

Paul Adriaanse, Frank van Ommeren,
Willemien den Ouden and Johan Wolswinkel (eds)

Scarcity and the State II

Member State Reports on
the Allocation of Gambling Licences,
Radio Frequencies and
CO₂ Emission Permits



intersentia





Scarcity and the State II

Member State Reports on the Allocation of Gambling
Licences, Radio Frequencies and CO₂ Emission Permits

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

Scarcity and the State II

Member State Reports on the Allocation of Gambling
Licences, Radio Frequencies and CO₂ Emission Permits

Intersentia Ltd
Sheraton House | Castle Park
Cambridge | CB3 0AX | United Kingdom
Tel.: +44 1223 370 170 | Fax: +44 1223 370 169
Email: mail@intersentia.co.uk
www.intersentia.com | www.intersentia.co.uk

Distribution for the UK and Ireland:

NBN International
Airport Business Centre, 10 Thornbury Road
Plymouth, PL6 7 PP
United Kingdom
Tel.: +44 1752 202 301 | Fax: +44 1752 202 331
Email: orders@nbninternational.com

Distribution for Europe and all other countries:

Intersentia Publishing nv
Groenstraat 31
2640 Mortsel
Belgium
Tel.: +32 3 680 15 50 | Fax: +32 3 658 71 21
Email: mail@intersentia.be

Distribution for the USA and Canada:

International Specialized Book Services
920 NE 58th Ave. Suite 300
Portland, OR 97213
USA
Tel.: +1 800 944 6190 (toll free) | Fax: +1 503 280 8832
Email: info@isbs.com

Scarcity and the State II. Member State Reports on the Allocation of Gambling Licences, Radio Frequencies and CO₂ Emission Permits

© Paul Adriaanse, Frank van Ommeren, Willemien den Ouden and Johan Wolswinkel (eds.) 2016

The author has asserted the right under the Copyright, Designs and Patents Act 1988, to be identified as author of this work.

No part of this book may be reproduced, stored in a retrieval system, or transmitted, in any form, or by any means, without prior written permission from Intersentia, or as expressly permitted by law or under the terms agreed with the appropriate reprographic rights organisation. Enquiries concerning reproduction which may not be covered by the above should be addressed to Intersentia at the address above.

ISBN 978-1-78068-389-8

D/2016/7849/45

NUR 823

British Library Cataloguing in Publication Data. A catalogue record for this book is available from the British Library.

EDITORS' PREFACE

This book is the result of a Europe-wide exploration of building blocks for a consistent and general legal theory on the allocation of limited rights by administrative authorities. The idea of an international book project on this theme was launched at an inspiring international conference, organised by researchers from the Departments of Constitutional and Administrative law of Leiden University and VU University Amsterdam, the Netherlands. The project has been realised with the help of many researchers from various EU Member States. This book contains the national reports on the allocation of gambling licences, radio frequencies and CO₂ emission permits in seven EU Member States: France, Germany, Greece, Italy, the Netherlands, Romania and Spain. Other contributions deal with the subject from a general perspective, as well as from an EU law perspective and a comparative law perspective.¹ Together, all these contributions have resulted in a valuable and interesting collection of legal scholarship, which sheds light on various complex issues concerning the allocation of limited rights by administrative authorities. We sincerely hope that, based on these building blocks, further research in this field can be carried out. We wish to thank all the authors for their efforts and contributions to this book project.

Paul Adriaanse, Frank van Ommeren, Willemien den Ouden and Johan Wolswinkel
Leiden/Amsterdam, November 2015

¹ See P. Adriaanse, F. van Ommeren, W. den Ouden and J. Wolswinkel, *Scarcity and the State I. The Allocation of Limited Rights by the Administration*, Intersentia, Antwerp 2016.

CONTENTS

<i>Editors' Preface</i>	v
1. The Allocation of Limited Rights by the Administration: Developing a General Legal Theory by Comparison	
Paul Adriaanse, Frank van Ommeren, Willemien den Ouden and Johan Wolswinkel	1
1. Introduction	1
2. Legal Approaches	2
2.1. Conceptual Approach	2
2.2. Top-Down Approach: A Perspective from EU Law	3
2.3. Bottom-Up Approach: A Comparative Perspective	4
3. Dimensions of Comparison	4
3.1. Two Dimensions	4
3.2. Comparison between Areas of Government Regulation	5
3.3. Comparison between EU Member States	6
4. Concluding Remarks	7
2. The Allocation of Gambling Licences, Radio Frequencies and CO₂ Emission Permits in France	
François Lafarge and Alexandrina Soldatenko	9
1. Introduction	9
2. Allocation of Gambling Agreements	10
2.1. Introduction	10
2.2. How is the Limitation of Gambling Agreements Constructed Legally? How is a Maximum – a Ceiling – to these Public Rights Created within a Given Period?	11
2.2.1. Offline gambling	11
2.2.2. Online gambling	12
2.3. What Kind of Allocation Procedure is being Used? Are Authorisations being Allocated by a Competitive Method?	12
2.3.1. Offline gambling	12
2.3.2. Online gambling	15

2.4.	How are Favouritism and Nepotism being Prevented? How is the Equal/Fair Treatment of Newcomers being Approached?	16
2.4.1.	Offline gambling.	16
2.4.2.	Online gambling.	17
2.5.	Which General Legal Principles (e.g. of Proper or Good Administration/Transparency) Play an Important Role in the National Debate or Jurisprudence Concerning the Allocation of Gambling Agreements?	17
2.6.	Are there any National Cases in which Competition Law (e.g. Abuse of a Dominant Position or State Aid) Played an Important Role?	18
2.6.1.	Offline gambling.	18
2.6.2.	Online gambling.	18
2.7.	Which Specific Problems of Legal Protection do you Consider to be the Most Important or Interesting Issues in the Light of Effective Legal Protection?	19
3.	Allocation of Radio Frequencies	20
3.1.	Introduction	20
3.2.	How is the Limitation of Radio Frequencies Constructed Legally? How is a Maximum – a Ceiling – to these Public Rights Created within a Given Period?	21
3.3.	What Kind of Allocation Procedure is being used? Are Authorisations being Allocated by a Competitive Method?	23
3.3.1.	ARCEP	24
3.3.2.	CSA	26
3.4.	How are Favouritism and Nepotism being Prevented? How is the Equal/Fair Treatment of Newcomers being Approached?	27
3.5.	Which General Legal Principles (e.g. of Proper or Good Administration/Transparency) Play an Important Role in the National Debate or Jurisprudence Concerning the Allocation of Radio Frequencies?	28
3.6.	Are there any National Cases in which Competition Law (e.g. Abuse of a Dominant Position or State Aid) Played an Important Role?	29
3.7.	Which Specific Problems of Legal Protection do you Consider to be the Most Important or Interesting Issues in the Light of Effective Legal Protection?	30
4.	Allocation of CO ₂ Emissions Permits	30
4.1.	How is the Limitation of CO ₂ Emission Permits Constructed Legally? How is a Maximum to this Public Right Created Within a Given Period?	31
4.1.1.	Legal nature of CO ₂ emission permits	31
4.1.2.	Determining the number of rights	32
4.2.	What Kind of Allocation Procedure is being Used? Are Authorisations being Allocated by a Competitive Method?	33
4.2.1.	Allocation method	33
4.2.2.	New entrants' reserve	34

4.2.3. Auctioning	34
4.3. How are Favouritism and Nepotism being Prevented? How is the Equal/Fair Treatment of Newcomers being Approached?	36
4.4. Which General Legal Principles Play an Important Role in the National Debate or Jurisprudence Concerning the Allocation of CO ₂ Emission Permits?	37
4.5. Are there any National Cases in which Competition Law (e.g. Abuse of a Dominant Position or State Aid) Played an Important Role?	37
4.5.1. Oversight of allocation rules	37
4.5.2. French Appeals Commission	38
4.6. Which Specific Problems of Legal Protection do you Consider to be the Most Important or Interesting Issues in the Light of Effective Legal Protection?	39
5. Conclusion	42
3. The Allocation of Gambling Licences, Radio Frequencies and CO₂ Emission Permits in Germany	
Mario Martini	43
1. Gambling Licences	43
1.1. Historical Development	43
1.2. Gambling in the German Law System	44
1.2.1. The definition of gambling in the German law system	44
1.2.2. Delimitation of skill based games (<i>Geschicklichkeitsspiel</i>)	45
1.2.3. Delimitation of competition (<i>Gewinnspiel</i>)	45
1.3. Regulatory Vision	46
1.3.1. Complex bundle of interests with conflicting goals	46
1.3.2. Combating gambling addiction and associated crime as the declared objectives of regulation	46
1.3.3. Deficiencies and legal challenges	48
1.3.3.1. Compatibility with national constitutional law	48
1.3.3.2. Limits of the law of the European Union: general governmental coherence as an acid test	50
1.3.3.3. Consequences	50
1.4. The Current Sub-Constitutional Legal Framework for Gambling in Germany	52
1.4.1. Federal gambling law	52
1.4.2. Permissive regulations under federal state law	53
1.4.2.1. Lotteries	54
1.4.2.2. Sports betting	55
1.4.2.3. Horse race betting	55
1.4.2.4. Casino games (<i>Spielbanken</i>)	56
1.4.2.5. Automated games	56
1.4.3. Conclusion and legal challenges	56

1.5.	Awarding Concessions for the Organisation of Sports Betting	
	According to the GlüStv 2012	59
1.5.1.	The regulatory concept of awarding concessions	59
1.5.2.	The design in detail	60
2.	Allocation of Scarce Frequencies	64
2.1.	Frequency Assignment as an Application of ‘Given’ instead of ‘Chosen’ Scarcity.	64
2.2.	Legal Framework of the Frequencies Allocation System	64
2.2.1.	Arrangement of a bidding procedure: assessment of scarcity.	64
2.2.2.	Types of award procedures: tendering versus bidding procedure.	65
2.2.3.	Reasons for the priority of the bidding procedure	66
2.2.4.	Constitutional predetermined breaking point of a bidding procedure.	66
2.2.5.	Requirements regarding the arrangement of a bidding procedure.	68
2.3.	Allocation of Mobile Phone Frequencies	69
2.4.	Allocation of Broadcasting Frequencies	72
2.4.1.	Mix of federal and state legislation in the area of broadcasting	72
2.4.2.	Prohibition of auction procedures (§61.2 sentence 3 TKG).	72
2.4.3.	Requirements of the tendering procedure	73
2.5.	Trading and Transferring Frequencies	73
2.5.1.	Spectrum trading according to §62 TKG.	73
2.5.2.	The transfer of frequencies according to §55.8 TKG	74
3.	Emission Permits	75
3.1.	The Economic Background of the Emissions Trading Scheme.	75
3.2.	Legal Framework of Emissions Trading in Germany.	76
3.2.1.	International regulations	76
3.2.2.	European regulations and their implementation in Germany.	77
3.2.2.1.	The legal framework for emissions trading up to the end of 2012.	77
3.2.2.2.	Deficits and structural defects in the emissions trading scheme.	80
3.2.2.3.	The new design from 1 January 2013	81
4.	Conclusion.	85
4.	The Allocation of Gambling Licences, Radio Frequencies and CO₂ Emission Permits in Greece	
	George Dellis and Nantia Sakellariou.	87
1.	The Allocation of Limited Authorisations and Claims in Case of Lack of Harmonisation at a European Level: The Gambling Industry	88
1.1.	Offline Gambling Regime	89
1.2.	Online Gaming Regime.	91

1.3.	Gaming Machine Regime	93
2.	The Allocation of Limited Authorisations and Claims in Case of Harmonisation at a European Level: Radiofrequencies and CO ₂ Emission Permits	94
2.1.	Radiofrequencies: The Specific Sector of Telecommunications	94
2.2.	CO ₂ Emission Permits	98
3.	Conclusion.....	100
5.	THE ALLOCATION OF RADIO FREQUENCIES AND CO ₂ EMISSION PERMITS IN ITALY	
5.1.	The Allocation of Radio Frequencies in Italy	
	Marco Orofino	105
1.	The Status of Radio Frequencies in the Italian Legal System	105
2.	The European Approach to the Radio Frequency Policy and the European Framework 2002 as Cornerstone	107
3.	The Communication Code and the Audiovisual Media Services Consolidated Act	109
4.	The General Authorisation Regime under the Italian Communication Code and the Descending Right to use Frequencies.....	110
5.	The Granting of Individual Rights: The Procedure and the Co-Management of the Ministry and the Communication Authority	111
6.	The Assignment of Limited Individual Rights.....	113
7.	Modifications of Rights and Conditions, Trading, and Fees.....	114
8.	The Specific Rules Governing Broadcasting: Authorisation and Allocation of Radio Frequencies	116
9.	The Pro-Competitive Regulation and the Protection of Media Pluralism	118
10.	The Right of Appeal	120
11.	Concluding Remarks	121
5.2.	The Allocation of CO₂ Emission Permits in Italy	
	Fabio Giglioni	123
1.	Introduction	123
2.	The Tortuous Story of the Italian Framework on Allowance Trading over Greenhouse Gas Emissions.....	124
3.	Debate on Qualification of the Emissions Allowances.....	126
4.	Support of the Administrative Concession Thesis	128
5.	Limited Authorisations and General Principles	129
5.1.	Impartiality Perspective	130
5.2.	Participation Rights	131
5.3.	The Procedure of Allocation with Specific Attention to Newcomers.	132
5.4.	Simplification of the Authorisation Procedure	134
6.	Conclusions	135

6. THE ALLOCATION OF GAMBLING LICENCES, RADIO FREQUENCIES AND CO₂ EMISSION PERMITS IN THE NETHERLANDS	
6.1. The Allocation of Gambling Licences in the Netherlands	
Marjan Olfers	139
1. Introduction	139
2. The Current Gambling Regime	140
2.1. WoK: The Dutch Betting and Gaming Act (Law of 1964)	140
2.2. WoK does not provide for Licences for Remote Gambling	141
2.3. Aim of the WoK	141
2.4. Slot Machine, Legal Regime	141
3. CJEU Relevant Case Law	142
3.1. General Remarks	142
3.2. Ladbrokes	142
3.3. Betfair	144
3.3.1. Lack of strict state control	144
4. European Commission: Infringement Procedure	145
5. Relevant Case Law at a National Level	146
5.1. Slot Machine Market, the Granting of Licences: Hommerson	146
5.2. Off-Line Casino, Abuse of Dominance Holland Cassino? Pontonnier	147
6. Reform of the Gambling System since 2011	148
6.1. Step 1: Gaming Authority Since 2012	148
6.2. Step 2: KOA, Remote Betting and Gaming Bill ('New' Proposed Law) ...	149
6.2.1. Severe criticism from the Council of State	150
6.2.2. Next steps	151
6.3. Future Step: Reform of Lottery System	152
6.4. Future Step: Reform of the Offline Casino Market	152
7. Important Recent Case Law, during the Reform of the Dutch System	153
7.1. X Against Unibet	153
8. Concluding Remarks	154
6.2. The Allocation of Radio Frequencies in the Netherlands	
Johan Wolswinkel	155
1. Introduction	155
2. Telecommunications Law and Frequency Management	156
3. Maximum	157
3.1. Frequency Bands	157
3.2. Size of Individual Licences	158
4. Allocation Procedures	159
4.1. Initial Allocation: Choice of the Allocation Procedure	159
4.2. Design of the Allocation Procedure	161
4.3. Scarcity Fee	163

4.4.	Amendments and Transfers	164
4.5.	Renewal	165
5.	Level Playing Field	165
5.1.	Asymmetric Measures	165
5.2.	Competition Law	167
5.3.	State Aid Law	168
6.	Judicial Protection	170
6.1.	Variety of Allocation Decisions and Lengthy Procedures	170
6.2.	Judicial Review	171
7.	Concluding Remarks	173
6.3.	The Allocation of CO₂ Permits in the Netherlands	
	Jan Reinier van Angeren and Laurens Westendorp	175
1.	Introduction	176
2.	Acquisition of Emission Allowances	180
2.1.	Acquisition of Emission Allowances by Means of Free Allocation	180
2.2.	Acquisition of Emission Allowances at an Auction	185
2.3.	Acquisition of Emission Allowances through Secondary Market Trading	187
3.	The Validity of Emission Allowances	190
3.1.	Loss of Validity as a Result of Emissions Cover	191
3.2.	Loss of Validity other than as a Result of Emissions Cover	193
3.2.1.	Change in the carbon leakage list	194
3.2.2.	The full or partial cessation of operations of the greenhouse gas installation or a significant capacity reduction of this installation	195
3.2.3.	Adjustment on account of the provision of incorrect information or evident inaccuracies in the allocation decision	196
3.2.4.	The consequences that an amendment of an allocation decision may have	197
4.	Conclusion	199
7.	The Allocation of Gambling Licences, Radio Frequencies and CO₂ Emission Permits in Romania	
	Dacian C. Dragoş, Bogdana Neamţu and Raluca Suciuc	203
1.	Public Rights and Authorizations under the Romanian Administrative Law	203
1.1.	Definitions	203
1.2.	Different Types of Scarcity with Respect to Public Rights	204
2.	Examples of Scarcity and Allocation Procedures in Romania: Gambling	206
2.1.	Background	206

2.2.	The 2009 Legal Framework and Subsequent Secondary Legislation: The Road toward an Infringement Procedure	207
2.3.	Steps Toward a Gambling Regime Compatible with Treaty Principles	210
2.3.1.	National Office for Gambling	211
2.3.2.	GEO no. 92/2014	212
2.4.	Licensing and Authorization Regime Currently in Place (As of February 2015)	212
2.5.	Other Relevant aspects Pertaining to the Allocation Procedure in Gambling	215
3.	Examples of Scarcity and Allocation Procedures in Romania: Radio Frequencies	216
3.1.	Introduction	216
3.2.	Institutional Framework	216
3.2.1.	ANCOM: Overview	216
3.2.2.	Legal principles underlying the regulatory activity of ANCOM	217
3.3.	General Authorization Requirements for the Provision of Networks and Electronic Communication Services	219
3.4.	Licensing for the Use of Radio Frequencies	219
3.5.	The First Competitive Bid held in Romania for the Allocation of Radio Frequencies (for Mobile Communications)	222
3.5.1.	Overview of the procedure	222
3.5.2.	Competition issues tackled by the Competition Council within the framework of the competitive bid	224
3.6.	Other Relevant aspects Pertaining to the Allocation Procedure of Radio Frequencies	226
4.	Examples of Scarcity and Allocation Procedures in Romania: CO ₂ Emission Allowances	227
4.1.	The Interaction of the EU Emissions Trading System (EU-ETS) and the Kyoto Protocol System	227
4.2.	Source of Scarcity and Ceilings	228
4.3.	The Allocation Procedure	232
4.4.	Verification Methodology	234
4.5.	Trading Issues – The Official Kyoto Carbon Market	235
4.6.	Trading Issues – The National Market	236
4.7.	Other Relevant Aspects Pertaining to Allocation: Transparency, Legal Principles, Access to Market of Newcomers	237
5.	Conclusions	238
8.	The Allocation of Gambling Licences, Radio Frequencies and CO₂ Emission Permits in Spain	
	Isabel Fernández Torres and Dolores Utrilla Fernández-Bermejo	241
1.	Introduction	241

2.	Allocation in Case of Lack of Harmonization at a European Level: The Gambling Industry	242
3.	Allocation in Case of Harmonization at a European Level: Radiofrequencies and Greenhouse Gas Emission Permits	245
3.1.	Radio Frequencies	245
3.2.	Greenhouse Gas Emission Permits	251
4.	Concluding Remarks	255
	<i>List of Contributors</i>	257

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

1. THE ALLOCATION OF LIMITED RIGHTS BY THE ADMINISTRATION: DEVELOPING A GENERAL LEGAL THEORY BY COMPARISON

1. Introduction

Managing scarcity to serve the public interest is a classic task of government. Within (almost) all jurisdictions, however, administrative law seems to assume that every party shall be granted a good or right once it satisfies all the necessary conditions.¹ This assumption neglects the fact that in several areas of government regulation, for example radio spectrum management, gambling regulation or the EU ETS (Emissions Trading System), individual rights such as licences or permits are available only in a limited quantity. As a result of this limited availability, these ‘limited’ rights are *scarce*: some applicants should be denied a right, even if they satisfy all necessary conditions

Despite the fact that these limited rights occur in many different areas of government regulation, the legal issues related to the allocation of these rights are not always exclusively linked to a particular policy field. Instead, some of the most important legal issues, e.g. on equal treatment and transparency, seem to be characteristic of *any* allocation of limited rights by administrative authorities. Therefore, solutions to these legal issues might be available not only in the area at stake, but also in other areas confronted with the allocation of limited rights.

* Paul Adriaanse is Associate Professor of constitutional and administrative law at Leiden University and practising lawyer at Justion Advocaten, the Netherlands. Frank van Ommeren is Professor of constitutional and administrative law at VU University Amsterdam, the Netherlands. Willemien den Ouden is Dean of the Honours Academy of Leiden University and Professor of constitutional and administrative law at Leiden University, the Netherlands. Johan Wolswinkel is Associate Professor of administrative law at Tilburg University, the Netherlands. Into more detail on this general legal theory on the allocation of limited rights, see our introductory chapter ‘The Allocation of Limited Rights by the Administration: A Quest for a General Legal Theory’ (pp. 3–25) in P. Adriaanse, F. van Ommeren, W. den Ouden and J. Wolswinkel (eds), *Scarcity and the State I. The Allocation of Limited Rights by the Administration*, Antwerp, Intersentia 2016.

¹ See e.g. Article 10(5) Directive of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36 (Services Directive): ‘The authorisation shall be granted as soon as it is established, in the light of an appropriate examination, that the conditions for authorisation have been met.’

What is more, legal issues on the allocation of limited rights are not restricted to certain EU Member States. Actually, since many of these limited rights have a European origin or a cross-border impact, the allocation of these rights is subject to a process of Europeanisation.

This is clearly illustrated by the case-law of the Court of Justice of the European Union (CJEU), covering allocation issues both in different areas (gambling, pharmacies, radio frequencies, etcetera) *and* in different EU Member States.

This widespread occurrence of allocation issues both in different areas of government regulation *and* in different EU Member States calls for a *consistent* and *general* legal theory on the allocation of limited rights. This legal theory should identify allocation rules and principles that apply in *any* allocation of limited rights, while at the same respect (other) allocation rules that are exclusively linked to a certain limited right, e.g. a gambling licence, or a certain allocation procedure, e.g. an auction, because of the inherent characteristics of that right or that procedure.

In order to support and expand a generalized analysis of the allocation of limited rights from a legal perspective, the following question underlies both this book and its counterpart:²

What rules and principles are relevant for a consistent and general legal theory on the allocation of limited rights by administrative authorities in the EU and its Member States?

In order to answer this central question, several approaches can be adopted. We identify three approaches as particularly fruitful in this respect, which we will sketch shortly in Section 2. In Section 3, we will pay specific attention to the merits of a so-called ‘bottom-up’ approach, which is characterised by a comparison both between areas of government regulation and between EU Member States. Section 4 contains some concluding remarks.

2. Legal Approaches

2.1. Conceptual Approach

The first approach, which should precede any other legal approach to allocation issues, is a conceptual one. This conceptual approach takes account of the specific characteristics of, on the one hand, the ‘resources’ that are to be allocated, *i.e.* rights awarded by administrative authorities, and, on the other hand, allocation procedures facilitating a relative comparison of applicants. The resulting conceptual framework might facilitate *any* legal system, either at the EU level or at the national level, to adopt general rules and principles on the allocation of limited rights.

² P. Adriaanse, F. van Ommeren, W. den Ouden and J. Wolswinkel (eds), *Scarcity and the State I. The Allocation of Limited Rights by the Administration*, Antwerp, Intersentia, 2016.

With the term ‘rights’ we designate individual rights granted by an administrative authority, such as authorisations or financial grants (subsidies). These rights are limited if they are available in a limited quantity only. Therefore, limited rights presuppose a *maximum* – often referred to as a *ceiling* – indicating the maximum number of rights that can be granted (within a given period). As indicated by the several Member State reports in this book, there may be numerous reasons for administrative authorities to set such a ceiling: it may result from scarcity of natural resources or from ‘artificial’ reasons, whereas allocating authorities might pursue their own interests as ‘necessary side-effects’ as well. Several characteristics of limited rights are particularly relevant for the allocation of these rights, such as their *duration* and their *tradability*.

Whenever the total number of applicants exceeds the number of available rights, these limited rights are ‘scarce’. In those circumstances, limited rights have to be granted by means of an *allocation procedure*. An *allocation* is understood as the resulting award of *limited* rights to individual applicants, thereby excluding other applicants from obtaining these rights. There are several allocation methods or procedures that can be applied by an administrative authority, such as allocation in order of receipt of the applications (‘first come first served’), a lottery, an auction, a comparative assessment (‘beauty contest’) or a proportional division. Characteristic of any of these allocation procedures is that these procedures have a *relative* character: applications are compared with each other by means of one or more allocation criteria.

When analysing the allocation of limited rights, attention should not be restricted to the ‘initial’ allocation only. For example, another very important issue is whether limited rights that have been granted by means of an allocation procedure can be modified, extended or renewed afterwards without applying a new allocation procedure. Besides, after the expiry of limited rights, the re-allocation of these rights raises the question whether new entrants should be put at an advantage *vis-à-vis* incumbents or not.

Finally, it is worth emphasizing the legal form of the allocation. This legal form refers to the public or private form in which the limited right at stake is granted. Although a limited right will usually be granted unilaterally, it is sometimes necessary that the other (receiving) party agrees with this grant and that there is some kind of bilateral or multilateral legal form to express this reciprocity. Public contracts in this broad sense are conceptualised very differently in separate EU Member States. However, these varying legal forms should not prevent us from identifying the specific allocation context of limited rights, irrespective of their public or private form.

2.2. *Top-Down Approach: A Perspective from EU Law*

Considering the relationship between the EU level and the level of the Member States in more detail, we distinguish two opposites of approaches: a top-down approach and a bottom-up approach. In the *top-down* approach, we examine the influence of EU law on the design of allocation procedures. Therefore, the relevant question becomes: Which

elements of a general legal theory on the allocation of limited rights follow from European Union law? This *top-down* approach highlights the guiding role of the European institutions, including the Court of Justice, in the development of general requirements on the allocation of limited rights. This guidance may vary in its general or specific character, depending on the question whether these EU requirements apply to a particular area of government regulation (e.g. telecommunications law, gambling law) or have a more general scope (e.g. services).

While this top-down approach identifies several legal concepts of EU law as being relevant for (a consistent approach to) the allocation of limited rights,³ it shows at the same time that the guidance provided for by EU law should not be overstated. In other words, Member States are not entirely bound by EU law in the ways they limit the number of rights available and they allocate these limited rights. Consequently, Member States still enjoy an (extensive) amount of discretion as to the design of allocation procedures for limited rights.

2.3. *Bottom-Up Approach: A Comparative Perspective*

In the absence of exhaustive and crystallised top-down EU regulation with regard to the allocation of limited rights, there is a need for a complementary *bottom-up* approach as well. This bottom-up approach aims to identify common principles or rules to the allocation of limited rights that apply in the absence of or in addition to EU law. This approach requires a *comparative* view on the subject-matter and aims at identifying some *ius commune*⁴ or best legal practices. Since comparative law is above all a method of gaining knowledge, it enriches and extends the ‘supply of solutions’ and enables to find a ‘better solution’ to a concrete allocation problem.⁵ Additionally, comparative law might contribute to a unification of allocation rules and principles to be implemented by national legislatures.⁶

3. Dimensions of Comparison

3.1. *Two Dimensions*

The purpose of this book is to contribute to the development of a consistent and general legal theory on the allocation of limited rights. For this purpose, we find it useful to distinguish *two dimensions* within our comparative bottom-up approach. In the first place, it is useful to analyse several areas of public regulation confronted with the allocation of limited rights. The aim of this sectoral comparison is to identify similarities

³ Into more detail, see part II of *Scarcity and the State I. The Allocation of Limited Rights by the Administration*.

⁴ J. Schwarze, *European Administrative Law*, London, Sweet & Maxwell 2006, p. 93.

⁵ See in general Schwarze 2006, p. 78.

⁶ See in general Schwarze 2006, p. 79–80.

and differences across these areas that may contribute to common rules or principles on the allocation of limited rights. In the second place, within these particular areas of public regulation, it is useful to compare Member States' practices with each other concerning their use of discretion as left by EU law. This bottom-up approach therefore serves to identify a common, though minimal, legal core of allocation rules, while respecting Member States' discretion in the allocation of limited rights.

3.2. *Comparison between Areas of Government Regulation*

With regard to the first dimension of comparison, it is useful to distinguish between limited rights with regard to their 'degree of Europeanisation', *i.e.* the extent to which the allocation of these rights is subject to (specific) EU law. At one end of this sliding scale, there are limited rights which are entirely governed by EU law and therefore leave no room for discretion to Member States. An example of this is the granting of subsidies by EU institutions in the case of 'direct management'. At the other end of this scale, there are limited rights that lack any connection with relevant EU rules, e.g. national authorisations or subsidies without any cross-border impact.⁷ In the absence of any boundaries imposed by EU law, the allocation of such limited rights is to be guided by national legal rules and principles. In between these extremes, there are many other examples of limited rights. Within this book, three examples of limited rights have been selected on the basis of their degree of Europeanisation: CO₂ emission permits (allowances), radio frequencies and gambling licences.

As regards the allocation of CO₂ emission allowances, EU legislation has governed the EU Emissions Trading System intensely from its very start. Nonetheless, there are still new tendencies towards a more centralised allocation of allowances, e.g. the uniform prescription of the auction as the allocation procedure to be applied. Moreover, the relevant EU legislation provides for one uniform auction platform which facilitates the allocation of emission allowances at an EU-wide level. As a direct consequence, Member States seem to have little discretion anymore as to the design of the allocation procedure, although EU legislation contains some exceptions to these uniform rules for specific EU Member States.⁸

A similar development towards a more centralised regulatory framework seems to be taking place in the area of radio spectrum management. Currently, the grant of individual 'rights of use' for radio frequencies is governed by a set of directives, known as the 'new common regulatory framework'. These directives still leave Member States considerable discretion as to their choices in the limitation and allocation of these individual rights. Consequently, Member States are allowed to make diverging choices, for example on the

⁷ EU law provisions on the fundamental freedoms do not apply to situations where all the relevant facts are confined within a single Member State. Cf. Case C-245/09, *Omalet* [2010] ECR I-13771, para. 12.

⁸ See into more detail the chapter by A. Rønne in *Scarcity and the State I. The Allocation of Limited Rights by the Administration*.

treatment of new entrants versus incumbents and on the allocation procedure to be applied. However, recent developments in EU legislation on radio spectrum management show increasing attempts for further coordination and harmonization of the use of radio spectrum. This might restrict Member States' discretion in the future when it comes to the design of the allocation procedure.⁹

Gambling law, finally, is not governed by secondary EU law. Consequently, the grant of limited gambling licences is governed by primary EU law only, in particular the freedom to provide services and the freedom of establishment. Given this rather general legal framework, it should not be surprising that Member States are allowed to make diverging choices with regard to the limitation and allocation of gambling licences, e.g. by maintaining legal monopolies or by introducing limited authorisation schemes with minimal geographic distances between establishments. Nonetheless, Member States' discretion is not unlimited, as the CJEU has made clear in many judgments in the last decade.¹⁰

3.3. *Comparison between EU Member States*

It follows from this first dimension of comparison that Member States enjoy various degrees of discretion when allocating limited rights. The following question, then, is how Member States use their discretion within a specific area of regulation. This is the topic of the second dimension of comparison, *i.e.* between EU Member States. Given the existence of more or less discretion with regard to the design of allocation procedures, this comparison between EU Member States may generate interesting and fruitful insights for an optimal design of allocation procedures or a least 'a better solution' for allocation problems. Moreover, this comparison may be helpful in identifying a common set of allocation rules and principles that apply in any allocation procedure, irrespective of the area of public regulation and the Member State concerned.

With regard to this comparison between EU Member States within three specific areas of law, this book contains reports on allocation practices in seven EU Member States: France, Germany, Greece, Italy, the Netherlands, Romania and Spain.¹¹ This selection does not only provide a rich variety of allocation practices, but also allows taking into account the different legal traditions that might be relevant from a conceptual point of view. Moreover, these Member State reports illustrate whether national legislatures or administrative courts are prepared to derive inspiration from other areas of law in developing rules on the allocation of limited rights.

⁹ See into more detail the chapter by G. Oberst in *Scarcity and the State I. The Allocation of Limited Rights by the Administration*.

¹⁰ See into more detail the chapter by S. Van den Bogaert and A. Cuyvers in *Scarcity and the State I. The Allocation of Limited Rights by the Administration*.

¹¹ The only Member State report lacking in this book is a report on gambling law in Italy, since this Italian legislation has been described already quite abundantly in the CJEU's case-law on this matter.

4. Concluding Remarks

This book with Member State reports aims to contribute to the development of a consistent and general legal theory on the allocation of limited rights by administrative authorities. A fruitful way to achieve this objective is to adopt a 'bottom-up' approach. This approach seeks to compare allocation practices both between different areas of government regulation and between several EU Member States. In fact, this bottom-up approach can be characterised as the necessary 'closer' in our search for relevant allocation rules and principles: as far as general rules in EU law on the allocation of limited rights are lacking, 'best performances' derived from practices in different Member States or specific areas of law, may be helpful in optimising the authorities' discretion with regard to the allocation of limited rights.

This book provides for a comparison between three areas of law confronted with limited rights (CO₂ emission permits, radio frequencies and gambling licences) and seven EU Member States. The resulting matrix can be considered a useful starting point to develop a more complete picture of the allocation of limited rights in different areas of EU law and in different EU Member States. In particular, by considering these three kinds of limited rights as specific points on a sliding scale, other limited rights could be compared with these examples as well. By doing so, it is not only possible to identify best practices in other areas of law, but also to develop general principles that reappear in any allocation of limited rights, irrespective of the sector-specific legislation and irrespective of the Member State at issue. These principles may contribute to the development of a consistent and general legal theory on the allocation of limited public rights. Thus, in order to finetune the 'scarcity' perspective to administrative law further and further, comparative exercises on the allocation of limited rights, both between areas of law and between Member States, are worth continuing.

2. THE ALLOCATION OF GAMBLING LICENCES, RADIO FREQUENCIES AND CO₂ EMISSION PERMITS IN FRANCE

1. Introduction

According to the draft definition proposed in chapter one of this book, limited public rights are the rights granted by an administrative authority, on its statutory competence to do so, in situations in which there are more applicants than available rights. Allocating limited public rights has always been one of the tasks of the public administration. Nowadays it progressively becomes a central issue up to the point that specific administrative bodies are being created and tailored to fulfil allocation activities, i.e. independent regulatory agencies. This is probably due to the tendency toward the ‘economisation’ of administrative law¹ (allocation of scarce resources). This tendency arises from either natural constraints (radio frequencies) or artificial ones (gambling licences, CO₂ emission permits) on several resources. Addressing these constraints requires taking economic considerations into account, especially according to the framework of ‘law and economics’ approaches.

France doesn’t escape this tendency. The present chapter outlines the French legislative provisions and the practices of the French administration related to the allocation of limited rights in the three above mentioned fields. It concludes that, with some notable exceptions (the role played by procedures and the setting up of *ad hoc* bodies), France didn’t elaborate a common approach to the allocation of public rights in cases of scarcity of such rights.² Reasons for this are discussed in part 5.

* François Lafarge is Senior Researcher at the French National School of Public Administration (ENA) and Senior Lecturer at the University of Strasbourg. Alexandrina Soldatenko is lecturer at the French National School of Public Administration (ENA) and University of Strasbourg. Part 1 and 5 were authored in common. Parts 2 and 3 were authored by François Lafarge. Part 4 was authored by Alexandrina Soldatenko.

¹ P. Adriaanse, F. van Ommeren, W. den Ouden, J. Wolswinkel, ‘The Allocation of Limited Rights by the Administration: A Quest for a General Legal Theory’ in P. Adriaanse, F. van Ommeren, W. den Ouden, J. Wolswinkel (eds.), *Scarcity and the State I. The Allocation of Limited Rights by the Administration*, Antwerp, Intersentia 2016.

² This lack of common approach is also reflected by the lack of legal literature dedicated to the subject, excepted the pioneering M. Waline, ‘Hypothèse sur l’évolution du droit en fonction de la raréfaction de certains biens nécessaires à l’homme’, (1976) 2 (*Revue de droit prospectif*) 9 and J.F. Calmette, *La rareté en droit public*, L’Harmattan, Paris 2004.

2. Allocation of Gambling Agreements

2.1. Introduction

In France, gambling activities are submitted to two different regimes according to their nature: online or offline (mainly ‘brick and mortar’ casinos). The two regimes share common features. Among them, the following four are particularly relevant. First, they rely on a general principle of gambling prohibition dating back two centuries ago (and reaffirmed by the law of 15 June 1907 regarding the casinos, substantially still in force). According to it, only State agreed gambling activities are authorised. Second, unlike many other European States, France keeps a hard grip on gambling activities. It exercises it through the submission of gambling activities to (a) heavy regulations, (b) a burdensome gambling agreement procedure (besides the ‘main’ gambling agreement, ancillary gambling agreements are also requested) and (c) a very tight control on running gambling activities (called *police des jeux*, gambling police). Third, gambling activities are not organised according to a ceiling, even if this needs to be nuanced in the case of offline gambling. Finally, at EU level, all kinds of gambling are excluded from the scope of the Services Directive. Consequently, in connexion with the preservation of the national public order, Member States are not obliged to take into account gambling agreements delivered by other Member States.³ But, of course, this doesn’t allow them (France included) to discriminate operators according to a nationality criterion as far as operators comply with national agreement’s conditions.

Despite these common features, the two regimes are separated from each other on many others characteristics. They are based on different legislations (*ad hoc* legislation in the case of online gambling and legislation included in the Code of Home Security – *code de la sécurité intérieure* – in the case of offline gambling) and on different administrative regulations. They are implemented by different kinds of public administrations: a ministerial administration in the case of offline gambling (a sub-department of the public liberties directorate within the Ministry of the Interior)⁴ and a recently created regulatory authority in the case of online gambling (Online Gambling Authority, *Autorité de regulation des jeux en ligne*, Arjel). They are also differentiated by an important aspect: in the case of online gambling, operators need one (main) ‘authorisation’, a gambling agreement released by Arjel; in the case of offline gambling they need two (main) ‘authorisations’, first a delegation of public service agreement (concluded with the municipality where the creation of a casino is at issue) and second a gambling agreement (or authorisation) released by the minister of the Interior. This justifies presenting the two regimes separately.

³ Things may change according to the Communication of the Commission, *Towards a comprehensive European framework for online gambling*, 23 October 2012, COM(2012) 596 final. As of September 2015, the process is unachieved.

⁴ A special branch of the *police judiciaire*, a law enforcement body also within the Ministry of the Interior, is in charge of the repressive issues.

2.2. *How is the Limitation of Gambling Agreements Constructed Legally? How is a Maximum – a Ceiling – to these Public Rights Created within a Given Period?*

2.2.1. Offline gambling

Casinos can be set up and operated only in some areas of the French territory, precisely in areas presenting specific features and called ‘touristic resorts’. This rule was issued at the beginning of the 19th century and has been constantly reaffirmed, even if it has softened on several points over the years. The rationale was to set casinos away from densely populated areas and to concentrate them on resorts frequented by usually wealthy non-residents during limited amounts of time (holidays, thermal treatments...).⁵ The criteria according to which an area can be listed as ‘touristic resort’ are mainly the presence of tourist facilities (accommodations, entertainment...) alongside natural characteristics.⁶ The area covered by a touristic resort must correspond to the territory of a municipality and cannot extend any further even if two neighbouring municipalities, acting for their own account, may be listed as well. Municipalities must take the initiative and request to be listed if they estimate that their territory meets the criteria. Related administrative decisions and procedures fall within the tourism state administration competence.⁷

It is consequently worth raising a question about the existence of a ceiling of some kind based upon the number of municipalities whose territory could be qualified as touristic resort. The nature of this ‘ceiling’ is ambiguous. For a part it is based on natural features. It could also be considered as legally constructed, at least partially, because the qualification of ‘touristic resort’ depends on natural conditions as much as on human interpretation. At present, 260 areas are listed as ‘touristic resorts’,⁸ and respectively the number of agreed casinos is 198.⁹ Moreover, municipalities whose territories are listed, always call for tender for only one casino. This is not a legal requirement but stems from

⁵ Ultimately, the main aim was to shelter less wealthier classes from ‘the temptation and the perils’ of gambling. Accordingly, a special regulation even forbade opening and running casinos in less than 100 kilometres around Paris. The interdiction was relaxed latter on. Only gambling circles were authorised in the capital. Gambling circles are not specifically addressed in this report. They are private bodies whose primary purpose must be either social, recreational or sportive... but not gambling. Gambling activities (gambling machines excluded) must be accidental and reserved to members only. They are submitted to the Minister of the Interior’s authorisation and supervision.

⁶ Coasts and beaches, mountains, thermal waters, *etc.*

⁷ For example, see article L133–17 of the Code of Tourism.

⁸ French Competition Council (*Conseil de la concurrence*), décision n°05-D-20 du 13 mai 2005, *Société du casino du Lac de la Magdeleine*.

⁹ June 2012’s figures, source: ministry of interior. They are of various size and profitability. The casinos contain more than 20 000 game machines (from which they make 90% of their profits) and employ around 18 000 people. After decades of grow and profitability the casinos entered from 2008 onwards in a period of recession. In 2011 they generated a game gross revenue (the bets minus the wins) of 2.3 billion of euros.

practice and market analysis. Consequently, it is probably more adequate to consider the number of municipalities' touristic resorts as a more precise basis for a 'ceiling'. The 'true ceiling' is in any case somewhere behind for the following reason. Ministerial agreements are not limited up to a ceiling. However, they are granted not only on the basis of the fulfilment of technical requirements by the would-be operator, but also by taking some elements of context into consideration. For example, the Minister of the Interior grants gambling agreements on the grounds, among others, of 'balanced distribution of gambling supply on the territory'.¹⁰ In practice it uses the notion of 'gambling area' as a criterion to make its decision. The average gambling area is usually larger than the average municipality touristic resort.¹¹ In the same logic, the would-be operators must include in their file an impact assessment establishing the existence of non-satisfied gambling demand and the impact their project may have on nearby casinos.¹²

2.2.2. Online gambling

The French law doesn't set up any limitation to the number of online gambling agreements that can be granted by the Arjel. The law in force (n°2010-476) is more liberal than the provisions of the Code of Public Security regarding the casinos. It enumerates the reasons why an agreement request can be dismissed.¹³ Out of these cases, there are no grounds, like context or opportunity, for not granting an agreement.

2.3. *What Kind of Allocation Procedure is being Used? Are Authorisations being Allocated by a Competitive Method?*

2.3.1. Offline gambling

Casinos operators needs to fulfil two conditions to run a casino: to win a municipality tender and to obtain a ministerial (State) authorisation.

Tenders for operating (and in some cases building up) casinos are launched by municipalities listed as touristic resorts according to the general rules governing the award of delegations of public service for local authorities (article L1411-1 and following, Local Governments General Code – *Code général des collectivités territoriales*). There is

¹⁰ Article 1, ministerial order of 14 May 2007 related to the regulation of casinos' gambling (see consolidated version).

¹¹ It is mainly appreciated according to the number of inhabitants that can potentially reach the place where a casino is situated in one hour's car.

¹² Article 6(3), ministerial order of 14 May 2007 related to the regulation of casinos' gambling.

¹³ These reasons are the protection of public, order, the fight against money laundering and against the financing of terrorism, the fight against pathologic gambling, the applicant's lack of technical, economic or financial capacity to sustainably meet the obligation associated with operating an online gambling business, the sanctions pronounced by the enforcement commission of the Arjel toward an operator, the criminal convictions imposed on operators (either legal persons or natural persons responsible for the operations) (article 21).

no possibility to bypass the municipalities' initiative monopoly. The public service delegation enables a public body, usually a local government, to grant the management of a public service activity to an external body (a private business or a public controlled entity). The delegate is remunerated at least partially by the users of the service under the control of the delegating authority.¹⁴ Criteria to win the tenders are financial capacities, involvement in the touristic and cultural development of the resort, adequate humans and materials means, references in managing casinos. Tenders for operating casinos are considered, by the European Commission (DG COMP) and by the French Competition Authority, as an upstream market of national dimension at least upon which mergers may have an effect.¹⁵

Under French law, the resulting agreement between the municipality and the chosen operator is qualified as public service concession since a ruling of the Council of State dating back to the 1960s.¹⁶ The category of public service concession is now subsumed into the category of delegation of public service¹⁷ and all the rules related to it apply to the casinos. Qualification of casinos as public services was largely debated and accused to over stretch and even to taint the very notion of public service, which is usually more related to the offering of socially useful services (education, culture, transportation...) to all categories of population. The arguments of both the Council of State and the legislator were that the specifications (*cahier des charges*) of the public service delegation agreement to run a casino require the operator to participate in cultural and entertainment activities of the tourist resort where the casino is established.

The delegation agreement details the relation between the municipality and its operator enumerating the reciprocal rights and obligations and the termination rules.

Once the delegation is obtained, the would-be operator must ask the minister of the Interior for a gambling agreement (*autorisation de jeux*). Gambling agreements are not granted according to a competitive method. This doesn't prevent the Minister from taking competition elements related to the upstream market of operating casinos into account.¹⁸

¹⁴ Decision to grant a delegation of public service should also take downstream markets competition issues in consideration according to a major evolution of the Council of State case law: Council of State, sect., 3 November 1997, *Million et Marais*, n° 169907.

¹⁵ See for example on the same case: *Accor / Colony / Desseigne-Barriere / JV* (Case COMP/M.3373), Commission Decision 4 June 2004, French Competition Authority, decision n°05-D-20, 13 May 2005, *Société du casino du Lac de la Magdeleine*.

¹⁶ Council of State, 25 March 1966, *Ville de Royan*, n° 46504 and 46707.

¹⁷ Council of State, sect., advice, 4 April 1995, n°357 274.

