The scope of this problem is not that serious when it comes to subsidies – theoretically the minister can make some extra amounts available within his budget for offshore wind energy if the legal procedure proves that Eneco should have been granted a subsidy – but that does not apply to a lot of other limited public rights. At a certain point there are no vacant frequencies available any more so that it is impossible to restore an incorrect allocation, especially not without a breach of the legal certainty of other parties. In that case, the applicant can only file a compensation claim with all the disadvantages connected to it.⁴⁹

Although appellants are often admitted at the administrative court to appeal the allocation to a 'competitor'⁵⁰, they have only very limited means to substantiate their appeal; the access to the documents concerning the procedure is often restricted as the administrative authority is not eager to disclose information on the competing applications or the consulted advisors, as was the case in the *Bard* case.⁵¹ The motivations of rejection decisions often do not disclose any specific information either.

⁴⁷ As proposed by A. Drahmann, 'Tijd voor een Nederlands transparantiebeginsel', in: *Europees offensief tegen nationale rechtsbeginselen? Over legaliteit, rechtszekerheid, vertrouwen en transparantie*, Jonge VAR-reeks 8, Den Haag: Boom Juridische uitgevers 2010, p. 145-196; and A. Drahmann, 'Streven naar een transparante (her)verdeling van schaarse publieke rechten', in: *Schaarse publieke rechten* 2011, p. 267-292.

⁴⁸ Cf. B.J. Schueller, 'Bestuursrechtelijke beslechting van geschillen over de verdeling van schaarse publieke rechten', in: *Schaarse publieke rechten* 2011, p. 363.

⁴⁹ See for an elaboration J.M.J. van Rijn van Alkemade in *Overheid & Aansprakelijkheid*, no. 2, 2011.

⁵⁰ The 'stakeholder concept' of section 1:2 Awb does not impede this. See for a recent example: ABRvS 13 april 2011, LJV BQ1072.

⁵¹ Cf. Vz. CBb 29 July 2010, AB 2010, 303, annotated by Van Rijn van Alkemade.

Moreover, a concurrence of circumstances could form an incentive for the the administrative judiciary to try to keep allocation decisions in place whenever possible. The consequences of rendering a decision of allocation or rejection null and void are certainly far reaching. The (financial) interests that are at stake while allocating limited rights are often significant and one cannot⁵² always wait until the decisions have gained legal force. As a result, substantial investments may have to be carried out in times of legal uncertainty in order to be able to actually make use of the limited right: a radio station must be set up, have personnel, and be operational to make use of the frequency; and if Bard wants to produce energy on a large scale with windmills in 2015, as was formulated in the subsidy obligation, it has to start investing significantly as well. Based on the latest jurisprudence, the risks of making use of a right that has not yet gained legal force seem to lie with the user.⁵³ If an administrative court, after a certain period of time, comes to the conclusion that the limited public rights have been allocated to the wrong party, it may bring tremendous costs with it. The applicant who has been wrongfully rejected in the first place will probably file a compensation claim, for example to compensate for the undue delay.⁵⁴ In this perspective it is not improbable that Betfair will present the Dutch government with an invoice for all the years when it was not able to make use of a gambling permit due to, as it has turned out, an incorrect allocation system.

If the administrative judiciary decides to render it void despite all the irregularities, it is likely that the rendition will take place on formal grounds, such as lack of due preparation and insufficient motivation. As the judge usually is unable to reallocate rights, the case is redirected back to the administrative authority so that a new decision can be taken based on the appeal against the rejection decision. Apart from prolonging the period of legal uncertainty for all the parties, this creates another problem. In principle the administrative authority must take the new decision *ex nunc*, aside from exceptional circumstances.⁵⁵ The question is whether the fact that the public rights are limited forms such an exceptional circumstance.⁵⁶ Besides that, the facts and circumstances may change to such an extent during the allocation procedure that it no longer is possible to allocate the rights based on the new decision; the applicant may for example already have gone bankrupt or the conditions on the market may have changed considerably so that the applicant no longer wishes to be granted the rights. It may thus very well be that an applicant could have been allocated a limited right if the procedure was

⁵² Frequently an obligation is included in the granting decision to make use of the limited right within a specified period of time. Cf. section 4:36 Awb on the 'coercion agreement'.

⁵³ See the still applicable standard case: HR (Supreme Court of the Netherlands) 29 april 1994, *AB Klassiek* 2003, 31, annotated by B.J. Schueler (GE / Den Haag).

⁵⁴ Cf. CBb 11 juli 2007, *LJN BA9351*, in which the Board of appeals for business (CBb) maintains the decision to not extend the term of the wrongly belated frequency authorisation (to radio station 100% NL), but did indicate the possibility of a request for damages.

⁵⁵ See for instance the recent case ABRvS 23 March 2011, *LJN BP8742*.

⁵⁶ See further on this topic: ABRvS 29 October 2008, *LJN BG1839*, para. 2.9 (translated): 'For the purpose of the decision in appeal, the Administrative Law Division of the Council of State indicates that this policy should be applied as it was in effect on the last day of the submission of applications, because the applications are assessed through a so-called tender system.'

followed correctly in the first place, but that because of the time lapse this is not possible anymore at the time of the new decision after appeal. Moreover, at that time it is often no longer possible to determine to which rights the appellant would have been entitled if the procedure was followed correctly. When it comes to allocation procedures everything has to be done correctly at once as it is impossible redo the procedure. What consequences should be connected to annulment of an administrative decision on formal grounds by the administrative court is an important question, one that causes many dilemmas in the legal practice and that deserves further consideration in order to guarantee effective legal protection in the allocation of limited public rights.

4. Conclusion

The analysis of a few recent controversial cases shows that the types of problems that occur in the allocation of limited public rights do not exist exclusively in the specific legal areas of these cases. The problem of creating sufficient competition capacity in allocation procedures is a recurrent one, partly because of the influence of European law. While this principle seems to become more and more embedded there still is not enough clarity as to its basis and scope, as well as to the position that new entrants should have in this competition.

The systematic and coherent analysis of the diverse cases that have been discussed in this article helps preventing that the quest for the best allocation methods takes place separately in each particular policy area, it also prevents the administrative courts from repeating the same mistakes over again. The legislator can take advantage of it too. By means of this analysis the mutual connections are being highlighted, not only between the different elements of a certain allocation issues, but also between the different limited public rights. Thus, a coherent system is being created for the assessment and regulation of limited public rights allocation.

We believe that the allocation of limited public rights should be seen as part of the general issues within administrative law. If we wish to maintain the concept of unity within general administrative law, then we certainly have to take some new steps concerning the notion of allocation of limited public rights. Otherwise we face the threat, caused by the European pressure, of fragmentation between limited public rights on one side to which the transparency obligation and the freedoms of movement are directly applicable, and on the other side those limited public rights to which these principles do not directly apply. A general and integral study of the allocation of limited public rights therefore can and must prevent this fragmentation.