¹⁸ As to downstream markets, and following the evolution mentioned at note 14, administrative decision-makers are obliged to check the competition context of their decisions and to take competition elements into account when appropriate. In other terms, compliance with competition rules is considered as part of the legality of administrative decisions and can be submitted to judicial review: Council of State, advice, section, 22 November 2000, *Société L et P Publicité SARL*. See F. LAFARGE, 'L'influence du droit

The procedure to obtain gambling agreements is time and resources consuming and constitutes a heavy burden on the operators. Request must be accompanied by no less than a dozen of documents (information regarding the capital share of the operator, municipality assent, specifications established by the municipality and previously approved by the Ministry of the Interior, impact assessment, appropriateness of the director and of the operator's board members...). Furthermore, an administrative inquiry must be conducted by domestic intelligence regarding the whereabouts of the operator and persons responsible of it. In case of renewal, transfer, introduction of new game tables or gambling machines, the agreement must be requested again but under less stringent conditions.

Once the instruction of a case, made by the competent unit of the Ministry of the Interior, is achieved, the case is submitted to the Consultative Commission of circles and casinos gambling which advise the decision maker, i.e. the minister. The advice doesn't bind the minister but in practice, the minister departs very rarely from it. The decision takes the form of a ministerial order. The ministerial order sets the duration of the concession and its conditions.¹⁹ More specifically it determines the kinds of gambling allowed and how they can be operated, the monitoring measures the casino is submitted to, the conditions of admission to the gambling rooms, the opening and closing hours, the rate and method of collecting levies.²⁰

The authorisation may be revoked by the minister of the Interior in the case of non-compliance with specifications or with the terms of the agreement. The municipality may ask the minister to revoke the agreement for the same reasons. Under no circumstances, the withdrawal of authorisations can give rise to compensation.

Public service delegation agreements (conventions) and gambling agreements (administrative decisions) are related to each other. The withdrawal of the agreement may motivate the decision of the municipality to terminate the delegation²¹ even without monetary compensation paid to the tenant. Independently, a termination of the delegation leaves the gambling agreement pointless.

As to judicial review, the administrative courts were initially reluctant to review ministerial orders denying the agreement. The Council of State argued that the law of 15 June 1907 regarding the casinos enabled the minister to decide on opportunity

européen sur les catégories juridiques du droit de la police administrative', in J.-B. AUBY et autres (dir.), *L'influence du droit européen sur les catégories du droit public*, Dalloz, Paris 2010, pp. 705–719. See also footnote 32.

¹⁹ Council of State, 3 October 2003, *Commune de Ramatuelle*, n°248523.

²⁰ Further agreements are necessary: agreement of the casino's director and the members of the board, agreement of the personnel of the casino, agreement of gambling machines manufacturers, agreement of playing cards manufacturers.

²¹ Council of State, 8 July 1987, *Société d'exploitation du casino de Capvern les Bains*, n°64829.

grounds that were out of reach of its reviewing powers.²² It gave up its position later, thereby accepting to review orders granting agreement, but on a limited scale (looking only for the manifest error of assessment, *erreur manifeste d'appréciation*).²³ Decisions withdrawing personnel's agreement are also reviewed on a limited basis.²⁴

2.3.2. Online gambling

Most of the online gambling activities are submitted to an agreement delivered by the regulatory authority, Arjel.²⁵ Some of them are not, like for example the lottery with prize money that remains a state monopoly operated by the *Française des jeux* (a public money lottery body). Each type of gambling requires a dedicated agreement (horserace betting, sporting bets, circle gambling – mainly poker – ...) but none is granted according to a competitive allocation procedure. Agreements are granted according to the respect of unilateral conditions set by the legislator and detailed by Arjel. Such conditions are very numerous. They range from the operator's 'nationality'²⁶ to the very detailed administrative requirements (for example in the field of advertising) and technical specifications, both elaborated by Arjel.²⁷ Yet, as already pointed out, any refusal of agreement must be based on grounds enumerated in the law and motivated. Any change to the information transmitted alongside the original demand during the on-going activity has to be communicated to Arjel. In case of crucial changes, Arjel may request the operator to ask for a new agreement. Agreements are granted for a five-year duration. They are renewable, but non-transferable. It should be observed that strictly speaking, online gambling agreements cannot be qualified as limited public rights according to the definition proposed in chapter 1 of this book.

Alongside adjudication and regulatory powers, Arjel was granted a third power by the legislator: the imposition of sanctions. Sanctions are imposed on agreed operators failing to comply with their agreement conditions and on un-agreed, illegal, operators. As seen, the French basic principle regarding gambling supervision is that only agreed operators can offer gambling activities but at the same time are subject to heavy regulatory conditions. This basic principle applies also to online gambling. However, by doing so, French approach to gambling takes the risk to indirectly encourage unauthorised online gambling activities. This forces the French legislator and regulator to dedicate a substantial part of online gambling law and regulations to the sanctioning of such

²² Council of State, 14 October 1970, *Société d'exploitation des eaux et thermes d'Enghien*, 76923, 77015.

²³ Council of State, 3 May 1993, *Société d'exploitation d'industries touristiques*, n°121923 and 19 November 1997, *Société Forges Thermal*, n°141297.

²⁴ Council of State, 16 March 2001, *Ministre de l'intérieur*, n°207646 and 9 February 2005, *M. Simon X*, n°261007.

²⁵ Ancillary authorisations are also necessary.

²⁶ Only operators established in an EU member State or a State belonging to the Economic European Space whose State concluded a bilateral convention with France aiming at mutual cooperation in cases of fraud and fiscal evasion.

²⁷ Arjel drafts administrative requirements and technical specifications that have to be approved by the ministries involved in the supervision of gambling before being imposed to the operators.

activities. Likewise, the Arjel dedicates a very important part of its implementation activities to fight unauthorised gambling operators.

2.4. *How are Favouritism and Nepotism being Prevented? How is the Equal/Fair Treatment of Newcomers being Approached?*

2.4.1. Offline gambling

Regarding the public service delegation agreement, the guarantees aimed at preventing favouritism and nepotism are those common to the public service delegation mechanism in general with their advantages and their shortcomings. Public service delegations were created in 1993 with the aim to conciliate the existing possibility for local government to grant the management of public activities to external bodies on a *intuitu personae* basis (backed by the references presented by the said body) with largely increased procedural requirements and transparency conditions (as a reaction to corruption cases). The formula is nevertheless questioned both because it didn't hinder conflicts of interest and corruption cases, and more generally because it doesn't avoid a somewhat legal uncertainty due to an un-stabilised case law.

Regarding the gambling agreement, there are no specific provisions designed to ensure that the main decision-maker, the minister of the Interior, is well informed and is not influenced by private interests. However, as mentioned previously, the minister follows the advice given by the Consultative Commission on circles and casinos gambling. Three categories of people are involved in the work of this Commission. Civil servants of the Interior's ministry in charge of gambling regulation investigate the case and are subject to the general behaviour obligations that apply to all civil servants. The case is then subject to a report made by *rapporteurs*. *Rapporteurs* are responsible for carrying out technical and objective analysis of cases at issue. They are nominated by the minister of the Interior among members of administrative courts or members of Ministry of Interior inspectorate. According to their professional backgrounds *rapporteurs* are submitted to reinforced conditions of professional behaviour and independence. The Consultative Commission deliberates on the basis of the said reports. The members of the Commission are either members of Parliament, high ranking civil servants representing the different ministries or agencies involved in the regulation of gambling (interior, budget, and public health) and mayors of touristic resorts.²⁸ They are bound by the confidentiality of the discussions and of the information they have accessed while performing their tasks (decree no. 2011-252).

There is no specific treatment offered to new entrants even if a *de facto numerus clausus* of operators prevails. Four groups of operators dominate the offline gambling industry, representing 77% of the activity.²⁹

²⁸ The Consultative commission may hear mayors of the concerned resorts, representatives of the casino operative boards and members of gambling police.

²⁹ 2004-2005 figures, source: ministry of interior.

2.4.2. Online gambling

The prevention of favouritism and nepotism in granting online gambling agreements is addressed by the provisions of the law no. 2010–476 regarding the status and the behaviour of the members of the regulatory authority in charge of adopting these agreements (Arjel).

The deciding body of Arjel is a college of seven members. The College decides upon reports prepared by its staff. Members are nominated (by the President of the Republic, and by the Presidents of the two parliamentary assemblies) according to their competencies in the fields of economics, law or ITC. First, the president and the members of the Authority must reciprocally disclose information about any interest they hold, directly or indirectly, of any duties they previously carried out pertinent to economic or financial activity and of any mandate they previously held in a corporation. Second, no member may deliberate in a case in which he or she is directly or indirectly involved. Third, being a member of the Authority is incompatible with holding a national elective office, which is not the case of the offline Commission members mentioned above. Furthermore, being a member of the Authority is incompatible with any function related to the gambling industry. Members and staff of the Authority cannot bet online, directly or indirectly. Rules regarding the prevention of conflicts of interest are detailed in the Authority's internal rules. In addition, members and staff of the Authority are bound to professional secrecy.

Another important body of the Authority is the Enforcement Committee that sanctions un-agreed operators and agreed operators violating their agreement or the attached rules. The Enforcement Committee operates somewhat separately from the College. Its members can only be magistrates from the highest administrative, ordinary and financial jurisdictions on secondment.

There is no specific treatment offered to new entrants. Operators are much more numerous than in the offline sector. Nevertheless, new comers consider that the online gambling market is not profitable or even viable under present conditions. However, they acknowledge that the situation is due to heavy taxation, persistence of a large illegal offer and, to a lesser extent, regulatory burden, rather than due to competition issues.³⁰

2.5. *Which General Legal Principles (e.g. of Proper or Good Administration/ Transparency) Play an Important Role in the National Debate or Jurisprudence Concerning the Allocation of Gambling Agreements?*

The main features of the French system are first that granting gambling activities is more an exception than a principle, second that authorised gambling activities are submitted

³⁰ A. Filippetti and J.F. Lamour, *Rapport d'information sur la mise en application de la loi n°2010–476 du 12 mai 2010 relative à l'ouverture à la concurrence et à la régulation du secteur des jeux d'argent et de hasard en ligne*, Assemblée nationale, n° 3463, 25 mai 2011, passim and pp. 147 ss.

to heavy regulatory rules. This comes at a price: the market of brick and mortar casinos is narrowed down substantially. But more importantly, this entails propagation of unauthorised gambling (especially online).

Moreover, new challenges arose over the past 10 years. They mainly regard transparency, regulatory and administrative burdens and the increasing necessity to cut the red tape. They have been partially addressed. In case of offline gambling, measures have been frequently simplified but within a limited scope.³¹ As to online gambling, the creation of a regulatory authority, Arjel, with all the guarantees attached to its status (independence, transparency, circumscribed involvement of the industry...) may also be read as an attempt to tackle these challenges.

2.6. *Are there any National Cases in which Competition Law (e.g. Abuse of a Dominant Position or State Aid) Played an Important Role?*

2.6.1. Offline gambling

Considerations regarding the upstream market were made at point 2.2.1. In the framework of EU rules and decisions, competent French competition authorities monitor the downstream market of operating casinos, being especially careful with mergers between groups of operators in order to avoid any creation of a dominant position. They consider that a dominant position is reached when a group satisfies 50% or more of the gambling demand in a given local market (gambling area) with possible detrimental effects on clients. If it occurs, the authorities ask the group in question to cede one or several establishments in precise places where the dominant position is acknowledged. The group is free to choose the establishment to be ceded within a 10-month deadline. In case of a refusal, the Minister of the Economy takes action directly. In 2004 – 2005, a situation of this kind occurred with the merger of two ‘heavyweights’ of the French casino sector (Barrière and Accor casinos) resulting in the cession of three casinos.³²

2.6.2. Online gambling

Before 2010, French law related to online gambling (sport betting, poker, casino, lotteries...) only allowed State-owned or controlled bodies (such as *Française des Jeux*, a public money lottery body, and *Pari Mutuel Urbain*, a public horserace betting body) and State agreed bricks and mortar casinos, to run online gambling activities. From the second half of the 2000’s onwards, the EU put a lot of pressure on EU Member States that were failing to comply with EU competition law in this field. This was the case of France.

³¹ These measures are primarily aimed at helping the industry in a difficult economic context.

³² *Accor / Colony / Desseigne-Barriere / JV* (Case COMP/M.3373), Commission Decision 4 June 2004 and Ministry in charge of the economy, decision n°C2004-117, 28 July 2004, *Bulletin officiel de la concurrence, de la consommation et de la répression des fraudes*, n°6, 23 juin 2005.

None of the well-known ECJ cases³³ concerned France directly, but the country was eventually requested by the Commission to dismantle its state monopolies and to enable foreign EU operators to gain access to the French gambling market.³⁴ As a result, the law no. 476–2010³⁵ revamps the regime of online gambling.³⁶ A key point of it is that the incumbent players *Française des jeux* and *Pari mutuel urbain* lose their monopolies on online gambling, at least partially. *Française des jeux* maintains a monopoly on online (and offline) money lottery. *Pari mutuel urbain* keeps its monopoly on offline horserace betting. For the online gambling activities not covered by the monopolies, both bodies need gambling agreements from Arjel as any other online operator.

In a recent advice spontaneously released, the French competition regulator (*Autorité de la concurrence*) draws the attention of the legislator and of the online gambling regulator (Arjel) on the one side and of the operators on the other, on the potential risks for the free competition of the presence of the two incumbent players.³⁷ Their position of public bodies operating free market activities and monopolistic activities simultaneously could first be questioned *per se* under EU competition law and second be qualified as a competitive advantage respectively to new comers.³⁸

As a sectorial regulator, Arjel is not in charge of supervising and even less of enforcing competition compliance among online gambling operators. But in cases in which it observes that operators' behaviour may hinder the free exercise of competition, it must appeal to the Competition Authority. In fact, this appeal may be lodged according to an emergency procedure. In turn, the Competition Authority refers to Arjel for any case regarding an online gambling issue it has under review.

2.7. Which Specific Problems of Legal Protection do you Consider to be the Most Important or Interesting Issues in the Light of Effective Legal Protection?

It can be argued that the degree of transparency of gambling agreement's decision-making is higher in the case of online gambling, with the setting up of Arjel that publishes online all the relevant information, than it is in the case of offline gambling.

³³ ECJ, Case C-275/92, *Schindler*; C-124/97, *Läärä*; C-243/1, *Gambelli*; C-359/04, *Placanica*; C-42/07, *Santa Casa*.

³⁴ European Commission, Reasoned Opinion, 27 June 2007, IP-07–909.

³⁵ Loi n°2010–476 du 12 mai 2010 relative à l'ouverture à la concurrence et à la régulation de du secteur des jeux d'argent et de hasard en ligne. The law n°2010–476 is now codified within the code of home security (Code de la sécurité intérieure) article L320–1 onwards.

³⁶ M. Behar-Touchais, J. Rochfeld, A. de Guillenchmidt-Guignot and A. Fournier, *Les jeux en ligne en France et en Europe: Quelles réformes trois ans après l'ouverture du marché?*, collection Trans Europe Experts, volume 7, Société de législation comparée, Paris 2013.

³⁷ French Competition authority, 20 January 2011, advice n° 11-A-02.

³⁸ The French competition authority reacted partially in 2014, see Autorité de la concurrence, décision du 25 février 2014 n°14-D-04 relative à des pratiques mises en œuvre dans le secteur des paris hippiques en ligne.

3. Allocation of Radio Frequencies³⁹

3.1. Introduction

Under French public law, radio electric frequencies are elements of the State's assets or more exactly of the States' public domain: 'The radio electric frequencies available on the territory of the Republic are in the State's public domain' (L2111–17, *Code général de la propriété des personnes publiques* – CGPPP – General Code of Property of Public Entities) with the consequence that 'the use by authorisation holders of radio electric frequencies available on the territory of the Republic is a private utilisation of the public domain' (L41–1(3), *Code des postes et des communications électroniques* – CPCE – Code of Postal Activities and Electronic Communications). This position was confirmed at constitutional level by a ruling of the Constitutional Council in 2000.⁴⁰

Hence it follows that, the principles (enumerated below) regarding the private use of the public domain in general apply to radio frequencies, especially to the allocation of the related authorisations. Nonetheless, due to the nature of the radio frequencies, some aspects may differ.

First, private users of the public domain at large must be holders of an authorisation. Authorisations cannot be tacit (L2122–1 CGPPP). As to radio frequencies, if in most of the cases, a previous authorisation is requested before any use, some frequencies may be used with no formality other than sending a declaration to the competent regulatory authority. In cases in which the public domain is not only used (like in the case of circulation of people or goods) but is also the location of an economic activity, competition considerations must be taken into account when releasing authorisations.⁴¹ The review of authorisations, either adopted according to competition considerations or not, is made by the administrative judge (Council of State) and not by the Competition Authority (*Autorité de la concurrence*). The competence of the Competition Authority is 'limited' to determine whether the conduct of economic agents (public or private) infringes competition rules. If so, it has the power to sanction it.⁴² Second, the use must not only be compatible with the assignment (*affectation*) of the considered part of the domain,⁴³

³⁹ The authors thank Thomas Perroud for the information provided during the preparation of this chapter. Constitutional Council, 28 December 2000, *Loi de finances pour 2001*, n°2000–442DC.

⁴¹ Council of State, section, 26 March 1999, *Société EDA*, n°202260 in the framework of related landmark decision. Council of State, sect., 3 November 1997, *Million et Marais*, n° 169907 and advice, section, 22 Novembre 2000, *Société L et P publicité*, n°222208.

⁴² Tribunal of conflicts, 18 Octobre 1999, *Aéroports de Paris*, n°03174 'if it is the duty of the public administration to which a part of the public domain has been assigned [*administration affectataire*] to manage it both in the interest of the asset's assignment and in the sake of the general interest at large; it is also its duty, if the asset in question is the location of productive, distributive or services activities, to take into consideration the various rules, such as the principle of freedom of trade and industry, under which these activities are exercised'.

⁴³ 'Compatible use' means causing no harm to the goods used (for example by creating interferences towards other frequencies) as well as to their collective uses, if any.

it should also seek the best use (*meilleure valorisation*) of the public domain. Third, authorisations to use the public domain are usually temporary (L2122–2 CGPPP). This is also the case with granting authorisations for the radio frequencies use. Although authorisations to (privately) occupy the public domain are in principle precarious and revocable (L2111–3 CGPPP), and, consequently, are not establishing rights to the benefit of their holders, in derogation, authorisations to use radio electric frequencies create such rights.⁴⁴ Finally, private use of the public domain gives rise to the payment of a fee – *redevance domaniale* (L2125–1 CGPPP). These fees have a *sui generis* nature, as they do not fall within tax, rent or any other category. They are calculated proportionately to the intensity of the use and should also take into account all the advantages enjoyed by the holder of the authorisation. In 2011, the amount of the fees paid to the State by the holders of radio electric frequencies amounted to approximately 250 million of euros (auction prices excluded), not that far from the amount of the fees paid by all other holders of authorisations for the use of the public domain (320 million of euros).

3.2. How is the Limitation of Radio Frequencies Constructed Legally? How is a Maximum – a Ceiling – to these Public Rights Created within a Given Period?

The spectrum of radio electric frequencies, even if limited in nature, was considered for a long time large enough to sustain all human radio-related activities. Nowadays, the continuously growing number of new systems of radio communication brings it near to saturation, at least in some part of it. Moreover, two other elements narrow down the use of the spectrum. First, the present state of the art of the technology does not yet allow us to use all the parts of it, even though progress is made and pieces of the spectrum previously inoperable are regularly won to human use. Second, the use of different but close frequencies may potentially lead to reciprocal interferences.

At international level, the sharing of the radio spectrum at large is decided within the International Telecommunication Union (ITU) and other organisations of regional scope (i.e. the European Conference of Postal and Telecommunication Administrations) according to the kinds of services for which the frequencies are used, to geographical considerations and to the requests of the Member States. The French Frequencies National Agency (*Agence nationale des fréquences*, ANF) is in charge of representing France's interests *vis-à-vis* the ITU and of insuring that France has at its disposal the spectrum sharing deemed necessary to its needs. With regard to the potential users of the frequencies in France, ANF plays a role of 'wholesaler' as its main mission is 'to ensure planning, management and control of the uses, including private use, of the public domain of radio electric frequencies' (L43, CPCE). It prepares the allocation of radio frequency bands among different categories of services and users. The allocation has to be approved by the Prime minister, after taking the advice of the two regulatory

⁴⁴ Council of State, section, 10 Octobre 1997, *Société Starsbourg FM*, n°134766 and Council of State, 30 June 2006, *Société Neuf telecom SA*, n°289564.

authorities mentioned below.⁴⁵ This decision takes the form of a ‘National Radio Frequency Allocation Table’.

The EU intends to play an increasing role in the field of frequencies allocation. The ‘2002 Telecom Package’⁴⁶ mostly deals with the downstream market of telecommunications. But its two radio spectrum Decisions, adopted in 2002⁴⁷ and 2012⁴⁸ by the European Parliament and the Council expressly address the allocation of frequencies by national authorities. More specifically, the Decision of 2012 is designed to ensure a key role for the European Union and concretely for the European Commission within the competent international organisations especially if the subject matter of the negotiations they host falls within the competences of the Union, to the detriment of the Member States (article 10(1)(a) of the Decision). It also aims at imposing the ‘consistent application of general regulatory principles across the EU’ in particular the one dedicated to the ‘application of the most appropriate and least onerous authorisation system possible in such a way as to maximise flexibility and efficiency in the spectrum use’ (article 2(1)(a) of the same Decision). Lastly, the EU committed itself to technological harmonisation of some parts of the spectrum, especially the ‘golden’ frequencies used for 4G mobile phone networks (800 MHz and 2.6 GHz). The Member States are therefore required to make these two frequency bands available for ultra-high-speed mobile systems. Furthermore, the harmonisation of frequency bands provides for the creation of a European market for network equipment and devices.

Frequencies included in the French National Radio Frequency Allocation Table are then managed by two kinds of national authorities that share the ‘national part’ of the spectrum and ‘retail’ frequencies or frequency bands to concrete users.

Authorities belonging to the first category are governmental departments such as the police forces, the army and the civil aviation. They have some parts of the spectrum at their disposal which they allocate to their respective activities. Authorities belonging to the second category are two sectorial regulatory authorities: the Electronic Communications and Postal Regulatory Authority (*Autorité de régulation des communications électroniques et des postes*, ARCEP) and the Superior Council for Broadcasting (*Conseil supérieur de l’audiovisuel*, CSA). ARCEP and CSA must justify the type and the amount of frequencies they request from the ANF. The overall examination of all the requests leads to the adoption of the National Radio Frequency Allocation Table.⁴⁹

The ARCEP has jurisdiction upon frequencies related to the use of the spectrum for electronic communications in general and for mobile phones in particular. Regulatory

⁴⁵ Law n° 86–1067 of 30 September 1986 related to the freedom of broadcasting, article 21.

⁴⁶ Directive 2002/19/EC, directive 2002/20/EC and directive 2002/21/EC.

⁴⁷ Decision n°676/2002/EC of 7 March 2002.

⁴⁸ Decision n°243/2012/EU of 14 March 2012.

⁴⁹ For example ARCEP is granted with around 15% of the (national share of the) spectrum between 29.7 and 960 MHz and 35% of it between 960 MHz et 10 GHz.

tasks of ARCEP are outlined in the Code of Postal Activities and Electronic Communications, CPCE. It includes responsibilities related to the ‘effective use and management of the radio frequencies’ (L32–1 (II) (11) CPCE). ARCEP establishes the technical conditions and the specifications according to which each frequency or frequencies band ‘assigned’ by the ANF must be used (L36–6 and L42 CPCE). It distinguishes between cases in which the use of a frequency or a frequency band is submitted to a declaration and cases in which it is submitted to an authorisation (L36–7(6)) and L42 CPCE).⁵⁰ It releases the said authorisations after examination of the case and supervises if ‘appropriate use’ is made of them.

The CSA awards radio frequencies *per se* (meaning those necessary for transmitting radio and television programs) in line with relevant provisions of the law no. 86–1067 of 30 September 1986 related to the freedom of broadcasting (as amended on a number of occasions). The CSA grants four types of authorisations according to the four kinds of services using the spectrum that fall within the scope of its competence: ground-based radio services broadcasted through analogical mode, ground-based television services broadcasted through analogical mode, ground-based radio services broadcasted through numerical mode, and ground-based television services broadcasted through numerical mode. The regimes according to which these different kinds of authorisations are granted, renewed and terminated have a lot in common. Especially, all the authorisations are granted according to the result of a call for applications. Consequently, they are not treated individually here. CSA is also competent for supervising services broadcasted through networks (cable and satellite) that do not use frequencies it allocates (article 33 to 34–5 of the 1986 law). This task is not taken into consideration here.

3.3. *What Kind of Allocation Procedure is being used? Are Authorisations being Allocated by a Competitive Method?*

With regard to broadcasting only, ARCEP and CSA allocation methods differ according to nature of the broadcaster, the public sector broadcasters and other broadcasters. The law created a specific legal status for public sector broadcasters (mainly the national broadcasting companies, *sociétés nationales de programmes*, article 44 of the 1986 law). These bodies are required by law to fulfil missions of public utility (*mission de service public*). Upon governmental request, CSA and ARCEP, within the scope of their respective competences, grant them priority access (together with the related rights) to use the radio-electric resource necessary to the accomplishment of their missions of public utility (article 26(II) of the law). Public sector broadcasters are nevertheless subject to obligations that are determined in specifications adopted by a decree. The following developments deal only with non-public broadcasters.

⁵⁰ The cases in which ARCEP is only recipient of declarations of use of some frequency bands is not taken into consideration in this study.

3.3.1. ARCEP

Grossly speaking, ARCEP grants two kinds of authorisations that must be carefully distinguished because they obey different regimes even if they share some common features: authorisations granted in cases of non-scarcity and authorisations granted in cases of scarcity.

In the case of non-scarcity, ARCEP grants the authorisation for the use of given frequency bands according to 'objective, transparent and non-discriminatory conditions' (L42-1 of the Code of Postal Activities and Electronic Communications, CPCE). It also takes into account the needs in terms of land coverage. Authorisations can be denied only on the grounds of one of the motives exhaustively enumerated by the Code: protection of the public order, needs in terms of national defence or public security; inappropriate use of frequencies; applicant's lack of technical or financial capacities; previous conviction of the applicant for disregard of the code provisions. The authorisation indicates the conditions according to which the frequency or the frequencies band must be used: technical requirements, duration of the authorisation (which can never exceed 20 years), renewal conditions, fees...

In the case of scarcity, ARCEP may decide on its own to cap the number of authorisations for certain specifically indicated frequencies. The conditions according to which it can resort to a cap are very broadly enunciated in the Code. As capping can occur 'when requested by the proper use of the frequencies' (L42-2, CPCE), ARCEP enjoys a wide discretionary power. Once ARCEP deliberated to resort to a cap, a public consultation has to be organised on the project. ARCEP proposes to the ministry the conditions according to which the capped authorisations to use the frequencies are granted or modified. The Code provides two mechanisms for selection of the recipients: calls for tender or auctions. Whatever the mechanism selected, it must 'ensure conditions of effective competition' (L42-2, CPCE). Calls for tender are based on the respect of the criteria according to which authorisations are usually granted, that is in the case of non-scarcity (L42-1 (II) or L32-1, CPCE), see above, but they are appreciated according to a competitive cross-examination. Auctions are usually held according to the amount of the fee that bidders agree to pay in case where the frequency bands are granted to them. The selected mechanism is then submitted to the Ministry in charge of electronic communications for final decision. The minister establishes the duration of the use.

Authorisations for mobile networks of the second, third and fourth generations and wireless local loops have been issued according to the criteria of comparative bidding between different candidates. For example, allocations related to the 'golden' 4G band of frequencies were made according to three major objectives:⁵¹ (1) digital regional development aimed at ensuring that balanced social welfare and economic development

⁵¹ D.G Courtois, Speech delivered at the TD-LTE technology and spectrum workshop, Geneva, 25 October 2011.

is maintained across many regions of France' (ambitious coverage targets, obligation to perform rollouts in sparsely populated areas first...);⁵² (2) maintaining and reinforcing a lasting competition in the mobile market, mainly through provisions guaranteeing a fair distribution of the 4G frequencies between the four operators already operating 3G authorisations in France; (3) monetising State assets because (given the value of the considered frequencies) monetisation represents a considerable stake.⁵³

More concretely, in July 2015 ARCEP elaborated the tender allocation procedure of the 700MHz band frequencies according through a multi-round ascending auction price for six 2 x 5 MHz blocks.⁵⁴ The procedure was designed to meet the policy objectives set by the Parliament and by the Government: monetising the State public domain (the Government has set a reserve price of 416 million euros per 2 x 5 MHz block or 2.5 billion for the entire band), stimulating investment and regional development (licences contain high coverage obligations including on boards coverage on every day trains), insuring an effective and fair competition.⁵⁵ After the main auction, a positioning auction will determine the position of the winners within the band.

According to a reform introduced in 2006, and regardless of the adjudication mechanism used, some of the authorisations to use a frequency or a frequency band can be ceded. Only frequencies or frequency bands previously listed by the minister in charge of electronic communications can be ceded. Intended assignments must be notified to ARCEP and made public. When frequencies are assigned through a declaration or used for the fulfilment of a public service mission, the assignment must be approved by ARCEP. Cession of authorisations is considered as a new tool for spectrum management. By increasing the flexibility for authorisation transferring, the French legislator intended to create a 'secondary market' and to provide for better use of spectrum resources. Indeed, it is considered that with the possibility to transfer frequencies, operators can contribute to a more efficient spectrum allocation system, especially by using the possibility of exploiting frequencies currently underutilised. The assignment does not cause transfer of ownership of the frequency itself, which remains in the public domain, but entails the transfer to another operator of any rights enjoyed by the original holder of the authorisation and duties associated with the private use of the public domain.

⁵² This objective stems from the law n° 2009-1572 of 17 December 2009 related to the fight against the digital divide.

⁵³ The lots related to the 800 MHz band finally contributed to 2.639 billion euros to the State's budget (reserve price was 1.8 billion). The lots related to the 2.6 GHz band contributed to 0.9 billion to the State budget.

⁵⁴ Arrêté du 6 juillet 2015 relatif aux modalités et aux conditions d'attribution d'autorisations d'utilisation de fréquences dans la bande 700 MHz en France métropolitaine pour établir et exploiter un système mobile terrestre.

⁵⁵ All mobile operators are able to obtain frequencies through a transparent procedure that allows them to manage their outcome. In addition, to limit spectrum imbalances between operators, a single candidate cannot acquire more than 2 x 15 MHz in the 700 MHz band or more than 2 x 30 MHz of low frequency spectrum.

3.3.2. CSA

Private broadcasters follow the ‘normal’ procedure (which public broadcasting operators are also submitted to) that includes a compulsory call for applications. Furthermore, the law stipulates that, in cases where the contemplated decision to allocate a frequency or a frequency band may ‘modify in an important way the related market’, CSA must organise a public consultation before launching the call (article 31 of the 1986 Law). According to the availability of the radio electric resources allocated to the different kinds of broadcasting and to the results of the public consultation, the CSA defines how the resources will be allocated, as well as the contents of the call for applications (article 28–4). This means that the Council may set up *ad hoc* rules for each type of allocation. These calls must nevertheless satisfy the following legal requirements: definition of the geographical area concerned (national or local), available frequency at stake, category of the services for which the call is tendered (free or paying television services, generalist or thematic, full-time or time-sharing...). Outside these requirements, the law left CSA with a broad margin of appreciation in drafting the calls. After the first examination, concerning only the fulfilment of formal criteria, the list of the admissible candidates is made public.

After that, CSA examines in substance the admissible candidates’ proposals. A public audition of each candidate helps to gain a more precise idea of their projects and also constitutes a key element in ensuring the transparency of the process.

The law requires the Council to appreciate the projects according to their ‘interest for the public’. It enumerates three priority criteria to guide the CSA’s choice: safeguard of the pluralism of the socio-cultural points of view (*courants d’expression*), diversity of the operators, necessity to avoid abuses of dominant positions and other practices restricting the free exercise of competition (article 29 of the 1986 of the Law, for example). The law also enumerates several subsidiary criteria: candidate’s previous experience in broadcasting activities, service’s financing and running perspectives, operators’ direct or indirect shares in advertising companies or in press publishing companies, etc. It may be observed that the accumulation of legal criteria may lead to the widening of the discretionary power left to CSA.

Authorisations are granted for a limited period of time (usually five years) and are normally renewable up to two times. Renewals are not submitted to a new call for application but depend on an evaluation made by CSA of the use of the frequencies allocated by the operator. CSA is also granted with an ongoing power of supervision of how the operators use their authorisations. In cases of breach of the authorisation’s conditions or of the terms of agreement (see below), CSA may suspend the authorisation or withdraw it in the most serious cases.

Symmetrically, CSA notifies denied authorisations to their proponents. These decisions must be motivated and clearly related to the non-fulfilment of one of the above-cited criteria.⁵⁶

Moreover, the 1986 law requires an agreement (*convention*) to be concluded between the authorised operator and the State, represented by CSA⁵⁷ (article 28 of the Law). The agreement is intended to determine the framework of the operator's activities (called the 'service'). According to the 1986 Law, some elements of this framework have to be taken into consideration like the 'integrity and pluralism of information', the area covered by the service, the part of the service in the advertising market, the respect for equality of treatment between different services and the respect of the competition conditions related to each service, as well as the development of digital ground radio and television. By contrast, some other elements are compulsory and must be part of each agreement, like provisions granting quotas for French language music and provisions limiting the space dedicated to advertising.

Finally, all the uses of the radio-electric resource related to broadcasting ground-based services are requested to respect technical conditions elaborated by CSA (article 25).

Synthetically, allocation procedures followed by both ARCEP and CSA may differ on some points but share two common features: the provision of the Code of Postal Activities and Electronic Communications and the 1986 law related to the freedom of broadcasting require the authorities to take diverse criteria into consideration in allowing the private use of radio frequencies. Those that are the most frequently put forward are pluralism, financial interest of State, proper use of the frequencies and competition considerations. The administrative judge has developed *ad hoc* case law in this regard and is competent to review decisions, especially those that dismiss an application.⁵⁸

3.4. How are Favouritism and Nepotism being Prevented? How is the Equal/Fair Treatment of Newcomers being Approached?

Three types of safeguards are aimed at preventing ARCEP and CSA decisions from favouritism and nepotism: structural, procedural and judicial. First, granting adjudicating powers to a regulatory authority like ARCEP and CSA means that a special attention is dedicated to the issues of transparency, neutrality and prevention of conflicts and favouritism, because it is deemed that this kind of bodies are more structurally keen to grant them than ministerial-like administrations. Notably members of both authorities

⁵⁶ For a refusal based upon the insufficient financial capacity of a candidate, Council of State, 6 July 2005, *Société Canal Neuf*, n°270210.

⁵⁷ Authorisations granted by ARCEP are not accompanied by conventions.

⁵⁸ In the case of ARCEP see Council of State, 30 June 2006, *Société Neuf telecom*, n° 289564, in the case of CSA see Council of State, 6 July 2005, *Société Canal Neuf*, n°270210.

are subjected to strict independence requirements (conflict of interest, declaration of direct or indirect shares in the regulated businesses...).

Second, from a procedural perspective, the publicity of the procedures must be respected at each stage. As to the authorisations granted by CSA, calls are made public and each candidate must present a standard application file within the fixed deadlines. CSA must publish the list of those candidates the applications are admissible. Auditions are public and criteria for selection are enunciated in the calls. Procedural guarantees also apply to ARCEP; especially as to the capped authorisations it grants: a public consultation has to be organized, the selection mechanism is made public and so is the selection criteria, motivating the decision is compulsory...

Third, the administrative judge is a key player in ensuring impartial decision-making. Bias is a traditional ground for review and if a decision shows that there is a conflict of interest, the Council of State may quash the decision on this ground alone.⁵⁹

The 1986 law related to the freedom of broadcasting and the Code of Postal Activities and Electronic Communication do not include provisions formally dedicated to the protection of new entrants but several provisions related to competition issues may be interpreted as having the same effect (article 35–11 of the Law and following). The equal fair treatment of new comers is particularly taken into consideration in the EU's decision of 2012 on the use of spectrum.⁶⁰

3.5. Which General Legal Principles (e.g. of Proper or Good Administration/ Transparency) Play an Important Role in the National Debate or Jurisprudence Concerning the Allocation of Radio Frequencies?

Two principles play an important role in the allocation of radio frequencies by ARCEP: transparency and efficiency. ARCEP is submitted to transparency requirements in the exercise of its regulatory and adjudicating powers. These requirements stem from the Code and from EU law (especially article 5 dedicated to the 'availability of information' of the first EU Radio Spectrum Decision of 2002). As said, important ARCEP decisions are submitted to a public hearing and must be motivated. ARCEP is also committed to enhancing the transparency of its activities, for example by creating and running databases related to the frequencies that it manages (allocation of frequencies to a specific service, related authorisation mechanisms, uses granted, technical conditions...) and to the authorisations related to the secondary market (cessions)... Its decision-making process is also in line with the ISO 9001 quality certification.

⁵⁹ Council of State, Assemblée, 3 December 1999, *Didier*, n° 207434 and 27 April 2011, *Formindép*, n° 334396.

⁶⁰ See for example article 5(2)(b) according to which, to promote effective competition and avoid distortions of competition in the internal market for electronic communication services "reserving, if appropriate in regard to the situation in the national market, a certain part of a frequency band or group of bands for assignment to new entrants."

Alongside the respect of the transparency principle, ARCEP is also required to ensure appropriate and efficient management as well as appropriate and effective use of the allocated frequencies (article 32-1 (II) (11) CPCE). This requirement may be read in connection with two other tasks granted to ARCEP: the supervision of the 'secondary market' of assigned authorisations (see above) and the reallocation of spectrum. Reallocation of spectrum is a consequence of the current switch of the European television broadcasting from analogue to digital systems. This frees several frequencies that can be then reallocated, the phenomena is called 'Digital Dividend'.⁶¹ ARCEP activities in the field are congruent with the EU requirement (see article 2(1)(a) of the 2012 Second Radio Spectrum Decision quoted above).

The principle of pluralism plays a very important role in the allocation of frequencies or frequency bands by CSA up to the point to curb the general French competition law in this field and to create a special branch of competition law: broadcasting competition law. This is due to the Constitutional Council case law. The Constitutional Council considers media pluralism as an 'objective with constitutional value', that is, a necessary condition to ensure the effective application of the principle of freedom of expression and even a prerequisite for democracy.⁶² In a famous decision dating back to 1986, it was decided that the rules enunciated in an earlier version of the 1986 law were inadequate to limit concentration between broadcasting companies likely to prejudice pluralism.⁶³ In other words, it forced the legislator to state clearly that, when attributing an authorisation, CSA must have regard that, in every geographical area covered, pluralism is respected and programs are diverse so that each citizen can have the widest choice possible.

3.6. *Are there any National Cases in which Competition Law (e.g. Abuse of a Dominant Position or State Aid) Played an Important Role?*

Competition is one of the legal criteria required by the 1986 law related to the freedom of broadcasting and the Code of Postal Activities and Electronic Communications to be taken into consideration when allocating radio frequencies. Consequently, among other tasks, ARCEP and CSA are also sectorial competition authorities with powers related to the upstream markets but also to the downstream markets of radio frequencies. Following the general approach of this study, we focus on if and how CSA and ARCEP take competition issues into consideration when examining requests for authorisation.

The CSA must take competition issues into consideration for each request it is competent to examine and to decide upon. The 1986 law provides for a precise regime to avoid excessively high concentration of the media. The same operator cannot control more than seven broadcasting companies that have already been granted an authorisation to

⁶¹ A broad division of the digital dividend has already been made between the EU members States: the GE-06 plan.

⁶² Decision n° 84-181 DC of 10 and 11 October 1984; Decision n° 86-210 DC of 29 July 1986.

⁶³ Decision n° 86-217 DC of 18 September 1986.

use the radio spectrum and run broadcasting services on a national scale. With regard to the broadcasting services of local or regional scope, the same operator cannot hold authorisations covering cumulatively more than 12 million people. In addition, operator's shares in the newspaper industry, in the distribution and in the edition of television or radio services are limited as well. Nevertheless, the rules relating to the concentration were softened by the possibility acknowledged to an operator to hold more than 49% of the capital or of the voting rights of a company that has received an authorisation for a service of national scope, under condition that the average audience recorded of this service is, altogether, lower than 8% of the total average audience of the television services.

In the case of ARCEP, taking competition issues into consideration is limited to certain issues (mostly the cases of radio spectrum scarcity), each of them being of great importance, qualitatively speaking (see point 3.3.1).

Moreover, ARCEP and CSA have both formal and reciprocal links (reciprocal duties of information...) with the French General Competition Authority (*Autorité de la concurrence*).

3.7. Which Specific Problems of Legal Protection do you Consider to be the Most Important or Interesting Issues in the Light of Effective Legal Protection?

Currently, projects of approximation or even fusion between ARCEP and CSA are under discussion as part of wider attempts to rationalise the regulatory authorities' landscape in France. The creation of such a 'super-regulator' should be accompanied by the adaptation of the procedural guarantees and transparency conditions granted to the operators. As to September 2015 there has been no progress in the projects.

4. Allocation of CO₂ Emissions Permits

In order to meet its obligations under the Kyoto Protocol, the European Union adopted the Directive 2003/87/EC⁶⁴ establishing the European Union Emission Trading Scheme (EU ETS), which became the first multi-national trading scheme for greenhouse gas emissions in the world. The EU ETS is based on "cap and trade" principle. According to the scheme, a limit is set on the total amount of greenhouse gas (GHG) that can be emitted by each participating installation. Emission allowances are allocated for free by Member States to their main energy users or auctioned off and are tradable. If, for example, company's installations exceed their carbon dioxide (CO₂) emission allowances, there is a possibility to purchase European Union allowances (EUAs) from other

⁶⁴ 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 L 275/32.

companies that achieve reductions. This “cap-and-trade” system creates an internal European market for emissions trading. The EU ETS is implemented in different stages. Launched in 2005, the pilot phase ran for three years to the end of 2007 and was a “learning by doing” phase. The second phase corresponded to the 2008–2012 period. The third phase (ETS-3) began in 2013 and will last until 2020.

Member States of the European Union adopted national measures in order to implement the EU ETS. However, because the EU ETS Directive left a certain margin of discretion (especially during the first two phases) to the EU Member States, national provisions differ in many respects including the legal qualification of allowances, the method of their allocation, the allocation to new entrants and the scope of installations covered by the scheme. The EU Directive 2009/29/EC⁶⁵ alters significantly the EU ETS. While the first two phases were characterised by the juxtaposition of national and often heterogenic policies, with the entrance into the third phase the system is moving to a greater extent at the *supra*-national level. Under the aegis of the French Ministry of Ecology and Sustainable Development, the Directive 2003/87/EC was transposed into French law by the Ordinance n° 2004–330 of 15 April 2004.⁶⁶ The Ordinance n° 2012–827 of 28 June 2012⁶⁷ modifies relevant provisions of the French Environmental Code in order to implement changes for the ETS-3.

4.1. *How is the Limitation of CO₂ Emission Permits Constructed Legally? How is a Maximum to this Public Right Created Within a Given Period?*

4.1.1. Legal nature of CO₂ emission permits

There is currently no harmonized legal status for CO₂ allowances neither at the European nor at the international level. The EU ETS Directive defines the CO₂ emission allowance as an allowance to emit one tonne of carbon dioxide equivalent during a specified period. What arises from the various provisions of the ETS Directive (as extended by the 2009/29/EC Directive) is that the European legislator left Member States with the responsibility of settling the tricky question of the legal definition of CO₂ allowances in line with the principle of subsidiarity. Issued by States as part of an environmental regulatory scheme, allowances are in the nature of an administrative grant and as such are subject to a public law regime. However, once allocated to the operator of an installation or transferred to a private firm or a company for trading, they assume certain characteristics of property

⁶⁵ 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 L 140/63.

⁶⁶ Ordonnance n° 2004–330 du 15 avril 2004 portant création d’un système d’échange de quotas d’émission de gaz à effet de serre and décret n° 2004–832 du 19 août 2004 pris pour l’application des articles L. 229–5 à L. 229–19 du code de l’environnement et relatif au système d’échange de quotas d’émission de gaz à effet de serre.

⁶⁷ Ordonnance n° 2012–827 du 28 juin 2012 relative au système d’échange de quotas d’émission de gaz à effet de serre (période 2013–2020).

and are therefore destined to private law regime. Emission permits may thus be considered as having a double or hybrid legal status (public rights when granted as an authorisation, property when traded afterwards). In the absence of clearly defined characteristics, the legal qualification of “allowance” under French law was a daunting task for drafters and caused heated doctrinal debates. France made a choice by default. Legal qualification of allowances was considered in light of three types of existing legal instruments: administrative rights, financial instruments and property in the sense of civil law.

The affiliation of CO₂ allowances within the category of administrative rights appeared, for several reasons, unsatisfactory. In reality, the property of an allowance only constitutes a consequence of the authorisation held by an industrial operator and differs from usual administrative authorisations on which the participation in an economic activity depends. The specificity of the CO₂ allowances is that they allow operators to choose their compliance method: allowances may be purchased, transferred, cancelled or returned to the State. The legal definition of allowances as financial instruments was also dismissed.⁶⁸ Allowances are not defined as financial instruments or securities under the French Monetary and Financial Code because they do not give the right to capital or to voting rights, they do not constitute claims in relation to their issuer, they are not issued by Undertakings for Collective Investment in Transferable Securities and are not futures instruments. Instead, allowances are defined in France as movable property: “the greenhouse gas emission allowances allocated to the operators of installations authorised to emit these gases are movable property which are exclusively materialized by a registration in the account of their holder at the national registry. They are tradable, can be transferable from one account to another and give identical rights to their holders. They can be transferred from the moment they are issued” (Article L 229–15 of the French Environmental Code). Although this choice was criticized from the ethical (individual appropriation of a common good) and legal (public law doctrine) viewpoints, the advantage of this qualification is that it ensures that the provisions of the Civil Code relating to property protection apply to CO₂ allowances thereby securing operators’ interests.⁶⁹

4.1.2. Determining the number of rights

National Allocation Plans (NAPs) were a central element of the EU ETS for the first two periods. Submitted by Member States and approved by the Commission, they determined the national “cap”, set the criteria for distribution of CO₂ emission allowances to operators and established the list of beneficiary facilities. Two subsequent national plans were developed in France.⁷⁰ Unlike Phases I and II, where discretion to determine the emissions cap was left to individual Member States, the cap is set at an EU-wide level for

⁶⁸ Allowance derivatives fall into this category.

⁶⁹ M. Prada, ‘The regulation of CO₂ markets Assignment report by Michel Prada’, MEFI, 4 April 2010.

⁷⁰ For the first period, France proposed a total number of emissions allowances equivalent 156.5 million of tonnes of CO₂. The second NAP began in 2008 with the overall envelope of emission allowances equivalent to 132.8 million tonnes of CO₂, a decrease of around 15% as compared to 2005–2007.

ETS-3 entailing the creation of a centralized European Union Registry⁷¹ managed by the European Commission. Member States were required to submit to the Commission their National Implementation Measures (NIMs) comprising a list of installations covered by the Directive 2003/87/EC and the preliminary amount of free allowances to be allocated to each installation calculated on the basis of the Union-wide harmonised rules. The transfer of allowances to installations in a Member State takes place once the authorities of that Member State have taken a “final national allocation decision” and updated its National Allocation Table in the Union Registry in accordance with the Commission’s decision⁷² on NIMs.⁷³

4.2. *What Kind of Allocation Procedure is being Used? Are Authorisations being Allocated by a Competitive Method?*

4.2.1. Allocation method

During the first two periods, France (similarly to virtually all Member States) did not allocate allowances by a competitive method. Both French plans relied upon the allocation of emissions allowances free of charge on the basis of the installations’ historical emissions according to the method known as “grandfathering”. Grandfathering method led to controversial outcomes because the system permitted Member States to use different base years. Using earlier reference years (emissions in a period when technologies were less efficient) systematically resulted in over-allocation in certain sectors.⁷⁴ The phenomenon gave rise to a number of concerns including competitiveness distortions, distributional equity, environmental effectiveness and economic efficiency of the NAP system of allocation in general.⁷⁵ France chose a relatively early reference period (average emissions between 1998 and 2001).

⁷¹ Within the framework of the EU emission trading system for Phase I and II, each Member State had to establish and operate a national registry in order to keep an account of the quotas issued, held, transferred and cancelled. Any individual or organisation operating an installation under the ETS was required to open a holding account within that registry. The *Caisse des dépôts et consignations* (public financial institution performing public interest activities at national and local levels) was mandated to manage the national register. ETS-3 entailed the suppression of the national registries for the benefit of a Union registry. The French *Caisse des Dépôts et Consignations* continues, however, to manage this registry for French operators and opens accounts in the Union registry for those operators that appear on a list established by the French Ministry in charge of environmental matters.

⁷² Prior to the transfer, the relevant figures are checked by the Commission to ensure that they are in line with the Commission’s NIMs decision and that the cross-sectoral correction factor is applied. The figures will then be communicated to the ETS Registry. Once this is done, Member States’ competent authorities can initiate the transfers of allocations to installations’ individual accounts in the Union registry.

⁷³ Arrêté du 12 décembre 2011 fixant la procédure d’affectation à titre gratuit de quotas d’émission de gaz à effet de serre aux exploitants d’aéronefs pour l’année 2012 et pour la période 2013–2020.

⁷⁴ R. Boubaker, ‘The European Union Emission Trading Scheme – Differences between regulations and practice: What is going on?’, Université Paris Sud.

⁷⁵ S. Lecourt *et al.*, ‘The impact of emissions – performance benchmarking on free allocations in EU ETS Phase 3’, RSCAS, 8 April 2013 <http://hal.archives-ouvertes.fr/docs/00/80/90/96/PDF/Schuman_Center_Version.pdf> accessed 13/07/2015.

To tackle these challenges, the revised ETS Directive of 2009 lays out new principles. While auctioning becomes the default method for allocating emission allowances, eligible operators continue to receive free allowances. However, the amount of allowances that each operator will receive are no longer allocated by a grandfathering method but determined by a reference to harmonized objective benchmarks designed to minimise distortions of competition and to ensure that allocation takes place in a manner that provides incentives for reductions in greenhouse gas emissions and energy efficient techniques. Free allocation will be devoted to non-electricity generators,⁷⁶ and will be transitional: operators will receive a decreasing amount of free allowance, with a target of no free allocation by 2027. In its decision on the NIMs adopted on 5 September 2013,⁷⁷ the Commission concluded that most submitted NIMs (including France) have been established in accordance with the rules.

4.2.2. New entrants' reserve

The ETS Directive required Member States to create an emission permits entrance reserve. The size of new entrant reserve depends on the total amount of allowances given to the Member State, the policy adopted to reduce its emissions and is influenced by the energy policy of each Member State. France has set aside 5.69 million tones of CO₂ during the first phase and 2.74 during the second. While in some countries new entrants had to buy allowances on the market or through auctions, in France the government was in charge of buying allowances for them. This was motivated by the will to create a higher degree of certainty for investment. The new entrants reserve in France for the period 2008–2012 was, however, exhausted in 2010. In order to address this problem, the French government purchased additional allowances. Starting from 2013 (third phase), similarly to free allocations, new entrants reserves will be managed at the EU level.

4.2.3. Auctioning

The EU-ETS Directive allowed countries to auction allowances that were not allocated free of charge (5% during Phase I and 10% during Phase II). France made little use of this possibility and did not auction the maximum percentage allowed. Reluctance of the French government to auction allowances may be justified by the fear to require companies to pay something that was not a subject to payment in the past. In case of leftover of allowances (when the reserve turns out to be too large) Member States could hold annual auctions, cancel or distribute them. France chose to cancel the “leftovers”.

⁷⁶ Installations considered as electricity generators (receiving about half of the allowances delivered in the EU), are no longer entitled free allowances and will consequently have either to reduce their emissions or turn to both EUA primary (auctions) and secondary markets to buy their rights to emit CO₂.

⁷⁷ Commission Decision of 5 September 2013 concerning national implementation measures for the transitional free allocation of greenhouse gas emission allowances in accordance with Article 11(3) of Directive 2003/87/EC of the European Parliament and of the Council [2013] OJ L 240/27.

With the entrance into the third phase, auctioning becomes the basic method of allocating allowances,⁷⁸ except installations from sectors exposed to carbon leakage.⁷⁹ As amended, the French Environmental Code provides that the quantity of emission allowances allocated for free to sectors not exposed to carbon leakage shall be 80% of the quantity determined on the basis of the ex-ante benchmarks provided by the EU-ETS Directive. The proportion of emission allowances distributed for free shall decrease each year thereafter by equal amounts, resulting in 30% free allocation by 2020 with a view to reaching no free allocation in 2027⁸⁰ (Art. L-228–8 of the Environmental Code). Hence, progressive auctioning of CO₂ emissions quotas is designed to create a true primary market. Member States will administer the auctions and will be responsible for the development of the auctioning infrastructure.

It is the Auction Monitor, a specific authority, which is to supervise the operation of auctions and the information supplied to “investors” by Member States.⁸¹ The French Financial Markets Authority (*Autorité des marchés financiers*, AMF) is entrusted with various prerogatives, including that of delivering authorisations (required by EU Regulation No. 1031/2010)⁸² to certain entities to participate in the regulated activity of bidding in emissions auctions. The AMF is also entrusted with control, inquiry, and sanction powers. Similarly, the Prudential Control Authority (*Autorité de contrôle prudentiel*, ACP), with prior advisory opinion from the AMF, is entrusted with the mission of issuing the authorisation to allow investment firms and credit institutions established in France to bid on their own account or on behalf of their clients.

This change of paradigm is expected to reinforce the weight of the EU ETS in combatting the climate change, and reducing CO₂ emissions in industrial sector. It should also create new revenues to finance public policies of the EU Member States. For example, the French government announced that it would earmark up to 590 million euros to the National Agency for Housing for the retrofitting of social housing.⁸³

It is worth pointing out that in recent years weak demand for allowances has led to a surplus of allowances on the market. In response to an over-supply of emissions

⁷⁸ The amount of allowances to be auctioned corresponds to the difference between the CO₂ emission cap and the number of allowances allocated free of charge (in addition to the reserve for new entrants).

⁷⁹ Carbon leakage could occur when, in the absence of binding international agreement, global greenhouse gas emissions increase in third countries where industry would not be subject to comparable carbon constraints and at the same time could put certain energy-intensive sectors and sub-sectors in the European Union, which are subject to international competition at an economic disadvantage.

⁸⁰ The schedule and practical terms and conditions of the auction were defined by a European Commission Regulation of 12 November 2011.

⁸¹ Following a competitive tender procedure, the Member States and the Commission appointed the European Energy Exchange AG (EEX) in Leipzig as transitional common auction platform.

⁸² 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 [2014] J L 56/11.

⁸³ Ministry of Economy and Finance, 2013 Finance Law Project.

allowances the auctioning timetable for the third ETS trading period was accommodated in order to achieve a better balance between offer and demand in the short-term. The amount of emission allowances auctioned has been reduced by 400 million for 2014. The measure is part of a back-loading scheme that postpones the auctioning of 900 million allowances in total in the period from 2014 to 2016 to 2019 and 2020 to allow demand for allowances to pick up and provide greater incentive to invest in greenhouse gas emission reductions.⁸⁴ As a long-term solution to ensure the ETS's resilience to fluctuating demand for allowances the European Commission put forward a legislative proposal⁸⁵ to introduce a market stability reserve (MSR).⁸⁶ Several Member States (including France) supported the initiative. France proposed adjustments of the parameters, and the establishment of an independent advisory board to assess developments in the carbon market.⁸⁷

4.3. *How are Favouritism and Nepotism being Prevented? How is the Equal/Fair Treatment of Newcomers being Approached?*

The integrity of the system lies primarily in the fact that members and agents of competent administrative authorities (e.g. decentralized state administrations, inspectorate of classified installations, relevant ministries, etc.) are civil servants and therefore subject to general duty and behaviour obligations (e.g. full commitment to professional activity, morality, reserve, hierarchical obedience, neutrality, professional discretion and honesty). Failure to comply with these duties may result in disciplinary actions. The *Autorité des marchés financiers* enjoys an original status of "independent public authority". The independence of its deliberative bodies and their members (College and Sanction Commission) is protected by a set of rules aimed at preventing and dealing with conflicts of interest, professional behaviour, declarations of interest, abstention or disqualifications. Members and agents of the *Commission de Régulation de l'Énergie* (CRE, the French Regulatory Commission for Energy)⁸⁸ fulfil their duties independently and impartially, free from any influence by the government or third parties (article L 133–6 of the French Energy Code). Its independent bodies (the College and the Committee for Dispute Settlement and Sanctions) follow transparent procedures in decision-making process and the Commission itself is subject to the supervision of the Court of Auditors.

⁸⁴ German Energy Blog, 'Start of Backloading of Emission Allowances – Fewer Allowances Auctioned', 19 March 2014 <www.germanenergyblog.de/?p=15505> accessed 22/06/2015.

⁸⁵ Proposal for a Decision of the European Parliament and of the Council concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading scheme and amending Directive 2003/87/EC, COM/2014/0020.

⁸⁶ Starting from 2021, with the fourth ETS trading period, 12% of the allowances in circulation would be placed in a reserve if the number of allowances in circulation two years earlier exceeds 833 million. For example, if at the end of 2024 there were 2 billion allowances in circulation, 240 000 allowances would be placed in the reserve in 2026.

⁸⁷ C. Goubet, 'French non paper on MSR proposal', CEPS, 27 June 2014 <www.ceps.eu/system/files/u153872/14-06-26%20CEPS%20FR%20position.pdf> accessed 16/11/2014.

⁸⁸ The *Commission de Régulation de l'Énergie* is an independent administrative body in charge of regulating the French electricity and gas markets.

4.4. *Which General Legal Principles Play an Important Role in the National Debate or Jurisprudence Concerning the Allocation of CO₂ Emission Permits?*

Since the industry plays an important role in shaping the GHG market the main legal principle put forward in France is the protection of the operators. In comparison to other Member States, the French legislator has adopted an original approach inspired by civil law.

4.5. *Are there any National Cases in which Competition Law (e.g. Abuse of a Dominant Position or State Aid) Played an Important Role?*

4.5.1. Oversight of allocation rules

The EU ETS Directive left a wide margin of discretion to the Member States in drafting the allocation rules. The problem with this approach was that Member States could over-assign permits to their operators (in a proportion higher than the amount needed to cover their emissions). It was the Commission's task to scrutinize these plans against allocation criteria specifically delineated in Annex III to the EU ETS Directive as to verify their compliance with the EU's competition and state aid rules (Articles 107 and 108 TFEU) and to ensure that sectors and companies are not discriminated against.

For the first phase, the Commission mainly verified whether the NAPs attributed more allowances to installations than they needed. In its review of the first plan the Commission stated that France had allocated excessive allowances to industrial activities, which would allow this activity to dispose of allowances without having to deliver a sufficient environmental counterpart. France has been asked to reduce the CO₂ emissions allowances granted to its companies by 4.5 million tonnes over the 2005–2007 trading period. The emissions “growth reserves” have also been considered excessive. The Commission accepted the revised version of the French plan covering 1138 sites. At the end, the French government unilaterally kept only 1126 for a total of 156.5 million of tonnes CO₂ allocated for that period.

In the second phase, the European Commission accepted the total number of emission allowances proposed by France equivalent to 132.8 million tonnes of CO₂.⁸⁹ Although, conditions established for operators became more stringent during phase II, the manufacturing sector was generally favoured across Member States. While Germany and Spain over-allocated their steel industries, France favoured its pulp and paper sectors.⁹⁰ The distribution of the allowances also showed a tendency to concentration.

⁸⁹ EUROPA, ‘Échange de quotas d'émission: la Commission approuve le plan national d'allocation de la France pour la période 2008–2012’, 26 March 2007.

⁹⁰ I. Jegou & L. Rubini, ‘The Allocation of Emission Allowances Free of Charge: Legal and Economic Considerations’, *ICTSD*, August 2011. <<http://ictsd.org/downloads/2011/11/the-allocation-of-emission-allowances-free-of-charge.pdf>> accessed 3 December 2013.

In addition, concerns were expressed regarding the “new entrant reserve”, which economically amount to an investment subsidy as far as in France the state was in charge of purchasing allowances for new entrants.

The regulatory bias in the third trading period is different compared to the preceding periods where the free allocations constituted widespread practice. The setting up of auctions is expected to bring important improvements to the operation of the European CO₂ market, which will become the primary market in addition to the already existing secondary market.

4.5.2. French Appeals Commission

The final decision on the total amount of emissions allowances to be allocated is an administrative act. Given that it can give rise to damages, the State’s allocation decision can be subject to legal action. More specifically, a company that has been allocated an insufficient amount of emissions allowances can bring an action with a view to obtaining a change in its allocation because of an evident assessment error or a violation of the fairness principle. Actions may also be based on a faulty application of the principles governing the allocation of emissions allowances to installations (businesses’ technical and economic ability to reduce emissions, forecasts of production trends).

It should be pointed out that in France, prior to any legal action against a decision to attribute or deliver emissions allowances, the operator must lodge a preliminary appeal with the Ministry of Ecology and Sustainable Development. This preliminary administrative review procedure (*recours administratif gracieux*) allows companies to request the administrative authority to reconsider its decision before taking the case to the court. The ministry bases its decision on the advice of the Appeals Commission⁹¹ (*Commission de recours sur les décisions relatives aux quotas d’émission de gaz à effet de serre*).⁹²

The case law of the Appeals Commission highlighted the challenges linked to the implementation of the French NAPs. For example, quotas allocated to hospitals were often inferior to the declared level of emissions providing hospitals with limited possibilities to avoid purchasing additional allowances. Within the sector of electricity production, thermal operators working in overseas regions and departments and those operating in metropolitan France were treated identically. With this regard the Appeals Commission pinpointed that those operators are in different situations. Many appeals were lodged by companies, which regardless of an effort to acquire more energy-efficient

⁹¹ The Appeals Commission has six weeks to deliver its opinion. The Ministry notifies the decision, which shall be accompanied by the commission’s opinion. The absence of a reply to a demand two months after said demand is made implies rejection. It is only after this procedure that the operator may appeal the decision before the administrative judge.

⁹² See Art. R.229–27, R.229–28, R.229–29 of the Environmental Code.

and environmentally friendly equipment, were nonetheless required to purchase a relatively high number of additional allowances due to a foreseeable increase in activity. It was therefore considered that they were not rewarded for their CO₂ reduction efforts. In addition, despite that companies have the possibility⁹³ to request additional allowances in the event of widening-up of activity, meeting the requirements appeared to be proportionally more burdensome on companies that are dynamic and growing fast.⁹⁴

4.6. Which Specific Problems of Legal Protection do you Consider to be the Most Important or Interesting Issues in the Light of Effective Legal Protection?

The CO₂ market comprises mandatory participants on the one hand and voluntary participants on the other. The trading system is thus open to banks and other financial institutions, trading platforms and brokers, as well as other organisations and private individuals that wish to trade in or speculate with emission allowances.⁹⁵ The CO₂ primary market is a market in which a participant purchases or acquires the eligible emissions unit directly from the issuer (auctions). The secondary carbon market is a market in which one market participant purchases an eligible emissions unit from another market participant, or enters into a derivative contract directly linked to the underlying emissions units. A large share of secondary trading activities concerns the allowances themselves (spot market) and future derivatives.

The oversight of the secondary market raised a number of serious concerns regarding protection against market abuse. Indeed, many transactions in emission allowances are made in the form of derivatives (futures, forwards, options) and are subject to the financial markets regulatory framework. A significant part of the European CO₂ market is supervised, as a market in derivative financial instruments, by national financial regulators.⁹⁶

A great amount of emission allowances are traded by means of trading platforms. However, as opposed to allowance derivatives, spot market was initially left in a legal vacuum. Transactions for immediate delivery of allowances (spot transactions) were not subject to equivalent rules since spot allowances have not been legally defined as financial instruments. The absence of any legal definition of spot allowances was particularly

⁹³ See Art. R. 229–11 of the Environmental Code.

⁹⁴ Ministère de l'Écologie, de Développement et de l'Aménagement durables, Commission de recours sur les décisions relatives aux quotas d'émission de gaz à effet de serre, *Rapport d'activité*.

⁹⁵ Dutch Emissions Authority, 'Risks of fraud in the emissions trading system', Study Report, 10 March 2011 <www.emissionsauthority.nl/mediatheek/emissierechten/copy_of_publicaties/Onderzoeksrapport%20Fraude%20English.pdf> accessed 1 October 2014.

⁹⁶ In France, carbon emissions derivatives fall within the scope of the French Monetary and Financial Code (Art. L.211–1 and L.211–2). Oversight of the CO₂ derivatives is hence the task of the *Autorité des Marchés Financiers* (Art. L.621–1).

challenging for establishing rules to protect CO₂ market from abuse, fraud and money laundering or guaranteeing the equitable treatment of various players.

Originally, the remit of the AMF was strictly limited to financial instruments. This situation appeared to be arduous, notably with regard to the regulation and supervision of the Paris-based exchange: BlueNext⁹⁷ – the largest CO₂ trading exchange platform. The AMF formally approved market rules and controlled their implementation, on the derivatives market compartment of BlueNext only, but not on the spot market and all that regardless of the fact that the latest accounted for the major part of traded volumes. Similarly, the national energy regulator, the *Commission de Régulation de l'Énergie*, did not have jurisdiction to handle the CO₂ spot market.⁹⁸

The shortcomings of the system were revealed by a series of operational failures and a number of cases of fraud.⁹⁹ Noting that secondary market for emission allowances was insufficiently regulated France decided to subject them to rules inspired by those governing markets for financial instruments. Based on the recommendations of the Prada Report, the Law on Banking and Financial Regulation of 22 October 2010 (LBFR)¹⁰⁰ provides for a new regulatory framework. The definition for financial instruments set forth in article L.421–1 of the Monetary and Financial Code has been amended to include the GHG emission allowances defined in article 229–15 of the Environmental Code and the units defined by the Kyoto Protocol.

The Law amends several provisions of the Monetary and Financial Code in order to enable the AMF to regulate trading in emission allowances and to exercise its supervisory powers *vis-à-vis* such products as if they were financial instruments. The LBFR amended article L.621–15 of the Monetary and Financial Code to allow the AMF's sanctions commission to crack down on cases of market abuse (insider trading or market manipulation) involving financial instruments related to another financial instrument traded on such a market, even if the financial instruments at stake are not listed.¹⁰¹

⁹⁷ BlueNext was established in 2007 and used to be the leading spot market for EUAs. BlueNext was interested in holding auctions for EU allowances (EUAs) within the ETS-3 but failed to win a bid to run European Union permit auctions and announced that it would close permanently its spot and derivatives trading operations as from December 2012.

⁹⁸ Prada Report on the regulation of CO₂ markets, *op. cit.*

⁹⁹ In 2009 France witnessed the biggest TVA fraud on CO₂ ever experienced by tax administration. The mechanism at work was that of a carousel-type VAT fraud, which was based on the tax system applicable to cross-border transactions between two countries of the EU. The entities accused purchased high volumes of allowances from suppliers located in another Member State and then sold them again on the national market: the purchase of rights from a foreign country gave rise to immediate tax levy and deduction by the buyer. In its investigation the French Court of Audit estimated that this fraud caused € 1.6 billion of loss of State revenue.

¹⁰⁰ Loi n° 2010–1249 du 22 octobre 2010 de régulation bancaire et financière.

¹⁰¹ Previously, the AMF's jurisdiction did not extend to derivatives underlying financial instruments, except for products traded on a regulated market or through a bilateral negotiating system meeting certain criteria.

Article L.621-17-2 of the Monetary and Financial Code also extended the obligation to declare suspicious transactions to financial instruments that are related to listed financial instruments.¹⁰² Thus, although with regard to auctioning (primary market) the AMF has a partial role, it plays a full role in regulating the secondary market.¹⁰³ Symmetrically, because there is a strong interaction between the CO₂ market and the energy market, the mandate of the CRE is extended to include supervision of transactions carried out in CO₂ allowances by energy market participants, and to analyse their coherence with the economic and technical factors underpinning the markets. Consequently, the new regulatory framework for CO₂ markets relies on the cooperation between both the financial and energy regulators. While the AMF becomes the competent authority for monitoring French spot and futures exchanges in CO₂, the CRE becomes the competent authority on questions of coherence between the fundamentals and spot markets and makes sure market abuses spotted by the AMF do not correlate with market abuses on related energy markets.¹⁰⁴ In its turn the AMF can identify sophisticated manipulation manoeuvres on market prices and alert the CRE. These complementary competences should contribute to more efficient detection of speculative conduct and thereby prevent market abuse attempts.

Cooperation between the two regulators was formalised in a memorandum of understanding on the exchange of information, control and supervision of markets in greenhouse gas emission allowances, electricity, natural gas and their derivatives in December 2010. It can be noted that with this regard, France took the lead on this issue in Europe. France is the first European country to anticipate the provisions of the draft European Regulation on Energy Markets Integrity and Transparency (REMIT). The setting up of auctions will have important consequences on the operation of the European Emissions Trading Scheme. This raises serious questions about the regulation of the primary market itself and about the coordination between the oversight of the primary and that of the secondary market encompassing all the subsequent transactions.

To summarise, the European Emissions Trading Scheme has an original market design. However, structural shortcomings, over-allocation by Member States, competition law concerns, cases of fraud and bypassing are factors that have been jeopardizing its effective implementation. In an attempt to remedy this problem there has been a progressive tightening of the framework for CO₂ emission allowances at the *supra*-national level. The current phase of the EU ETS builds upon the previous two phases and is revisited to make a greater contribution to tackling climate change and a more delicate management of the system through the EU-wide cap on the number of available allowances and an increase in auctioning of those allowances. However, because the CO₂ market has grown

¹⁰² G. Leclerc & S. Tripathi, 'France Learns from the Economic Crisis: New Regulations Governing Banking and Finance', *Fasken Martineau*, 22 March 2011.

¹⁰³ AMF, 'Supervision of the market in CO₂ allowances', Press backgrounder, 23 December 2010. <www.amf-france.org/documents/general/9794_1.pdf> accessed 24 April 2013.

¹⁰⁴ For example, the CRE can alert the AMF if the CO₂ price is not coherent with prices observed on the gas and electricity markets or if the traded volumes are out of touch with operators' economic activities.

significantly both in size and sophistication further difficulties cannot be ruled out including the volatility of the carbon price. Member States should learn how to cope with this high variable resource and ensure a robust infrastructure and supervision system as CO₂ markets are becoming increasingly like financial markets by their characteristics. In this sense the financial and energy regulators appear to be playing a major role in further maturing of the Scheme.

5. Conclusion

French administrative law, like most of the other European administrative laws, didn't elaborate a common approach to the allocation of public rights in cases of scarcity of such rights, except elements related to decision-making process. Legislation is sectorial and so are the applied legal solutions, concepts and regimes. They all rely on the specificities of each issue. For example, this explains why the French legislator, when transposing the 2003 Directive on the European Union Emission Trading Scheme, hesitated so much before categorising the CO₂ emission allowances under French law (administrative right? financial instrument? private property?). It can nevertheless be observed that French administrative law resorts to some kind of a common legal approach, the use of general tender rules, as standardised by the EU law. These rules were not specifically elaborated to tackle the scarcity issue but to streamline public procurement practices and to shelter them from corruption.

Perhaps, the focus on procedural issues can be considered as an embryonic common approach. In fact, procedures of allocation of limited public rights are 'reinforced' respectively with regard to those dedicated to the allocation of non-limited public rights. This reinforcement usually takes the form of the 'juridicisation' of the procedure or at least of some parts of it. This includes some of the following elements: attention paid to all the parties involved, guarantees granted to 'defence rights', double adjudication system (integrated appeal procedure) and adjudication power granted to independent regulatory authorities rather than the ministerial administration. General tender rules may be included in these procedures but they are only part of it. The general tendency is that the higher are the interests at stake (especially financial like in the case of the allocation of 4G frequencies), the more elaborated and guaranteed are the allocation procedures. Another trend is that of the 'financialization' of the permits systems because the primary and secondary markets are becoming more sophisticated in their operation and design. This calls for the establishment of more complex oversight procedures and refined coordination frameworks for various regulatory bodies (as it is emerging in the case for energy and financial regulators on the CO₂ market).

3. THE ALLOCATION OF GAMBLING LICENCES, RADIO FREQUENCIES AND CO₂ EMISSION PERMITS IN GERMANY

The allocation of scarce resources in Germany is subject to constant change. Especially concerning gambling licences (1.), radio frequencies (2.), and CO₂ emission permits (3.) the last decade has seen drastic alterations.

1. Gambling Licences

1.1. *Historical Development*

Gambling looks back on a history thousands of years old. In the area of historical Germany gambling was first mentioned by *Tacitus*, who characterized the Germanic people as follows: ‘Strangely enough they make games of hazard a serious occupation even when sober, and so venturesome are they about gaining or losing, that, when every other resource has failed, on the last and final throw they stake the freedom of their own persons’.¹ Until the end of the Middle Ages gambling was a private event only. In 1379 in *Frankfurt* and in 1425 in *Mainz* the first gambling houses were opened. These were either run by the public sector or leased out to private individuals.² In 1610 the city of *Hamburg* carried out the first lottery – the revenue was used to finance the local jailhouse.³ Other countries at this time, such as Prussia and Saxony, soon followed suit. With the implementation of public lotteries the state took up the baton and never gave it back: At the same time as it carried out the first lottery Prussia prohibited every private lottery.⁴

* Professor of Administrative Science, Constitutional Law, Administrative Law and European law at German University of Administrative Sciences Speyer, Germany.

¹ Tacitus, *Germania*, 24.3.

² Wolfgang R Zink, *Spielbanken in Deutschland: historische Entwicklungen und heutige Rechtsgrundlagen* (Ditters Bürodienst, Mainz 1970) 23.

³ Doreen Kreuz, *Staatliche Kontrolle und Beteiligung am Glücksspiel* (M Press, Meidenbauer, München 2005) 107.

⁴ Harald Brandl, *Spielleidenschaft und Strafrecht: Eine Betrachtung zu den Glücksspieltatbeständen der §§284 ff. StGB* (Peter Lang, Frankfurt am Main [u.a.] 2003) 11–12.

1.2. *Gambling in the German Law System*

Following this tradition, the German gambling market is heavily regulated and even partly monopolised by the state. The guiding principle of the monopolization is an opportunistic and regulative concept: Gambling is, even if not desirable, an invariable constant, a phenomenon of social life that cannot be eradicated. Consequently, any government ban on gambling would not prevent gambling as a social phenomenon but would only lead it into the black economy of illegal gambling, especially via online games. Such gambling venues elude governmental control to a large extent and increase the risks inherent in gambling. As gambling cannot be prevented, it is a rational approach to regulate it, especially to limit its extent and/or reserve the right to offer gambling services to a state provider only.

In the past the German state considered the business of gambling its own exclusive prerogative. Yet in recent times Germany has opened up the gambling sector noticeably and now allows private individuals – to a limited extent – to offer gambling to the public. The basic frameworks for the regulation of gambling, competitions, and skill-based games differ considerably, although in practical terms their boundaries are often blurred.

1.2.1. *The definition of gambling in the German law system*

German law defines gambling in §3.1 sentence 1 GlüStV 2012⁵ as a game that demands payment in exchange for the possibility to win, wherein the profit opportunity has to be wholly or mainly conditioned by chance.⁶ This also includes situations, in which winning is related to the occurrence or non-occurrence of a future event, set forth in §3.1 sentence 2 GlüStV 2012. In Germany four variations are included under the general term ‘gambling’: sports betting in general, the historically special case of bets on horse races, lotteries including draws, and casino gambling as well as automated games. Each is subject to different legal requirements (see below section 1.4.).

Gambling is to be distinguished from skill-based games (1.2.2.) and competition (1.2.3.). They follow another regulatory pattern.

⁵ State Treaty on Games of Chance in Germany (*Glücksspielstaatsvertrag – GlüStV 2012*) of 15 December 2011, announced as Article 1 in the First State Treaty on the Amendment of the State Treaty on Games of Chance in Germany of 15 December 2011, which entered into force on 1 July 2012.

⁶ See also BGHSt 2, 274 (276 f.); BVerwGE 115, 179 (185 f.); Martin Bahr, *Glücks- und Gewinnspielrecht: Eine Einführung in die wichtigsten rechtlichen Aspekte* (2nd edn E. Schmidt, Berlin 2007) 14; Günter Heine and Bernd Hecker, ‘284’, in Adolf Schönke and Horst Schröder (eds), *Strafgesetzbuch* (29th edn Beck, München 2014) 7; Florian Kolb, *Die Veranstaltung von Glücksspielen: Eine Bestandsaufnahme und Überprüfung der bestehenden Veranstaltungsbeschränkungen für Private in der Bundesrepublik Deutschland anhand verfassungsrechtlicher und europarechtlicher Grundsätze* (Nomos, Baden-Baden 2009) 40.

1.2.2. Delimitation of skill based games (*Geschicklichkeitsspiel*)

The element of randomness of profit in gambling distinguishes it from skill-based games, which fall under different legal rules. A skill-based game is one where the physical or mental capabilities of the player significantly affect the result of the game; gambling, on the other hand, occurs if the result is left mostly to chance.⁷

In a wide range of games winning depends on coincidence just as much as on the abilities of the player. Difficulties especially arise for the classification of poker.⁸ On the one hand, the strategy of the player has a significant influence on whether he wins or loses; on the other hand, the quality of the cards dealt to the player is decisive. German case law⁹ addresses this by quantifying the respective elements – chance and skill – and their relative influence on the probability of winning a game, with skill being set at the level of an average individual interested in gambling.¹⁰

1.2.3. Delimitation of competition (*Gewinnspiel*)

Other than gambling, competitions do not, for the most part, need official permission. Nonetheless, they are subject to the general legal provisions of the Unfair Competition Act (*Gesetz gegen den unlauteren Wettbewerb*) as well as the §§657 et seq. and §§134, 138 of the Civil Law Code and the data protection rules. However, German law lacks a definition of what is to be understood as a competition. The term is not used consistently in jurisdiction and literature – terms like ‘prize competition’,¹¹ ‘free raffle’,¹² etc. are used interchangeably.¹³ The general understanding seems to consider competition to be an umbrella term for all games with aleatoric stimuli, except those classified as gambling.¹⁴

⁷ Heine and Hecker (n 6) 7; BGHSt 2, 274 [276]; Kolb (n 6) 40; Bahr (n 6) recital 14; Axel Belz, *Das Glücksspiel im Strafrecht* (Elwert, Marburg 1993) 56.

⁸ Finanzgericht Köln, Urteil vom 31.10.2012 – 12 K 1136/11 – classifies the winnings in tournaments of a professional poker player as taxable; the decision was confirmed by the Federal Finance Court (Urteil vom 16.9.2015 – X R 43/12 – DStR 2015, 2651). See also Jörg Diehl: ‘Der Fiskus blufft nicht’, *spiegel-online* (31 January 2012) <www.spiegel.de/panorama/justiz/finanzgericht-koeln-haelt-pokern-nicht-fuer-gluecksspiel-a-864556.html> accessed 19 December 2014.

⁹ See for example BGHSt 2, 274 [276]; BVerwGE 115, 179 [184].

¹⁰ See Bundesverwaltungsgericht, Urteil vom 22.1.2014 – 8 C 26/12 – NJW 2014, 2299 [2300]; Kolb (n 6), 41–42 with further references; Clemens Weidemann and Hans Schlarmann, ‘Die Prüfung überwiegender Zufallsabhängigkeit im Glücksspielrecht’ (2014) NVwZ 1350.

¹¹ Gottfried Berg, *Die Zulässigkeit von Preisausschreiben im Wettbewerb* (1958) 1; Andrea Hainz, *Das Preisausschreiben als Instrument der Verkaufsförderung dargestellt am Beispiel der Markenartikelhersteller in der Konsumgüterindustrie* (Freiburg 1984) 1; Hartwig Steffenhagen and Klaus Schmalenberg, *Preisausschreiben und Wettbewerbsrecht: Ein Prüfprogramm für die Werbepraxis* (BDW-Service-u.-Verl.-Ges. Kommunikation, Bonn 1987) 6; Hanspeter Zweng, *Die wettbewerbsrechtliche Beurteilung der Werbung mit Gewinnspielen: In Deutschland, Österreich, Schweiz, Frankreich und dem Vereinigten Königreich von Großbritannien und Nordirland* (VVF, München 1993) 10.

¹² Dirk Bruhn, ‘E. §4. Vor Nr 5’ in Henning Harte-Bavendamm and Frauke Henning-Bodewig (eds), *Gesetz gegen den unlauteren Wettbewerb* (3rd edn Beck, München 2013) 8.

¹³ Bahr (n 6) recital 36–37 with further references.

¹⁴ Bahr (n 6) recital 39; Ekkehard Gerstenberg, ‘Der Kunde als Schatzgräber – Neue Gewinnspiele in der Rechtsprechung’, WRP 1973, 444 (444); Gerd Kunze, ‘Zur wettbewerbsrechtlichen Beurteilung von

The formal differentiation is based on the criterion of coincidence and the substantial use of monetary stakes. If these criteria are not met then it is a competition.¹⁵

1.3. *Regulatory Vision*

The regulation of gambling is characterised by conflicting interests.

1.3.1. **Complex bundle of interests with conflicting goals**

Public and private gambling providers are eager to exploit the high-volume German gambling market. They are welcomed by an affluent German population with a high interest in gambling, especially in sports betting. To date this interest has been expressed largely through uncontrolled internet gambling. Sports associations have also sought after a liberal arrangement of the gambling law, with an eye towards their own prospects for additional revenues.

The state is confronted with a double role, which sometimes is accompanied by a moral dilemma: On the one hand, the state monopoly is justified by reference to the common good, especially the need to combat gambling addiction and other negative side effects of gambling. On the other hand, tight government budgets profit from the expansion of gambling. This fact entices the state to expand public gambling opportunities and advertise public gambling extensively instead of reducing the opportunities in line with stated public policy.

1.3.2. **Combating gambling addiction and associated crime as the declared objectives of regulation**

The supporters of an intensively regulated gambling market justify the strong role of the state first of all with reference to the need to combat potential gambling addiction, which is assumed to be related to gambling in general. As shown by a representative survey in Germany,¹⁶ one-third to one-half of the interviewed persons had participated in public gambling within the last year; other studies found values ranging between 39 and 55%.¹⁷ According to latest findings, in Germany 200,000 persons are addicted to gambling and

Gewinnspielen' in Wolfgang Hefermehl (ed), *Rechtsfragen der Gegenwart: Festgabe für Wolfgang Hefermehl zum 65. Geburtstag* (W. Kohlhammer, Stuttgart, Berlin, Köln op. 1972) 320.

¹⁵ Bahr (n 6) recital 12.

¹⁶ In the Anglo-Saxon and the Scandinavian countries gambling is more popular. Also, the ratio of problematic gamblers fluctuates between the countries. See S. Buth and H. Stöver, 'Glücksspielteilnahme und Glücksspielprobleme in Deutschland: Ergebnisse einer bundesweiten Repräsentativbefragung' (2008) Suchttherapie 3–11.

¹⁷ Bundeszentrale für gesundheitliche Aufklärung (BzgA), *Glücksspielverhalten und Glücksspielsucht in Deutschland, Ergebnisse aus drei repräsentativen Meinungsumfragen 2007, 2009, 2011* (Köln 2012) 12 with further references. Within 2013 more than 40% of the interviewed persons had participated in gambling, see Bundeszentrale für gesundheitliche Aufklärung (BzgA), *Glücksspielverhalten und Glücksspielsucht in Deutschland. Ergebnisse des Surveys 2013 und Trends* (Köln 2014) 9.

300,000 persons show problematic gaming behaviour. The number of gamblers seeking assistance from an ambulant addiction advice centre increased threefold between 2005 and 2011, with most showing problematic behaviour in playing automated games. There is a potential connection between the increase of problematic gaming behaviour and the increasing amount of slot machines. In 2011 there were 50 per cent more slot machines than in 2005.¹⁸

Pathological gambling leads not only to financial problems for the (gambling) addict, but sometimes also to serious changes in personality or psychosomatic disorders, which impact the family and social environment of the addict as well.¹⁹ As soon as an addict's financial resources are exhausted he is tempted to raise money in an illegal way – therefore, gambling addiction contributes to associated crime.²⁰ The social costs of gambling addiction place a significant burden on the social welfare state.²¹ Moreover, the combination of sports and betting on the outcome of matches can lead the gamblers or bookmakers to manipulate the match, instead of leaving the outcome to the abilities of the players. Therefore, sports betting endangers the integrity of sporting itself. In light of these dangers, Germany recently signed the Council of Europe Convention on the Manipulation of Sports Competitions.^{22, 23} According to Art. 1.1 of the Convention, its purpose is to combat the manipulation of sports competitions in order to protect the integrity of sport and sports ethics in accordance with the principle of the autonomy of sport. For this purpose, several measures in the field of prevention, information sharing,

¹⁸ Britta Beerger, 'Gefährliches Spiel, Mehr Glücksspieler in ambulanter Betreuung' FAZ vom 4.4.2013, p. 7. Participation in automated games has increased since then, see Bundeszentrale für gesundheitliche Aufklärung (BzgA), *Glücksspielverhalten und Glücksspielsucht in Deutschland. Ergebnisse des Surveys 2013 und Trends* (Köln 2014) 10.

¹⁹ In general only 10 per cent of pathological gamblers are debt-free, see Tilmann Becker, 'Gefährdungspotential von Glücksspielen für den Spieler und die Gesellschaft' (2008) 20 <<https://gluecksspiel.uni-hohenheim.de/fileadmin/einrichtungen/gluecksspiel/Forschungsarbeiten/Gefahrungspotenzial.pdf>> accessed 19 Dezember 2014; Gerhard Meyer and Meinolf Bachmann (eds), *Spielsucht: Ursachen und Therapie* (Springer, Berlin, Heidelberg 2012) 112. On the definition of 'pathological gambling' see Frank Heseler, 'Der Einfluss des Europarechts auf die mitgliedstaatliche Glücksspielregulierung' (Baden-Baden 2013) 76–77.

²⁰ Gerhard Meyer and Meinolf Bachmann (n 19) 113 found that values of gambling-related crimes committed by gambling addicts range between 35 and 90% or between 13 and 48% depending on whether the data are based on information from the persons concerned or on objective criteria such as complaint of an offence or previous convictions.

²¹ Supporters of state regulation even see gambling against this background as a demerit good. These are goods that are considered to not only be economically unbeneficial but to actually be economically harmful, such as drugs, forced prostitution and gambling. See Lothar Wildmann, *Einführung in die Volkswirtschaftslehre, Mikroökonomie und Wettbewerbspolitik* (2nd edn Oldenbourg, München 2010) 47. The official justification of the new GlüStV 2012 holds to this view; see explanations on the GlüStV 2012, clause B to Art. 1 § 4d, p. 27 <https://gluecksspiel.uni-hohenheim.de/fileadmin/einrichtungen/gluecksspiel/Staatsvertrag/ErlauterungenGluecksspielaenderungsstaatsvertrag_01.pdf> accessed 19 Dezember 2014.

²² See Vertrag-Nr. 215, Übereinkommen des Europarates über die Manipulation von Sportwettbewerben, <www.coe.int/de/web/conventions/full-list/-/conventions/treaty/215> accessed 23 December 2014.

²³ See Bundesministerium des Innern, Gegen Manipulation von Sportwettbewerben, Pressemitteilung vom 19.9.2014.

and criminal law are to be adopted. The Council of Europe has placed particular importance on the betting regulatory authorities, which, in its view, have a key role to play in ensuring exchange of information between sports organisations and sports betting operators, and in coordinating the rules governing sports betting operators as well as supervising compliance with these rules.²⁴

Taking into account the dangers of gambling, the Federation substantiated (in the 6th German Criminal Law Reform Act, which came into force on 1 April 1998) the official justification for punishing the organisation of gambling,²⁵ stating: the law is supposed to prevent excess demand for gambling and hinder the exploitation of people's natural gambling urges, whether for private or commercial use; in order to meet this objective the state guarantees the orderly conduct of games through state controls and also supports public and non-profit interests with a significant part of the gambling revenues.²⁶

1.3.3. Deficiencies and legal challenges

The legal reality often does not meet the goals²⁷ set by the state itself. In fact the state often does not place great emphasis on effectively combating gambling addiction and the associated risks. Instead, the state occasionally wants to create and ensure high government revenues and therefore expands the range of gambling services rather than restricting them. The generation of revenues is considered by many to be the real reason for the state's monopoly. With gambling revenue pouring into their coffers, the temptation to misuse the state's monopoly is often considered to be irresistible. After all, from 2005 to 2009 the German gambling market generated gross gaming revenues in the amount of 9 to 10 billion Euro.²⁸ Thus it is no surprise that the gambling regulations in Germany were soon challenged under constitutional law (1.3.3.1) and the law of the European Union (1.3.3.2).

1.3.3.1. Compatibility with national constitutional law

The traditional monopolistic regulatory structure of gambling has generated an unusual theoretical basic-law-orientated perception of this economic sector: the state monopoly is seen as the norm, while 'commercialisation' of the gambling market requires

²⁴ See the Explanatory Report <www.conventions.coe.int/Treaty/EN/Reports/Html/215.htm> recital 95 accessed 23 December 2014.

²⁵ See §284 Penal Code. See also p. 52.

²⁶ See the reasoning in BT-Drs. 13/8587, p. 67.

²⁷ See e.g. the objectives of the Gaming Acts of the federal states; §1 No. 1 to 4 State Treaty on Lotteries in Germany (Lotteriestaatsvertrag) of 18 December 2003, replaced by the State Treaty on Games of Chance in Germany (Glücksspielstaatsvertrag) of 30 January 2007.

²⁸ Goldmedia, 'Glücksspielmarkt in Deutschland 2015, Situation und Prognose des Glücksspielmarkts in Deutschland' (Berlin 2010). However, with regard to the statistics it must be noted that they do not fully meet scientific methodological criteria, see e.g. Tilmann Becker/Dietmar Barth, 'Die Forschungsstelle Glücksspiel informiert...', 'Der deutsche Glücksspielmarkt: Eine Schätzung des nicht staatlich regulierten Marktvolumens' (2012) <https://gluecksspiel.uni-hohenheim.de/fileadmin/einrichtungen/gluecksspiel/Newsletter/Newsletter_0212.pdf> accessed 19 December 2014, p. 3–10.

justification.²⁹ In the past the economic operation of gambling was occasionally not subsumed under the protection of the Basic Law, following the concession theory of Otto Mayer.³⁰ This understanding is, however, incompatible with the claim to economic freedom guaranteed in the fundamental rights of the Basic Law. Even though restrictions on the operation of gambling can be justified, the providers can claim their fundamental rights while carrying out their activity, as already decided by the Federal Constitutional Court (*Bundesverfassungsgericht*) in its '*Apothekenurteil*'.³¹ The regulations of the gambling market thus have to be measured by the standard of the freedom to choose an occupation guaranteed in Article 12.1 of the Basic Law.^{32,33}

State interference that constitutes regulation of an occupation – like the establishment of a state monopoly, the awarding of a concession, or the repressive ban on internet offerings – is only justified if it can be established that it is necessary for the public good and the regulation is compatible with the principle of proportionality. The determination of whether the public interest needs to be protected must adequately take into account the type of the operation and the intensity of the state interference. Barriers for occupational licensing do not regulate the modalities of the exercise of the profession, but create barriers for entry into a profession. These barriers are neither connected with the qualifications of the applicant nor can they be influenced by him. Such an objective barrier for occupational licensing (*objektive Berufszulassungsvoraussetzung*) generally³⁴ has to meet extremely high requirements in order to be justified: its interferences are only justified if they are necessary to protect against concrete and serious danger to an over-riding legal interest.³⁵ Given the hazard gambling presents for the individual and the society, limiting access to gambling is justifiable. However, the German Federal Constitutional Court examines such limitation for logic and consistency³⁶ as part of the appropriateness test set out in, depending on the case, Article 12.1 or Article 14.1 (right of property) of the Basic Law.

²⁹ See the characterisation of the debate within 19. Hauptgutachten 2010/2011, BT-Drs. 17/10365, p. 47 recital 10.

³⁰ Otto Mayer, *Deutsches Verwaltungsrecht, I. und II. Band* (Duncker & Humblot, Berlin 2004) 147–48, 225 and 294.

³¹ BVerfGE 7, 377 [397]-[398].

³² Art. 12.1 of the Basic Law embraces only Germans in its scope of protection. With regard to EU citizens the personnel scope of protection of Art. 12.1 of the Basic Law can either be interpreted in a manner that conforms to the Law of the Union or Art. 2.1 of the Basic Law can be considered to be applicable with an upgrade of its level of protection, so that in the end it does not make a difference. On this dispute see e.g. Bundesverfassungsgericht, Beschluss vom 19.7.2011 – 1 BvR 1916/09 – NJW 2011, 3428–3434; Michael Sachs, 'vor Art. 1' in Michael Sachs and Ulrich Battis (eds), *Grundgesetz: Kommentar* (7th edn Beck, München 2014) 72–73.

³³ Apart from that, Art. 14.1 of the Basic Law, the right to property, has to be considered, if e.g. a legislative amendment leads to the need to close casinos that were legal until the amendment.

³⁴ The Bundesverfassungsgericht has already deviated from this generally strict system in the '*Spielbanken-Urteil*' and has found important public interest is a sufficient justification, BVerfGE 102, 197. See also Bundesverfassungsgericht, Beschluss vom 14.10.2008 – 1 BvR 928/08 – NVwZ 2008, 1338–1343.

³⁵ BVerfGE 7, 377 [406].

³⁶ The Bundesverfassungsgericht introduced the notion of 'consistency' for the first time in BVerfGE 115, 276 [310].

1.3.3.2. Limits of the law of the European Union: general governmental coherence as an acid test

In the European Union regulations on gambling are limited by the freedom of establishment set out in Article 49 TFEU and the freedom to provide services in Article 56 TFEU.³⁷ In the face of these Articles the regulation of monopolies through concessions, authorisation rules, or quota fixing³⁸ are permitted in general³⁹: The ECJ recognises the underlying ideas of German law, especially the aim to combat gambling addiction and its effects, as overriding reasons based on the general public interest.⁴⁰ Yet the regulations and their practical application have to combat gambling addiction and its negative effects in such a way that gambling services are restricted coherently and systematically.⁴¹ This requires especially that the national system neither encourages gambling nor offers equivalent incentives. Such coherence is the decisive element in determining compatibility with Union law.⁴²

1.3.3.3. Consequences

On the fundamentals of Article 12.1 Basic Law the German Federal Constitutional Court in 2006 roughed up the previous gambling law markedly. In its decision on sports betting it declared that the state monopoly to combat gambling addiction was generally justified under constitutional law, but that the regulation, as set by the public provider 'Oddset', was not appropriate for reaching the stated legitimate goal in a coherent way.⁴³ The court criticised specifically the lack of substantive rules and structural security guaranteeing that the offering of gambling services really focuses on combating gambling addiction. It stated: 'The deficiencies in the actual regulation of 'Oddset' are not only a

³⁷ In the field of gambling see Case C-243/01 *Criminal proceedings against Piergiorgio Gambelli and Others* [2003] ECR I-13031, paras 44–49, 61–76; Case C-316/07 *Stoß and Others* [2010] ECR I-8069, paras 57, 74, 97.

³⁸ Quota fixing describes an activity for which the number of permissions is quantitatively restricted. A legal right for the granting of permissions exists – unlike the granting of a concession – as long as not all permissions are allocated. For the different dogmatic categories of quantity regulation by the state see Mario Martini, *Der Markt als Instrument hoheitlicher Verteilungslenkung: Möglichkeiten und Grenzen einer marktgesteuerten staatlichen Verwaltung des Mangels* (Mohr Siebeck, Tübingen, Germany 2008) 43–46.

³⁹ Affirmed by Case C-186/11 and C-209/11 *Stanleybet International Ltd and Others* (C-186/11) and *Sportingbet plc* (C-209/11) v. *Ypourgos Oikonomias kai Oikonomikon and Ypourgos Politismou* [2013] ECR I-33; Oliver Klöck and Matthias Klein, 'Die Glücksspielentscheidung des EuGH und die Auswirkungen auf den Glücksspielstaatsvertrag' (2011) NVwZ 22 [25]. More recently see Frank Heseler (n 19) 142–244.

⁴⁰ Case C-46/08 *Carmen Media Group Ltd v Land Schleswig-Holstein and others* [2010] ECR I-8149, paras 45–46, 84; Case C-316/07 *Stoß and Others* [2010] ECR I-8069, paras 74–79; in the German literature see for example Christoph Brüning, 'Die Regulierung des Glücksspiels aus verfassungs- und europarechtlicher Perspektive' (2011) DVBl 1126 [1129].

⁴¹ Case C-463/13 *Stanley International Betting Ltd and Stanleybet Malta Ltd v. Ministero dell'Economia e delle Finanze and Agenzia delle Dogane e dei Monopoli di Stato* [2015] ECR I-25, recital 21.

⁴² See on this question, with an analysis of the related case law of the ECJ, Frank Heseler (n 19) 177–187.

⁴³ BVerfGE 115, 276 [309]–[310].

deficit in the enforcement of non-constitutional law but rather a deficit in the regulation itself.⁴⁴ Thus the regulation for sports betting was deemed unconstitutional.

As a result of this judgment the federal states restructured the German gambling law in the 1st GlüStV, which took effect on January 1, 2008. In §1 GlüStV they emphasised more than before the need to combat gambling addiction by channeling the propensity for gaming into a regulated and controlled supply system.⁴⁵ It also had accompanying measures for the protection of minors and pathological gamblers, the orderly conduct of games and the avoidance of associated crime. The focus clearly had to be on the channeling of gambling addiction through the limitation of gambling services and offers.

The 1st GlüStV continued a general nationwide state monopoly on sports betting – realised through the local companies of the German ‘*Lotto-Totto-Block*’. Yet the goal of offering sports betting only through the state was never achieved. On the one hand, four private sports betting providers existed, which offered their services on the basis of permits granted by the GDR. The GDR authorities granted these permits shortly before the GDR acceded to the Federal Republic of Germany. These licences generally retained their validity after the accession.⁴⁶ On the other hand, the emergence of the internet created competition for the public providers. Sports betting opportunities were increasingly offered via internet by foreign providers. This was not legally permitted (unless the law of the European Union stated otherwise based on the primacy of the fundamental freedoms), but control and/or sanctions were not really possible to implement. Consequently, in 2010 the ECJ declared the monopoly provisions of the GlüStV 2008 as incompatible with Union law.⁴⁷

⁴⁴ BVerfGE 115, 276 [310].

⁴⁵ Consequently, the Bundesverfassungsgericht upheld the constitutionality of the former GlüStV 2008 (Bundesverfassungsgericht, Beschluss vom 14.10.2008 – 1 BvR 928/08 – NVwZ 2008, 1338–1343) as well as the Bavarian State Casino Monopoly (BVerfG, Beschluss vom 26.3.2007 – 1 BvR 2228/02 – NVwZ-RR 2008, 1–4). However, several lower courts have doubted the accordance of the GlüStV 2008 with Union law, see with further references Jörg Ennuschat, ‘Konsistenz und Kohärenz im Glücksspielrecht’ (2014) WRP 642–649 [646].

⁴⁶ Bundesverwaltungsgericht, Urteil vom 20.12.2005 – 6 B 52.05 – NVwZ 2006, 1423; Bundesgerichtshof, Urteil vom 11.10.2001 – 1 ZR 172/99 – NJW-RR 2002, 395. The scope of this decision is disputed in the literature and legislation. It was debated, whether it is applicable nationwide or only in the federal state concerned. On the dispute and with further references to the literature and legislation see Bahr (n 6) recital 690–92. At the same time the authorities tried to withdraw the licences granted by the GDR (e.g. Saxony withdrew the licence to *bwin* in 2006, which was granted by the GDR, see press release of the Saxon Ministry of the Interior of 10 August 2006). The operators responded with a claim for damages. See to the question of compensation caused by illegal prohibition of gambling by the German administration (including an appraisal of the related judgments) Johannes Unterreitmeier, ‘Glücksspielanbieter ohne Glück, Kein Schadensersatz trotz rechtswidriger Untersagung von Glücksspielen’ (2013) NJW 127–130.

⁴⁷ Case C-46/08 *Carmen Media Group Ltd v Land Schleswig-Holstein and others* [2010] ECR I-8149. As in the wake of this judgement two traders filed claims against two towns in Nordrhein-Westfalen, which enforced the monopoly provisions against them in 2006 and 2007. The traders were seeking compensation on the basis that the GlüStV 2008 constituted a breach of European Law. The German Federal Court of Justice rejected these claims for damages, pointing out that the legal situation was not clear until the ECJ’s decision in 2010, Bundesgerichtshof, Urteil vom 16.4.2015 – III ZR 204/13, III ZR 333/13 – MDR 2015, 706; see also the judgment review about the impacts of this judgment on German

The federal states needed to admit their failure to channel all offerings of sports betting into a state's monopoly.⁴⁸ This caused the majority of the federal states⁴⁹ to depart from the philosophy of a state monopoly for sport bettings through the modification of the GlüStV 2012. They started to deregulate the gaming sector by opening it up to private providers. Yet because they believed the market for the organisation of sports betting should still be limited, they desired to restrict the number of providers that could enter this market. The contracting states of the GlüStV chose the awarding of concessions as the preferred method to regulate provider entry.⁵⁰

1.4. *The Current Sub-Constitutional Legal Framework for Gambling in Germany*

German gambling law in its present appearance is characterised by the 'dual order of the gambling matter' (*duale Ordnung der Spielrechtsmaterie*).⁵¹ There is an interaction between criminal and public law as well as between federal and state legislation. This results from the allocation of legislative powers in the federal construction of German Basic Law. The Federation uses its legislative powers in criminal law, Article 74.1 No. 1 of the Basic Law, as well as in commercial law, Article 74.1 No. 11 of the Basic Law (*'Recht der Wirtschaft, ... Gewerbe'*), to implement its regulatory aims (1.4.1.). The federal states have the competence to regulate gambling as a result of the legislative power granted them in Article 30, 70 of the Basic Law, which allows them to regulate basic police and administrative law. Thus, as set out in the Basic Law, the power to shape gambling law mainly falls under the legislative authority of the federal states (1.4.2.).

1.4.1. Federal gambling law

The Federation uses its competence for criminal law (Article 74.1 No. 1 of the Basic Law) for the establishment of §284 et seq. Penal Code (Strafgesetzbuch [StGB]). §284.1 StGB prohibits the organisation or holding of public gambling or the provision of facilities for public gambling.⁵² §287 StGB contains a corresponding stipulation against the organisation of lotteries or raffles (*Ausspielungen*). Both criminal offences require – as a

state liability law by Martin Pagenkopf, 'Keine Staatshaftung für legislatives Unrecht und bei Vollziehung von dem Unionsrecht widersprechenden nationalen Recht' (2015) NVwZ 1264–1268.

⁴⁸ See explanations of GlüStV 2012 (n 21), p. 7.

⁴⁹ Except for Schleswig-Holstein, which first went its own way, but joined the treaty in 2013. See in detail p. 54.

⁵⁰ See explanations of GlüStV 2012 (n 21), p. 8.

⁵¹ Jörg Ennuschat, '33h' in Peter J Tettinger and others (eds), *Gewerbeordnung: Kommentar* (8th edn Beck, München 2011) 1.

⁵² For the definition of each act, see Heine and Hecker (n 6) 15–22; Olaf Hohmann, '284' in Wolfgang Joecks and others (eds), *Münchener Kommentar zum Strafgesetzbuch Bd. 5: 263–358 StGB* (2nd edn Beck, München 2014) 24–25.

negative element⁵³ – the absence of permission. The providers do not fulfil the conditions for a criminal offence if they have a valid permission. Furthermore, under §285 StGB the mere participation in unlawful gambling is punishable.⁵⁴

In the area of commercial law the Federation passed, based on its legislative power included in Article 74.1 No. 11 of the Basic Law, §33c et seq. Trade Regulations (*Gewerbeordnung*). These provisions relate to slot machines. According to this regulation any commercial activity must distinguish between gaming machines that include the possibility of making a profit (§33c Trade Regulations), other games that include the possibility of making a profit (§33d Trade Regulations), and amusement games that do not offer the possibility for monetary winnings. The first two possibilities are basically always⁵⁵ subject to a preventive ban with an authorisation option.⁵⁶

The Race Betting and Lottery Act (*Rennwett- und Lotterieggesetz* – RWG)⁵⁷ constitutes a further piece of the legal framework for gambling at federal level. It was created by the Federation under its legislative power granted in Article 74.1 No. 11 of the Basic Law.⁵⁸ The RWG covers the authorisation rules for horse race betting only.⁵⁹ Other forms of sports betting or lotteries fall under the legislative power of the federal states according to the allocation of competences within the Basic Law, as long as the federation has not made use of its power to regulate business law on the basis of Article 74.1 No. 11.⁶⁰ The RWG is unique insofar as it is the only authorisation rule for sports betting created by the Federation. §§5 and 6 of the RWG criminalise as *lex specialis* in relation to §284 StGB, the activity of bookmaker or the operation of a totalizer for a horse racing association. An applicant has a legal right to be granted a licence if he fulfils the personal and material requirements of §1 and/or §2 RWG.⁶¹

1.4.2. Permissive regulations under federal state law

While the law of the Federation contains a general prohibition of gambling operations (concerning horse racing), the law of the federal states allows, as an exception under certain circumstances, the granting of an authorisation for gambling activities (in all

⁵³ Olaf Hohmann (n 52) 16.

⁵⁴ For the first time, a court recently sentenced a person to pay a fine for such an offence. See AG München Urteil vom 26.9.2014 – 1115 Cs 254 Js 176411/13.

⁵⁵ §33g in conjunction with §5 SpielV (Verordnung über Spielgeräte und andere Spiele mit Gewinnmöglichkeit in the version as published on 27 January 2006, BGBl. I p. 280) as well as the annex establish exceptions for prize competitions and gambling at special places or events.

⁵⁶ Jörg Ennuschat, ‘Zur verfassungs- und europarechtlichen Zulässigkeit landesrechtlicher Restriktionen für private Glücksspielveranstalter’ (2001) NVwZ 771–773.

⁵⁷ Race Betting and Lottery Act (RWG) of 8 April 1922, (RGBl. I p. 393), BGBl. III/FNA 611 – 614.

⁵⁸ The Bundesverwaltungsgericht classified bookmaking or operating as a totalizer board as a matter of the right of business, Art. 74.1 No. 11 of the Basic Law, because the economic activity is in the foreground, whereas the administrative regulations are an annex to this only, BVerwGE 97, 12 [14]–[15].

⁵⁹ The tax provisions in §§17 et seq. RWG are also applicable to sports bets, lotteries and draws.

⁶⁰ BVerfG 115, 276, recital 96.

⁶¹ Kolb (n 6) 59.

other fields).⁶² In 2012, 15 federal states agreed on a uniform regulation in the Inter-State Treaty⁶³ on Gambling (*Glücksspielstaatsvertrag – GlüStV* 2012).⁶⁴

Schleswig-Holstein first went its own way (for economic reasons) and passed its own gambling law, one which diverged on many points from the legislation of the other federal states. However, on 24 January 2013, after a change of government, *Schleswig-Holstein* decided to accede to the GlüStV 2012.⁶⁵ In the meantime *Schleswig-Holstein* already issued 48 licences for sports betting providers and online-casino operators based on its own Gambling Law of *Schleswig-Holstein* (*SchlHGIG*).⁶⁶ These licences remain valid for six years according to §4.3 sentence 1 of *SchlHGIG* (even though this law was repealed in 2013).⁶⁷ Therefore, the licence holders are allowed to use their licences as provided for in the Gambling Law of *Schleswig-Holstein*; otherwise *Schleswig-Holstein* would face indemnities. These licences will expire by January 2019 at the latest.⁶⁸ Until then *two* legal regimes continue to exist in Germany.⁶⁹

1.4.2.1. Lotteries

For lotteries, the GlüStV codifies a state monopoly (§10.1, 2, 6 GlüStV 2012). Only for 'lotteries with a low potential risk of addiction'⁷⁰ (this also includes bonus-scheme savings [*Gewinnsparen*]) can a permit be granted to private individuals, following from §10.6 in conjunction with §§12 et seq. GlüStV 2012. For small lotteries⁷¹ the federal states

⁶² For a general overview of the law of gambling coming after GlüStV 2012 into force, see Alexander Windoffer, 'Das neue Glücksspielrecht – Präventionsmodell mit Gewinnchancen in Karlsruhe und Luxemburg?' Speyerer Vorträge (2012).

⁶³ For further details on this topic see for example Hartmut Maurer, *Staatsrecht I: Grundlagen, Verfassungsorgane, Staatsfunktionen* (3rd edn Beck, München 2003) §10 recital 66.

⁶⁴ In addition, there are executive laws that incorporate the regulations into the current law of the federal state.

⁶⁵ Gesetz zum Ersten Staatsvertrag zur Änderung des Staatsvertrages zum Glücksspielwesen in Deutschland (Erster Glücksspieländerungsstaatsvertrag – Erster GlüÄndStV), S-H GVOBl. 2013, 51. The accession took place on 9 February 2013. Bekanntmachung über das Inkrafttreten des Ersten Staatsvertrages zur Änderung des Staatsvertrages zum Glücksspielwesen in Deutschland (Erster Glücksspieländerungsstaatsvertrag – Erster GlüÄndStV), S-H GVOBl. 2013, p. 97.

⁶⁶ Gesetz zur Neuordnung des Glücksspiels (Glücksspielgesetz) vom 20. Oktober 2011, GVOBl. 2011, 280.

⁶⁷ The *SchlHGIG* applies to the licences that were granted under it according to Art. 4 Law amending the Law on Gambling (*Gesetz zur Änderung glücksspielrechtlicher Gesetze*) of 1 February 2013.

⁶⁸ Heeg, 'Anmerkung zu BGH: Vorlagefragen zur Neuregelung des Glücksspielrechts – digibet' (2013) *Multimedia und Recht* (MMR) 329 [332].

⁶⁹ This brings up the question, whether a coherent arrangement of gambling offerings in Germany exists (see below section 1.4.3., p. 57 onwards).

⁷⁰ The legislation does not define what it means by this, but they are systematically distinguishable from 'lotteries with a calculable jackpot' according to §22 GlüStV 2012 and from 'small lotteries' according to §18 GlüStV 2012. So they must neither provide a calculable jackpot nor take place more often than twice a week (otherwise §22 GlüStV 2012 is applicable).

⁷¹ These are lotteries with a total maximum payment of € 40,000 and where the net income and the earned prize money are at least 25% of the fees and the net income is used for charitable, religious or benevolent objectives only.

can implement their own rules, as well as deviate from the above regulation and give free-reign to private individuals.⁷²

For internet offerings the GlüStV 2012 codifies a repressive ban⁷³ (stated in §4.4 GlüStV 2012).⁷⁴ Under certain conditions (stated in §4.5 GlüStV 2012) exceptions can be granted for the placement of lotteries.

1.4.2.2. Sports betting

The GlüStV 2012 establishes a concession model for sports betting (except for horse race betting) on an experimental basis for the next seven years, provided for in §10a GlüStV 2012. There is no legal claim to these concessions and the GlüStV restricts the number of permits available to 20 maximum (§10a.3 GlüStV 2012).⁷⁵ Interested parties can apply for a permit and claim a right to participate in the competition for the permits in accordance with objectively appropriate and subjectively reasonable criteria (derivative right to participate). For sports betting that is planned to be offered via the internet the same regulations apply as for lotteries: the interested parties are supposed to apply for an exemption from the repressive ban of §4.4 GlüStV 2012 according to §4.5 GlüStV 2012.⁷⁶

1.4.2.3. Horse race betting

The federal states have only limited competences to regulate horse race betting. The reason is that the Federation used most of its competence in Article 74.1 No. 11 of the Basic Law and created the RWG.⁷⁷ Nonetheless, the federal states are allowed to codify further restrictions according to the opening clause in §25.3 RWG in conjunction with §27 GlüStV 2012. The RWG also does not regulate the organisation and placing of horse race bets on the internet. Before adopting the GlüStV 2012, horse race bets on the internet

⁷² Until 2013 Schleswig-Holstein also provided for a state monopoly in principle, in §6 of SchlHGlspielG. However, as an exception it provided an authorisation option for non-profit lotteries, §10 SchlHGlspielG, as well as a prohibition against lotteries in the form of bonus-scheme savings unless notification is given, §16 SchlHGlspielG. For small lotteries the public authorities had the power to deviate from these regulations, §15 SchlHGlspielG.

⁷³ Both, the constitutionality and the conformity with European Law of §4.4 GlüStV 2012 and the identical regulation of §4.4 GlüStV 2008, have been confirmed in principle by several courts, see Bundesverfassungsgericht, Beschluss vom 14.10.2008 – 1 BvR 928/08 – NVwZ 2008, 1338; Bundesgerichtshof, Urteil vom 28.9.2011 – I ZR 43/10; OVG Münster, Urteil vom 25.2.2014 – 13 A 2018/11; AG München, Urteil vom 26.9.2014 – 1115 Cs 254 Js 176411/13.

⁷⁴ In Schleswig-Holstein, in contrast, the offering of lotteries on the internet was not subject to any restrictions. See also Windoffer (n 62) 9.

⁷⁵ On the basis of new information a modification can be made, insofar as it serves the objectives of the State Treaty, §4a.3 sentence 2 GlüStV.

⁷⁶ In contrast to most federal states of Germany, Schleswig-Holstein until 2013 obliged sports betting only to obtain authorisation, pursuant to §§4, 5 in conjunction with §§21 et seq. SchlHGlspielG. This regulation also applied to sports betting offered via the internet. The number of permits available was not restricted. Further restrictions were not codified by this law.

⁷⁷ See n. 57.

were not allowed at all.⁷⁸ Today, the repressive ban still exists, but the exemption option specified in §4.5 GlüStV 2012 applies and the granting of permits is left to the discretion of the competent authorities.⁷⁹

1.4.2.4. Casino games (*Spielbanken*)

The authorisation to operate a casino falls under the legislative power of the federal states. Thus the GlüStV 2012 is applicable here. The prevailing opinions in the federal states consider the potential addiction risk of casino games to be particularly dangerous.⁸⁰ Therefore, casino games are allowed in casinos only, pursuant to §20.1 GlüStV 2012. The operation of a casino requires a permit in accordance with §4.1 to 4 in conjunction with §2.2 GlüStV 2012.⁸¹

1.4.2.5. Automated games

The Federation is responsible for the installation of automats and requires a permit to do so (according to §§33c, 33f Trade Regulations (GewO) in conjunction with the Gaming Ordinance).⁸² Amusement halls in the sense of §3.7 GlüStV 2012 (*Spielhallen*) are,⁸³ in contrast, part of the regulatory competence of the federal states (Art. 74.1 No 11 of the Basis Law). §24.1 GlüStV 2012 subjects those halls to an authorisation requirement.⁸⁴

1.4.3. Conclusion and legal challenges

In summary, German gambling law in its current legal form is highly fragmented. The different types of gambling must fulfil completely different requirements. On the one hand, the laws differ according to the mode of gambling services (local or via the

⁷⁸ BVerwGE 140, 1 [15]-[16], [37]; for a differing view see Oliver Klöck and Matthias Klein, 'Die Glücksspielentscheidung des EuGH und die Auswirkungen auf den Glücksspielstaatsvertrag' (2011) NVwZ 22 [25].

⁷⁹ See explanations of GlüStV 2012 (n 21), p. 12. Until 2013 Schleswig-Holstein lacked a corresponding regulation and therefore this area has seen significant liberalisation. Given the meaning and the risk of addiction to this form of gambling, the historical absence of a regulation in Schleswig-Holstein was surprising.

⁸⁰ BVerfGE 115, 276 [305] with references to relevant findings from addiction research; in the literature see e.g. Kolb (n 6) 105–06; Gerhard Meyer and Meinolf Bachmann (eds), *Spielsucht: Ursachen und Therapie* (Springer, Berlin, Heidelberg 2012) 82.

⁸¹ Before 2013 Schleswig-Holstein also required a permit for the operation of casino games, per §4 in conjunction with §17.12 SchlHGIG and the Gaming Act of Schleswig-Holstein (SchlHGSpielG). The regulations in Schleswig-Holstein differed from the regulations in other federal states mainly with regard to online offerings. While the GlüStV 2012 contains a strict ban on online gambling, Schleswig-Holstein provided permits for the operation of online casino games, §§18 et seq. SchlHGIG.

⁸² Schleswig-Holstein established a corresponding regulation in §2.1 SchlHGIG. Virtual gambling machines were not permissible.

⁸³ Since stage I of the federalism reform.

⁸⁴ See explanations of GlüStV 2012 (n 21), p. 13.

internet). On the other hand, different types of gambling, above all horse race betting and automated games, are partly subject to regulation by the Federation and partly by the federal states. Until 2013 the regulations in *Schleswig-Holstein* differed from all the other federal states. This situation will persist until 2019 at the latest, when licences granted under SchlHG1SpielG expire.⁸⁵

Nonetheless the GlüStV 2012 in principle overcomes the hurdles set by national constitutional law. It is consistently geared towards combating all the risks of gambling. The constitutional principle of consistency addresses especially only the competent public authorities within the states, not the totality of public authorities. Divergent regulations in the federal states are part of the essence of federalism. An overall consistency is not constitutionally required.⁸⁶ The continued validity of licences granted under the SchlHG1SpielG, on the one hand, and the regulations of GlüStV 2012, on the other hand, are thus not in violation of national constitutional law, because different authorities are competent to regulate the same legal matters differently.

In contrast to German constitutional law the law of the European Union takes into account an overall coherence. It views the German gambling regulations from a collective national perspective and does not differentiate between federal law and state law (or among state laws).⁸⁷ If the German regulatory system on gambling is to be coherent, the Federation has to, with view to the level of risk, adapt its regulation system on automated games.⁸⁸ But different regulations in different areas are not necessarily against the law of the European Union in general.⁸⁹ However, differing regulations become an issue if the area, which is less relevant with regard to addiction issues, is highly affected by a new regulation. Yet this is exactly what is likely to happen with the new regulations on gambling because they establish a state monopoly for lotteries, which are regarded as less relevant for addiction issues, while the highly problematic sports betting can be offered

⁸⁵ See 1.4.2., p. 54.

⁸⁶ BVerfGE 115, 276 [304]. The European Court of Justice asks for an overall consistency independent of the domestic structure of responsibilities, see Case C-46/08 *Carmen Media Group Ltd v Land Schleswig-Holstein and others* [2010] ECR I-8149, paras 47, 68–70.

⁸⁷ Case C-46/08 *Carmen Media Group Ltd v Land Schleswig-Holstein and others* [2010] ECR I-8149, paras 47, 68–70; see also BVerwGE 138, 201 [225]. For a critique of the interpretation of the Bundesverwaltungsgericht in this case see Manfred Hecker, 'Glücksspielrecht und Grundfreiheiten. Zur Auslegung der Kohärenzanforderungen des EuGH nach der Carmen Media und Markus Stoß-Rechtsprechung' (2011) DVBl 1130 [1133]-[1134].

⁸⁸ These are games with a high risk potential. The enlargement of the offering of automated games was especially decisive for the qualification as 'incoherent' by the ECJ, Case C-46/08 *Carmen Media Group Ltd v Land Schleswig-Holstein and others* [2010] ECR I-8149, paras 67–70. Federal policy has obviously recognised this need; see 'Antrag der SPD-Fraktion vom 29.6.2011, BT-Drs. 17/6338 sowie Bundesministerium für Wirtschaft und Technologie, Evaluierung der Novelle der Spielverordnung im Hinblick auf die Problematik des pathologischen Glücksspiels, 2010' <www.bmwi.de/BMWi/Redaktion/PDF/B/bericht-evaluierung-spielverordnung.property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf> accessed 19 December 2012.

⁸⁹ Case C-46/08 *Carmen Media Group Ltd v Land Schleswig-Holstein and others* [2010] ECR I-8149, para 63; Case C-316/07 *Stoß and Others* [2010] ECR I-8069, para 63; see in the German literature Christoph Brüning, 'Die Regulierung des Glücksspiels aus verfassungs- und europarechtlicher Perspektive' (2011) DVBl 1126 [1129]; Heselner (n 19) 166.

also by private individuals. Specifically, the model of *Schleswig-Holstein* opened up (even if to a limited number) access to the sports betting market, which contradicted the lottery monopoly of the state and therefore questioned the overall coherence of German gambling law.⁹⁰

Against this background, by order of 24 January 2012 (I ZR 171/10) the Federal High Court of Justice (*Bundesgerichtshof*) submitted to the European Court of Justice the question of whether the still valid licences result in an incoherent regulation scheme for gambling in Germany, even though *Schleswig-Holstein* acceded to the GlüStV 2012.⁹¹ The ECJ held that the existence of two conflicting regulatory frameworks within one member state does not lead to inconsistency (and thus to a violation of European market freedoms) provided that the more restrictive legislation is able to satisfy the conditions of proportionality laid down by the case law of the ECJ.⁹² The various control systems in the federal states are due to the German federal system of jurisdiction, which is protected by Article 4.2 TEU.⁹³ In the end the Federal High Court of Justice did not decide whether the German scheme satisfies the requirements set by the ECJ because the defendant withdrew his appeal.⁹⁴ However, the final die is not yet cast. The days of the German gambling law in its present form are possibly numbered due to European Law.

At a glance, currently valid gambling law is structured as follows:

Type	Mode in which service is offered	Regulation of the GlüStV 2012	Regulation of the SchlHG1SpielG (applicable for licences granted under SchlHG1SpielG before 2013)
Lotteries	locally	state monopoly; preventive ban with an <i>authorisation option</i> for lotteries with a low hazard potential; possibility of deviation for small lotteries	state monopoly preventive ban with an <i>authorisation option</i> for charitable lotteries; prohibition of lotteries in the form of bonus-scheme savings unless notification is given; for small lotteries the public authorities have the power to deviate from these regulations.
	via internet	repressive ban with an <i>exemption option</i>	<i>no</i> special restrictions

⁹⁰ VGH Mannheim, Beschluss vom 10.12.2012 – 6 S 3335/11, see also the critics of Windoffer (n 62) 21 and Ennuschat (n 45) 647, for a differing view see OVG Münster, Urteil vom 25.2.2014 – 13 A 2018/11. The Bundesgerichtshof referred the problem of coherence in German gambling law to the ECJ, Beschluss vom 24.1.2013 – I ZR 171/10 – GRUR 2013, 527.

⁹¹ See Bundesgerichtshof, Beschluss vom 24.1.2013 – I ZR 171/10 – GRUR 2013, 527; Heeg, ‘Anmerkung zu BGH: Vorlagefragen zur Neuregelung des Glücksspielrechts – digibet’ (2013) Multimedia und Recht (MMR) 329.

⁹² See Case C-156/13 *Digibet Ltd, Gert Albers/Westdeutsche Lotterie GmbH & Co. OHG* [2014] GRUR 878 paras 36 and 39.

⁹³ Case C-156/13 *Digibet Ltd, Gert Albers/Westdeutsche Lotterie GmbH & Co. OHG* [2014] GRUR 878 para 34.

⁹⁴ Bundesgerichtshof, Beschluss vom 7.5.2015 – I ZR 171/10 – GRUR 2015, 820.

Type	Mode in which service is offered	Regulation of the GlüStV 2012	Regulation of the SchlHGlspielG (applicable for licences granted under SchlHGlspielG before 2013)
sports betting	locally	preventive ban in the form of <i>awarding concessions</i> (20 concessions max.)	<i>preventive ban, permits are not limited</i>
	via internet	repressive ban with an <i>exemption option</i>	<i>no special restrictions</i>
horse race betting	locally	<i>preventive ban</i> by the Federation	<i>preventive ban</i> by the Federation
	via internet	repressive ban with an <i>exemption option</i>	<i>no special restrictions</i>
casino games	locally	repressive ban with an <i>exemption option</i> for the operation of a casino	<i>preventive ban</i> for the operation of a casino
	via internet	not permitted	<i>preventive ban</i> for online offerings
automated games	locally	<i>preventive ban</i> for the installation of automatats; <i>preventive ban</i> for the operation of an amusement hall	<i>preventive ban</i> for the installation of automatats; <i>preventive ban</i> for the operation of an amusement hall
	via internet	not permitted	not permitted

1.5. Awarding Concessions for the Organisation of Sports Betting According to the GlüStV 2012

The introduction of the awarding of concessions for sports betting is the most spectacular and, therefore, the most controversial amendment of the GlüStV 2012.⁹⁵ With this provision a market, in which the number of permits is limited, is now coming into being in this gambling sector.

1.5.1. The regulatory concept of awarding concessions

The awarding of concessions was established on an experimental basis by §10a GlüStV 2012.⁹⁶ This concession model is to be tested for a time period of 7 years, at which time it

⁹⁵ In Schleswig-Holstein a preventive ban with an authorisation option for the regulation of the sports betting market (§§21 et seq. SchlHGlspielG) existed until 2013. The Ministry of the Interior issued 25 certificates for the operation of sports betting with a six-year validity according to §4.3 sentence 1 of SchlHGlspielG. There was a legal claim on the granting of these certificates provided the conditions were fulfilled. The number of permissions available was not determined in advance. The Ministry of the Interior publishes a list of the licence holders; see <www.schleswig-holstein.de/MIB/DE/Service/Gluecksspiel/Gluecksspiel_node.html> accessed 20 March 2015.

⁹⁶ See explanations of GlüStV 2012 (n 21), p. 10.

will be evaluated.⁹⁷ This approach is built on the recognition of the rapidly changing nature of the field of sports betting – in offering and supply – and the need to quickly adjust to this evolution, and thus not to create vested interests with permanently guaranteed property rights.⁹⁸

The decision to award 20 sports betting concessions was based on an evaluation of the former Inter-State Treaty on Gambling (*Glücksspielstaatsvertrag* [GlüStV 2008]).⁹⁹ The old treaty led to the development, next to the (previously legal) public offerings, of a rampant and sizable grey-market, with an annual turnover of an estimated € 2.7 billion. Of this, € 1.1 billion is attributable to some 2,000 illegal betting shops and € 1.6 billion was turned over on the internet.¹⁰⁰ The objective of the regulation is to set the maximum number of licences at such a level that the market can be channeled through numerically limited permissions and brought back into the formal sector. Twenty concessions are considered to be sufficient to cover present demand.¹⁰¹ If it transpires that the number is not suitable to reach the aims of §1 GlüStV 2012, then the number of licences will be adjusted according to the evaluation clause in §4a.3 sentence 2 GlüStV 2012.

1.5.2. The design in detail

The licences are valid in all federal states (§4a.2 sentence 1 GlüStV 2012). The granting of a permission is subject to numerous conditions, including an examination of the applicant's extended reliability (§4a.4 sentence 1 No. 1 GlüStV 2012), the possession of sufficient financial resources (§4a.4 sentence 1 No. 2 GlüStV 2012), and the willingness and ability to guarantee the transparency and safety of the gambling (§4a.4 sentence 1 No. 3 GlüStV 2012). Additionally, the achievement of the objectives of §1 GlüStV must not be jeopardised by the awarding of the concession according to §4a.4 sentence 2 GlüStV 2012.

There is no legal right to be awarded a concession (§4a.2 sentence 2 GlüStV 2012): Even if the conditions of §4a.4 GlüStV are fulfilled, no more licences can be granted if the maximum number of licences has already been issued (§4a.2 sentence 2 GlüStV 2012). In the language of basic rights it is not a preventive ban with an authorisation option, but a repressive ban with an exemption option.¹⁰² The applicants are only entitled to be considered on the basis of a transparent and non-discriminatory selection procedure; its criteria have – according to the general principles of Union law relating allocation of scarce resources¹⁰³ – to be objective and known in advance (derivative right of access, see also §4b.1 sentence 1 GlüStV 2012).

⁹⁷ (§ 10a.1 sentence 1 GlüStV 2012). A first report evaluating the State's Treaty should be given after five years (§ 32 GlüStV 2012).

⁹⁸ See explanations of GlüStV 2012 (n 21), p. 10.

⁹⁹ Report of the evaluation of the GlüStV 2008, p. 87–90.

¹⁰⁰ Report of the evaluation of the GlüStV 2008, p. 90–91.

¹⁰¹ See explanations of GlüStV 2012 (n 21), p. 11, 21.

¹⁰² See explanations of GlüStV 2012 (n 21), p. 20.

¹⁰³ In this context due consideration has especially to be given to the fundamental freedom of establishment (Article 40 TFEU) and the freedom to provide services (Article 52 TFEU). See explanations of GlüStV 2012 (n 21), p. 23.

Against this background, a Europe-wide announcement of the concession system in the Official Journal of the European Union is prescribed (§4b.1 sentence 2 GlüStV 2012). §4b.2 GlüStV 2012 codifies the content and scope of the application documents.¹⁰⁴ Additional requirements have to be specified in the tender in advance.¹⁰⁵ In this way it should be clear from the beginning which criteria will apply to the selection and an impartial and verifiable selection decision should be guaranteed.¹⁰⁶

If several equally qualified candidates apply for the granting of a concession, §4b.5 GlüStV specifies selection criteria. According to the explanation of the GlüStV 2012, a distinction should be made between ‘criteria for qualitative selection’ and ‘award criteria’: the conditions in No. 3 to 5 apply to the former, the conditions in No. 1 to 2 for the latter.¹⁰⁷ The order in which these conditions are met dictates the order in which applicants are ranked.¹⁰⁸ Yet at the same time, §4b.5 GlüStV leaves the authorities the discretion to apply other criteria through its use of the word ‘particularly’. Any additional criteria need to fulfil also the conditions set by §4b.1 GlüStV 2012. Judicial review of the award process is provided for by the administrative remedies following from §§40 et seq. Law on Administrative Court Proceedings (VwGO).¹⁰⁹

To ensure control by the authorities over the gambling market in general and the concessionaire in particular, the concession cannot be transferred by the concessionaire or relinquished for exercise to any third-party without permission of the legal authorities (§4c.1 sentence 2 GlüStV 2012). The authorities must maintain the same standards as set for the granting of a concession when deciding whether to allow a transfer or relinquishment. Otherwise attempts to circumvent conditions of the granting of concessions become likely.

Under the GlüStV 2012 the competence for granting nationwide sports betting licences lies with the state of *Hessen* (§9a.2 No. 3 GlüStV 2012), specifically with the Ministry of the Interior and Sports of the State of *Hessen*.¹¹⁰ The first concession granting procedure is currently taking place. The granting of the concessions is two-tiered: in a first step the applications have to be submitted in a sealed envelope. The deadline for

¹⁰⁴ The requirements and standards of §4b.2 to 5 GlüStV 2012 are similar to the broadcasting law, namely §§21, 24 RStV; see the official justification of GlüStV 2012 (n 21), p. 24.

¹⁰⁵ Thus, beyond the requirements of the GlüStV 2012, the IT department must consist of at least two persons with at least five years of working experience. Moreover, it is required that the person responsible for offering sports betting has been educated according to the RWG as a (horse-) bookmaker or has a comparable degree or, alternatively, has three years of working experience in the operation of gambling; see the tender <www.hmdis.hessen.de/irj/servlet/prt/portal/prtroot/slimp.CMReader/HMdl_15/HMdl_Internet/med/9ed/9ed40b18-deb1-7931-f012-f312b417c0cf,22222222-2222-2222-2222-222222222222,true> (accessed 20 March 2015) under II.2.3.

¹⁰⁶ See explanations of GlüStV 2012 (n 21), p. 23.

¹⁰⁷ See explanations of GlüStV 2012 (n 21), p. 25.

¹⁰⁸ See explanations of GlüStV 2012 (n 21), p. 25.

¹⁰⁹ See explanations of GlüStV 2012 (n 21), p. 23–24. The decision for the correct legal process is easier compared to (other) service concessions. Within these service concessions it is decisive if the contract is under public or under private law, whereas here the granting of concessions is under police law and therefore under public law.

¹¹⁰ <www.hmdis.hessen.de/irj/HMdl_Internet?cid=b901b42be766387b0cbd4b219bb21af1> accessed 20 March 2015.

incoming applications was originally 9 September 2012¹¹¹ but was extended until September 12, 2012.¹¹² The second phase of the granting procedure began on 24 October 2012.¹¹³ It was supposed to end by 12 December 2012 but was extended until 7 January 2013¹¹⁴ and again until 21 January 2013¹¹⁵ because of discrepancies in the application procedure. Although the competent Ministry of *Hessen* informed 20 applicants in September 2014 that they would obtain a licence,¹¹⁶ no licences have yet been granted. The *Verwaltungsgericht Wiesbaden*¹¹⁷, confirmed by the Higher Administrative Court of the state of Hesse (*Verwaltungsgerichtshof Kassel*),¹¹⁸ has recently, in a so-called *Hängebeschluss*, prohibited the granting of any licences by the Ministry due to legal steps that have been taken against the Ministry's decision of September 2014 by some unsuccessful applicants. In the view of the court the award procedure, especially its criteria, was neither transparent nor comprehensible for the applicants.¹¹⁹ Thus the procedure, so ruled the court, violates a central principle of public allocation procedures: In the allocation of scarce state-managed resources, candidates must have the ability to ascertain the proper application of the selection criteria. Only then can they properly enforce their fundamental right of a derivative claim to participation. This requires an appropriate way to access to the case files. The interest of the Ministry in the immediate licensing has to take second place.¹²⁰ In October 2015 the *Verwaltungsgerichtshof Kassel*¹²¹ held that the participation of all 16 German federal states in the concession granting committee violates the principle of the federal state as well as the principle of democracy. Furthermore the court reconfirmed that the procedure was neither transparent nor non-discriminatory and infringed upon the applicant's freedom of profession.

The Local Court Sonthofen has asked the European Court of Justice under the preliminary ruling procedure (Article 267 TFEU) if the experimentation clause for sports betting in the *GlüStV 2012* and its implementation by the Ministry infringe European Union Law.¹²² The European Court of Justice has asked the EU Commission for an opinion in this procedure. The Commission has expressed concern that the experimentation clause could lead to a *de facto* continuation of an unlawful monopoly contrary to European Law. Whether this is the case is up to the assessment of the

¹¹¹ See the tender reference in footnote 105.

¹¹² On the extension of the deadline see reference in footnote 105.

¹¹³ See footnote 110.

¹¹⁴ <www.isa-guide.de/isa-gaming/articles/66558.html> accessed 20 March 2015.

¹¹⁵ <www.isa-guide.de/isa-law/articles/67058.html> accessed 20 March 2015.

¹¹⁶ <www.faz.net/aktuell/rhein-main/sportwetten-hoffnung-auf-ein-ende-der-haengepartie-13142525.html> accessed 20 March 2015.

¹¹⁷ See *Verwaltungsgericht Wiesbaden*, Beschluss vom 17.9.2014 – 5 L 1428/14.WI.

¹¹⁸ See *Verwaltungsgerichtshof Kassel*, Beschluss vom 7.10.2014 – 8 B 1686/14, recital 15.

¹¹⁹ See also *Verwaltungsgericht Wiesbaden*, Beschluss vom 16.4.2015 – 5 L 1448/14.WI.

¹²⁰ *Verwaltungsgericht Wiesbaden*, Beschluss vom 17.9.2014 – 5 L 1428/14.WI; *Verwaltungsgerichtshof Kassel*, Beschluss vom 7.10.2014 – 8 B 1686/14, Recital 28.

¹²¹ *Verwaltungsgerichtshof Kassel*, Beschluss vom 16.10.2015 – 8 B 1028/15.

¹²² See Question 3 of the pending proceeding, EuGH C-336/14. Vorlagebeschluss vom 7.5.2013, 1 Ds 400 Js 17155/11.

member state's court. A permanent ban could result in any case, if Germany cannot implement the rules for providing concessions in a way that will actually lead to an award of concessions within a reasonable time.¹²³ Advocate General *Maciej Szpunar* expressed a similar view in his opinion delivered on 22 October 2015.¹²⁴ According to the Advocate General, it is the task of the referring court to decide whether the ongoing licence granting procedure complies with general principles and justifies a restriction to Article 56 TFEU.

Thus the division of the German sports betting market will once again experience delays. It is unlikely that the licences will be granted in the near future. The unreasonably long concession procedure has not yet come to an end and both the successful and the unsuccessful applicants face legal uncertainty.

Due to the existing difficulties, sports bets in Germany can only be offered with a licence obtained in another EU Member State. The Deutsche Telekom AG has decided to go this way. The company, in which the Federation has a 31.9% stake, and which is therefore (according to German law) state-controlled, has acquired a 64% stake in Deutsche Sportwetten GmbH. It manages to shake up the German sports betting market by using an Austrian licence (based on a share in the Austrian Sportwetten GmbH by the German Sportwetten GmbH amounting to 36%). Deutsche Telekom AG is seeking in this way to obtain a piece of the lucrative sports betting market pie. Many competitors see that as a distortion of competition and an abuse of the freedom to provide services under EU law, as Deutsche Telekom AG is not a private company like any other, but significantly influenced by the government due to the state's controlling stake.

As the concession granting seems to be trapped in a deadlock situation, the federal state government of *Hessen* suggested in October 2015 a radical reform of the current legal framework. Its 'Five guidelines for a contemporary gambling regulation in Germany'¹²⁵ are going far beyond only dealing with the concession granting for betting operators: (1.) Permits shall be provided for the operation of online poker and casino games without any maximum concession limit, while the GlüStV 2012 contains a strict ban on online gambling. According to the federal state government of *Hessen* this step is necessary to combat the flourishing black market and to ensure player and youth prevention. (2.) *Hessen* wants to abolish the maximum limit for sports betting licences. This change could be the light at the end of a tunnel of pending lawsuits, legal uncertainty – and missed tax revenues. (3.) The maximum stake limit of € 1.000 per month and player in GlüStV 2012 shall be altered to a maximum loss limit as suggested by addiction experts. The requirements for registration could be softened in order to prevent players from migrating to the black market. (4.) *Hessen* further suggests the replacement of the concession granting committee with a common Supervisory Authority of the Federal States and (5.) wants to unify blacklists for addictive gamblers.

¹²³ See also statement of the EU Commission in the proceedings; cited from <www.isa-guide.de/isa-law/articles/122955.html> accessed 20 March 2015.

¹²⁴ See Opinion of Advocate General Maciej Szpunar, C-336/14.

¹²⁵ See Hessisches Ministerium des Innern und für Sport, *Hessen macht konkrete Vorschläge für eine moderne Glücksspielregulierung*, Pressemitteilung vom 8.10.2015.

2. Allocation of Scarce Frequencies

2.1. *Frequency Assignment as an Application of ‘Given’ instead of ‘Chosen’ Scarcity*

Just as with gambling licences, frequencies are scarce. But unlike gambling licences, the shortage of frequencies is not caused by the state. It is not a case of chosen, but of given scarcity.

Frequencies are the essential basis of a digital information society. Wireless communication services such as radio broadcasting or mobile services rely on frequencies. Not least because of their enormous economic importance they have been referred to as the ‘oil of the 21st century’. The reason for the scarcity of frequencies (and therefore the assumption of responsibility for allocation decisions by the state) is physical: frequencies are non-reproducible. Not every part of the electromagnetic spectrum is suitable for every type of use and the same frequency band cannot be used by more than one user at the same time, as this would result in interference.¹²⁶ For these reasons, the legislator largely excludes frequencies from open accessibility and subjects them to a system of allocation by the state.

2.2. *Legal Framework of the Frequencies Allocation System*

The key provision regarding the allocation of frequencies, whether they be radio or individual frequencies, is §55 German Telecommunications Act (TKG). It codifies a preventive ban on the use of frequencies: In order to use a frequency, permission by the authorities is normally required in advance (§55.1 sentence 1 and 2 TKG). A legal right to use a frequency – though not a specific single frequency (§55.6 TKG) – exists, if a suitable frequency is available according to the frequency plan (§55.5 No. 1, 2 TKG), no disturbances will result (§55.5 No. 3 TKG), and the applicant can guarantee the efficient and problem-free use of the frequency (§55.5 No. 4 TKG).

2.1.1. Arrangement of a bidding procedure: assessment of scarcity

If, based on a prognostic assessment by the Federal Network Agency for Electricity, Gas, Telecommunications, Post and Rail (*Bundesnetzagentur [BNetzA]*), frequencies are not available in a sufficient volume (acute scarcity) or there are many requests for a specific

¹²⁶ Martini (n 38) 642; Gudrun Götzke, *Ökonomische Analyse der Frequenzallokation unter besonderer Berücksichtigung des zellularen Mobilfunks* (Nomos, Baden-Baden 1994) 42–46; BVerfGE 12, 205 [227] – Erste Rundfunkentscheidung; Lorenz Nett and Ulrich Stumpf, *Eckpunkte zur Ausgestaltung eines möglichen Handels mit Frequenzen* (Bad Honnef: WIK, Wissenschaftliches Inst. für Kommunikationsdienste, 2003) 10.

frequency (prognostic scarcity),¹²⁷ then the *BNetzA* can organise an award procedure for frequency assignment (§55.10 TKG).

The *BNetzA* has made use of this possibility in several cases.¹²⁸ The decision of the *BNetzA*, prognosticating a case of scarcity as laid down in §55.10 TKG, can be fully reviewed by the courts:¹²⁹ the *BNetzA* is responsible for assessing if sufficient frequencies are available in the prospective market. This is accomplished, for example, by inviting interested parties to submit forecast requirements in so-called demand identification proceedings. The facts the decision is based on are verifiable.

When the *BNetzA* orders a bidding procedure, the legal right to use a frequency (§55.5 TKG) transforms into the right to equal participation in the legal allocation procedure. The procedure must meet the requirements set out by the German Constitution and the law of the European Union: it must be objective, transparent, non-discriminatory, and proportionate (Article 7.3 Authorisation Directive [*Genehmigungsrichtlinie*]¹³⁰; see also §61.4, sentence 1 TKG). The selection criteria have to be objectively relevant and individually reasonable.¹³¹ The state as ‘guarantor of the public allocation procedure’ (*Garant der Verteilungslenkung*)¹³² has to find a proper allocation solution respecting the equal fundamental rights of the subjects.

2.2.2. Types of award procedures: tendering versus bidding procedure

It is the legislative objective of an award procedure to identify the applicants that promise to make the most effective use of a given frequency (§61.3, sentence 1 TKG). The underlying idea is simple: If frequencies are scarce, the allocation procedure has to assign them to where they generate the greatest benefits.

German law provides two modes of allocation procedure: an auction procedure (§61.4 TKG) and a tendering procedure (§61.5 TKG). In principle, preference is given to the auction procedure. Only if the auction procedure is not suitable for achieving the desired regulatory goal set by §2 TKG, the tendering procedure is used in its place (§61.2 sentence 1 TKG).¹³³

¹²⁷ Martini (n 38) 643. See for the possibilities of acute and prognostic scarcity, Susann Kroke, ‘§55’ in Heinrich Wilms, Johannes Masing and Georg Jochum (eds), *Telekommunikationsgesetz* (Kohlhammer January 2006) recital 72–73.

¹²⁸ Especially for allocating GSM and UMTS licences, WiMax frequencies, and the LTE frequencies. See for details 2.3, p. 69.

¹²⁹ Bundesverwaltungsgericht, Urteil vom 22.6.2011 – 6 C 5.10 – BeckRS 2011, 52926, recital 22; BVerwGE 139, 226 [233].

¹³⁰ Directive (EC) 2002/20 of 7 March 2002 on the authorisation of electronic communication networks and services [2002] OJ L108/21.

¹³¹ On this see BVerfGE 33, 303 – Numerus Clausus.

¹³² Martini (n 38) 643.

¹³³ The Bundesnetzagentur has limited discretion, see for example Susann Kroke, ‘§61’ in Heinrich Wilms, Johannes Masing and Georg Jochum (eds), *Telekommunikationsgesetz* (Kohlhammer October 2006) recital 19 with further references.

Regardless of the procedure used, the allocation of frequencies is usually limited to a set period of time (§55.9 TKG). In 2000, for example, the *BNetzA* allocated frequencies for a period of 20 years.

2.2.3. Reasons for the priority of the bidding procedure

The bidding procedure is a novelty in German legislation. Prior to the introduction of the bidding procedure in the TKG, German public law did not use it as an instrument to allocate scarce resources administered by the state at all. The legislature opted for the primacy of the bidding procedure based on economic logic: namely the markets promise of efficiency, hence the actor with the greatest willingness to pay will derive the greatest benefit from the scarce good. Auctions use the price as a reliable signal for scarcity and potential efficiency. The price mechanism should force the bidders to truthfully disclose their ability to use the scarce resource efficiently. The legislator sees this as a decisive advantage over the tendering procedure (*function of efficiency*): The tendering procedure is not able to bridge the information asymmetry between bidder and provider with regard to the potential efficiency, because the misstatement of possibility for use by its very nature can be verified and sanctioned only ex post, if at all. As the auction forces the bidders to offer a scarcity price for allocation, unlike the tendering procedure, it takes advantage of the scarcity that is part of the allocation (*function of absorption*). Therefore, it is committed to the principle of allocative justice. The criterion of willingness to pay precludes non-transparent, discretionary, or arbitrary decision-making standards (*function of transparency*). This – especially in comparison to the complex tendering procedure – renders a rapid allocation possible; judicial review of the correct application of the selection criteria is normally not necessary (*function of speed and legal security*). This is of special importance in the dynamic and fast-moving telecommunications market.

2.2.4. Constitutional predetermined breaking point of a bidding procedure

An auction allows the allocation to result from the competition of the bidders. As a game theoretical mechanism, complex internal dynamics are an inherent part of this system. This makes it susceptible to the strategic influence of bidders and raises the risk of collusion.¹³⁴ It creates an incentive for bidders to use their own bidding power strategically for anticompetitive practices, especially to drive competitors out of the market or prevent their entry into the market. Additionally, given the condition of uncertainty of value regarding the frequency, the auction also triggers the risk of a winner's curse: Then, despite the market's promise of efficiency and the legislative objectives, the good is awarded to the one who, due to the lack of sufficient information, most overestimates the value of the good and not to the one who would use the good most efficiently. The necessity to decide under the condition of uncertainty of value can, in individual cases, inadmissibly curtail the constitutionally guaranteed scope of professional freedom.¹³⁵

¹³⁴ Martini (n 38) 365–69.

¹³⁵ Martini (n 38) 379–396.

The market as a mechanism for allocation ensures economic efficiency, but does not in itself ensure allocation orientated toward the common good. It does not, according to the superior criterion of common good, always pick the best allocation option from the various options.¹³⁶ The auction mechanism is generally silent on the matter of whether there is an equal chance of success for all bidders. It aims at efficiency by the determination of willingness to pay, but ignores the differing abilities of the applicants to pay. An indissoluble connection exists between these two factors. This connection, one which affects the interests mainly of small to medium-sized organisations (see §61.4 sentence 1 half-sentence 2 TKG), can be taken into account by reserving allocation contingents for certain user groups or by granting them discounts on the auction price.

The fact that the auction mechanism brings considerable financial resources into the state's coffers makes this procedure vulnerable to being motivated by fiscal revenue interests. They can become the driving concern, overriding constitutional requirements of objectivity and the appropriateness and reasonableness for the individual bidder. Moreover, this calls into question the constitutional justifiability of such public revenues. Revenues from frequency auctions do not fit seamlessly into the complex German constitutional system of revenues. They have a functional similarity to conferment fees (*Verleihungsgebühren*), but are not entirely the same because they lack state conferment, i.e. permission to engage in an activity that is in principle not allowed.¹³⁷ In essence, it amounts to – something new to German law – a scarcity fee.

Considering the numerous constitutionally predetermined breaking points, the auctioning of frequencies has thus not been without criticism in German legal sciences. Numerous concerns have been voiced regarding the German Constitution and the law of the European Union.¹³⁸ Closer analysis reveals the auctions raise less hurdles to admissibility for the 'if' there is to be an auction and more barriers in the arrangements for 'how' the auction is to be conducted.¹³⁹ This also applies to the constitutional guarantee in Article 87f.1 of the Basic Law: The allocating state has to ensure that competitors provide a sufficient and adequate infrastructure also in structurally weak and rural regions. As a sunk cost, auction proceeds do not generally increase retail prices according to the pure doctrine of economic logic, as they are not relevant for investment decisions but skim off excess profits from the shareholders of the companies concerned: The retail prices depend on the supply and demand relationship. The available supply of frequencies is not affected by whether the frequency is allocated totally free of charge or for payment. Auctions also needn't affect supply to end customers in other respects. They are in particular not necessarily limited to monetary payment. In their allocation rules they can also incorporate a competition on who offers the most comprehensive minimum level of supply, either as a major or minor component.

¹³⁶ For details see Martini (n 38) 405.

¹³⁷ For details see Martini (n 38) 511–12.

¹³⁸ On this see the summary of numerous legal opinions in Herrmann-Josef Piepenbrock and Fabian Schuster, *UMTS-Lizenzvergabe: Rechtsfragen der staatlichen Versteigerung knapper Ressourcen* (Nomos, Baden-Baden 2001) as well as Martini (n 38) 346–47 and 658–63.

¹³⁹ For details see Martini (n 38) 652–653.

Auctions of frequencies are generally compatible with the fundamental freedoms as well as with authorisation and framework directives, as long as the structural performance requirements are met and the individual cases are appropriately designed.¹⁴⁰ This applies in particular to the auction design. It is analogous to a tailor-made dress: It only fits the one it is tailored for.¹⁴¹

2.2.5. Requirements regarding the arrangement of a bidding procedure

The arrangement of the auction design lies within the responsibility of the *BNetzA*. It, therefore, determines the required reserve and the deposit, is responsible for the choice of auction type, the choice of frequency packets, and for the applicable rules for bidders as well as instruments to prevent bidder collusion.¹⁴² The rules must be published (§61.1, sentence 2 TKG). The auction procedure is not confined to a one-off price-guided allocation act. In fact it is designed as a two-stage system: the auction is preceded by an admission procedure (§61.4, sentences 3 to 5 TKG).¹⁴³ It serves as a filter intended to prevent the acceptance of a bid that does not fulfil the individual, professional, and objective minimum conditions for proper frequency use. This procedure brings a discretionary decision-making aspect into the allocation procedure and it is often suspected that it may lead to the purposeful exclusion of unwanted tenders.

In determining the applicable rules, the *BNetzA* has a decisive influence on the allocation result. It highly depends on the chosen design. The varieties of game-theoretical auction designs¹⁴⁴ are nearly endless. The *BNetzA* currently generally uses a simultaneous multi-stage bidding procedure based on the interaction of bids via networked PCs:¹⁴⁵ It calls up all auction goods at the same time. The bidders can simultaneously, but independent of each other, bid via their PCs over the course of a predetermined time-frame. After expiry of the auction period the highest bid for a particular frequency and the corresponding tender are shown simultaneously on all activated PCs. All bidders are informed of the frequencies and their highest bid at the same time. The procedure takes place through multi-stages until no more bidders submit a valid bid.¹⁴⁶

¹⁴⁰ See also Martini (n 38) 649–54.

¹⁴¹ Martini (n 38) 445.

¹⁴² Bundesverwaltungsgericht, Urteil vom 22.6.2011 – 6 C 5/10 – BeckRS 2011, 52926, recital 22; BVerwGE 139, 226 (243). The Bundesverfassungsgericht ruled that the condition regarding appropriate financial standing does not conflict with occupational freedom, see Bundesverfassungsgericht, Beschluss vom 22.4.2014 – 1 BvR 2160/11 – NVwZ 2014, 1226–1228.

¹⁴³ See for example Guido Göddel and Martin Geppert, ‘§61’ in Martin Geppert and Raimund Schütz (eds), *Beck’scher TKG-Kommentar* (4th edn Beck, München 2013) recital 42.

¹⁴⁴ On this see Martini (n 38) 312–26 and 443–47 with further references.

¹⁴⁵ Ernst-Olaf Ruhle and Martin Geppert, ‘Versteigerungsverfahren für Funkfrequenzen und Lizenzen – ERMES-Auktion: Vergleich zwischen Deutschland und USA’ (1998) *Multimedia und Recht* (MMR) 175 [176]; Alfons Keuter, Lorenz Nett and Ulrich Stumpf, *Regeln für das Verfahren zur Versteigerung von ERMES-Lizenzen/Frequenzen sowie regionaler ERMES-Frequenzen* (1996).

¹⁴⁶ On the development of the auction designs see Keuter, Nett and Stumpf (n 145).

2.3. Allocation of Mobile Phone Frequencies

Mobile phone frequencies are notoriously scarce and are regularly assigned by auction procedures.¹⁴⁷ To date, six auction procedures for mobile phone frequencies have taken place in Germany: the ERMES auction procedure in September 1996 (revenue: DM 3.8 million), the GSM-1800 auction procedure in October 1999 (revenue: DM 416 million), the UMTS auction procedure in August 2000 (see below), the WIMAX auction procedure in 2006 (revenue: € 56 million), and the procedure for allocation of LTE frequencies in 2010 (revenue: € 4.4 billion) and 2015 (€ 5.1 billion).

Until today, the highest revenue and publicity was achieved by the auction of UMTS-frequencies. Under the spell of the New Economy's stock exchange and technology fever it brought in € 50 billion to the treasury, one-fifth of the total federal budget at that time.¹⁴⁸ Twelve companies registered for the auction, seven of them participated later. With two frequency blocks each, six companies came out as winners (E-Plus, Hutchinson, Group 3G/Quam, Mannesmann, MobilCom Multimedia, T-Mobile, Viag Interkom). The high revenues of the UMTS frequencies auction in Germany in 2000 similarly left a bad aftertaste, particularly as T-Mobile, one of the companies bidding at the time, was a state-controlled former state-monopoly that decisively contributed to the exorbitantly high auction prices through its aggressive bidding behaviour.¹⁴⁹ The high state revenues at first turned out to be a winner's curse:¹⁵⁰ The bidders emerged victorious in the auction but overstretched themselves with their bids. Quam GmbH was unable to gather the necessary funds to install a mobile phone network. Two years after obtaining the frequencies in the auction the company discontinued operations. In 2003 the *BNetzA* initiated a withdrawal procedure,¹⁵¹ ending with the revocation of the licence. A conflict was sparked by the question of whether the revocation could take place without compensation, specifically of the frequency's inherent residual value. The German Courts denied Quam GmbH

¹⁴⁷ This applies especially to wireless access to the network for the purpose of offering telecommunication services: frequencies in the range of 800 MHz, 1.8 GHz as well as 2 and 2.6 GHz are not available in a sufficient scale according to the opinion of the Bundesnetzagentur, see Decision of the Präsidentenkammer of Bundesnetzagentur of 12.10.2009 (Verfügung 59/2009), p. 39, Amtsblatt der Bundesnetzagentur Nr. 20/2009 vom 21.10.2009. This was confirmed by the Judgment of the Verwaltungsgericht Köln, Urteil vom 17.3.2010 – 21 K 7769/09; BVerwGE 139, 226 [234–243].

¹⁴⁸ For detailed references on the legality of the choice of auction procedure, process, results and particularities of the auction see also Martini (n 38) 645 with footnote 1363–65.

¹⁴⁹ Stefan Niemeier, *Die deutsche UMTS-Auktion: Eine spieltheoretische Analyse* (Dt. Univ.-Verl., Wiesbaden 2002) 66–70 and 154–157; for the legal conclusions see Klaas Kruhl, *Die Versteigerung knapper Frequenzen: Verfassungs- und europarechtliche Aspekte von Versteigerungen nach §11 Abs. 4 TKG* (Nomos, Baden-Baden 2003) 295–96; Claus Luttermann, 'UMTS-Milliarden der Deutschen Telekom für den Bund: aktien- und postverfassungsrechtliche Zweifel' (2000) K & R 473–79.

¹⁵⁰ For details on this phenomena with further references see Martini (n 38) 335, 379–92, 554–60.

¹⁵¹ The licences can be withdrawn because of disuse according to §63 TKG. On this see Guido Göddel, '§63' in Martin Geppert and Raimund Schütz (eds), *Beck'scher TKG-Kommentar* (4th edn Beck, München 2013) recital 2; Josef Ruthig, '§63' in Hans-Wolfgang Arndt and Ulrich Ellinghaus (eds), *TKG: Telekommunikationsgesetz: Kommentar* (Schmidt, Berlin 2008) recital 4–10.

such compensation.¹⁵² Mobilcom AG returned their licences also (considering the legal obligations of §55.8 sentence 4 TKG). For the bidders who remained on the market, the UMTS business did not turn out to be a graveyard for their billions. The ambitious expectations turned out to be justified following the boom of internet-capable mobile phones, so-called smartphones.

In 2012 the returned frequencies from Quam GmbH and MobilCom AG came under the hammer again, in conjunction with the LTE-frequency auction (in an ironic twist of fate, parts of the frequencies of Quam GmbH that belongs to Telefonica S.A. as part of a joint venture were newly acquired by Telefonica S.A.). These are frequencies in the range of 800 MHz and 1.8 GHz as well as 2 and 2.6 GHz. They were freed up in the process of the digitisation of broadcasting, a sort of digital dividend. Four applicants were admitted to the auction, namely E-Plus, O2, T-Mobile and Vodafone. In total 41 frequency blocks were auctioned off, each having been allocated to a particular frequency range. The auction itself lasted a total of 6 weeks with 27 auction days and 224 auction rounds. The amount of government revenue totaled € 4.4 billion.

The last auction of mobile phone frequencies took place in the first half of 2015. The federal government auctioned frequencies in the range of 700 MHz, 900 MHz, 1500 MHz and 1.8 GHz.¹⁵³ The new licences will expire at the end of 2031. While the 900 MHz and 1.8 GHz frequencies are available as from the year 2016 due to expiring rights, a conversion of radio broadcasting (which is to date working in the range of 700 MHz frequencies) to DVB-T2 is required to make frequencies in the range of 700 MHz available.¹⁵⁴ Through the use of the 700 MHz spectrum for mobile communications it shall be possible to achieve a nationwide broadband coverage with a transmission rate of at least 50Mbit/sec, also along the motorways and ICE routes.¹⁵⁵ The existing network operators have to supply at least 98% of German households with mobile broadband

¹⁵² Verwaltungsgericht Köln, Urteil vom 25.4.2007 – 21 K 3675/05; Oberverwaltungsgericht Münster, Urteil vom 30.6.2009 – 13 A 2069/07; Bundesverwaltungsgericht, Urteil vom 17.8.2011 – 6 C 9/10 – NVwZ 2012, 168; Bundesverfassungsgericht (1. Kammer des 1. Senats), Beschluss vom 25.6.2015 – 1 BvR 2553/11 – NVwZ 2015, 1757; Mario Martini, 'Entschädigungsloser Entzug erstererter Nutzungsrechte? – Zu den verfassungsrechtlichen Schranken einer Kommerzialisierung der hoheitlichen Verteilungslenkung' (2011) WiVerw 1–52; Mario Martini, 'Leipzig locuta, causa non finita: Die Rechtssache Quam und ihre verfassungsrechtlichen Wunden' (2012) NVwZ 149–53.

¹⁵³ Detailed results of the auction are available at <www.bundesnetzagentur.de/cln_1431/DE/Sachgebiete/Telekommunikation/Unternehmen_Institutionen/Frequenzen/Projekt2016_Frequenzauktion/projekt2016-node.html> accessed 17 September 2015.

¹⁵⁴ The necessary change in the frequency regulation was approved by the German Cabinet, see: Die Bundesregierung, Funkgesteuerter Breitbandausbau, Frequenzen für schnelles Internet <www.bundesregierung.de/Content/DE/Artikel/2015/02/2015-02-10-kabinett-frequenzverordnung.html> accessed 2 March 2015. The current planning status is available at <www.bundesnetzagentur.de/cln_1431/DE/Sachgebiete/Telekommunikation/Unternehmen_Institutionen/Frequenzen/OeffentlicheNetze/Mobilfunknetze/Projekt2016/projekt2016-node.html> accessed 2 March 2015.

¹⁵⁵ Entscheidung der Präsidentenkammer der Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen vom 28. Januar 2015 zur Anordnung und Wahl des Verfahrens sowie über die Festlegungen und Regeln im Einzelnen (Vergaberegeln) und über die Festlegungen und Regelungen für die Durchführung des Verfahrens (Auktionsregeln) zur Vergabe von Frequenzen in den Bereichen 700 MHz, 900 MHz, 1800 MHz sowie weiterer Frequenzen im Bereich

access. Newcomers are partly excluded from this obligation.¹⁵⁶ The Federation is reinvesting the proceeds of the auction to finance terrestrial broadband expansion.¹⁵⁷ The resulting association between the tenderers and the investment efforts of the Federation is problematic in view of the purpose of the TKG and the allocation mechanism: The tenderers will benefit from the advantages of their own payments in an asymmetric manner. One of the bidders, Telekom Deutschland GmbH, benefits significantly more than other bidders, such as the Telefónica Deutschland GmbH or the Vodafone GmbH, from the reflux of the auctioning revenues into the broadband expansion. This is because Telekom Deutschland GmbH drives forward terrestrial broadband expansion more intense than the other bidders and therefore profits from the blessings of the auction proceeds in a special way. This also may change the economic calculus of Telekom Deutschland GmbH. Its preference structure is indeed shifted by the fact that it benefits from its own auction bids in the form of promoting its own terrestrial broadband expansion: For them it is rational to make their own auction offer dependent not only on their value of the frequencies but also on the expected subsidy back-donation for their broadband expansion plans.¹⁵⁸ If this second factor has strong enough economic incentives, the auction procedure might fail in its goal to determine the tenderer who values the frequencies most and which would, following the rule of market logic, use the scarce resource in the economically optimal way. According to §55.10 TKG in conjunction with §61.1, sentence 1¹⁵⁹ and §61.4 TKG the auction procedure has to be ‘objective, transparent and non-discriminatory’ as well as ‘take into account the needs of small and medium-sized enterprises’¹⁶⁰ (§61.4, sentence 1 TKG). Those legal requirements are to serve the overall regulation objectives as set in §2.2 No. 4 TKG, to ensure fair competition, promote competitive markets, and avoid distortions and restrictions of competition. The auctioning procedure in the design chosen in 2015 defeats therefore the regulatory goal of fair competition.

1452 – 1492 MHz für den drahtlosen Netzzugang zum Angebot von Telekommunikationsdiensten; Entscheidung gemäß §§55 Abs. 4, Abs. 5 und Abs. 10, 61 Abs. 1, Abs. 2, Abs. 3, Abs. 4 und Abs. 6, 132 Abs. 1 und Abs. 3 TKG – Aktenzeichen: BK1–11/003, p. 9.

¹⁵⁶ Entscheidung der Präsidentenkammer der Bundesnetzagentur (n 155), p. 9.

¹⁵⁷ Die Bundesregierung (n 154).

¹⁵⁸ See also Thomas Fetzer, ‘Verwendung von Frequenzauktionserlösen zur Förderung des Breitbandausbaus? Rechtliche Vorgaben und Gestaltungsoptionen’ (2015), *Multimedia und Recht* (MMR), 369 [370 ff.]; also concerned VATM-Geschäftsführer Jürgen Grützner on the IT-Gipfel in Hamburg, see Guido Heitmann, ‘Geplante Vergabe von Mobilfunkfrequenzen sorgt für Diskussionen’ *Blog Telefónica* (27 November 2014) <<https://blog.telefonica.de/2014/11/frequenzauktion-geplante-vergabe-von-mobilfunkfrequenzen-sorgt-fuer-diskussionen/>> accessed 16 March 2015.

¹⁵⁹ The reference in §61.1 sentence 1 TKG to §61.5 TKG for the bidding procedure is a mistake of the legislator. The auctioning takes place according to §61.4 TKG.

¹⁶⁰ The Federal Network Agency didn’t ‘reserve’ frequencies for new entrants. This increases the danger that market power in the new frequency ranges will concentrate within the leading telecommunication groups, especially within Telekom Deutschland GmbH. Liquid Broadband and Telefónica Deutschland GmbH have lodged complaints against the Federal Network Agency with the Cologne Administrative Court. Liquid Broadband, as a new entrant, feels discriminated against existing mobile network operators. Until now without success: VG Köln, Beschluss vom 30.4.2015 – 9 L 538/15.

2.4. Allocation of Broadcasting Frequencies

2.4.1. Mix of federal and state legislation in the area of broadcasting

The allocation of broadcasting frequencies lies at the intersection of broadcasting law and telecom law: It is subject to the interplay of federal and state legislation. The Federation has the competence for telecom law, according to Article 73.1 No. 7 of the Basic Law, and therefore for the technical aspects – excluding studio technology. The determination of the contents of broadcasting programs, as a cultural matter, lies within the competences of the federal states. The regulatory areas are strictly separated according to the competences but are nonetheless related, especially when it comes to the allocation of frequencies. Without a frequency a program schedule is not possible. Hence §57.1, sentence 1 TKG provides for the allocation of broadcasting frequencies in consultation (*Herstellung des Benehmens*) with the competent state authority.¹⁶¹

2.4.2. Prohibition of auction procedures (§61.2 sentence 3 TKG)

The allocation of broadcasting frequencies is not subject to the auction procedures under §61.2 sentence 3 TKG but to the tendering procedure under §61.5 TKG.¹⁶² The reason for this approach is due to the special function of the freedom of broadcasting in Article 5.1, sentence 2 of the Basic Law: The fundamental right of freedom of broadcasting is supposed to guarantee the free, individual, and public formation of opinions. Broadcasting contributes to such opinion formation by providing for the comprehensive dissemination of information and opinions.¹⁶³ The freedom of broadcasting is thus of fundamental importance for a free democratic order.¹⁶⁴ The main question determining the allocation of broadcasting frequencies is not efficiency or potential for high economic return, but rather what contribution the applicants can make with their program, i.e. will it further the variety and balance of opinions and information offered.¹⁶⁵

An auction would not be useful for making such a determination: The plurality of opinions cannot be measured by the economic value of their contents.¹⁶⁶ According to

¹⁶¹ See the reasoning of BT-Drucks. 15/2316, p. 78; see also Susann Kroke, '§57' in Heinrich Wilms, Johannes Masing and Georg Jochum (eds), *Telekommunikationsgesetz* (Kohlhammer, Stuttgart 2008) recital 15–20, Karl-Heinz Ladeur and Tobias Gostomzyk, 'Vom Benehmen zum Einvernehmen? Mischverwaltungsvebot und Absicherung rundfunkbezogener Belange im TK-Recht' (2012) *Multimedia und Recht* (MMR) 80.

¹⁶² The original draft of the Bundesregierung provided for an auction procedure for all types of frequencies. In the Vermittlungsausschuss the Bundesrat prevailed with its preference for this variant, BT-Drucks. 15/3063, p. 6. See also Martini (n 38) 663 with footnote 1445.

¹⁶³ BVerfGE 57, 295 [319] – Dritte Rundfunkentscheidung.

¹⁶⁴ BVerfGE 107, 299 [329].

¹⁶⁵ Martini (n 38) 667.

¹⁶⁶ There is a danger that such selection mechanisms reduce the diversity of opinion because the offer is orientated to the client with the most economic potential who is, therefore, most attractive to the advertising market. See for this especially BVerfGE 73, 118 [159] – Vierte Rundfunkentscheidung; Martini (n 38) 665–67.

the understanding of the German Federal Constitutional Court the legislator has the duty to ensure, 'that broadcasting fulfils its function free of influence or usages, be they political or economic in nature, other than those which are purely journalistic'.¹⁶⁷

2.4.3. Requirements of the tendering procedure

The tendering procedure consists of an evaluation of the applicant's suitability (§61.5 sentence 1 and 2 TKG). A prognosis has to be made on the basis of the abilities and attributes of the applicants.¹⁶⁸ Thereby, the level of geographical coverage realisable by the applicants and the promotion of a sustainable and competitive broadcasting market have to be taken into account.

There is no quantitative ranking of the selection criteria within the actual allocation,¹⁶⁹ though if applicants are equally qualified along most criteria, or in balance, then the level of geographical coverage is decisive (§61.5 sentence 3 TKG). The regulatory authorities have a great deal of scope in their assessment because of the prognostic elements of the suitability test.¹⁷⁰

2.5. Trading and Transferring Frequencies

The allocation of frequencies is not always completed with the end of the tendering or auction procedure. The legislator provides for the possibility of trading and transferring frequencies.

2.5.1. Spectrum trading according to §62 TKG

§62 TKG allows telecommunications companies to rent, trade and jointly use frequencies. This allowance goes back to the release clause in Articles 9.3 and 4 of EC Directive 2002/21. In addition to using the auction as an instrument of initial allocation, trading can ensure the optimal allocation of scarce goods by utilizing the allocation function and price mechanism of the market. In this way the macroeconomic and microeconomic benefit of frequencies can be optimised in the interest of their efficient use.

According to the legislation, trading is subject to regulatory control. A trade can only be made if the *BNetzA* has determined the frequency ranges that are allowed to be traded, rented, or jointly used (§62.1 sentence 1 TKG). The *BNetzA* also sets the framework conditions and the procedure for spectrum trading. The law assigns the revenue to the holder of the frequency (§62.3 sentence 2 TKG).

However, trading is not allowed for all frequencies allocated under the pre-2004 law (§150.8 TKG). This also includes the UMTS frequencies auctioned off in 2000.¹⁷¹ In

¹⁶⁷ BVerfGE 97, 228 [266 f.] – Kurzberichterstattung.

¹⁶⁸ Göddel and Geppert (n 143) recital 50.

¹⁶⁹ Göddel and Geppert (n 143) recital 49.

¹⁷⁰ Göddel and Geppert (n 143) recital 57.

¹⁷¹ On this limited scope of application see also Josef Ruthig, '62' in Hans-Wolfgang Arndt and Ulrich Ellinghaus (eds), *TKG: Telekommunikationsgesetz: Kommentar* (Schmidt, Berlin 2008) 8.

individual cases this can lead to a disproportionate restriction on property rights as laid down in Article 14.1 of the Basic Law.¹⁷² The protection of property guaranteed by constitutional law is generally determined by the competent legislator. He decides the content of the property and what the owner is entitled to. However, if the state sells the frequencies after withdrawal, the previous owner has – in certain circumstances – a right to compensation according to Article 14.1, sentence 1 of the Basic Law. German courts though rejected any rights to the sale proceeds of the state.¹⁷³

2.5.2. The transfer of frequencies according to §55.8 TKG

In addition to the possibility of the trading and pooling of spectrum (§62 TKG), the law provides for the possibility to transfer a frequency by means of singular or universal successions in accordance with §55.8, sentence 1 No. 1 TKG. The transferee fully takes over the legal status of the previous owner. Changes in the frequency usage provisions are not possible. The regulatory authority has to agree to the transfer as well, but there is no room for full discretion – provided there is no reason to fear any distortion of competition and the efficient and trouble-free use of the frequency is ensured. Moreover, the requirements of §55.5 TKG have to be fulfilled just as they would be for a primary allocation.¹⁷⁴

Contrary to previous assumptions in the literature,¹⁷⁵ §55.8 TKG is not applicable to frequencies allocated through an auction or a tendering procedure (according to §55.10 TKG) – but only to cases of bound allocations within the meaning of §55.2 TKG.¹⁷⁶ This derives, on the one hand, from the systematic position of the regulation. On the other hand, there is no indication that the legislators wanted to subject regulated trading to strict rules under §62.1 and §150.8 TKG, but at the same time allow a succession according to §55.7 TKG with less strict requirements. In the end, the non-discriminatory, transparent access provided for under constitutional law and the law of the European Union would be lost: In this way the frequency holders could sell their frequencies freely, without the knowledge of other interested parties.¹⁷⁷

¹⁷² Mario Martini, 'Entschädigungsloser Entzug erstergeordneter Nutzungsrechte? – Zu den verfassungsrechtlichen Schranken einer Kommerzialisierung der hoheitlichen Verteilungslenkung' (2011) *WiVerw* 1 [19] – [29].

¹⁷³ See also the judgement of Oberverwaltungsgericht Münster, Urteil vom 30.6.2009 – 13 A 2069/07; as well as the judgement of Bundesverwaltungsgericht, Urteil vom 17.8.2011, 6 C 9.10 – JZ 2012, 407; Bundesverfassungsgericht (1. Kammer des 1. Senats), Beschluss vom 25.6.2015 – 1 BvR 2553/11 – MMR 2015, 686–687, agreeing Jürgen Kühling and Manuel Klar, 'Anmerkung' (2012) *JZ* 414–18; critically see Mario Martini, 'Leipzig locuta, causa non finita: Die Rechtssache Quam und ihre verfassungsrechtlichen Wunden' (2012) *NVwZ* 149, [151]–[152].

¹⁷⁴ For details on this instrument see Klaus-Udo Marwinski, '55' in Hans-Wolfgang Arndt and Ulrich Ellinghaus (eds), *TKG: Telekommunikationsgesetz: Kommentar* (Schmidt, Berlin 2008) recital 30–40; Guido Göddel, '55' in Martin Geppert and Thorsten Attendorf (eds), *Beck'scher TKG-Kommentar* (4th edn Beck, München 2013) recital 46.

¹⁷⁵ See Marwinski (n 174) 30–31 with further references.

¹⁷⁶ Martini (n 38) 754–756.

¹⁷⁷ For details see Martini (n 172) 2; Martini (n 38) 754–756.

3. Emission Permits

Within the last decade the emissions trading system has evolved into an important element of the governmental allocation system. At first glance the emissions trading scheme appears to be – similar to frequencies – a case of natural scarcity.¹⁷⁸ However, this overlooks the difference between scarcity and shortage. The emissions trading scheme connects to natural scarcity, but moreover, it reduces consciously and deliberately access to a scarce good. It is a case of volitional shortage.¹⁷⁹

3.1. *The Economic Background of the Emissions Trading Scheme*

Emission trading takes advantage of the market's efficiency, specifically its ability to bring goods to the place of highest economic benefit, to cope with environmental problems. It manages the tragedy of the commons by transferring the public good¹⁸⁰ 'carbon dioxide' into an economic good. Its release obtains a market price for air pollution reflecting the social value of scarcity, which is then supposed to provide an incentive to control behaviour, i.e. carefully monitor and control climate-relevant activities. The issuers should internalise the external costs connected to the release of carbon dioxide in their economic calculation.¹⁸¹ The concept is based on a cap-and-trade scheme: It subjects the authorisation to emit CO₂ to an absolute quantitative limit and requires its producers to obtain a permit. Only producers having allowances in the amount needed are permitted to emit carbon dioxide. The certificates are transferable. Thus the participants can choose the most advantageous adaption from their individual point of view: They can reduce CO₂ emissions with the help of environmental technologies, discontinue their environmentally harmful activity because the emission of CO₂ doesn't provide enough corresponding economic benefit, or buy emissions certificates and leave the extent of emissions unchanged but bear the external costs of the environmental pollution caused and thus have to set their own products' prices according to those costs. The environmental pollution occurs where it is opposed by the lowest marginal abatement costs. Emissions certificates go to the place of greatest

¹⁷⁸ See e.g. Dominik Kupfer, *Die Verteilung knapper Ressourcen im Wirtschaftsverwaltungsrecht* (Nomos, Baden-Baden 2005) 105: 'As clean air is only available to a limited extent, it is a case of natural scarcity.'

¹⁷⁹ See also the classification of Martini (n 38) 684 with footnote 1524 and further references.

¹⁸⁰ Therefore, a good with no right to exclusive use and no rivalry for use; see Martini (n 38) 14 with footnote 61; Hans-Bernd Schäfer and Claus Ott, *Lehrbuch der ökonomischen Analyse des Zivilrechts* (5th edn Springer, Berlin, Heidelberg 2012) 553–556; Mario Martini and Jochen Gebauer, 'Alles umsonst'? Zur Zuteilung von CO₂-Emissionszertifikaten: Ökonomische Idee und rechtliche Rahmenbedingen' (2005) ZUR 225 [226 with footnote 13].

¹⁸¹ Martini and Gebauer (n 180) 226, see also the Commission of the European Community, Green Paper on greenhouse gas emissions trading within the European Union, Com (2000) 87 final, 8; Alfred Endres and Cornelia Ohl, 'Der Handel mit Emissionszertifikaten aus wirtschaftswissenschaftlicher Sicht' in Reinhard Hender, Peter Marburger and Meinhard Schröder (eds), *Emissionszertifikate und Umweltrecht: Vom 28. bis 30. September 2003* (Schmidt, Berlin 2004) 11, 13, 26–27; Körner, in Raimund Körner and Hans-Peter Vierhaus (eds), *Treibhausgas-Emissionshandelsgesetz: Kommentar* (Beck, München 2005) introduction recital 23.

economic benefit. This complies with the principle of Coase's Theorem.¹⁸² The creation of environmental property rights is supposed to reduce the social costs of preventing emissions and achieve the emission reduction target of the Kyoto Protocol in an efficient and ecological way.¹⁸³ The emissions trading scheme promises environmental protection at the lowest possible economic cost.

3.2. *Legal Framework of Emissions Trading in Germany*

3.2.1. International regulations

The EU emissions trading scheme is the way the European Union implements its international obligations under the Kyoto Protocol.¹⁸⁴ The European Community's commitment under the Protocol required it to reduce its greenhouse gas emissions by eight percent of the 1990 level by 2012.¹⁸⁵ Germany has undertaken to reduce its emissions pro rata by 21%.¹⁸⁶ Both of these aims have been achieved by 2012.¹⁸⁷ This reduction obligation included the six climate-damaging greenhouse gases: CO₂, CH₄, N₂O, HFC, PFC, und SF₆.¹⁸⁸ CO₂ forms the reference level for the other gases: All greenhouse gases are calculated according to their global warming potential.¹⁸⁹ The European Union agreed on an extension of the Kyoto Protocol including a second commitment period from 2013 till 2020.¹⁹⁰ Furthermore, the European Commission aims to conclude a new

¹⁸² Ronald Coase, 'The Problem of Social Cost' (1960) 3 *Journal of Law & Economics* 1–44; see also Jeffrey L. Callen, 'The Coase Theorem and the Empty Core' (1981) 24 *Journal of Law & Economics* 175–181; George J. Stigler, 'Two Notes on the Coase Theorem' (1998) 98 *Yale Law Journal* 631–633; Martini (n 38) 725–730. Coase doubts that the efficiency problems caused by external effects always necessitate state intervention. From his point of view market failure is not primarily a failure of the market but a failure of the structure of the market caused by the framework conditions. Coase, therefore, questions a classic assumption of the welfare economic approach by Pigou and its implication for regulatory policy: Namely, the assumption that the removal of the market's inefficiencies necessitates a compensation by price control (so-called Pigouvian tax). According to Coase the mere institutionalization of the exchange principle regularly achieves an efficient allocation. The economic operators regroup the user's rights as long as an optimum allocation is given. 'The ultimate result is independent of the legal position if the pricing system is assumed to work without cost' Coase (l.c.) 8.

¹⁸³ Martini and Gebauer (n 180) 226.

¹⁸⁴ 'Kyoto Protocol to the United Nations Framework Convention on climate Change, 1998'; for details see Ines Zenke and Miriam Vollmer, '118. Emissionshandel' in Wolfgang Danner and Christian Theobald (eds), *Energierrecht* (82. Ergänzungslieferung Beck, München 2015) recital 24–31 with further references.

¹⁸⁵ 'Annex B of Kyoto Protocol to the United Nations Framework Convention on climate Change' of 1997.

¹⁸⁶ See also table in Zenke and Vollmer (n 184) recital 18–19.

¹⁸⁷ See <www.bmub.bund.de/themen/klima-energie/klimaschutz/internationale-klimapolitik/kyoto-protokoll/> accessed 23 March 2015.

¹⁸⁸ Annex A of the Kyoto Protocol.

¹⁸⁹ Global Warming Potential (GWP). The Intergovernmental Panel on Climate Change (IPCC) determines the actual values. Decisive for the Kyoto Protocol are the values of the Second Assessment Report (1995 IPCC GWP values), see Decision 2/CP.7 Nr. 3. See also Zenke and Vollmer (n 184) recital 21 and footnote 32.

¹⁹⁰ See <www.faz.net/aktuell/wirtschaft/kyoto-protokoll-verlaengert-mini-kompromiss-beim-welt-klimagipfel-11986836.html> accessed 25 January 2015.

international climate agreement at the Paris Climate Conference in December 2015 that covers all countries.¹⁹¹

3.2.2. European regulations and their implementation in Germany

The implementation of obligations can be split up into two time periods: the phase up to the end of 2012 (under 3.2.2.1.) and the phase since 2013 (under 3.2.2.3.).

3.2.2.1. The legal framework for emissions trading up to the end of 2012

In the first phase the European Union to a large extent conceded freedom to the Member States in arranging and allocating the certificates available in order to achieve their obligations. The legal basis for the national obligations of the Member States in the emissions trading scheme were established by the Emissions Trading Directive¹⁹² as well as by the linking directive 2004/101/EC.¹⁹³ They imposed quantified reduction obligations on the Member States, which had to be met by the end of the trading periods, but left the determination of the national annual limit of the emission volume to the national allocation plans of the Member States.¹⁹⁴

In its national allocation plan Germany decided for a CO₂ emission limit of 859 million tons a year. Germany transposed the obligations of the Directive by virtue of the Greenhouse Emissions Trading Act (*Treibhaus-Emissionshandels-Gesetz* – TEHG), the

¹⁹¹ See <http://ec.europa.eu/clima/policies/international/negotiations/future/index_en.htm> accessed 25 January 2015.

¹⁹² Directive 2003/87/EC of the European Parliament and 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. See especially the reasoning on p. 4–5. For details on its origins and the content see Zenke and Vollmer (n 184) recital 35-45.

¹⁹³ See also Ines Zenke and Thomas Fuhr, *Handel mit CO₂-Zertifikaten: Ein Leitfaden* (Beck, München 2006) 17–18.

¹⁹⁴ On this see also EU-Commission, *The EU Emissions Trading Scheme: How to develop a National Allocation Plan*, Non-Paper, April 2003; see also Peter Zapfel, 'A brief but lively chapter in EU climate policy: the Commission's perspective' in A. D Ellerman, Barbara K Buchner and Carlo Carraro (eds), *Allocation in the European emissions trading scheme: Rights, rents and fairness* (Cambridge University Press, Cambridge [etc.] 2010) 21. The German plans were at first rejected by the EU Commission. The EU Commission criticised the NAP I (2005–2007) because it accepted subsequent corrections of the allocation volume. This would constitute an infringement of Article 11.1 and Annex III No. 10 of the Emissions Trading Directive; see Commission Decision of 7 July 2004 concerning the national allocation plan for the allocation of greenhouse gas emission allowances notified by Germany in accordance with Directive 2003/87/EC of the European Parliament and of the Council, C(2004) 2515/2 final. The claim of Germany before the CFI led to the annulment of the Decision of the Commission; see Case Rs. T-374/04 *Germany v Commission* [2007] ECR II-4431. The EU Commission classified NAP II (2008 to 2012) as not permissible because of an inflated CO₂ budget and because of illegal state aid pursuant to Article 87 of the EC Treaty (caused by long-time allocation guarantees for the operators of new facilities), see Commission Decisions of 29 November 2006 on the national allocation plan of Germany in accordance with Directive 2003/87/EC, especially reasoning No. 5. Germany afterwards adapted its NAP II. A claim by the affected enterprises was rejected, Case Rs. T-28/07, *Fels-Werke and others v Commission* [2007] ECR II-00098. For details see also Zenke and Vollmer (n 184) recital 54.

Allocation Act 2007 (*Zuteilungsgesetz 2007 – ZuG 2007*; for the first trading period from 2005 to 2007),¹⁹⁵ and the Allocation Act 2012 (*Zuteilungsgesetz 2012 – ZuG 2012*; for the second trading period from 2008 to 2012).¹⁹⁶ Each law was further specified by a regulation.¹⁹⁷

Emission allowances are generally valid for one allocation period only (§7.2 sentence 1 TEHG). At the expiration of the period they become worthless. Nonetheless, §7.2 sentence 2 TEHG provides for the possibility of ‘banking’: Upon application old authorisations can be replaced by new ones without further requirements. This complies with the normative order of Article 13.2 subparagraph 2 of the Emissions Trading Directive.

If the owner of the authorisations neither wants to use the possibility of ‘banking’ nor wants to nullify the allowances according to §7.2 sentence 3 TEHG, they may transfer them according to §7.3 TEHG. The possibility to transfer allowances puts the idea of trading for private individuals into practice. The market place is not limited to Germany but encompasses the entire EU (according to Article 12.1 of the Emissions Trading Directive). The details for transference are to be found in the EU Registry Regulation.¹⁹⁸ The transference takes place via agreement between buyer and seller and inscription from the seller’s to the buyer’s account (§7.3 sentence 2 TEHG).¹⁹⁹

The German legal framework on the emissions trading scheme was reviewed by the courts shortly after its introduction. The courts rejected the complaints of German companies against the introduction of the system almost unanimously. They rightly considered the system to be compatible with the fundamental rights of freedom to choose an occupation and the freedom of property.²⁰⁰

To take into account the established interests of companies already operating on the market, for the first trading period the Directive provided for a mostly free allocation of allowances to the enterprises subjected to the system. A maximum 5% of the

¹⁹⁵ Gesetz über den nationalen Zuteilungsplan für Treibhausgasemissionsberechtigungen in der Zuteilungsperiode 2005 bis 2007 – Zuteilungsgesetz 2007 – (ZuG 2007) of 26.8.2004, BGBl. I p. 2211.

¹⁹⁶ Gesetz über den nationalen Zuteilungsplan für Treibhausgasemissionsberechtigungen in der Zuteilungsperiode 2008 bis 2012 – Zuteilungsgesetz 2012 – (ZuG 2012), of 7.8.2007, BGBl. I p. 1788.

¹⁹⁷ Verordnung über die Zuteilung von Treibhausgas-Emissionsberechtigungen in der Zuteilungsperiode 2005 bis 2007 (Zuteilungsverordnung 2007 – ZuV 2007) of 31.8.2004, BGBl. I p. 2255. See also Verordnung über die Zuteilung von Treibhausgas-Emissionsberechtigungen in der Zuteilungsperiode 2008 bis 2012 (Zuteilungsverordnung 2012 – ZuV 2012) of 13.8.2007, BGBl. I p. 1941.

¹⁹⁸ Commission Regulation (EU) No 1193/2011 of 18 November 2011 establishing a Union Registry for the trading period commencing on 1 January 2013, and subsequent trading periods, of the Union emissions trading scheme pursuant to Directive 2003/87/EC of the European Parliament and of the Council and Decision No 280/2004/EC of the European Parliament and of the Council and amending Commission Regulations (EC) No 2216/2004 and (EU) No 920/2010. The regulatory process for the amendment is currently underway; see <http://ec.europa.eu/clima/news/articles/news_2013012301_en.htm> accessed 23 March 2015.

¹⁹⁹ For details see Walter Frenz, ‘§7 TEHG’ in Walter Frenz (ed), *Emissionshandelsrecht: Kommentar zu TEHG und ZuV 2020* (3rd edn Springer, Berlin 2012) recital 38–63.

²⁰⁰ See Bundesverfassungsgericht, Beschluss vom 14.5.2007 – 1 BvR 2036/05 – NVwZ 2007, 942–945; Bundesverwaltungsgericht, Urteil vom 30.6.2005 – 7 C 26.04 – NVwZ 2005, 1178–1184; BVerfGE 118, 79–111.

certificates could be auctioned;²⁰¹ in the second trading period the amount of certificates allocated by auction was increased to a maximum of 10% (Article 10 Emissions Trading Directive, old version). Germany at first allocated emission allowances mostly for free according to the model of ‘grandfather rights’ (see §7 ZuG 2007).²⁰² Only §21 ZuG 2012 established the legal framework for the allocation of CO₂ emissions through auctions from 2010 onwards. It was intended to provide for an auction procedure with objective, comprehensible, and non-discriminatory rules; in addition precautions were taken against attempts to influence price formation by single bidders (§21.2 sentence 3 ZuG 2012). The utilisation by single bidders of their market power, collusion, and the exercise of strategic influence on bidders should be prevented in order to guarantee equal opportunities for all bidders and an objective allocation procedure. However, a specific auction model was not defined by the German ZuG 2012.²⁰³ Instead, Germany decided to wait in the first instance and observe the experiences of other Member States that had already implemented auction models. The legislation empowered the German Government to design an auction procedure through regulation. The delegation of the power to design the auction procedure has significant implications: The auction design has a considerable effect on the exercise of fundamental rights, especially on the freedom to choose an occupation and the freedom of property. Yet decisions related to or affecting fundamental rights are principally reserved for the parliament (‘parliamentary reservation’). The law seeks to compensate for the increased scope of the German Government caused by the delegation of the auction design through the reservation of approval by the German Federal Parliament (§21.2 sentence 2 ZuG 2012) and content-related guidelines (§21.2 sentence 3 ZuG 2012).

The Emissions Trading Auction Regulation 2012 (*Emissionshandels-Versteigerungsverordnung* 2012 – EHVV 2012)²⁰⁴ specifies an ‘exchange related solution’.²⁰⁵ The auction takes place at a stock exchange where a regulated market for the trading of emission allowances already exists (§3.1 EHVV 2012). Since 2009 this has been the European Energy Exchange (EEX) based in Leipzig. As the responsible authority, the German Emissions Trading Authority (*Deutsche Emissionshandelsstelle* – DEHSt) within the Federal Environmental Agency commissions the KfW banking group to auction the allowances. Market participants authorised to engage in secondary trading

²⁰¹ Only Denmark, Latvia and Hungary made use of this possibility; see Jochen Diekmann and Joachim Schleich, ‘Auktionierung von Emissionsrechten – Eine Chance für mehr Gerechtigkeit und Effizienz im Emissionshandel’ (2006) 30 ZfE 299–306.

²⁰² See also Stefan Kobes, ‘Grundzüge des Emissionshandels in Deutschland’ (2004) NVwZ 513 [518]; Christoph Sieberg, ‘Emissionshandel im Luftverkehr’ (2006) NVwZ 141 [144]; see also Martini (n 38) 123 with footnote 454; Tobias Greb, *Der Emissionshandel ab 2013: Die Versteigerung der Emissionszertifikate auf europäischer Ebene* (Nomos, Baden-Baden 2011) 34.

²⁰³ For details see Uwe Neuser, ‘Umweltrecht Besonderer Teil (BImSchV, TA Luft, TA Lärm, TEHG u. a.), §21 ZuG in Martin Beckmann and others (eds), *Landmann/Rohmer, Umweltrecht* (73rd edn Beck, München 2014) recital 10–11.

²⁰⁴ Of 17 July 2009, BGBl. I, p. 2048.

²⁰⁵ Neuser (n 203) recital 10–11. On the reasoning for the regulation see also BT-Drucks. 16/13189 p. 7.

according to §3.2 EHVV 2012 were permitted to take part in the auction.²⁰⁶ §3.4 EHVV provides for an auction carried out by means of a single-round, sealed-bid, and uniform-price format: every bidder submits one or more offers during the bidding phase without knowledge of the other participants' bids. The bids are ranked according to the offered price, starting with the highest bid and working downward until the sum of the volumes bid has reached the auctioned amount. The last price taken into account is the auction price to be paid by all participants who bid that (or a higher) price. The Auction Regulation therefore established a comparatively market-orientated and transparent procedure which requires little effort by the participants.²⁰⁷ Price formation is based solely on the groundwork of the bids. To eliminate the influence of third-parties on price formation, interventions in the mechanism are only justifiable in cases of abuses specified in §5.3 EHVV 2012. Between January 2010 and November 2012 the Federal Republic of Germany offered in this manner around 10% of the national emissions trading budget – approximately 41 million emission allowances (EUAs) annually for auctioning.²⁰⁸ Auctions were held twice weekly on the spot and futures market of the EEX.²⁰⁹

3.2.2.2. Deficits and structural defects in the emissions trading scheme

During the first two phases, from 2005 to 2007 and from 2008 to 2012, substantial deficiencies in the structural and institutional arrangement of the European emissions trading system became evident.²¹⁰ The emissions of the participating facilities in Europe fell – especially in 2009, by about 11.6% compared to 2008 – but this was caused more by the global recession and the resulting decline in production levels than by the success of the EU's emissions trading scheme.²¹¹ In reality the amount of certificates available on the market was higher than the actual demand.²¹² The demand for allowances was over-estimated and their amount was, therefore, not suitable for encouraging a shift toward more sustainable behaviour. The per unit price for emission allowances in Germany fell

²⁰⁶ This leads to the system's vulnerability to fraud: Persons were sentenced to several years in prison for the creation of a tax evasion system within the emissions trading scheme, Bundesgerichtshof, Beschluss vom 21.11.2012 – 1 StR 391/12 – NStZ 2013, 411.

²⁰⁷ For the reasoning for the regulation see BT-Drucks. 16/13189 p. 9.

²⁰⁸ See <www.dehst.de/EN/Emissions-Trading/Auctioning/Auctions_2008-2012/Auctions_2008-2012_node.html> accessed 1 October 2014.

²⁰⁹ See <www.dehst.de/EN/Emissions-Trading/Auctioning/Auctions_2008-2012/Auctions_2008-2012_node.html> accessed 1 October 2014.

²¹⁰ For details from a German perspective see Moritz Hartmann, 'Zuteilung, Auktionierung und Transfer von Emissionszertifikaten. Entwicklungsperspektiven des EU-Emissionshandels in Phase III (2013–2020)' (2011) ZUR 246 [247] with further references.

²¹¹ EU-Commission IP/09/794 (15 May 2009) and IP/10/576 (18 May 2010).

²¹² On this see also Maria Lee, *EU environmental law – Challenges, change and decision-making* (Hart Pub. Oxford and Portland, Or 2005) 201; Michael A Mehling, 'Emissions Trading and National Allocation in the Member States: An Achilles' Heel of European Climate Policy?' (2005) 5 Yearbook of European Environmental Law 113–156; Markus Pohlmann, 'European Union Emissions Trading Scheme' in David Freestone and Charlotte Streck (eds), *Legal aspects of carbon trading – Kyoto, Copenhagen, and beyond* (Oxford University Press, Oxford (UK) 2009) 343. This has not changed until today. It is for this reason that the EU plans to implement a market stabilisation reserve. See also footnote 236.

from € 23.16 at the beginning of 2008 to € 7.30 by the end of 2012. This fact highlights a structural deficit that discredited the entire German trading scheme in the public's eyes, especially when combined with the Europe-wide VAT fraud regarding emission allowances.

Furthermore, due to the decentralised structure of the trading system significant implementation asymmetries appeared amongst the Member States.²¹³ In Germany the use of state aid for renewable energies at first caused a reduction in the demand for emission allowances because fossil fuels were being substituted with renewables. As a result, the prices for emission allowances fell, after which hydrocarbon energy products again became cheaper. In this way the intended relationship between emissions trading and renewable energies was reversed.²¹⁴ Emission trading is only cost-efficient if it ensures that measures are technology-neutral. State aid for renewable energies is counteracting this system.²¹⁵ The two (individually useful) regulation systems mutually neutralised each other.

3.2.2.3. The new design from 1 January 2013

Against the background of these structural defects, the European Union fundamentally revised the Emissions Trading Directive. The new Directive 2009/29/EC²¹⁶ aims for a more centralised arrangement and on the bundling of competences in the hands of the EU Commission; from 2013 the emission ceiling is determined by centralised EU allocation, set by the Commission for every year.

In addition, the structure of the covered greenhouse gases is changing. Now both industrial plants and the air transport sector are integrated into the emissions trading system.²¹⁷ In particular, the allocation parameters for emission allowances will change. The auction is set to be the central allocation model, with the aim of a complete auctioning system for all certificates by 2027. Especially²¹⁸ the energy sector²¹⁹ will be obliged to

²¹³ On this see e.g. Sanja Bogojevic, 'Ending the Honeymoon: Deconstructing Emissions Trading Discourses' (2009) 21 *Journal of Environmental Law* 443 [449].

²¹⁴ For details see René A Pfromm, *Emissionshandel und Beihilfenrecht: Eine Analyse der EG-beihilfenrechtlichen Zulässigkeit einer entgeltfreien Zuteilung von Emissionszertifikaten durch die Mitgliedstaaten in Umsetzung der Richtlinie 2003/87/EG* (Duncker & Humblot, Berlin 2010).

²¹⁵ Joachim Weimann, 'Ökostrom-Förderung ist im CO₂-Handelssystem absurd', *FAZ* (Frankfurt, 25 March 2013) 18.

²¹⁶ 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.

²¹⁷ The claim was rejected by the ECJ; see C-366/10 *Air Transport Association of America and others* [2011] ECR I-13833. Nevertheless, only European flights are included.

²¹⁸ Exceptions are especially made for new Member States with an out-of-date system or a power-plant structure essentially isolated from the European electricity network.

²¹⁹ For industrial plants and facilities for heat production the amount of allowances auctioned-off will be increased in the 2013 to 2020 time period from 20% to 70%, Article 10a.11 Emissions Trading Directive. However, exceptions exist for industries that compete internationally with states without a comparable climate protection program and, therefore, raise the risk of 'carbon leakage'. To prevent the shifting of production and emissions, the allocation is free. The list of industries concerned includes almost all

purchase CO₂ allowances at auction pursuant to Art. 10.1 subparagraph 3 sentence 2 Emissions Trading Directive.²²⁰ The auction procedure and the bidding rules are standardised by the EU Auctioning Regulation.²²¹

In its decision of 9 July 2010 the Commission determined the EU-wide allocation of emission allowances for the year 2013.²²² The amount (2.04 billion) falls short of the total quantity of emissions in the EU in 2012 by 258.5 million. The quantity will decrease by a linear factor of 1.74% per year until 2020, thereby reaching the objective of reducing emissions by at least 21% from 2005 levels. The concrete allocation rules for the free allocation of certificates are derived from a benchmark-based²²³ allocation model.²²⁴

The increased use of competences by the EU for regulating emission trading has allowed the German transposition law to become more slender.²²⁵ The law of the European Union is mainly²²⁶ implemented through the pre-existing but now trimmed-

industrial branches and makes the exception into the rule, see Dirk Weinreich, 'Umweltrecht Besonderer Teil (BImSchV, TA Luft, TA Lärm, TEHG u. a.) 5. Handel mit Emissionsberechtigungen, 5.1 Gesetz über den Handel mit Berechtigungen zur Emission von Treibhausgasen (Treibhausgas-Emissionshandelsgesetz – TEHG), Vorbemerkung' in Martin Beckmann and others (eds), *Landmann/Rohmer, Umweltrecht* (73rd edn. Beck, München 2014). The list can be seen in Commission Decision of 24.12.2009, which determines, pursuant to Directive 2003/87/EC of the European Parliament and of the Council, a list of sectors and subsectors that are deemed to be exposed to a significant risk of carbon leakage, as last amended by the Decision of the Commission of 11 November 2011.

²²⁰ On the amendments and other details see Bernhard W Wegener, 'Die Novelle des EU-Emissionshandelssystems' (2009) ZUR 283–88 with further references and Uwe M Erling and Stephan P Wagnershauser, 'Novellierung der EU-Emissionshandels-Richtlinie (EH-RL)' (2008) UPR 175–99.

²²¹ Commission Regulation (EU) No 1031/2010 of 12 November 2011 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 the Council establishing a scheme for greenhouse gas emission allowances trading within the Community.

²²² Commission Decision of 22 October 2010 adjusting the Union-wide quantity of allowances to be issued under the Union Scheme for 2013 and repealing Decision 2010/384/EU.

²²³ On this see Wolf F Spieth and Martin Hamer, 'Die neuen Zuteilungsregeln für Industrieanlagen in der dritten Phase des europäischen Emissionshandelssystems' (2011) NVwZ 920 [921].

²²⁴ Commission Decision of 27.4.2011 determining transitional Union-wide rules for the harmonised free allocation of emission allowances pursuant to Article 10a of Directive 2003/87/EC, from now on allocation decision.

²²⁵ National allocation plans, in which the Member States in the first trading period determined the emission objectives and the allocation rules, are omitted as are the previous allocation laws. Also national allocation regulations are obsolete. For more details on the implementation rules, especially concerning the first trading period, see Zenke and Vollmer (n 184) 56–57, as well as Weinreich (n 219) Vorbemerkung recital 42–46.

²²⁶ The linking directive is implemented by the Project Mechanisms Act, Gesetz über projektbezogene Mechanismen nach dem Protokoll von Kyoto zum Rahmenübereinkommen der Vereinten Nationen über Klimaänderungen vom 11.12.1997 (Projekt-Mechanismen-Gesetz – ProMechG) of 22.9.2005, BGBl. I p. 2826, zuletzt geändert durch Gesetz of 7.8.2007, BGBl. I p. 1788. It is the basis for the participation of Germany in climate protection projects and in combination with §18 ZuG 2012 gives the enterprises the possibility to replace up to 22% of the allocated amount of allowances by instruments of the project-based mechanisms of Kyoto. For details see Ines Zenke and Alexander Handke, 'Das Projekt-Mechanismen-Gesetz – Eine erste und kritische Bewertung' (2007) NuR 668–674; Markus Ehrmann, 'Das ProMechG: Projektbezogene Mechanismen des Kyoto-Protokolls und europäischer

down TEHG.²²⁷ It establishes the baselines for the emissions trading scheme in Germany. The allocation decision of the EU is implemented by the Allocation Regulation 2020 (*Zuteilungsverordnung* 2020).²²⁸ The Data Collection Regulation 2020 (*Datenerhebungsverordnung* 2020)²²⁹ ensures the implementation of reporting obligations according to the Emissions Trading Directive.

The current allocation procedure providing for the free allocation of allowances is specified in §9 TEHG. However, it constitutes an exception. The application for free allocation still takes place through the Federal Environment Agency (§19.1 TEHG). If such a request is filed according to §9.2 sentence 1 TEHG, then the Federal Environment Agency calculates the preliminary quantities of allowances and publishes these in the *Bundesanzeiger* (§9.3 sentence 1 TEHG). The European Commission decides about the allocation and rejects the allowance if necessary, with reference to Article 11.3 Emissions Trading Directive. Based on the Commission's decision a final decision is then made by the Federal Environment Agency according to §9.4 TEHG. It is, therefore, a staggered decision-making procedure. Not every step in the procedure is subject to appeal, only the final decision of the Federal Environment Agency (§9.3 sentence 3 TEHG). This is supposed to prevent procedural delays and claims made with the sole aim of playing for time.

The auction procedure – now the rule rather than the exception – is standardised in §8 TEHG. The norm refers to the EU Auctioning Regulation (§8.1 TEHG). The EU Auctioning Regulation contains detailed rules for the procedure. The general concept is determined by Article 10.4 Emissions Trading Directive: The operators, with special attention to the small and medium-sized enterprises that are included in the emission trading, shall have unrestricted, fair, and equal access (see Article 10.4 subsequence 2 lit. a) Emissions Trading Directive). The system has to be permeated with the concept of equal opportunities. All auction participants must have the same information simultaneously, while it also must be ensured that no participant can influence the auction (Article 10.4 subsequence 2 lit. 2 b) Emissions Trading Directive). Organisation and participation have to be cost-efficient; unnecessary administrative costs have to be avoided (Article 10.4 subsequence 2 lit c) Emissions Trading Directive). Germany's share of the overall European allowances volume to be auctioned in the third trading period amounts to around 21%.²³⁰

Emissionshandel' (2006) ZUR 410 [410]; Alexander Reuter and Thomas Löwer, 'Das Projekt-Mechanismen-Gesetz: Deutschlands CO₂-Handel wird international' (2006) RdE 182; Simon Marr and Frank Wolke, 'Das Emissionshandelssystem nimmt Formen an – Aktuelle Rechtsprechung und die Einführung der projektbasierten Mechanismen des Kyoto-Protokolls im deutschen Emissionshandelsrecht' (2006) NVwZ 1102; Dirk Weinreich, 'Klimaschutzrecht in Deutschland' (2006) ZUR 399.

²²⁷ Gesetz zur Umsetzung der Richtlinie 2003/87/EG über ein System für den Handel mit Treibhausgasemissionszertifikaten in der Gemeinschaft (TEHG) of 8 July 2004, BGBl. I p. 1578.

²²⁸ Verordnung über die Zuteilung von Treibhausgas-Emissionsberechtigungen in der Handelsperiode 2013 bis 2020 (*Zuteilungsverordnung* 2020 – ZuV 2020) of 26 September 2011, BGBl. I p. 1921.

²²⁹ Datenerhebungsverordnung 2020 – DEV 2020 of 22 July 2009, BGBl. I p. 2118.

²³⁰ <www.dehst.de/EN/Emissions-Trading/Auctioning/Auctions_2013-2020/Auctions_2013-2020_node.html> accessed 1 October 2015.

Instead of a platform shared by the Member States and the Commission, Germany has – as has Great Britain – decided to establish its own platform: Under Article 30 et seq. of the EU Auctioning Regulation No 1031/2010 the Member States have the opportunity to opt out of the common auction platform and establish their own platform. As a first step, Germany carried out a Europe-wide awarding procedure to establish a temporary auction platform. German emission allowances as well as the air traffic authorisations were auctioned on this temporary platform until 31 December 2013. The European Exchange AG (EEX) in Leipzig prevailed in its bid to operate the auction, with its associated clearinghouse, European Commodity Clearing AG (ECC).²³¹ After the granting of the award the platform went through a test procedure conducted by the European Commission and was incorporated in the annex of the EU Auctioning Regulation. The amendment of the annex of the EU Auction Regulation for the German platform EEX was finally made in 2013.²³² Auctions are held by using the established single-round, uniform-price procedure and a closed order book – the procedure that had already been applied in the primary auctions in Germany.²³³ EEX will serve as the German auction platform at least until autumn 2018. Poland has not yet implemented its own platform, but has contracted the German platform (EEX) to auction on its behalf.²³⁴

It turned out that the new emissions trading system could not overcome all the deficiencies of the old scheme. Therefore, the EU plans to reform it again. Until today, more emission allowances are available on the free market than needed by the companies to cover their emissions. To reduce the existing surplus and to incentivise companies to use environmentally friendly technologies, the EU decided in 2013 to take 900 million certificates off the market by the end of 2014.²³⁵ A market stabilisation reserve is further planned to be established by 2021.²³⁶ Surplus allowances are to be transferred into a reserve. The situation of artificial scarcity will thereby be enhanced. If the allowances are required at a later date, the reserve can be released.²³⁷

²³¹ See <www.dehst.de/DE/Emissionshandel/Versteigerung/Versteigerungen_2013-2020/Versteigerung_2013-2020_node.html> accessed 1 October 2015.

²³² Commission Regulation (EU) No 1143/2013 of 13 November 2013.

²³³ See www.dehst.de/DE/Emissionshandel/Versteigerung/Versteigerungen_2013-2020/Versteigerung_2013-2020_node.html accessed 1 October 2015.

²³⁴ See <http://ec.europa.eu/clima/policies/ets/cap/auctioning/index_en.htm> accessed 17 March 2015.

²³⁵ Hendrik Kafsack and Andreas Mihm, 'EU will den Emissionshandel verschärfen', FAZ.net vom 6.5.2015.

²³⁶ The Parliament planned to establish the market stabilisation reserve by 2018 at the latest, see European Parliament, 'ETS reform: everything you need to know in a nutshell', press release from 6.7.2015 (26 February 2015). The German Federal Minister of Economics and Energy, Sigmar Gabriel, wants to establish the market stabilisation reserve in 2017 already, see BMWI, 'Wichtige Investitionssignale für den Energiesektor' (17 December 2014) <www.bmwi-energiewende.de/EWD/Redaktion/Newsletter/2014/35/Meldung/eu-wichtige-investitionssignale.html> accessed 16 March 2015.

²³⁷ European Parliament (n 236).

4. Conclusion

The allocation of gambling licences, frequencies, and emission allowances follow common developmental lines: They use the power of the market or market analogous schemes to bring scarce goods to the place where they will be used to the best benefit for the society. All three areas are characterised by a tension between the task of an objective constitutional allocation and the state's interest in making profit. The allocation models established incentives to cope with scarcity while linking them to the generation of state revenues in the interest of recapitalising the state's coffers. In this case they commercialise the state's control of allocation in an inadmissible way (so-called prohibition of coupling [*Koppelungsverbot*]). This tension is inherent in using a market allocation model as an instrument of state allocation policy.

In the face of the state's task of controlling allocation, the state uses the efficiency features of the market and its ability to find the equilibrium between supply and demand in an increasing range of fields. The generation of state revenues combined with the scarcity function of the price does not make the instrument inadmissible as such – just as the state's gambling monopoly is not inadmissible as such. However, the potential conflicts of interest make special attentiveness by the legal system indispensable. The legal system must diligently ensure an objective conceptual design and arrangement of allocation instruments – one which meets the constitutional aims of allocation but is not designed with the state's interest in high revenues first-most in mind.

4. THE ALLOCATION OF GAMBLING LICENCES, RADIO FREQUENCIES AND CO₂ EMISSION PERMITS IN GREECE

Managing the allocation of public rights which are scarce either for natural/technical reasons (for example radio spectrum management) or for *'overriding reasons relating to the public interest'*¹ (for example gambling industry) becomes a subject of a cross-border impact which requires a broader thinking in the EU about the necessity of developing common general principles which may even have a harmonising effect. The need for a comparative view emerges in order to share different perspectives which may be helpful in optimising the competent authorities' discretion regarding the allocation of selected limited rights in the Member States.

Identifying legal practice with regard to the allocation of limited authorisations and claims in Greece highlights the idiosyncratic dimension of the management of scarce resources. In the absence of European harmonization, the Greek legislator opts, in most cases, for a restrictive licensing regime with regard to so-called *'limited public rights'*; gambling industry is a prominent policy area where the great margin of appreciation of the national legislator has led to a foreclosure of the relevant market (1). On the contrary, in policy areas which are governed – partly or completely – by secondary EU law such as radio frequencies and CO₂ emission permits, the Greek legislation contains rules favouring competition and fair treatment of all market players in conformity with EU respective legal provisions (2). Considering these three kinds of limited public rights, this contribution aims at identifying, in particular, how the limitation of the various limited rights is established, which is the selection procedure in each case and which specific problems of legal protection do occur with regard to the allocation in question.

* George Dellis is Associate Professor of public law at the Athens' Law Faculty; Attorney-at-law, Member of the Athens Bar Association; PHD Panthéon-Assas University (Paris II); Supervisor of researchers at the Panthéon-Assas University (Paris II); former référendaire at the CJEU. Nantia Sakellariou holds a Master II of Panthéon-Sorbonne University (Paris I); Attorney-at-law, Member of the Athens Bar Association.

¹ We refer to the terminology adopted in the Council Directive 2006/123/EC of 12 December 2006 on services in the internal market, [2006] OJ 2006, L376/36, the provisions of which build on a distinction between authorisations that are limited in number *'because of the scarcity of available natural resources or technical capacity'* and authorisations that are limited in number *'by an overriding reason relating to the public interest'*.

1. The Allocation of Limited Authorisations and Claims in Case of Lack of Harmonisation at a European Level: The Gambling Industry

As consistently held by the Court of Justice of the European Union (hereinafter: 'CJEU'), the legislation on games of chance is one of the areas in which there are significant moral, religious and cultural differences between the Member States. In the absence of EU harmonisation in this field, it is for each Member State to determine in those areas, in accordance with its own scale of values, what is required in order to ensure that the interests in question are protected.² However, irrespective the fact that Member States remain, in principle, competent to define the conditions for the pursuit of the activities in that sector, they must, when exercising their powers in this area, respect the basic freedoms guaranteed by the Treaty on the Functioning of the European Union (hereinafter: 'TFEU').³

In this context, Greece has been listed until recently among the Member States which prohibited gambling in their territories through a blanket ban on gambling except in so far as exceptions are provided by law, i.e. with the exception of land-based casinos and the Greek Organization of Football Prognostics (hereinafter: 'OPAP')⁴ which are allowed by statute to provide gambling services in Greece. This extremely restrictive policy was supposed to be justified by overriding requirements in the public interest such as consumer protection and the prevention of fraud and gambling addiction. Another objective of the said policy was ensuring that the profits derived from the gambling market are devoted to the public interest.

Following the introduction in 2011 of the new law 4002/2011,⁵ a first attempt has been made, as mentioned in the explanatory memorandum accompanying the new law,⁶ to '*regulate the market and monitor games of chance in accordance with EU requirements, aiming to safeguard the public interest and the public order for the citizens' safety and protection*'. However, the provisions of law 4002/2011, as subsequently amended,⁷ govern

² Case C-42/07, *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-7633, para. 57 and the case-law cited.

³ Case C-58/98, *Corsten* [2000] ECR I-7919, para. 31 and Case C-514/03, *Commission v Spain* [2006] ECR I-963, para. 23.

⁴ OPAP, which started trading as a public corporation wholly owned by the Greek State, was converted into a public limited company in 1999 and listed on the Athens Stock Exchange in 2001, with the State retaining 51% of OPAP's shares at the time of the stock exchange listing. Since the entry into force of Law 3336/2005, the Greek State had kept only a minority shareholding (34% of the shares) in OPAP. Following the issuance of Law 3986/2011, on 12.8.2013, a contract for the sale of 33% of OPAP's shares to the company under the name EMMA DELTA was signed.

⁵ See Chapter VIII of Law 4002/2011 (Government Gazette A' 180/2011) entitled '*Regulation of gambling market*'.

⁶ Available on the website of the Greek Parliament at: www.hellenicparliament.gr/UserFiles/2f026f42-950c-4efc-b950-340c4fb76a24/r-anapt-eis-anatyp.pdf.

⁷ See article 52 of Law 4021/2011 (Government Gazette A' 218/2011), article 7 of Law 4038/2012 (Government Gazette A' 14/2012), Law 4141/2013 (Government Gazette A' 81/2013), article 74 of Law 4170/2013 (Government Gazette A' 163/2013) and article 173 of Law 4261/2014 (Government Gazette A' 107/2014).

in reality only two segments of the Greek gaming market, i.e. the sector of entertaining – technical games and games of chance played through gaming machines⁸ (1.2) and the sector of online gaming (1.3). According to the explanatory memorandum of the law, the latter ‘...regulates parameters and procedures which govern games and betting of all types played using gaming machines or via the Internet with the overall objective of a shift towards controlled, lawful activities away from uncontrolled unlawful betting, for the benefit of citizens, society in general and the State...’.

The new Law indeed does not govern the offline gaming market given that the games of chance offered by the land-based licenced casinos and the authorized monopolistic company OPAP (1.1) are expressly excluded from the scope of the law (see article 26(2) of law 4002/2011).

1.1. Offline Gambling Regime

As mentioned above, by virtue of law 4002/2011, the Greek State legalized and partially deregulated the whole online betting sector, while preserving the monopoly enjoyed by OPAP on offline gaming. More specifically, OPAP has been granted, by virtue of law and under a contract concluded with the Greek State on 15 December 2000⁹ – not preceded by any transparent and competitive procedure – the exclusive right to run, manage, organise and operate games of chance for twenty years. At the same time, the Greek legislation provided for strict penalties imposed to any person who, as betting agent, player, intermediary or advertiser, acts in breach of OPAP’s monopoly. By virtue of an ‘Addendum to the Contract dated 15 December 2000 between the Greek State and OPAP’, the exclusive right to run, organise, manage and operate gambling games initially granted to OPAP was extended for ten years after the expiration of the initial contract, i.e. until 2030.

In view of the doubts arising in relation to the compatibility of the abovementioned national legislation granting OPAP the exclusive right to run, organise, manage and operate games of chance, with the provisions of Articles 49 and 56 TFEU, the Council of State¹⁰ Plenum has referred, in accordance with Article 267 TFEU to the CJEU for a preliminary ruling¹¹ asking whether EU law, particularly the principles of the fundamental freedoms (freedom of establishment and freedom to provide services), preclude national legislation which grants the exclusive right to operate games of chance

⁸ It should be noted that Law 3037/2002 (Government Gazette A’ 174/2002) previously governing the sector of games on gaming machines had been declared by the CJEU to be in contradiction with EU law and for which Greece has paid substantial fines (Case C-65/05, *Commission v. Hellenic Republic* [2006] ECR I-10341 and Case C-109/08, *Commission v. Hellenic Republic* [2009] ECR I-04657).

⁹ See article 2 of Law 2433/1996 (Government Gazette A’ 180/1996), article 27 of Law 2843/2000 (Government Gazette A’ 219/2000) and the relevant contract concluded with the Greek State dated 15.12.2000.

¹⁰ The Council of State (‘Symvoulío tis Epikrateias’) is the Greek Supreme Administrative Court.

¹¹ See the decision n° 231/2011.

to a single entity. The Council of State observed though that, whilst the objective of the national legislation in question is to restrict the supply of games of chance and to support the effort to combat criminality linked to games of chance, OPAP pursues a commercial policy of expansion as well.

In its respective judgment in Cases *Stanleybet International Ltd and Others (C-186/11) and Sportingbet plc*¹², the CJEU noted, *firstly*, that national legislation which grants a monopoly to OPAP and prohibits providers established in another Member State from offering the same games of chance on Greek territory constitutes a restriction on the freedom to provide services or on the freedom of establishment. It then examined whether such a restriction may be allowed as derogation on grounds of public policy, public security or public health or justified by overriding reasons in the public interest. The CJEU emphasised, however, that such restrictive measures imposed by Member States must satisfy the conditions of proportionality and non-discrimination, whilst actually ensuring attainment of the objectives pursued in a consistent and systematic manner. The CJEU then answered that EU law precludes national legislation ‘*such as that at issue in the main proceedings*’ which grants the exclusive right to run, manage, organise and operate games of chance to a single entity, where, *firstly*, that legislation does not genuinely meet the concern to reduce opportunities for gambling and to limit activities in that domain in a consistent and systematic manner and, *secondly*, strict control by the public authorities of the expansion of the sector of games of chance, solely in so far as is necessary to combat criminality linked to those games, is not ensured. The following merits also attention: although the CJEU stated that it is for the national court to ascertain whether this is the case, at the same time, it underlined that several aspects of the case which have been highlighted by the request for a preliminary ruling tend to suggest that the requirements referred to above might not be satisfied.

When the national court, i.e. the Council of State, was called upon, after the abovementioned judgment of the CJEU, to rule whether the national legislation meets the requirements ascertained by the latter, it took into account the developments in national legislation which had taken place meanwhile, i.e. after the date of the request of the preliminary ruling. More specifically, the Supreme Court stated that law 4141/2013 voted after the issuance of the aforementioned judgment of the CJEU ‘*includes provisions primarily aiming at ensuring the compatibility of the legislation on gambling games with the EU law and the principles governing the Treaty for the Functioning of the European Union (TFEU) and updating the regulatory framework for the function of games of chance in a way that fulfils the requirements of proportionality and prohibition of discrimination in order to “ensure attainment of the objective pursued in a consistent and systematic manner”*’. What the Council of State considered as important is the fact that the new legislation, i.e. laws 4002/2011, 4038/2012 and 4141/2013, has strengthened monitoring and control mechanisms in the area of gambling games in general, especially by transforming the ‘*Supervisory Gambling Control Committee*’ (hereinafter: ‘EEEE’) into an independent

¹² Joined Cases C-186/11 and C-109/11, [2013] ECR-00000.

administrative authority and by establishing a three-member Control Committee¹³ especially for OPAP. The unceasing systematic policy of quantitative and qualitative expansion of OPAP's activities did not lead the Court of State to a different ruling with regard to the compatibility of OPAP's monopoly with EU fundamental freedoms although this element does not genuinely meet the concern to reduce opportunities for gambling and to limit activities in that domain in a consistent and systematic manner, as ascertained by the CJEU. For the Supreme Administrative Court, since the Greek State has established vigorous and coherent public supervision on the sector, the monopoly fulfils the criteria set by CJEU.¹⁴ It is worth mentioning that the aforementioned preliminary ruling of the CJEU had left a window for such an approach by stating that even an 'expansionist' and profitable betting monopoly, exercised by a company listed on the stock exchange is not by definition incompatible with the fundamental freedoms.

In sum, offline gambling remains a monopoly in Greece, extended up to 2030 and qualified by recent case-law and after an *ad hoc* preliminary ruling of the CJEU to be compatible with EU law requirements. All this, despite the fact that such a monopoly is exercised by a company listed on the stock exchange, constantly broadening its gambling activities and profitability. That company, i.e. OPAP, has been recently privatized and is today the third biggest company in the Greek stock exchange, in term of capitalization.

1.2. Online Gaming Regime

As mentioned above, law 4002/2011 as amended introduced several measures for the legalisation, partial deregulation and development of the online betting.

More particularly, pursuant to article 27 of law 4002/2011 as amended and in force, prior authorisation for the operation and exploitation of internet gambling games is set

¹³ Article 24 par. 2 of law 4141/2013 added a paragraph 3A in article 28 of law 4002/2011, which provides that '3A. By virtue of a decision by the EEEP, a three-member Control Committee shall be created, of which one of the members shall be an appointed member of the EEEP and the other two members shall be selected according to the terms, criteria and procedure defined in the Regulation for the operation and control of games of chance. The three-member Control Committee, which shall attend the meetings of OPAP S.A. Board of Directors shall oversee and ensure the compliance of OPAP S.A. and its agents and concessionaires of article 39 with the existing legislation and the contractual obligations of OPAP S.A. to the Greek State...'.

¹⁴ However, a minority opinion has also been expressed according to which the abovementioned provisions of the new legislation have not substantially altered the basic characteristics of OPAP's function; more specifically, they do not offer the guarantees of exercising public control, let alone strict and effective control, since the above three-member Control Committee is governed by private law and, most importantly, the expenses for its operation are covered by that same audited company, i.e. OPAP. Consequently, according to this minority opinion, national legislation may not be deemed appropriate for the attainment, in a consistent and systematic manner, in accordance with the requirements of EU law and CJEU case-law, of the objectives pursued by national policy in the area of betting games, i.e. the attempt to reduce gambling and combating betting-related criminal activity through the exercise of control.

forth as a general rule. According to article 28 of the same law, the competent authority for the issuance of the relevant authorisation and the monitoring and control of the operation and exploitation of online gambling is EEEP whose independence has been strengthened by virtue of laws 4038/2012 and 4141/2013.

More specifically, the legislator, after reminding that the operation of games of chance on the Internet belongs to the exclusive jurisdiction of the Greek State, stipulates that this operation will be carried out through specially Licenced providers (see article 45(2)) according to licences the number of which is announced by way of a decision of the Minister of Finance (see articles 45(3) and 46(3) of law 4002/2011 as in force). Although the draft bill made reference to a restricted number of fifteen to fifty licences, the reference to a specific number was erased in the course of the parliamentary discussions and, thus, the final text of law does not expressly mention a maximum or/and minimum number of online gaming licences (there is no *ex lege numerus clausus*). Notwithstanding the quantitative limit on the number of operators potentially able to access the Greek relevant market, which constitutes a restriction of the freedom to provide services governed by Article 56 TFEU, law 4002/2011 fails to explain the reason for such limitation although the CJEU has ruled, with regard to limited number of Licences, that such restrictions should reflect a concern about a genuine diminution of gambling opportunities.¹⁵

It has to be also noted that law 4002/2011 does not refer to any criterion on the basis of which the restricted number of licences will be determined. The unlimited discretion which is allowed to the Minister of Finance could be assessed under the light of the EU case-law¹⁶ which imposes that, in case of limitation of the number of licences granted in order to provide services, the prior administrative authorisation scheme should, in any event, be based '*...on objective, non-discriminatory criteria which are known in advance to the undertakings concerned, in such a way as to circumscribe the exercise of the national authorities discretion, so that it is not used arbitrarily*'.

According to the respective framework, the relevant licences will be awarded to operators by a competitive method, i.e. by way of an international tender procedure. EEEP's role in setting up the details of the tender procedure is prominent. In order for operators to participate in the tender procedure, they need to fulfil the strict conditions stipulated in articles 46–50 of law 4002/2011. One has to underline the concerns that some of these conditions may constitute unjustified restrictions and economic burdens to newcomers, such as opening the tender procedure only to capital companies with a minimum paid-up capital according to article 46(1) or forcing them to have a seat or a permanent establishment in Greece according to article 47(1) of law 4002/2011. As a consequence, the new regime could be considered as containing non-justified restrictions on primary EU law, in particular on the fundamental freedom to provide services and the freedom of establishment.

¹⁵ Case C-243/01, *Gambelli* [2003] ECR I-13031.

¹⁶ Case C-205/99, *Anadir* [2001] ECR I-01271 and Case C-203/08, *Betfair* [2010] ECR I-04695.

Furthermore, the express exclusion of OPAP from the scope of the law¹⁷ creates, by definition, an unlevel playing field for the potential new market entrants seeking Licences under the new regime. It is clear that this regulatory environment has for consequence to render Greek online gaming market less attractive to economic operators significantly impairing the alleged planned liberalisation of the respective market to the detriment of EU fundamental freedoms. In addition, evoking general interest grounds to set a strict monopoly for offline gambling and at the same time providing for an extremely tolerant transitional regime for online gambling (the providers operating in Greece on the basis of a Licence attributed by another EU Member State were not for a long time subject to a strict supervision by the national authorities) does not seem to meet the consistency criterion imposed by CJEU case-law. Last but not least, the situation in Greece remains extremely confuse: *on the one hand*, OPAP, after its privatization, claims to be the holder of the exclusive right for online gambling also and contests the legality of the transitional regime set by law 4002/2011. *On the other hand*, such regime is still in force, despite its provisional nature, since the Greek State has not organized during the last 4 years a procedure for awarding ‘ordinary’ licences according to that same legislation.

1.3. Gaming Machine Regime

With regard to the gaming machine regime, in order to run and operate games using gaming machines it shall be necessary to obtain an administrative licence in advance. Games, gaming machines and premises where games are played must be certified in accordance with the provisions of law 4002/2011 as in force (see article 27).

In order to open up the gaming machine sector, the Greek legislator chose to grant directly, by virtue of law 4002/2011, without any tender or other open and transparent procedure, to OPAP a ten year renewable exclusive licence for the operation of 35,000 such machines with the right to grant to third parties sub-licences (for the 18,500 gaming machines) for their exploitation (see article 39 of law 4002/2011).¹⁸ The fact that OPAP is granted directly by virtue of law a single licence for the operation and exploitation of the entirety of the 35,000 gaming machines permitted to be installed in Greece, with the unrestricted right to sub-assign more than half of their number, could raise concerns of breaching internal market rules and EU competition rules. Such direct and non

¹⁷ See article 25 of Law 4002/2011 which specifies that, by way of exception, ‘...the provisions of this Law, without prejudice to the provisions on the GSCC and Article 35, shall not apply to games of chance already being played upon the entry into effect of this Law at casinos and by the companies OPAP S.A. and ODIE S.A., to which the specific relevant provisions [in force] shall continue to apply...’.

¹⁸ Article 39 of the New Law stipulates that ‘...35,000 gaming machines shall be permitted to operate in the Greek State. The Minister of Finance shall issue a decision granting a licence to OPAP S.A. in accordance with the provisions of Article 27 of Law 2843/2000 (Government Gazette 219/A) for the totality of the 35,000 gaming machines. Of those, 16,500 gaming machines shall be installed exclusively at the agencies of OPAP S.A. and the remainder 18,500 shall be installed at dedicated premises in accordance with Articles 42 and 43 and will be exploited by Licencees to which OPAP SA grants the right of installation and operation in accordance with the provision of paragraph 6 hereof’.

transparent attribution has formed the object of several complaints before the European Commission filed by economic operators that wish to enter the Greek gaming machine market. Nevertheless, the European Commission has not initiated any proceedings against Greece on that ground.

The licences for the 18,500 gaming machines, which OPAP has the right to sub-contract, may be granted to a limited number of concessionaires (4 to 10) that have to pay a price for the grant of the licence. Law 4002/2011 does not provide for the criteria which are applied in order to choose the specific concessionaires. It only stipulates that the terms of the invitation to tender in respect of the abovementioned licences shall be approved by EEEP (with regard to the legal issues raised because of the absence of objective, non discriminatory criteria which are known in advance.¹⁹

According to article 39 of law 4002/2011 as in force, the licencees shall undertake the entire entrepreneurial risk of operations and shall be entitled to choose the gaming machines they use as well as the games they offer whose technical requirements must ensure in any case their electronic supervision by OPAP, EEEP and the Ministry of Finance. The pricing policy of the licencees is part of the pricing policy defined by the holder of the licence. The licencees are able to define their promotion policy, taking into consideration the restrictions regarding gaming advertising provided for by law.

By way of an overall comment it should be noted that Greek authorities failed to put forward a coherent licensing model for organizing betting activities. *On the one hand*, such activities are still linked with OPAP's omnipresence in the various fields of the sector, the historical monopoly being recently subject to stricter public regulation. *On the other hand*, segments of the relevant markets are open to competition, without such opening being clear, rational and based on a consistent and well functioning regime. Since the European Commission seems to be unwilling to interfere, those inconsistencies may not be cured for a long time.

2. The Allocation of Limited Authorisations and Claims in Case of Harmonisation at a European Level: Radiofrequencies and CO₂ Emission Permits

2.1. Radiofrequencies: The Specific Sector of Telecommunications

With respect to the telecommunications sector, which is one of the most dynamic sectors in Greece even in an era of continuous challenges for the Greek economy, Greece is following the EU legal framework implementing the respective European regime, namely

¹⁹ See above Case C-205/99, *Analir* [2001] ECR I-01271 and Case C-203/08, *Betfair* [2010] ECR I-04695.

EU Directives 2002/19/EC,²⁰ 2002/20/EC,²¹ 2002/21/EC,²² 2002/22/EC,²³ 2002/58/EC²⁴ and 2002/77/EC,²⁵ Directive 24/2006,²⁶ Directives 2009/136/EC²⁷ and 2009/140/EC²⁸ and Regulation (EC) 1211/2009.²⁹ The above framework has been incorporated basically³⁰ through Law 3431/2006 (Government Gazette A' 13/2006) which has been succeeded by Laws 4070/2012³¹ (Government Gazette A' 82/2012) and 4053/2012 (Government Gazette A' 44/2012) by virtue of which the whole EU e-communications framework has been transferred to the internal legislation.³²

The provisions of laws 4070/2012 and 4053/2012 pertain to the review of the regulatory framework for electronic communications networks and services aiming at the competitive growth of the relevant market and the provision of quality services for consumers. In this sense, they shaped a more operational and transparent framework for

²⁰ Council Directive 2002/19/ of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) [2002] OJ L 108.

²¹ Council Directive 2002/20/EC of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) [2002] OJ L 108.

²² Council 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.

²³ Council Directive 2002/22/EC of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) [2002] OJ L 108.

²⁴ Council Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) [2002] OJ L 201.

²⁵ Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services [2002] OJ L 249.

²⁶ Council Directive 2006/24/EC of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] OJ L 105.

²⁷ Council Directive 2009/136/EC of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws [2009] OJ L 337.

²⁸ Council Directive 2009/140/EC of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services [2009] OJ L 337.

²⁹ Council Regulation (EC) No 1211/2009 of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office [2009] OJ L 337.

³⁰ See also Laws 2472/1997 (Government Gazette A' 50/1997) and 3471/2006 (Government Gazette A' 133/2006) (Data Protection in general and Communications Data Protection) and Laws 2251/1994 (Government Gazette A' 191/1994), 3674/2008 (Government Gazette A' 136/2008), 3917/2011 (Government Gazette A' 22/2011) and Presidential Decree 47/2005 (Government Gazette A' 64/2005) (Security, Privacy and Data Retention).

³¹ Law 4070/2012 entitled '*Regulations of Electronic Communications, Transport, Public Works and other provisions*'.

³² According to article 1 of Law 4070/2012, by virtue of the latter European Directives 2009/140/EC and 2009/136/EC were transposed in the Greek legislation.

electronic communications and broadened the competences of the ‘*Hellenic Telecommunications and Post Commission*’ (hereinafter: ‘EETT’).³³ The latter is an independent administrative authority which acts as the National Regulator monitoring, regulating and supervising the electronic communications market. EETT is also given the competence to keep the National Frequencies Registry, manage the Radiofrequencies or zones of the Radiofrequencies Spectrum, monitor and control the use of Radiofrequencies Spectrum imposing relevant sanctions.

Regarding the licensing regime, according to the provisions of law 4070/2012 (see article 18), a general licence is required in order to install or operate electronic communications networks or provide services over them. In fact, under the General Authorisation Regime (see the Regulation on General Authorisations),³⁴ any person interested in providing public communication networks or publicly available electronic communication services, as well as operating special radio networks) has to complete and submit to EETT a Registration Declaration for Engaging in Electronic Communication Activities under a General Authorization Regime. Article 18 of law 4070/2011 explicitly stipulates that, except from the Registration Declaration, no other administrative act is required in order to provide the respective services; once a complete Registration Declaration has been filed (including the payment of the applicable fee), the applicant may immediately begin to provide the network elements and services identified in the respective Declaration.

It has also to be noted that pursuant to the new General Authorisation Regulation, the provisions regulating licensing procedure have been considerably improved. The main characteristic of the new secondary legislation is the simplification of the legalising documents required by EETT for submitting the Registration Declaration. In parallel, the Regulation sets additional obligations for electronic communications operators with respect to transparency and publicizing information on current prices, price lists and terms for consumers accessing and using their network and services.³⁵

³³ EETT, originally named Hellenic Telecommunications Committee (EET) was established in 1992 by Law 2075/1992 and became operational in the summer of 1995. With the enactment of Law 2668/1998 that defined the organization and operation of the postal services, EET was also entrusted with the responsibility of supervising and regulating the postal services market and was renamed Hellenic Telecommunications and Post Commission (EETT). EETS’s regulatory, supervisory and monitoring competences have been enhanced by virtue of Law 2867/2000 whereas Law 3431/2006 further expanded EETT’s role. By virtue of the currently applicable Laws 4070/2012 on electronic communications and 4053/2012 on the postal market and electronic communications issues, the role of EETT is further enhanced, as the new framework provides for more competences, (for more details see EETT’s Annual Report 2012 available on www.eett.gr/opencms/opencms/EETT_EN/Publications/Proceedings/).

³⁴ The said Regulation was established by virtue of EETT’s decision n° 676/41/2012 (Government Gazette B’ 298/2013).

³⁵ It should be noted that the consumer’s protection was further enhanced. More specifically, instructions were given with respect to publicising amendments to price lists, as well as the manner and the time in which consumers should be notified. Furthermore, consumers are able to submit a complaint for the non-fulfilment of the aforementioned obligations by the operator, whilst the operator is obliged to credit

With regard to the radiofrequency spectrum sector, if the engagement in an electronic communication activity also requires the granting of rights of use for numbers or frequency bands, prior to engaging in the said activity, the interested person – in addition to obtaining a General Authorization – shall have to secure the required rights of use for the numbers or frequency bands in question.³⁶ It is explicitly stipulated that, on the contrary, no individual right of use is required in case the risk of interference is minimal.

In the above context, the current Regulation on the Use and Granting of the Radiofrequency Rights of Use under the General Authorisation for Electronic Communication Networks and/or Services³⁷ establishes the legal framework for the use of radio frequencies under a General Authorisation and the procedure for granting individual Rights of Use of specific radiofrequencies or radiofrequencies bands for the provision of electronic communication networks and/or services. The Regulation in question reflects the adjustment of the Greek regulatory environment to the requirements of the international and European regulatory framework.

With respect to the potential limitation of the number of the individual rights of use of frequency, which shall be established only in order to safeguard efficient use of spectrum (see article 23(1) of law 4070/2012), the latter is decided by way of a reasoned decision of the competent Minister acting on a recommendation issued by EETT following a public consultation. In this case where the spectrum allocated for a specific use is scarce, article 23(5) of law 4070/2012 stipulates that a public tender is held by EETT.

In order to manage scarce radio spectrum in a beneficial way, EETT usually launches auctions releasing valuable radiofrequencies. The spectrum for mobile networks (GSM and UMTS) has been granted in this way (1993, 2002). The same happened with spectrum for LMDS (2001) and a smaller segment to be used for Wi-max (2006).

In addition, EETT successfully completed on November 2011 the spectrum auction process for mobile communication services in the 900MHz and 1800MHz bands by raising a total sum of 380,535,000 euros. Although the two-stage tender progress, as designed and implemented by EETT, guaranteed the equal treatment of existing operators and favoured the entrance of potential newcomers, only the three existing mobile operators expressed their interest and no potential new entrant participated in the tender procedure.³⁸ However, it has to be noted that the successful completion of the abovementioned auction resulted in the commercial provision in Greece of 4G/LTE

the subscribers' account with an amount equal to the difference between new and old price lists for the time period up to the fulfilment of the said obligations and the lapse of the corresponding deadlines.

³⁶ See article 2 para. 2 of the abovementioned "Regulation on General Authorisations".

³⁷ See EETT's decision n° 676/30/2013 (Government Gazette B' 110/2013).

³⁸ Cosmote Mobile Telecommunications S.A. acquired four sections in the 900 MHz zone and two sections in the 1800 MHz zone for 118,833,000 euros, while Vodafone acquired six sections in the 900 MHz zone and two in the 1800 MHz zone for 168,502,000 euros. Wind Hellas Telecommunications S.A. acquired four sections in the 900 MHz zone for 93,200,000 euros.

services, much earlier than in other European countries. In this context, EETT attended to the smooth entry into operation of the new frequencies that were provided to mobile telephony companies in November 2011 and continued to work together with the Civil Aviation Authority (CAA) and the Armed Forces, to ensure the uninterrupted operation of their networks.

In 2014, EETT launched a tender process for granting new radiofrequency rights in the 3.4–3.8GHz band, together with the renewal of the rights for the 3.4–3.6GHz band. These two bands are primarily intended for the delivery of mobile and nomadic broadband services. It is worth noting that, despite the participation of seven bodies in the public consultation which preceded the tender process, finally, only one application was submitted.³⁹ This phenomenon may illustrate the decline in revenues, profits and investment in the Greek telecommunication sector which seems to be affected by the current adverse economic conditions.

In addition, in October 2014 took place the completion of an auction for allocating radiofrequency rights of use in the 800MHz and 2.6GHz which is considered to be a major one for mobile telephony in Greece.⁴⁰ According to the auction results, the bands released were allocated to the three existing mobile providers whereas no newcomers did participate in the procedure.

The abovementioned recent developments shall demonstrate that market-based assignment mechanisms, such as auction, which uses financial bids as a means of deciding between competing stakeholders for the allocation of a scarce public right, cannot itself guarantee the participation of newcomers and the competition enhancement; fostering competitive growth, in parallel, with beneficial management of scarce national resources depends also on the structure and the dynamics of the relevant market, as well as on the financial background, which encourage or discourage operators from participating in a specific market.

2.2. CO₂ Emission Permits

According to Directive 2003/87/EC as amended and in force,⁴¹ all installations carrying out any of the activities listed in Annex I to this Directive and emitting the specific

³⁹ The tender process was launched in February 2014 and was completed in March 2014 with the award of one right for the use of radiofrequencies in the spectrum bands of 3.440–3.470GHz and 3.540–3.570Gh to OTE S.A.

⁴⁰ See EETT's Annual Report 2013, p. 11 available on www.eett.gr/opencms/opencms/EETT_EN/Publications/Proceedings/.

⁴¹ See Council Directive 2004/101/EC of 27 October 2004 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in respect of the Kyoto Protocol's project mechanisms [2004] OJ L 338.

Council Directive 2009/29/EC of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community [2009] OJ L 140, Council Regulation (EC) No 219/2009 of 11 March 2009 adapting a number of instruments subject to the

greenhouse gases associated with that activity must be in possession of an appropriate permit issued by the competent authorities (see Article 4). In addition, for each period referred to in Article 11(1) and (2) of the same Directive, each Member State shall develop a national plan stating the total quantity of allowances that it intends to allocate for that period and how it proposes to allocate them (see Article 9(1)).

Greece implemented the abovementioned EU provisions by way of a Joint Ministerial Decision⁴² that initially referred to stationary installations only, but was later amended⁴³ to include aviation activities complying with the EU developments which took place meanwhile. According to article 5(1) of the said Joint Ministerial Decision as in force, the operator of each installation carrying out any of the crucial activities listed in Annex and emitting the specific greenhouse gases associated with that activity must be in possession of an appropriate permit issued according to the procedure and the terms stipulated in the same Decision. The permit is granted by the competent Minister following a consultation with the Gas Emission Trading Office and may cover one or more installations on the same site operated by the same operator.

Regarding the national allocation plans which were developed under article 9(1) of the Directive 2003/87/EC, the first one – for the period 2005–2007 – was approved by the European Commission without conditions whereas the European Commission conditionally approved the national allocation plan -for the period 2008–2012- indicating the steps that needed to be taken by the Greek State to make the plan fully acceptable.⁴⁴

In addition, aiming to the more efficient fulfilment of the obligations of the European Union and its Member States for greenhouse gases emissions reduction, according to the Kyoto Protocol, the EU adopted in 2003 the European Union Emissions Trading System (EU-ETS) which constitutes the largest multi-country, multi-sector greenhouse gas emissions trading system in the world. During Phase II of the EU-ETS, which refers to the period 2008–2012, the Hellenic Exchanges Group (HELEX) supported, through its technological infrastructure and human resources, the primary auctioning of emission

procedure referred to in Article 251 of the Treaty to Council Decision 1999/468/EC with regard to the regulatory procedure with scrutiny [2009] OJ L 87 and Council Regulation (EU) No 421/2014 of 16 April 2014 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in view of the implementation by 2020 of an international agreement applying a single global market-based measure to international aviation emissions [2014] OJ L 129.

⁴² See Ministerial Decision n° 54409/2632/2004 (Government Gazette B' 1931/2004).

⁴³ The Decision in question was amended by Ministerial Decisions n° 57495/2959/E103/2010 (Government Gazette B' 2030/2010) and 26910/852/E103/2013 (Government Gazette B' 1021/2013).

⁴⁴ See the Commission Decision of 29 November 2006, concerning the national allocation plan for the allocation of greenhouse gas emission allowances notified by Greece in accordance with Directive 2003/87/EC of the European Parliament and of the Council. By virtue of the latter, except for the objections regarding the calculation of the allowances, the European Commission, examining the compatibility of the notified plan with the criteria of the Directive 2003/87/EC, it reminded to the Greek State that the plan shall contain information on the manner in which new entrants will be able to participate in the Community scheme.

allowances of which the Greek State possessed according to the abovementioned National Allocation Plan for the period 2008–2012. The auction referred to a small percentage of allowances given that pursuant to the regulatory framework applicable in that time (see article 10 of the Directive 2003/87/EC and article 7 of the Joint Ministerial Decision no. 54409/2632/2004) during the period 2008–2012 at least 95% of the allowances shall be allocated for free. The auction, which took place on June 2011,⁴⁵ referred to the disposable Greenhouse Gas Emission Allowances from the New Entrants' Reserve⁴⁶ period 2008–2012.⁴⁷ It seems that EU requirements were respected and the process was open to any potential buyer under non-discriminatory conditions. However, according to press information, there were market operators who claimed that it was quite a closed auction in the sense that there were few participants and the process was established under Greek State's pressure to generate revenues.

During Phase III of the EU-ETS,⁴⁸ i.e. from 2013 onwards, apart from the direct participation of the interested parties in the EU-ETS, at a Member State level, auctioning is the mandatory primary means for distributing national allowance budgets that are not allocated free of charge (see Article 10(1) of Directive 2003/87/EC). Given the almost complete harmonisation at EU level, at least from 2013 onwards, Greece is expected to allocate national emission allowances implementing an auction. However, because of the fact that there are no available allowances for the time being since all allowances assigned to the Greek State have already been previously allocated, no auction has taken place recently. In this context, interested parties that bear the obligation to possess a specific number of allowances seek for the latter through emission allowances exchange markets such as ICE Futures Europe or through banking and stockbroker firms or through direct transactions with other installations.⁴⁹

3. Conclusion

Finally, the Greek experience in the three policy areas of gambling, radio frequencies and CO₂ emission permits clearly illustrates how the varying degrees of 'Europeanisation' is guiding to the authorisation regime to be applied; in the absence of EU harmonisation,

⁴⁵ It has to be noted that a previous auction failed as participants were discouraged by a high minimum price and the lack of transparency.

⁴⁶ It concerns a set aside of EU allowances, reserved for new operators or existing operators who have significantly increased capacity.

⁴⁷ See Joint Ministerial Decision n° 171164/2011 (Government Gazette B' 2/2011).

⁴⁸ At the European level, Greece participates in the allowance auctions conducted through the common European platform and is currently represented by the Operator of Electricity Market (L.A.G.I.E. S.A.).

⁴⁹ There is an electronic registry system that keeps track of the ownership of emission allowances as they change hands in the secondary market. This registry system is separate from trading activity because of the fact that not all transactions result in changes in ownership of allowances. Nevertheless, in cases that there is a transaction which equals to a change in ownership, there is a transfer of allowances between accounts in the registry system. It is worth noting that, on January 2011, were traced hackers who used to attack the national registry for Emission Allowances trading rights which led to the closure of the spot market in EU emission permits.

the Greek State is increasingly willing to enter political expediency while designing a licensing scheme often by bypassing any rationality assumption which shall be at the heart of an optimised and efficient management of scarce resources. In this context, the role of the European institutions, including the CJEU, is highlighted; a harmonised – at EU level – licensing regime in a specific sector clearly leads to a more consistent framework which, *on the one hand*, bridges the gaps between the different perspectives Member States may share and, *on the other hand*, seems to ensure a more efficient way of regulating economic activities.

5. THE ALLOCATION OF RADIO
FREQUENCIES AND CO₂ EMISSION
PERMITS IN ITALY

5.1. THE ALLOCATION OF RADIO FREQUENCIES IN ITALY

1. The Status of Radio Frequencies in the Italian Legal System

The first question which is necessary to answer for defining the status of radio frequencies in the Italian legal system is what they are.

From a technical point of view, a frequency is not a materially appreciable entity or a physical phenomenon but just a rate of oscillation, capable of measuring the passage of electromagnetic waves through the electromagnetic fields.¹ For this reason, qualification of the frequencies as goods is highly questionable since, *in rerum natura*, these goods don't exist. Instead, what exist are the electromagnetic fields and the signals radiated through electromagnetic waves.

Despite this fact, in the Italian legislation, radio frequencies have largely been defined, and still are, as goods. The 'reification' derives, improperly, by art. 814 of the Italian Civil Code.² This norm classifies those natural energies, as the electronic magnetic waves which have an economic value, as movable goods.³

Under this provision, it is possible to consider radio frequencies as susceptible of ownership and to guarantee the legitimate holders a petitoria protection and a protection,

* Assistant Professor of Constitutional Law and Jean Monnet Teaching Professor of Electronic Communication Law/Internet Law at the Department of International, Legal, Historical and Political Studies (DILHPS), University of Milan. Any comments or thoughts on this article can be addressed to marco.orofino@unimi.it.

¹ The electromagnetic field is a physical field produced by electrically charged objects. It affects the behaviour of charged objects in the vicinity of the field. The electromagnetic field extends indefinitely throughout space.

² The 'reification' of the radio frequency is improper because, in the reality, what becomes a good, under art. 814 of the Civil Code, is the right to radiate electrical impulse in certain ways. See V. Zeno-Zencovich, 'Le frequenze radio' in A. Frignani, E. Poddighe and V. Zeno-Zencovich (eds.), *La televisione digitale. Temi e problemi. Commentario al D. Lgs. 177/05 (T.U. della Radiotelevisione)*, Giuffrè, Milano 2006, p. 386. See about the property rights regarding the use of radio frequencies, R.H. Coase, 'The Federal Communication Commission' (1959) 2 *The Journal of Law and Economics* 1, 32–33.

³ The Italian Supreme Court of Cassation confirmed that electromagnetic waves have to be considered as goods. See, Cass. Civ., S.U., 3 dicembre 1984, n. 6339.

sui generis, of possession. On the other hand, the natural energies without an economic value are not goods, and, consequently, can't be subject for rights.⁴

This formal distinction is important but not satisfactory.

It is worth mentioning the economic value, as it is well known, can't be abstractly assessed. In fact, it depends on a plurality of factors such as the allotment of the spectrum, the scarcity of frequency resources, the type of activities, the number of potential users and the market development.⁵ Therefore, the qualification of radio frequencies as movable goods, under art. 814 of the Civil Code, works just, *ex post*, on the basis of public and private choices.

The subsequent question to answer is about the legal property of radio frequencies, which, having an economic value, are movable goods. Since the very beginning of the nineteenth century, when radio frequencies began to be used to carry out specific public activities, they have been considered as public goods and their use have been restricted by laws and regulations.

In order to understand the meaning of public goods, the first reference is the Italian Constitution which recognizes, *ex art. 42*, comma 1, the coexistence of a state-owned property and a private-owned property in the Italian legal system. It represents a compromise between very different political and economic views which found a difficult synthesis in the constitutional text.⁶ The quoted constitutional norm is considered the manifesto of the aspiration of Italian Constituents towards a system of mixed economy.⁷ To assure this aim it provides two guarantees: one in favour of the public property that is placed at the same level of private property and one in favour of private property that, being recognized, can't be expelled from all production systems. This distinction is also extremely relevant at an operational level because different legal rules apply to public goods and to private goods.

The subsequent comma of art. 42 concerns the identity of the owner: the State and other public institutions or private parties such as natural persons or legal entities.⁸ The constitutional norm does not define the extension of the state-owned property neither if the owner shall be the State or another public institution.⁹ It means that radio frequencies,

⁴ See art. 810 of the Civil Code. The distinction of goods/things (*res*) according to their susceptibility or insusceptibility of ownership has its origin in Roman texts. See Justinian Institutes, Book II Of Things. I. Division of Things.

⁵ See Zeno-Zencovich 2006, p. 385.

⁶ The main political parties represented in the Italian Constituent Assembly had really different approaches to the economy according to their catholic, socialistic or liberal inspiration. See S. Rodotà, 'La proprietà nell'Assemblea Costituente' (1979) 4 *Politica del diritto* 395, 412.

⁷ S. Rodotà, 'Art. 42', in G. Branca and A. Pizzorusso (eds.), *Commentario alla Costituzione. Rapporti economici (art.41-44), t. II*, Zanichelli - Società del Foro Italiano, Bologna - Roma 1982, p. 168.

⁸ See Rodotà 1982, pp. 168-169.

⁹ This fact allowed a gradual reduction of the public sector and of the public intervention in the economy. See about this transformation, S. Cassese, 'La nuova Costituzione economica', in S. Cassese (ed.) *La nuova Costituzione europea*, Editori Laterza, Roma-Bari 2013, pp. 319-330.

See also for a complete overview of the impact of the European integration process on the national constitutional system, P. BILANCIA, *The Dynamics of the EU Integration and the Impact on the National Constitutional Law. The European Union After The Lisbon Treaties*, Giuffrè, Milano 2012.

as public goods, could be owned by the State as well as the territorial institutions (Regions, Provinces or Metropolitan City and Cities) which compose the Italian Republic.

The Italian constitutional reform of 2001 was potentially quite radical because Regions gained a specific competence in the communication sector.¹⁰ Nevertheless, the State ownership of the frequencies has never been questioned.¹¹

The regime of public goods, owned by the State, is ruled by art. 822 to 831 of the Civil Code and integrated by specific matter-related laws.

The Civil Code distinguishes three categories of public goods.

Firstly, the Code enumerates the goods belonging to the State owned assets (*demanium*). Then, it lists the public goods, movable or immovable, that belong to the so called 'unavailable heritage'. Finally, it refers to the public goods of the 'available heritage'.

Radio frequencies are currently considered as things belonging to the State 'unavailable heritage'.¹² All goods pertinent to this category are inalienable and destined for public utility or for public services. Nor the inalienability nor binding destination prevent, however, the granting of rights of use. For radio frequencies or frequency bands it means that a private use can be authorized under certain conditions for a defined period of time.¹³

The traditional legal approach, here described, has been particularly suitable for a system that subordinated the use of frequencies, with an economic value, to the release of individual administrative concessions. This traditional legal system has been deeply changed by the European intervention in the electronic communication sector.

2. The European Approach to the Radio Frequency Policy and the European Framework 2002 as Cornerstone

Since frequencies have started to be used in order to carry radio signals, they became an international issue. The propagation of radio signal through the space is, naturally, limited by the orography, by the mountains, by the atmospheric currents but not by the artificial boundaries that separate neighbouring states.

In order to avoid interferences, States developed in this sector one of the oldest international cooperation. The first international organization dates back to 1867.¹⁴ Most of the decisions about the division of the radio spectrum between close or neighbouring countries as well as the allotment of some bands of frequencies to specific services are today taken at international level, by the International Telecommunication Union (ITU).¹⁵

¹⁰ See M. Orofino, *L'ordinamento della comunicazione tra direttive comunitarie e riforma del Titolo V della Parte II della Costituzione*, Giappichelli, Torino 2003, pp. 33–69.

¹¹ See V. Zeno-Zencovich, 'Le frequenze elettromagnetiche fra diritto ed economia' (2002) *Dir. Inf. (Diritto dell'informazione e dell'informatica)* 713, 723–724.

¹² See about Zeno-Zencovich 2002, p 721.

¹³ See B. Tonoletti, *Beni pubblici e concessioni*, CEDAM, Padova 2008, p. 203 ff.

¹⁴ The International Telegraph Union was founded in 1867. See about the origin and the evolution of the international cooperation, G.A. Coddington, *The International Telecommunication Union. An Experiment in International Cooperation*, E.J. Brill, Leiden 1952, p. 4 ff.

¹⁵ The International Telecommunication Union (ITU) was created in 1931 and, after the Second World War, became the specialist agency of the United Nations for this sector. Its work covers the entire field of ICT. It is significant that the ITU manages the radio spectrum as a scarce and finite public resource.

The interest of the EU in radio frequencies and spectrum management is more recent and dates back only two decades. From the very beginning the EU's policy has been very distant from the national and international approaches.

The European Union didn't directly intervene to define the legal status of the frequencies or the related ownership rights but had the aim to liberalize the telecommunication markets and to create a common European market. According to this objective, radio frequencies have been primarily considered as a facility to provide specific services.

Indeed, the intervention of the EU has been based on the idea that the right of use of frequencies coincides with the right to develop a specific business.

With the adoption of the Authorisation Directive (2002/20/CE) as a part of the Framework 2002, the European Union generated a broader framework regarding market entry and, accordingly, about radio frequency allocation.¹⁶

The new regime to enter the market replaced the existing national systems mostly based on individual licences with a general authorisation system, harmonized at european level. Then, while before, the use of radio frequencies was mainly conditioned by a licence released by a public authority which defined both the terms to carry out specific activities and the correspondent terms of use of the frequencies, now the use of frequencies is generally liberated in accordance with the conditions indicated by the general authorisations.¹⁷

Under the European system which now follows from the Telecom Package 2009¹⁸, individual or exclusive rights to use frequencies may still be granted but just under specific conditions and just for those services which strictly require an exclusive use. Then, a limitation is legitimate just if the demand of radio frequencies exceeds its availability.

EU law doesn't provide a common allocation procedure, but just sets out the principles for the States action.

First, the current European Framework fixes the conditions, that allow Member States to release individual rights.

Second, the European Framework requires Member States to adjust previous decisions to grant individual rights, determining time limits for previous concessions and specify whether such concessions can be transferred and under which conditions.

Regarding the evolution of the ITU, see C. Koenig and J-D Braun, 'The International Regulatory Framework of EC Telecommunications Law: The Law of the WTO and the ITU as a yardstick for EC law' in C. Koenig, A. Bartosch, J-D Braun and M. Romes (eds.), *EC Competition and Telecommunication Law*, 2 nd ed., Kluwer, Austin 2009, p. 1 ff.

¹⁶ The core of the 'Framework 2002' is the Directive 2002/21/CE of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), [2002] OJ L108/33. The 'Framework 2002' also includes four specific directives: the Directive 2002/19/EC (the Access Directive), [2002] OJ L108/7; the Directive 2002/20/EC (the Authorization Directive) [2002] OJ L108/21; the Directive 2002/22/EC (the Universal Service Directive) [2002] OJ L108/51; and the Directive 2002/58/EC (Data Protection Directive), [2002] OJ 201/37.

¹⁷ See A. Brandenburg, 'Authorizations', in Koenig 2009, p. 471 ff.

¹⁸ The Framework 2002 has been updated by the 'Telecom Package 2009', which includes the Regulation (EC) 1211/2009 (the BEREC Regulation), [2009] OJ L 337/2; the Directive 2009/136/EC [2009] OJ L337/11 and the Directive 2009/140/EC, [2009] OJ L337/37.

Third, European rules permit Member States to choose among a competitive (auction) or a comparative (so-called ‘beauty contests’) procedure.¹⁹ The condition is to respect the principles of openness, transparency, proportionality and non-discrimination.²⁰ These principles also apply to broadcasting, but the Authorisation Directive explicitly allows ‘an exception to the requirement of open procedures’ for ‘the providers of radio or television broadcast content services’ when it is necessary to achieve a general interest objective as ‘defined by Member States in conformity with Community law’.²¹

The main purposes that justify these exceptions for the broadcasting sector are the media pluralism and the protection of minority languages. These values are rooted in the national constitutions of the EU member states and are guaranteed by the Charter of Fundamental Rights of the European Union. The European Court of Justice can scrutinise whether an exception is appropriate and proportionate, in order to protect the general interest that it specifically aims to safeguard.²²

3. The Communication Code and the Audiovisual Media Services Consolidated Act

The Italian specific rules concerning the use of radio frequencies are enclosed in two different codes. The main legal source is the Legislative Decree No. 259/2003 (as revised by the Legislative Decree No. 70/2012). This act contains the Italian ‘Electronic Communications Code’ (hereafter referred to as ‘Communication Code’).²³

The second legal source is the Legislative Decree No. 177/2005.²⁴ This act unifies the provisions on audiovisual and radio services in the so called Consolidated Act on Audiovisual and Media Services (hereafter referred to as ‘AVMS Act’).

The Communication Code regulates the entire electronic communication sector, which includes the broadcasting sector. The AVMS Act refers exclusively to the audiovisual and media services. Therefore, the Communication Code should be considered the *lex generalis*, whereas the AVMS Act is the *lex specialis*.²⁵

¹⁹ This provision is the result of two compromises – one in 2002 and the other in 2009 – between Member States, which desire to protect their autonomy, the European Commission, which emphasizes that a lack of harmonization may distort competition and the European Parliament.

²⁰ See art. 7 par. 3 of the Authorisation Directive and art. 9, par. 1 of the Framework Directive.

²¹ Art. 5, par. 2, Authorisation Directive. For a comprehensive study of the EU intervention in the broadcasting sector, see A. Harcourt, *The European Union and the regulation of media market*, Manchester University Press, Manchester 2005.

²² Case C-380/05, *Europa 7 v. Ministero delle comunicazioni e Autorità per le garanzie nelle comunicazioni* [2008] ECR 2008 I-00349. See also the Opinion of the General Advocate delivered on 12 September 2007 and the General Advocate’s assertion that ‘National courts must closely scrutinise the reasons given by a Member State for seeking to delay the allocation of frequencies to an operator who has thus obtained national broadcasting rights, and, if necessary, order appropriate remedies to ensure that those rights do not remain illusory’.

²³ Legislative Decree No. 259 of 1 Aug. 2003 (OJ no. 214 of 15 September 2003).

²⁴ Legislative Decree No. 177 of 31 Jul. 2005 (Ordinary Supplement no. 150, OJ no. 208 of 7 September 2005).

²⁵ The concept of the *lex specialis* is expressly referred to in art. 53 of the AVMS Act. Regarding the application of the Communication Code to the broadcasting sector, see O. Grandinetti, ‘Profili

It means that if these two acts diverge (with regard to broadcasting, and in particular to the procedure to allocate the radio frequencies) the AVMS Act prevails as *lex specialis*. In all other cases, the general legislation of the Communication Code is fully applicable.

Because both acts regulate the use of frequencies and the granting of individual rights, in subsequent paragraphs, I will consider them separately.

4. The General Authorisation Regime under the Italian Communication Code and the Descending Right to use Frequencies

Section 2 of the Italian Communication Code implements the European provisions concerning the general authorisation system.

Art. 25 of the Communication Code is the manifesto of the new regime: it states that ‘the activity of providing electronic communications networks or electronic communications services is free’.²⁶ This formulation marks a sharp discontinuity with the previous Italian legislation, which had generally required a specific administrative authorisation, usually in the form of a licence, to provide a service in the telecommunication market and to use the necessary frequencies.²⁷

Beyond the formal statement, electronic communications networks and services remain subject to relevant legal limits regarding who (individuals or companies) can enter the market and how the services should be offered.²⁸

The Communication Code indicates that all the Italian or EU entrepreneurs have the right to enter the market.²⁹ Companies must conduct commercial activity according to the Italian Civil Code.³⁰ In addressing non-EU citizens or companies, art. 25, par. 2 of the Code introduces the principle of full reciprocity and the need for adherence to any international conventions or agreements – such as those of the WTO – signed by Italy (and by the EU).

The Communication Code shows quite clearly that the general authorisation, despite its name, is not substantially an administrative act. Although it is adopted by an administrative authority (the Ministry of Economic Development, hereafter the

radiotelevisivi del Codice delle comunicazioni elettroniche’ in M. Clarich, GF. Cartei (eds), *Il Codice delle comunicazioni elettroniche*, Giuffrè, Milano 2004, pp. 481–528.

²⁶ Art. 25, par. 1 of the Code. Regarding the adoption of this code and about the general authorisation regime, please see F. Donati, *L’ordinamento amministrativo delle comunicazioni*, Giappichelli, Torino 2007, pp. 83–102; A. Ali, ‘Le autorizzazioni generali di reti e di servizi di comunicazione elettronica’ and L. Ulissi, ‘I diritti di uso delle frequenze radio e dei numeri’, in M. Clarich, GF. Cartei (eds), *Il Codice delle comunicazioni elettroniche*, Giuffrè, Milano 2004, pp. 151–180 and 181–197; M. Orofino, *Profili costituzionali delle comunicazioni elettroniche nell’ordinamento multilivello*, Giuffrè, Milano 2008, pp. 289–330.

²⁷ See decision no. 69/2010 of the Italian Constitutional Court, which declared unconstitutional a regional legislative provision (art. 12 of the Law of the Regione Veneto no. 32/2007) that had reintroduced a specific authorization. (2010) *Foro It.*, 4, I, 1083.

²⁸ See M. Clarich, A. Boso Casetta, ‘Il nuovo sistema delle autorizzazioni per le reti e i servizi di comunicazione’ in G. Morbidelli and F. Donati (eds.), *L’evoluzione del sistema delle comunicazioni tra diritto interno e diritto comunitario*, Giappichelli, Torino 2005.

²⁹ The companies that belong to the European Economic Area are included in this category.

³⁰ See Cons. St., VI Sez., no. 6574 of 19 Oct. 2004.

Ministry), it is a normative act because it contains rights and obligations that apply to all undertakings in the market. Thus, its content is fundamentally normative and is hierarchically subordinated to that of the Communication Code, that lists in its annex, the conditions applicable to the general authorizations.

General authorisation confers a specific *status* that is associated with particular rights and duties. Between the privileges conferred there is the right to use radio frequencies without requiring an individual grant of rights, if the risk of harmful interferences is low or doesn't affect the quality of services.

Ex art. 25, par. 4 of the Communication Code, the general authorisation follows a declaration of intent (called '*segnalazione certificata di inizio attività*' or SCIA) to provide networks or services.³¹

The notification enables the provider to enter into the market without waiting for the adoption of a specific administrative measure or the expiration of any particular term. Within a period of 60 days, the Ministry shall assess the fairness of the declaration and verify that the activity conforms to the legal requirements. If the Ministry determines that one of the requirements has not been met, it has the right to demand (with a reasoned order) that activities cease within 60 days.

Thus, under the Communication Code, the administration has begun to operate in a new manner. In this specific sector, the traditional power of the administration is swiftly declining in favour of a system that is mostly based on *ex post* control. This change, which has been driven by the EU, represents a significant shift for Member States like Italy, which historically have an extensive administration and must now re-define the power and the functions of its administrative apparatus.³²

Finally, the Communication Code requires that the general authorisation lasts at least 20 years and could be extended for an additional term of 15 years. During this time, the general authorisation can be transferred. In such cases, art. 25, par. 8 of the Code, again requires a prior communication to the Ministry, which has 60 days to deny the transfer. In case of denial, the reason must be non-compliance with the criteria and requirements presented in the Communication Code or with those of the general authorisation itself.

5. The Granting of Individual Rights: The Procedure and the Co-Management of the Ministry and the Communication Authority

As previously mentioned, the general authorisation is the condition that allows an enterprise to enter into the electronic communications market and to undertaking and

³¹ See art. 25, par. 4 of the Communication Code. The SCIA was introduced by the Law no. 122/2011 and replaced the previous declaration, the DIA or '*denuncia di inizio attività*' (DIA). The DIA, introduced into the Italian legal system by the Law no. 47/1985, was originally intended to assist the construction industry by allowing the commencement of standard reconstruction works without a prior authorization from the public administration. Now, the SCIA scheme applies to many industrial sectors and is intended to ease the relationship between the public administration and the citizenry and to boost the economy.

³² For an overview of these systemic shifts, see S. Cassese, *Oltre lo Stato*, Laterza, Roma-Bari 2006, p. 38 ff and 120 ff. Regarding the impact of the new technologies on the public administration, see F. Pizzetti, *Sette anni di protezione dati in Italia*, Giappichelli, Torino 2012, pp. 35–38.

contracting. It may regulate the use of certain radio frequencies which are not subject to specific limitations.³³

The decision to grant individual rights has to be taken, under the Italian current legislation, through a multipart procedure which involves two main actors: the Ministry and the Italian Communication Authority (hereinafter as the ‘Authority’).³⁴

The first part is the adoption or the review of the National Allotment Plan by the Ministry. Through the Plan, the radio spectrum is divided in frequency bands and each band has a specific assignment. The assignment to a specific type of service must respect the ITU recommendations and resolutions as well as the spectrum harmonisations implemented by the European Commission.³⁵

The second part of the procedure involves the Authority.

It adopts and reviews the National Allocation Plan and determines the conditions of use for each of these bands of frequencies. Under this task, the Authority decides if it is necessary to limit the use of certain bands and subsequently to grant individual rights.

Under art. 27, the Communication Code defines when the use of radio frequencies can be subordinated to the release of individual rights. The conditions listed are: a) to avoid harmful interferences; b) to guarantee the quality of the services; c) to secure the efficient use of the radio spectrum; d) to achieve objectives of general interest.³⁶

Behind all four conditions, there is the need for balance between the nature of radio frequencies as public goods and the nature of radio frequencies as essential facilities. For this reason, the decision to grant individual rights is not just driven by technical issues but also by political ones.

The Communication Code also provides that the Authority has to specify which conditions (such as service or technology designations, technical and operational conditions, usage fees and, overall, the duration of the individual rights) shall be attached to the individual rights.

The fact that the Code confers the Authority, which is an independent administrative body, the power to make somehow discretionary decisions, creates a problem of political accountability. The Communication Code employs a typical output accountability system to overcome it.

It requires the adoption of a notice and comment procedure under which a draft decision is published and opened to comments by all interested parties. The public

³³ Except those limitations arising from the general authorization itself. See Art. 27, par. 3 of the Code.

³⁴ The Italian Communication Authority is the *Autorità per le garanzie nelle comunicazioni* (or AGCOM).

³⁵ Under Decision No 676/2002/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community (Radio Spectrum Decision), the Commission adopted further decisions on harmonization of radio spectrum for several services (as, for example, radio frequency identification (RFID) devices operating in the ultra high frequency band, 2GHz frequency bands for the implementation of systems providing mobile satellite services, mobile communication services on aircraft or 5875–5905 MHz frequency band for safety-related applications of Intelligent Transport Systems).

³⁶ Art. 27, par. 1 of the Code, affirms – without any further explanation – that the general interest must be consistent with the European legislation.

consultation shall last a minimum of thirty days: within this term, the interested parties may deliver their comments or request a hearing.³⁷

The notion of ‘interested parties’ is broad and it embraces the operators and the consumers, both as individuals and as associations. The scope of the provision is to offer the Authority a panoramic view of all different interests such as, for example, the sustainability and profitability of investments and the interests of end-users. These interests are not claimed in general but referred to the proposed decision.

It is worth underlining that, once public consultation has been completed, the Authority shall adopt the final decision taking due account of the results of the consultation. Finally, if the Authority has decided to grant individual rights to use radio frequencies and has selected the conditions of their use, the Ministry is competent to assign them to the requiring operators.

6. The Assignment of Limited Individual Rights

In some case the Authority, assessing conditions to grant individual rights of use of frequencies and the market situation, may decide that it is also necessary to limit those rights.

The decision to grant a limited number of rights calls the Authority to define as well the procedure to assign them.

The Communication Code does not identify, ex art. 29, a single procedure to be used in all cases. It refers to the fact that individual rights can be awarded either by means of a competitive or a comparative selection procedure and just repeat, without further explanations or details, the same criteria – fixed by the European framework – of openness, transparency, proportionality and non-discrimination.³⁸

Once again, the Italian legislation confers upon the Authority a significant competence and once again the Authority enjoys a high degree of autonomy in its decision counterbalanced to some extent by the adoption of a notice and comment decision-making procedure.³⁹

The choice requires the Authority to consider, with reference to the specific allocation and the actual market conditions, pros and contra of the auction model or the beauty contest model.

Then, the Authority shall select the type of auction or the criteria of the beauty contest.⁴⁰ All these choices require a broad consideration and a prior balance of different objectives such as efficient allocation, efficient use of the radio frequencies, market competition, revenue maximisation, collusion minimization and also social objectives.

³⁷ See AGCOM deliberation no. 453/03/CONS.

³⁸ See art. 29 par. 1 and par. 4.

³⁹ Under the Communication Code, all regulatory decisions taken by the Authority require the adoption of a notice and comment procedure.

⁴⁰ It is important to underline that the potential difference between auction and beauty contest could be, finally, not as marked as it may seem at first sight. In fact auctions may also require participants to satisfy a certain set of criteria and, on the other side, a monetary criteria may be added in a beauty contest selection procedure.

This complexity may lead the Authority in case ‘of special national significance’, to request the creation of a ministerial committee for the coordination of the whole procedure.⁴¹

Once that the Authority has selected and regulated the procedure, the Ministry has the task to administrate the auction or the beauty contest.

Firstly, it has to prepare the public tender notice. It is important to stress that the Ministry has no right to interpret or change the procedure or the selected criteria as well as it has no right to withdraw an Authority decision.⁴²

Then, the Ministry has to give wide publicity to the tender, both using the national official journal (the ‘Gazzetta Ufficiale’) and the Internet website, and to invite all potentially interested parties to apply.

After that, it has to process the applications and organise the auction or appoint a board of experts in case of a beauty contest selection procedure. In the latter case, the board conducts the assessment of the competitors. The general rules governing administrative activity apply. It means that the board has administrative discretion and the Ministry has no power to give specific instructions.

Finally, based on the results of the auction or of the beauty contest, the Ministry grants operators the individual rights to use a portion of the radio frequency spectrum in a given geographical area. The granted individual rights define the conditions of use of the radio frequencies. They have a fixed duration, determined by the tender, that can’t exceed the duration of the general authorisation.

7. Modifications of Rights and Conditions, Trading, and Fees

Rights and conditions concerning the use of radio frequencies, descending by individual rights, can be modified only in justified cases and in a proportionate manner.

Art. 14-bis of the Communication Code deals with the review of the conditions and limitations associated to the individual rights of use frequencies. The norm regulates two different procedures: one is applicable until 25 May 2016 and a new one will enter in force after that date.

The current legislation allows holders of individual rights to submit an application for a reassessment of the restrictions on their rights. Before taking a decision, as their powers, the Ministry and the Authority inform the right holder of the reassessment of the restrictions, indicating the extensions of the rights after the reassessment, and grant the applicant a deadline for withdrawal of the request. If the right holder withdraws his application, the right shall remain unchanged until its expiry.⁴³

After 25 May 2016, the holders of rights will be able to change the use of the frequencies without a prior authorization. However, the Ministry and the Authority, in accordance

⁴¹ Art. 29 par. 7, of the Code.

⁴² This is a consequence of the explicit request to preserve the independence of the National Regulatory Authorities arising by the European legislation. See S.A. Frego Luppi, ‘Un freno al tentativo del Governo di limitare l’apertura dei mercati’ (2011) 9, *Foro Amministrativo*, 2922.

⁴³ See art. 14bis, par. 1 of the Communication Code.

with their respective competence, may require, if necessary to fulfil a general interest, the exclusive use of specific bands for specific services and may forbid the providing of any other services in specific bands in order to protect special services which are used to save human lives.⁴⁴

Closely related to the previous issue is the ‘trading’ of radio frequencies.

In accordance with art. 14-ter of the Communication Code, the individual rights are also generally tradable and leasable on a commercial basis.⁴⁵ As regards, however, the individual rights of use of frequencies assigned to a predetermined number of operators through a comparative or competitive procedure, they can be transferred on a commercial basis by the legitimate holders to other ‘authorized’ operators, but the transfer has to be notified to the Ministry and the Authority and it is effective by the approval of the Ministry.⁴⁶

The Communication Code requires the Ministry to seek the opinion of the Communication Authority. The Ministry can refuse clearance for a transfer or a lease if the receiver doesn’t meet the requirements indicated by the Communication Code or by the specific rules on which the selection procedure was based. If the transfer (or the lease) could distort competition, the Ministry, in strict consultation with the Italian Antitrust Authority, may forbid it or propose additional conditions of use in order to authorize it.⁴⁷

Regarding fees, it is important to distinguish between the administrative fees and the contributions for the granting of the individual rights.

The administrative fee, according to art. 34 of the Communication Code, applies to cover expenses related to the management, control and application of the general authorization and of the release of individual rights.⁴⁸

The contribution fees (or spectrum charge) are ruled by the art. 35 of the Communication Code. The norm provides that they shall be objectively justified, transparent, non-discriminatory and proportionate to their aims. The main purpose of this contribution is to ensure the optimal use of the frequencies. For this reason, under the current framework, the Authority is responsible for defining and reviewing the criteria under which the Ministry proceeds to their determination.

⁴⁴ See art. 14bis, par. 2 together with art. 14, pars. 5 and 6.

⁴⁵ Art. 14ter, par. 1 and 2 of the Communication Code. The article was inserted by Legislative Decree No. 70/2012.

⁴⁶ Art. 14ter, par. 4.

⁴⁷ Art. 14ter, par 6.

⁴⁸ See Cons. St., sez. III, 17.2.2015, no. 600 and 815; 11.3.2015 no. 1224 and 1274; 1.4.2015 no. 1712. With these decisions, the Administrative Court prohibited the use of the administrative fees to cover expenses of the Authority not strictly related to those indicated by the Code. See about M. Orofino, ‘L’impatto delle sentenze del Consiglio di Stato nn. 600, 810, 1224, 1274 e 1712 del 2015 sul sistema di finanziamento dell’Autorità per le garanzie nelle comunicazioni’ (2015) 1 *Rivista della regolazione dei mercati* 247. See after these decisions, the Law no. 115/2015, which specifies, ex art. 5, par. 1 the amount of the contribution and identifies the audience of contributors.

8. The Specific Rules Governing Broadcasting: Authorisation and Allocation of Radio Frequencies

The specific legislative source for broadcasting, as previously stated, is the AVMS Act. Despite this consolidated Act has been adopted in 2005 to re-order an extremely uneven legislation,⁴⁹ it has already suffered several changes which frustrated the effort of harmonization and made the legal framework again uncertain.⁵⁰

The changes, often partial and emergency, concerned in particular the discipline of the broadcasting market-entry and the procedure for the allocation of radio frequencies.

Proceeding step by step, first of all, the current legislation provides different rules for broadcasting network operators and broadcasters.

For broadcasting network operators, the AVMS Act provides, pursuant to art. 15, the adoption of the general authorization system. This is done through the explicit reference to the Communication Code. Based on this reference, the authorization lasts no more than twenty years and is renewable and transferable.

For broadcasters, the AVMS Act maintains a system of individual Licences. These Licences are released by the Ministry which evaluates within thirty days, the request on the basis of the 'New Regulation on the Terrestrial Television Broadcasting in Digital Technology (hereafter as Digital Broadcasting Regulation), adopted by the Authority with deliberation no. 353/11/CONS.⁵¹

Under this Regulation, the Licence has a duration of twelve years and is renewable for successive periods of equal duration. It is tradable to third parties, which comply with the requirements of the Digital Broadcasting Regulations. The trade has to be authorized or denied by the Ministry that shall acquire the opinion of the Authority.

Neither the general authorization nor the Licence grants the right to use radio frequencies. In the broadcasting sector, the use of radio frequencies is always subjected to a specific and additional concession. It depends on the fact that the broadcasting transmission through the 'ether' always needs an exclusive right to use a frequency in order to avoid harmful interference.

Under the AVMS Act, the individual rights to use the frequencies are assigned to network operators, which are generally (but not necessarily) the owners of sites and transmission infrastructures. It should be noted that the broadcasting sector in Italy is characterised by strong vertical integration between network operators and broadcasters.

⁴⁹ There are many explanations for this state of affairs. The most important is the historical failure of the Italian transition from a monopoly system to a competitive and plural broadcasting market. See C. Hanretty, *Public broadcasting and Political Interference*, Routledge, London 2011, pp. 45–80.

⁵⁰ The main amendments have been introduced by the Decree Law No. 59 of 8 Apr. 2008 (OJ no. 84 of 9 Apr. 2008), which was then converted with amendments into the Law No. 101 of 6 Jun. 2008 (OJ no. 132 of 7 Jun. 2008). The Decree Law was adopted by the Italian government to close four infringement proceedings (no. 2005/5086, no. 2007/2110, n. 2005/2240 and n. 2004/4303). See the Commission reasoned opinion of 18 Jul. 2007 about the proceeding no. 2005/5086 (<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/1114&format=HTML&aged=1&language=EN&guiLanguage=fr>).

⁵¹ Art. 18, par. 1, AVMS Code provides that licences to broadcast at local level might be released by regional Authorities.

For this reason, since 2001, the Authority introduced a mandatory legal separation between them.⁵²

With regard to the assignment of radio frequencies the AVMS Act, ex art. 42, par. 2, repeats, as the Communication Code, that it shall be done through objective, transparent, non-discriminatory and proportionate procedure.

Subsequent par. 5 provides that ‘the Authority adopts and updates the national allocation plans of radio and television frequencies in digital technology, guaranteeing throughout the national territory an efficient and pluralistic use of the spectrum, a uniform coverage, a rational distribution of resources between actors at national and local level, in accordance with the principles of this single Act, and a reserve in favor of the linguistic minorities recognized by law’.⁵³

On this basis, the Authority, during the transition from analogue to digital TV, has identified an important group of frequencies (a portion of the s.c. digital dividend) to be re-assigned.

With deliberation no. 181/09/CONS, the Authority expressed its preference, quoting the European best practices, for the allocation of this digital dividend, through a comparative procedure.⁵⁴

Based on this guidance, when enough radio frequencies to build six multiplex became available, the Authority adopted deliberation 497/10/CONS, which drew a beauty contest procedure for their allocation. The Ministry published the tender in the Official Journal and the interested operators made their applications.

Due to the worsening of the Italian financial crisis, the Italian Government decided to suspend the ongoing procedure with an urgent order and to proceed to the redefinition of the allocation procedure by Decree Law No. 16 of 2 March 2012,⁵⁵ which became Law No. 44 of 24 April 2012.⁵⁶

This law confirms the competence of the Authority for the regulation of the allocation procedures but it fixes, only for this specific allocation, new and stringent principles which the Authority has to follow.⁵⁷ The new criteria required the Authority to replace the mechanism of the beauty contest with an auction.⁵⁸

⁵² See AGCOM Deliberation no. 435/01/CONS. The mandatory legal separation concerns just digital terrestrial television.

⁵³ Art. 8 par. 2 of the AVMS Act specifies that one third of the transmission capacity must be reserved for local broadcasters.

⁵⁴ See p. 7, of Annex A entitled ‘Criteria for the complete digitalization of the terrestrial television networks’ of the AGCOM deliberation no. 181/09/CONS.

⁵⁵ Decree Law No. 16 of 2 Mar. 2012 pub. in OJ No. 52 of 2 March 2012.

⁵⁶ The Law No. 44 of 24 Apr. 2012 pub. in OJ No. 99 of 28 April 2012.

⁵⁷ Some interesting issues arose from this decision: for instance, one might question the legitimacy of a legislative intervention that terminates an on-going administrative procedure and indirectly changes an Authority deliberation. Please refer to M. Orofino, ‘*La controversa sospensione del beauty contest per l’assegnazione delle frequenze radiotelevisive tra diritto interno e diritto comunitario*, (2012) 6 *Astrid Rassegna*.

⁵⁸ See G. Avanzini, ‘Sistemi di assegnazione delle frequenze radio-televisive tra valorizzazione economica e tutela del pluralismo’ (2013) 2 *RIDPC (Rivista italiana di diritto pubblico comunitario)*, 317.

With Deliberation 277/13/CONS, the Authority, on the basis of the new law, has regulated again the procedure introducing significant changes. Firstly, the Authority has chosen the Simultaneous Multiple Round Ascending (SMRP) auction model. In this type of auction, one starts from a minimum value set by the administration and participants can raise and improve their offers after knowing those of competitors.

Secondly, the Authority has reduced the offer from six to three batches composed of frequencies that allow an optimal coverage. The duration of the individual rights has been fixed in twenty years and they are not transferable or leasable for a term of three years.

Thirdly, the Authority fixed a system of caps to facilitate the entry into the market of new entrants and to exclude operators which already hold enough individual rights to use radio frequencies for transmit more than three TV networks.

Eventually, just one operator participated in the auction and gained a batch.⁵⁹

In conclusion, the current law regarding the allocation of broadcasting frequencies provides two different regimes. The first is quite similar to the allocation model provided by the Communication Code because it assigns the Authority the task of choosing among beauty contest or auction. The second one, which is prescribed just for one specific allocation, limits the power of the Authority, by requiring an auction and specifying its basic features. In both cases, the Ministry is required to manage the procedures and grant the individual rights.

It is more than clear that the current framework must be considered a provisional one. A comprehensive reform of the broadcasting sector and of the rules concerning the authorisation system and the allocation of frequencies seems necessary. Such a reform should create a single, stable and predictable regulatory framework and should limit the recourse to extraordinary rules.

9. The Pro-Competitive Regulation and the Protection of Media Pluralism

The Communication Code does not stipulate specific limits on the allocation of frequencies to protect market competition. This choice is consistent with the European strategy of postponing the introduction of pro-competitive remedies after an earlier analysis of the real market conditions.

The Authority must therefore assess whether it is necessary to introduce specific limits.

Under the Communication Code, only the procedure for assigning frequencies for 4G services has been concluded.⁶⁰

In that case, the Authority limited the participation in the selection procedure to one operator from each corporate group or consortium. This limitation had the aim to

⁵⁹ The tender has been published by the Ministry in OJ no. 17 of 12 Feb. 2014. Just Cairo Network SrL participated and gained a batch with a bid of 31 million Euro.

⁶⁰ See AGCOM Deliberation no. 282/11/CONS, which established the procedure for the allocation and use of band frequencies 800, 1800, 2000 and 2600 MHz (4G frequencies). See G. Gardini, 'L'asta delle frequenze per la banda larga mobile, il "preminente" interesse nazionale e il diritto di difesa delle emittenti locali' (2011) 7-8, *Foro Amministrativo TAR*, 2621. With Deliberation no. 321/15/CONS, the Authority opened a new public consultation for the assignment of the 3600-3800 MHz frequency band.

preserve competition avoiding all frequencies from being allocated exclusively to a small number of corporate groups. In addition, the Authority established a maximum cap on the bands available and generated specific caps for each type of band to be allocated. Such caps are often used to combat the undue concentration of resources, even if they may reduce the efficiency of the allocation. Finally, the Authority granted preferential rights to new entrants for a particular band of frequencies.⁶¹

With regard to the allocation of frequencies and their use in the broadcasting sector, the AVMS Act provides *ex ante* restrictions and allows the Authority to define other restrictions for specific allocations.

The ‘*ex ante*’ restrictions are listed in art. 43 of the AVMS Act.⁶²

The first one concerns the prohibition of each network operator to hold sufficient frequencies to transmit more than 20 percent of the existing television programs.⁶³ This limitation directly affects the granting of new individual rights and it has been further developed by the Authority in several subsequent deliberations.

At present, the most important acts are the Digital Broadcasting Regulation and the deliberation no. 181/09/CONS, which establish a general cap of five digital multiplex or four multiplex for previously existing analogue broadcasting operators who own more than two analogue networks. This cap directly limits the granting of individual rights because applicants can participate in the allocation procedure only if they have not already reached this cap but can apply for as many frequencies as they desire as long as they will not exceed the cap.

This restriction also affects the transfer of individual rights, which is otherwise regulated by the same procedure from the Communication Code as is provided in the AGCOM regulation annexed to deliberation 353/11/CONS.⁶⁴ The only difference is that the Ministry must ensure that the transfer or leasing does not allow the buyer or lessee to exceed the cap.

Another important ‘*ex ante*’ restriction governs the use of the radio frequencies for vertically integrated operators. It indicates that 40 percent of the transmission capacity must be reallocated from operators that already have two or three multiplex Licences and are obtaining other frequencies, to broadcasting services providers that do not own any multiplex.⁶⁵

⁶¹ There were no bands exclusively reserved for new entrants, although the Authority have evaluated this possibility.

⁶² Regarding these restrictions, see G. Gardini, *Le regole dell’informazione. Dal cartaceo al bit*, Giappichelli, Torino 2014, 211.

⁶³ Art. 43, par. 6 and 7 of the AVMS Act.

⁶⁴ Art. 20, par. 2 of the AGCOM Digital Broadcasting Regulation.

⁶⁵ See AGCOM Deliberations no. 109/07/CONS, 566/07/CONS, 645/07/CONS.

10. The Right of Appeal

The last relevant issue is the right to appeal decisions concerning the allocation of frequencies. The point of departure is the provision that Italian law shall submit the acts of independent regulatory authorities to the administrative jurisdiction.⁶⁶

This principle is consistent with the Italian administrative system and clarifies that independent authorities remain part of the public administration and, as such, are subject to administrative judicial review.⁶⁷

With reference to the subject, art. 9 of the Communication Code states that ‘the judicial remedy before the administrative judge is governed by the Code of the Administrative Process’.

The Code of the Administrative Process includes a plurality of relevant rules for the field examined here.⁶⁸ First, under the Administrative Process Code, the administrative courts have exclusive jurisdiction over all disputes related to the measures adopted in the field of electronic communications by both the Ministry and the Authority.⁶⁹

Therefore, Italian administrative judges have jurisdiction over radio frequency issues related to both individual rights and legitimate interests.

This choice is particularly appropriate. It is common knowledge that the European Community legal system does not make the typical Italian distinction between the protection of individual rights (usually in the ordinary courts) and the administrative protection of legitimate interests. However, the EU requires the same protection of the legal positions established by European legislation. Exclusive jurisdiction certainly facilitates a uniform national protection.

Second, for all disputes related to the allocation of individual rights, the Administrative Process Code establishes the Regional Administrative Court of Lazio (Rome office) as the mandatory court of first instance.⁷⁰ As a result, the court is more specialised, and issues regarding territorial jurisdiction are avoided.⁷¹

Third, for all Authority acts, the Administrative Process Code requires the adoption of abbreviated rite with all procedural terms reduced by half;⁷² it also requires any precautionary measures to have a shorter procedural term. Both provisions are intended to

⁶⁶ See F. Donati, *L'ordinamento amministrativo delle comunicazioni*, Giappichelli, Torino 2007, pp. 225–228.

⁶⁷ See P. Rossi, *Le autorità di regolazione dei servizi di interesse economico generale*, Giappichelli, Torino 2004, p. 265 ff.

⁶⁸ Legislative Decree no. 104 of 2 July 2010 in OJ no. 156 of 7 July 2010. For a complete overview, see FG. Scoca (ed), *Giustizia amministrativa*, Giappichelli, Torino 2011.

⁶⁹ Art. 1, par. lett. m) Administrative Process Code. Regarding the division of the jurisdiction, see D. De Pretis, ‘Il riparto di giurisdizione’ (2010), *Giorn. dir. amm.* 1129 ff.

⁷⁰ Art. 135, par. 1, lett. d).

⁷¹ See MP. Chiti, ‘Le procedure giurisdizionali speciali’ in S. Cassese (ed), *Diritto amministrativo speciale – Il processo amministrativo*, V, CEDAM, Padova 2003, p. 3657 ff.

⁷² Except for the terms associated with application notifications, cross appeals and additional motives (art. 119, par. 2) and the term during which precautionary measures can be appealed (art. 82).

accelerate the resolution of disputes in a sector in which technological changes necessarily require faster decisions.⁷³

With regard to the specific parameters of judgment, this system retains outstanding issues. By giving administrative judges exclusive jurisdiction, the system extends their traditional powers of investigation;⁷⁴ they can consider the factual context, employ the extensive evidence of the Civil Code and consult with technical experts.⁷⁵

However, the Authority deliberations on radio frequencies are mainly regulatory and are already shaped by a high degree of expertise. Moreover, as it has been previously noted, the legal parameters in this context are often vague. Therefore, administrative judicial review can only occur if the reasoning and procedures of the Authority are not sound. Contrary, the administrative judge cannot replace the Authority's discretionary assessment.⁷⁶

Finally, art. 30, par. 2 of the Administrative Process Code notes that compensation should be provided for any damages that arise from the illegitimate exercise of administrative activity or the non-exercise of obligatory activity.

11. Concluding Remarks

In concluding this report on the Italian legislation regarding radio frequencies, we can review some of the most significant aspects of the system here described.

The first feature of the system is the co-management by the Ministry and the Authority. Under the Communication Code, such fragmentation is quite common, but it generates significant ambiguity.⁷⁷ The legislation assigns the Authority a central role, but the Ministry still has really important responsibilities, including the power to adopt general authorisations, to grant licences and to approve transfers or leases.⁷⁸

The second important feature, which is closely related to the first, is the significant regulatory autonomy that the Communication Code and the AVMS Act concede to the Authority. Clearly, the Communication Code attempts to compensate for the deficit of accountability, particularly in the consultation procedure, to increase the legitimacy of the decisions announced and to decrease the volume of judicial appeals. However, the

⁷³ See G. Pesce, 'Tutela giurisdizionale avverso i provvedimenti amministrativi e sanzionatori, e soluzioni non giurisdizionali per la definizione delle controversie tra imprese' in M Clarich, GF Cartei (eds), *Il Codice delle comunicazioni elettroniche* Giuffrè, Milano 2004, pp. 405–468.

⁷⁴ See G. Pesce, *Poteri istruttori e mezzi di prova nel processo amministrativo*, Giuffrè, Milano 2003.

⁷⁵ See F. Cintioli, 'Consulenza tecnica d'ufficio e sindacato discrezionale della discrezionalità tecnica (art. 16)' in F. Caringella, M. Protto (eds), *Il nuovo processo amministrativo*, Giuffrè, Milano 2003, 913.

⁷⁶ See Cons. St. sez VI, 2 March 2004, n 926, (2005) III, *Foro It.*, 6.

⁷⁷ M. Libertini, 'I rapporti tra Ministero e Autorità garante delle comunicazioni, (2011) *Giorn. dir. amm.*, 1287. See also, M. Mensi, 'Il riparto di competenze fra Autorità e Ministero nel settore delle comunicazioni elettroniche' in G. della Cananea (eds), *Il nuovo governo delle comunicazioni elettroniche*, Giappichelli, Torino 2005, pp. 37–47.

⁷⁸ See M. D'Alberty, 'Comunicazioni elettroniche e concorrenza', in R Perez (ed), *Il nuovo ordinamento delle comunicazioni elettroniche*, Giuffrè, Milano 2004.

success of this strategy is questionable.⁷⁹ The level of conflict is quite high overall in the broadcasting sector where the decisions of the Authority often become a political battleground.

The third important feature is the admissibility under the current law of both systems of allocation: the auction and the beauty contest. This possibility of choice has several advantages and some drawbacks.

On one hand, it gives the Authority (through the consultation process) the ability to decide the best procedure in each specific case. The Authority could be able to promote efficiency and to balance competition, customer advantages, the efficient use of the spectrum and other general interests. On another hand, changing the allocation system often and within a short period of time can alter the dynamic of the competition. Those operators that obtain frequencies through a beauty contest competition do not directly pay for them, whereas an auction always requires a form of monetary payment. In contrast, the beauty contest procedure imposes specific conditions attached to the individual rights. The difficult challenge is how to balance the different positions in order to avoid any possible market disruption.

In conclusion of this report it is necessary to say that a widespread legislative intervention seems necessary.

Such intervention should at least pursue: a) a more accurate definition of competences among the Authority and the Minister; b) the unification of the existing sources to clarify which rules fully apply to the electronic communication sector and which apply just to the broadcasting sector; c) a selection of which general interests may justify exceptions for the broadcasting sector; d) the criteria for the Authority to select a comparative or a competitive procedure; e) the repeal of the existing double regime for frequency allocation in the broadcasting sector.

All of these reforms should be considered with regard to both the current European legislation and the proposals that are already under discussion at European level. In particular, it should be considered that the Digital Agenda and the Single Market Strategy require the creation of supranational markets through supranational Licences and a broader reservation of the spectrum for Internet mobile connectivity.⁸⁰

⁷⁹ See V. Zeno-Zencovich, 'Una "Sunset Clause" per le Autorità di regolazione?' in P. Bilancia (ed), *La regolazione dei mercati di settore tra Autorità indipendenti nazionali e organismi europei*, Giuffrè, Milano 2012, p. 221.

⁸⁰ See Commission Communication, *A Digital Agenda for Europe*, COM (2010) 245 final/2 and Commission Communication, *A Digital Single Market Strategy for Europe*, COM (2015) 192.

5.2. THE ALLOCATION OF CO₂ EMISSION PERMITS IN ITALY

1. Introduction

Limited authorisations are a topic which Italian administrative scholars have often examined in the past when legislators were accustomed to giving broad discretionary power to administrations in order to verify the compatibility of an applicant's interests with public interests. That system was based on the preconception that private interests were unlikely to be compliant with public objectives, so that preventive administrative control was necessary. Recently, even with respect to the massive recourse to competitive techniques of allocation required by the EU, the Italian legal system has adopted this device to an ever lesser extent. So it is paradoxical that the EU itself has led it to back, through its directive 2003/87/EC on CO₂ emission permits, to restoring the studies on limited authorisations. However, this tool has been placed within a modified context, so that the similarities are more apparent than real.

This paper aims to investigate how Italy has fulfilled the obligations provided by the above-mentioned directive, along with its modifications, and how this new framework is to be interpreted in the light of the general principles which inform the Italian legal system. For this purpose, it is important to take into account the lively doctrinal debate that this framework has caused and some judicial decisions on this topic.

For this reason the paper starts with a short description of the Italian sequence of events regarding the rather confused implementation of this EU directive. Then the qualification of the authorisations and emission allowances will be examined in light of the very different positions that Italian scholars have taken on it; at the end of this part, I myself will propose an argument in support of a certain interpretation of the framework on the CO₂ emission permits system. The following topics concentrate on the compatibility of limited authorisations on emission allowances with the general principles of Italian administrative law and particularly with the principle of transparency and impartiality, taking into account the special position of newcomers, for whom specific treatment is reserved. Finally, brief conclusions will be drawn on what has been said.

* Associate Professor of administrative law at Sapienza University of Rome, Italy. Any comments or thoughts on this article can be addressed to f.giglioni@gmail.com.

2. The Tortuous Story of the Italian Framework on Allowance Trading over Greenhouse Gas Emissions

The problems of the Italian framework on greenhouse gas emissions allowance mainly depend on the tortuous history of Italy's fulfilment of its EU directive 2003/87/EC-related obligations. From the very beginning the Italian authorities have been sceptical about the European framework for limiting greenhouse gas emissions, because of its negative consequences for the domestic industrial and production system. It is no coincidence that Italy, along with other countries, has so strenuously urged the EU to adopt the linking directive 2004/101/EC. To the end of "softening" the cap criterion of allowance relating to greenhouse gas emissions, this latest directive allows companies to gain additional credits from their investments in clean technologies. It is common knowledge that these additional credits enable countries to increase the maximum ceiling of the CO₂ gas emission allowance, as a result of the Joint Implementation and Clean Development Mechanism projects.

For this reason the implementation of directive 2003/87/EC was unsystematic and late in arriving. On the one hand, pending the definitive transposition of the EU directive on the allowance of greenhouse gas emissions, urgency decrees were issued from 2004 to 2006 guaranteeing partial application of the EU framework so as to bridge the most pressing gaps; on the other hand, the definitive Italian framework, i.e. legislative decree 216/2006, was introduced when the EU had already provided for the maximum emissions allowance and its allocation at various plants. Consequently, legislative decree 216/2006 had new limited effects and was heavily influenced by the previous legal provisions. An additional note concerns the decision-making of the two National Allocation Plans (hereinafter, NAP), that of 2005–2007 and that of 2008–2012, both of which came into force with a year's delay because of objections from the EU Commission, which had the task of ensuring the NAPs compliance with the EU framework before they have legal effects.¹

Furthermore, many legal disputes have also been raised by companies or company associations, bringing the competent national authority before the Italian courts in order to obtain repeal of the aforesaid acts, though few of these appeals have been granted. Significant to say, the courts have often neglected national regulatory provisions opposing the EU Commission's decisions, thus leading to their greater compatibility with EU law, notwithstanding the result of an inconsistent, fragmentary legislation. These cases are very interesting, because the Italian administrative judges have stated, more clearly than at any previous time, that the greenhouse gas emission allowance framework is a clear

¹ For a summary of the Italian implementation of directive 216/2006 see M. D'Auria, 'Primi passi per la riduzione in Italia delle emissioni di gas ad effetto serra' (2006) *GDA (Giornale di diritto amministrativo)* 708; V. Jacometti, 'La direttiva *Emission Trading* e la sua attuazione in Italia: alcune osservazioni critiche al termine della prima fase' (2008) *RGA (Rivista giuridica dell'ambiente)* 273, 279; V. Jacometti, *Lo scambio di quote di emissione*, Giuffrè, Milano 2010, pp. 416–421; B. Pozzo, *Il nuovo sistema di emission trading comunitario*, Giuffrè, Milano 2010, pp. 27–43; F. Gaspari, 'Tutela dell'ambiente, regolazione e controlli pubblici: recenti sviluppi in materia di *EU Emission Trading Scheme (ETS)*' (2011) *RIDPC (Rivista italiana di diritto pubblico comunitario)* 1149, 1156.

example of the existence of European Administrative Law, which is in turn part of a broader Global Administrative Law. In these terms some decisions of foreign authorities, provided that certain conditions subsist, are becoming essential for the validation of national administrative acts, which remain legally enforceable only if they comply with EU decisions. In the case of *Soc. Columbian Carbon Europa v. Environment Ministry*² the court dismissed the appeal against an administrative national act, because the national authority had widened the production categories included in the gas emissions trading framework, even though the national legislative provisions were more restrictive. In this circumstance the judge ruled that the national legislative act must be disapplied because of its clear opposition to the EU decision, which, however, had included that category in the emissions allowance scheme.

Nevertheless, the court rulings have also come at a distance of years from the appeals, thereby preventing the EU framework from gaining force at the proper time.

This situation has had, among others, three important consequences: a) it has penalized Italian industrial operators by delaying them to trade their emission allowance on the market, above all internationally; b) at the same time it has allowed existing companies to benefit from market advantages on the grounds that their urgency prevented public authorities from basing their choices on independent data rather than those provided by the operators themselves, so that public decisions ended up mirroring traditional emission levels instead of planning according to a strategic commitment; c) it has ignored the position of newcomers. In any case, the delay in law enforcement did not regard only Italy, having negative results on the European as well as the national level, because of the tightly linked national markets on the issue of gas emissions allowance trade. The EU itself has had difficulties with the commitment it undertook through the Kyoto Protocol.

Therefore, the impossibility adopting a real plan because of the cumulative delays described impeded the obtainment of competitive procedures of allocation, thus damaging further the interests of new operators.³

However, Italy is currently fulfilling the obligations stipulated by directive 2009/29/EC, which provides for the competitive allocation scheme as a general principle when gas emissions allowances are to be assigned. Legislative decree 216/2006 has been replaced by the new legislative decree 30/2013, which is fully in line with the EU framework, and the emissions allowance assignment plan for the 2013–2020 period is in accordance with the Commission's 2013/448/EU decision. The national authority has been deprived of some notable powers, which have passed to the EU Commission, but this shifting of powers is stirring up new legal issues. For instance, now there are two requests for preliminary rulings from Italian administrative judges to the Court of Justice since the courts deemed apparently valid the appellants' arguments whereby the illegality of some Italian administrative acts stems precisely from that of certain EU decisions, whose

² Tar Lazio, II-bis, 3 March 2010, n. 3313. Similar rulings are: Tar Lazio, II-bis, 16 March 2010, n. 4090; Tar Lazio, II-bis, 24 August 2010, n. 31276.

³ Cf. C. Tosello, 'Effetto serra ed *emission trading*: il commercio dei diritti di emissione' (2005) *RDA (Rivista di diritto agrario)* 463, 465. Hence it should be no surprise that the emissions allowance allocation has been free for a long period, going beyond the maximum thresholds established by the EU, namely 95% for the 2005–2007 period and 90% for the 2008–2012 period.

jurisdiction is limited to the Luxembourg Court.⁴ So the perfect compliance of the Italian legal framework with EU law raises new questions before the Court of Justice about the extent to which free emissions allowance allocations can be applied.

3. Debate on Qualification of the Emissions Allowances

The Italian legal debate on gas emissions allowance is peculiar, since the existence of public rights should not be taken for granted. So a lively debate is on among national commentators who have rallied around two main currents of opinion⁵: the first tends to enhance aspects of public law, while the second emphasizes aspects of civil law. Undoubtedly legislation offers elements to back them both.

Analysts of public law point out that the scheme is focused on the national regulation authority and on two ministries that regulate and police operators, to the point of issuing sanctions. A multitude of public powers can be acknowledged since the national authority *inter alia*: a) lists the plants that must comply with the gas emissions allowance law; b) establishes preliminary free allowances and, then, makes the final assignment; c) determines allowances assignments to newcomers; d) manages the registry where the assigned allowances are transcribed, transferred and cancelled; e) issues authorisations for emitting greenhouse gas; f) approves emission monitoring plan; g) establishes evaluation criteria; h) issues sanctions. All these powers are public and involve legal relations based on the dichotomy of public power – public rights. In particular, the analysis concerns the nature of the authorisations, which, according to the well-known distinction of Italian administrative law⁶, are divided between authorisations in strict sense of the word, and concessions. According to this distinction authorisations are administrative acts capable of eliminating obstacles that prevent the concrete exercise of rights, which the legal system previously gave to individuals; vice-versa, concessions are administrative acts granting new rights which individuals did not have previously.

On the grounds of this theoretical difference, some authors consider that the framework for trading gas emissions allowances is based on the authorisations. In support of this thesis commentators argue that authorisations concerning gas emissions overlap, more or less explicitly, other authorisations, of which private operators are already in possession for running an economic activity whose right is stated by article 41 of the Italian Constitution, regarding the freedom of economic initiative. Therefore, gas emission authorisations are limited to eliminating an obstacle, the ban on emitting greenhouse gases, which would deny a Constitutional right enjoyed by everyone. The issue of authorisations depends on the respect of certain requirements which public authorities are called on to verify without exercising any real discretionary power. The

⁴ The sentences requesting a preliminary ruling are: Tar Lazio, II-bis, 30 July 2014, n. 8360; Council of State, II – special assembly, 27 August 2014, n. 3404. As the author writes, the Court of Justice has not yet ruled.

⁵ They are effectively described in F.L. Gambaro, 'Emissions Trading tra aspetti pubblicistici e profili privatistici', (2005) *CI-Europa (Contratto e impresa – Europa)* 855, 868; Jacometti 2010, pp. 424–444.

⁶ The milestone of this distinction was the work of one of the founding fathers of Italian administrative law, i.g. O. Ranelletti, 'Concetto e natura delle autorizzazioni e concessioni in diritto amministrativo' (1894) *GI (Giurisprudenza italiana)* IV, 7.

national framework provides for authorisations to be granted when the application is complete and accurate.⁷

Another argument which also stresses the aspects of public law conflicts with the one just described. According to this different approach, authorisations are to be considered as a real concession since they are extraneous to the freedom of economic initiative. The authors supporting this argument note that public authorities in this case protect the atmosphere as a common good from the predatory exploitation of private operators. Therefore, public authorities would not regulate an economic activity of operators, but would establish rules of use of a common good in order to guarantee its fruition for all. In this sense, then, the permits on air pollution are an exoneration from a general prohibition. The right to pollute is allowed only thanks to the authorisations and has nothing to do with economic freedom. A confirmation of this interpretation derives from article 13 of legislative decree 30/2013, which states that “no plant undertakes any activity listed on Annex I entailing greenhouse gas emission specified at the same annex relating to that activity, unless it holds permits”.⁸ This framework recalls to commentators the administrative concessions in the previously described terms. Although the issuing of these authorisations is bound by strict regulations, they are closely connected to the narrow amount of emission allowances granted to any single operator. The possibility of acquiring further allowances to increase gas emissions must not exceed the general ceiling of gas emission allowances at the national level, so that the rights granted by the authorisations are in any case limited.

The approach of authors tending to enhance the aspects of civil law is completely different. According to them, the authorisations are totally separate from the assignment of gas emission allowances. Authorisation is an essential preliminary act, but it cannot invent a new right since it is fully bound by the law. The rights of operators are strictly linked to their possession of gas emission allowances. The assignment of gas emission allowances states that a property right is fully autonomous from preliminary authorisations, which would be a mere initial prerequisite for wielding a property right. In this sense, emission allowances would be an immaterial good towards which the owners take steps as if it were an ordinary material good. They would not entail a right to pollute as stated if the framework on gas emission allowances is considered based on the authorisation scheme, but they would give proprietary values on the grounds of its scarcity. The doctrine also deems the obligation to transcribe the holding, transfer and cancellation of allowances in the public registry not to be a condition of validity of trade, but merely a publicity burden necessary to provide legal certainty. Emission allowances trade is valid regardless of the transcription in the registry. Hence, allowances entitle a true proprietary right, to be exercised in total freedom.⁹ According to these authors,

⁷ See article 15, legislative decree 30/2013.

⁸ In the same terms M. Clarich, ‘La tutela dell’ambiente attraverso il mercato’ (2007) *DP (Diritto pubblico)* 219, 229.

⁹ See on the right of property W. den Ouden and M.K.G. Tjepkema, ‘The Allocation of Limited Licences by Government: Requirements under European Fundamental Rights: Protection of Property’, in P. Adriaanse, F. van Ommeren, W. den Ouden and J. Wolswinkel, *Scarcity and the State I. The Allocation of Limited Rights by the Administration*, [PM].

the endorsement of this approach is also proved by the fact that the purchase of these titles is not reserved to operators; anyone, whether an individual or an environmental association, can buy allowances on the market even for the purpose of reducing the total amount of gas emissions. Transfer of emission rights is the technique chosen by the legislator for containing pollution effects, in place of the command and control techniques that often reveal themselves insufficient for achieving these desired objectives.¹⁰ Consequently, according to this doctrinal mainstream, every attempt to put this framework under a category of public law ends up deceiving the real goal of gas emission allowances trade, whose purpose is to overcome the traditional unsatisfactory approaches of command and control.

4. Support of the Administrative Concession Thesis

The distinction among the three different approaches is no mere academic speculation but a distinction of concrete, diverse effects. For instance, according to a general rule of the Italian legal system, the annulment of authorisations by an administration entailed compensating the recipients only if this invalidates any subsequent contracts.¹¹ Therefore, the arguments supporting the separation of authorisations from gas emission allowances trade would have meant annulment as an infringement of property whose legality is strictly limited to a clear public interest with an obligation of indemnity, while the other arguments would have affected the power of annulment, in accordance with the principle of legitimate expectations.

Dealing with the nature of greenhouse gas emission allowances means deciding, first of all, whether this scheme belongs to the category of public law or civil law. Despite the fact that elements of public law and civil law coexist within legislative decree 30/2013, the former seems to prevail. The gas emission allowances market, in which trade and proprietary rights are enacted, is not a real market, which public authorities attempt to correct because of the externalities, but an artificial market¹², which, though founded on the principle of free trade, exists within the boundaries established by public authorities. As one author has said¹³, the creation of artificial markets forces operators to “internalize” public interests within the private action. Private freedom is only seemingly absolute, because it is in fact curbed by the conditions assuring the instrumental effects conducive to public interests. Public interests are not the reason why the market is

¹⁰ On the taxonomy of command and control policy see Clarich 2007, 221–223.

¹¹ On the nature of the contracts in CO₂ gas emission permits framework see F. Annunziata, ‘L’atmosfera come bene negoziabile. I contratti di cessione di quote di emissione tra tutela dell’ambiente e disciplina del mercato finanziario’ in M. Lamandini and C. Motti (eds.), *Scambi su merci e derivati su commodities. Quali prospettive?*, Giuffrè, Milano 2006, 777, 786–793; M. Lipari, ‘Il commercio delle emissioni’ (2006) *Giustamm.it* 1; S. Armella, ‘Operazioni di “emission trading”’: la qualificazione giuridica influenza la territorialità’, (2011) *CT (Corriere tributario)* 916.

¹² See M. D’Auria, ‘L’emission trading e la negoziazione policentrica’ in S. Cassese and M. Conticelli (eds.), *Diritto e amministrazioni nello spazio giuridico globale*, Giuffrè, Milano 2006, 2, pp. 247, 251–253; Clarich 2007, 226; A. Lolli, *L’amministrazione attraverso strumenti economici*, Bononia, Bologna 2008, p. 37.

¹³ Lolli 2008, p. 35.

regulated, but are the origin of the market itself. The authorisations avail themselves of the market instead of regulating it. Therefore, the principle of free trade is emphasised because it is supposed, within the established terms, to safeguard public interests by protecting the environment. Every year the freedom of private operators relies on emission allowances, whose criterion of allocation does not regard the results of any single operator the year before. Public choice affects the way operators can count on the enhancement of their own proprietary rights.¹⁴

A further validation of this argument comes from the judicial review given by the Italian administrative court, the granting is based on the exercise of public power to which public rights are opposed.

In addition, this scheme is not completely unknown, because other experiences of this type exist. One example is taken from the local private transport framework of taxis whose delivery is arranged to ensure the public interest by exploiting the wider freedom of licence holders. Even in that case the Licences can be traded, but they remain subject to the limits established by public authorities, which are able to affect their market value by increasing the number of Licences on the market or by setting limits on the trade itself.

The public nature of the CO₂ gas emission permits raises the further question of whether they are authorisations in a strict sense or administrative concessions, according to the traditional distinction of Italian administrative law. For this purpose the argument, according to which the issue of authorisations cannot admit the right to pollute by private operators is crucial; those authorisations must be regarded as a way to build up an artificial market to protect the atmosphere from pollution. Therefore, it is more appropriate to interpret such a system as an administrative concession on which the rights of operators rely. In the case of *Endesa v. Environment Ministry*¹⁵ the Regional Administrative Court of Latium specified that the objective of the establishment of gas emission allowances is not to set a cap on operators, but to define a maximum amount of free emission allowances. Moreover, the nature of limited authorisations of CO₂ gas emission permits necessarily entails making discretionary choices of allocation whose outcome stems from procedures in which it is not only the holders of industrial interests that take part, but also the general public. So the weighting of interests goes beyond the mere recipients' interests of emission allowances. Even from this perspective it points out that the protection granted by the scheme serves to safeguard a common good whose management is requested by everybody¹⁶, given the universal benefits of a clean atmosphere.

5. Limited Authorisations and General Principles

Once CO₂ gas emission permits are qualified as limited administrative concessions, some implications must be underlined. First of all, the aforesaid shifting of important

¹⁴ See the comments on Gaspari 2011, 1153.

¹⁵ See the case Tar Lazio, II-bis, 24 August 2010, n. 31276.

¹⁶ A confirmation of this address is in Tar Lazio, II-bis, 16 March 2010, n. 4086.

powers to the EU Commission obviously involves the application of general EU principles of transparency, objectivity and non-discriminatory allocation of grants. Nonetheless, it is worth evaluating if the remaining powers of allocation in the hands of national authorities correspond to coherent principles coming from the main Italian administration statute, namely law n. 241/1990. In this sense four features need to be underlined: a) impartiality perspective; b) rights of participation; c) the allocation procedure with specific attention to newcomers; d) simplification of procedures.

5.1. *Impartiality Perspective*

The impartiality principle is a general Constitutional principle of Italian public law with particular regard to its organisational aspects. From this perspective the nature of the national regulatory authority that grants CO₂ gas emission permits needs to be closely examined. Italy has established a National Committee for the management of directive 2003/87/EC and for supporting the project activity of the Kyoto Protocol (hereafter, the National Committee). The authority is composed of two boards, the Governing Council and the Technical Secretariat.¹⁷ The former has nine members, three of them selected by the Environment Ministry and three by the Ministry of Economic Development, with three additional components having only consulting powers, appointed one apiece by the Ministry of Economy, the Ministry of European Policy, and the permanent Conference for relations between the State, the Regions and the special Provinces of Trent and Bolzano.¹⁸ These members, according to the specific subjects, could include other members appointed by the Ministry of Foreign Affairs and by the Ministry of Infrastructures and Transports. The Technical Secretariat is made up of twenty-three members of high professional level; these members are also appointed by the various Ministries and national bodies having jurisdiction over the environment and economic development.¹⁹ The National Committee lies within the Environment Ministry, which also provides budget and staff.

It should be easy to conclude that the National Committee is a national body lacking independence. Even the professionals are a direct expression of the appointing Ministries and bodies, which guarantee that they mirror partial interests. However, it is worth noting that National Committee members represent plural, sometimes even conflicting, interests so that their final decisions reflect an attempt to find a balance among them. According to the general categories of Italian administrative law, the National Committee can be included in the “Republican administration”, whose essential purpose is to coordinate different interests within a specific board instead of obtaining it by way of procedure.

Moreover, legislative decree 30/2013²⁰ also states that National Committee members must not encounter conflicts of interest, in which case they are replaced. However, this

¹⁷ Cf. Article 4.6 legislative decree 30/2013.

¹⁸ Cf. Article 4.8 legislative decree 30/2013.

¹⁹ Cf. Article 4.10 legislative decree 30/2013.

²⁰ Cf. Article 4.7 legislative decree 30/2013.

provision does not give control power to any authority of guarantee, and so it can only be applied by a self-declaration of the interested member who is duty-bound to report his/her condition of incompatibility. At any rate, it should not be undervalued the new Italian anticorruption statute²¹ which outlines additive obligations on civil servants encountering conflicts of interests, whose application indeed concerns the National Committee too.

The National Committee's framework appears fairly congruent with EU law and its composition mirrors the policy nature of the limits on greenhouse gas emissions. The partially professional composition of the National Committee is inclined to preserve partial interests. While this may seem coherent, the risk is that the main interest of environmental protection is blurred by a constant search for compromise. If the main objective of this framework is to preserve air quality as a common good to share with a broad range of subjects, this interest is perhaps excessively compromised by other concurrent interests, such as economic development and international affairs. A fully professional body would perhaps have done a better job of tackling these difficult tasks. The organisational aspects are underestimated by both the European and the national legislators.²²

5.2. Participation Rights

As concerns participation rights, it is also important to note that the National Committee adopts a widely participatory procedure in both its decision-making about which plants to include within the allowance limits and about the assignment of preliminary free emission allowances, by allowing not only operators but also the general public (associations for environmental protection included) to participate. Participation is guaranteed beyond the limits set up by the aforesaid main Italian administration statute, which usually limits participation to directly interested parties. Significantly, participation rights are therefore even broadened with respect to the ordinary procedure.

However, one judgment made it clear that broad public participation in emission allowance procedures does not cancel the discretionary power of decision of the National Committee, even if such participation forces the administration to justify its decisions more precisely. In the case of *Soc. Acciaierie di Sicilia v. the Environment Ministry* the Regional Administrative Court of Latium ruled that the choice of limiting gas emission allowances to a specific industrial sector amounts to exercising a discretionary technical power whose judicial review is narrowed to ascertain if the decision is manifestly unreasonable or discriminatory.²³ According to the court, moreover, the judge may not

²¹ The anticorruption discipline lies within the law n. 190 of 2012.

²² See on the role of the European and the national legislator with regard to the allocation of limited rights A. Buijze, 'The Allocation of Limited Rights by the Administration: the Perspective of the EU Legislator' and F. van Ommeren, 'The Allocation of Limited Rights by the Administration: Challenges for the National Legislator' in P. Adriaanse, F. van Ommeren, W. den Ouden and J. Wolswinkel, *Scarcity and the State I. The Allocation of Limited Rights by the Administration*, Intersentia, Antwerp 2016.

²³ Tar Lazio, II-bis, 24 August 2010, n. 31276. However, in case Tar Lazio, II-bis, 12 June 2012, n. 5335, the judge partially amended the cited ruling.

interfere in “the unquestionable scope of technical discretion linked to the demand for a review of allowance allocation among the sectors in order to ensure a fair “effort” to reduce emissions, in consideration of numerous variables which differ from sector to sector (technological and economic potential of emission reduction, opportuneness of transferring the possible burden onto end customers) and even in the light of considering that the domestic thermoelectric sector is protected from international competition”. Given the administrative court’s narrow margin for judicial review, the procedural confrontation among the several interests becomes the best guarantee for respecting objective criteria concerning the final assignment decisions on emission allowances. Such conditions ensure choices that reflect a broad weighting of interests.²⁴

5.3. *The Procedure of Allocation with Specific Attention to Newcomers*

Another aspect is the allocation procedure for authorisations. General principles require that the allocation be transparent and objective, with the aim of satisfying two different needs: on the one hand, keeping a check on the discretionary power of public authorities, and on the other, avoiding market distortions. Therefore, the objective allocation of authorisations is, on the one hand, addressed to augmenting transparency in the granting of advantages to operators, while on the other it counteracts interference with the market. As already stated, the allocation of gas emission allowances was free up to 2013. The main assignment criterion was “first came, first served”. Although an objective criterion, it risked privileging existing operators, who could maximise their advantages. This tendency was definitively abandoned as a result of the obligations imposed by directive 2009/29/EC, in which onerous, competitive allocations became the general rule for greenhouse gas emissions, since the remit of determining quantitative allowances now falls under the jurisdiction of the EU Commission.²⁵ With reference to the competitive allocation, the legislative decree requires the application of open procedures managed by the *Gestore dei servizi energetici*, GSE.²⁶

Both of the aforesaid criteria reveal pros and cons.²⁷ The adoption of competitive, onerous allocation mechanisms requires coordination among the different EU countries, and it is for this reason that the competence has shifted to the EU. If the countries were not coordinated, operators residing in a country adopting a competitive measure of allocation would suffer disadvantages compared with foreign companies. In this case, in fact, the purchase of emissions allowances entails additional disbursements. It is undoubtedly true that competitive allocation complies with the fair treatment principle, which makes no distinction between old and new plants. In addition, competitive tenders, thanks to the purchase of gas emission allowances, comply with the principle that “the polluter pays”, at the same time gaining revenue that public authorities can use

²⁴ See the case Tar Lazio, II-bis, 8 March 2010, n. 3527. Similar rulings are: Tar Lazio, II-bis, 5 February 2010, n. 1577; Tar Lazio, II-bis, 16 February 2010, n. 2241.

²⁵ Cf. A. Gratani, ‘Le “quote” per inquinare: a titolo gratuito o oneroso? (2013) RGA, 392, 393.

²⁶ Cf. Article 19 legislative decree 30/2013.

²⁷ See also Jacometti 2010, pp. 110–116.

to increase energy efficiency or lessen further emissions. However, through free allocation, operators have the advantage of carrying on their activities without paying any additional price. Nevertheless, existing operators enjoy a significant advantage compared with new ones since free allocation considers information and data coming from the former. In this way the newcomers are forced to purchase allowances on the market, bearing costs that their competitors did not have to face. On the other hand, conceding free permits would mean increasing pollution without imposing adequate penalties. An alternative solution could be the purchase of emission titles from public authorities in order to reserve, even freely, a stock for newcomers; public authorities could count on the fact that a new operator would produce through more advanced technological means which would compensate for the initial costs through a long-term return. It can also be said that the possible added costs faced by newcomers might not entail disadvantages, because the existing operators would be forced to compete with more efficient techniques obliging them to foot new costs in order to remain competitive.

However, as the competitive allocation is adopted by the EU Commission, the most important power of the National Committee concerns the free allowances allocation²⁸, of which two different types of allocation can be distinguished: that of existing plants and that of newcomers.²⁹ While the former is strictly bound by the EU Commission's decision, the second leaves wider margins of discretion to the National Committee. Particularly, one very sensitive question concerns the detection of newcomers, since beyond them alone it could also include existing operators who decide to use new plants or to turn old ones into more up-to-date structures. The general approach of the courts is to favour a generous interpretation for newcomers. In the case of *ENI v. National Committee*³⁰, the court ruled against the National Committee's restrictive interpretation on a new plant transformed from an old one. According to the judge, the "significance" of transformation cannot be used to circumscribe the entrance of newcomers, also taking into account the positive contribution of the overall efficiency. So the system would encourage investments in the most advanced technologies as one of the main instruments for obtaining a reduction in pollution. Anyway, the free allowances allocation should be progressively decreasing for all.

The artificial market established by emission permits seems to outline a mechanism of restraint based on the cap, but it is, vice versa, a system that boosts technological investment as an opportunity for productive modernization. In contrast to the traditional cases of regulation, the incentive is not defined by the public authorities in order to guide the companies, but this is an effect that occurs due to the introduction of market mechanisms in fields in which the market is traditionally considered uninvolved or where it is not desirable it should be involved.

²⁸ Cf. Article 20 legislative decree 30/2013.

²⁹ Cf. M. Cecchetti and F. Grassi, 'Le quote di emissione', in R. Ferrara and M.A. Sandulli (eds.), *Trattato di diritto dell'ambiente*, Giuffrè, Milano 2014, II (S. Grassi and M.A. Sandulli, *I procedimenti amministrativi per la tutela dell'ambiente*), pp. 303, 332–333.

³⁰ See the case Tar Lazio, II-bis, 31 March 2010, n. 5292. See again Tar Lazio, II-bis, 15 May 2012, n. 4374.

A new relationship between administration and market emerges³¹, neither reproducing the traditional separation in which they mutually excluded each other, nor reproducing the connection for interference on businesses through public command. In the gas emission allowances framework the market is an administrative instrument that creates the framework in order to exploit the virtuous mechanisms for the protection of general interests.³² The advantage of the market is realized if competition is able to promote productive efficiency and technological modernisation.

5.4. *Simplification of the Authorisation Procedure*

Another general principle in force in the Italian legal system is the simplification of procedures specifically related to authorisations. According to this principle, authorisation procedures may be replaced by either a mere communication from the individuals to the administration in charge of controlling within fixed terms³³, or a specific mechanism whereby the application is approved even if the administration formally fails to make a final decision.³⁴ The objectives of these principles is to prevent applicants from paying for the failures or delays of the administration by permitting them to undertake an activity in the default of an explicit denial.

In the case of CO₂ gas emission permits this general principle is not enforceable. The replacement of the authorisation procedure with a mere communication from applicants is prevented because this occurs when the replacement procedure is strictly binding, but, as said before, this feature does not pertain to CO₂ gas emission permits, which are limited. The other instrument does not even work, since the exceptions to this general principle concern the procedures aimed at protecting the environment and the procedures derived from EU law. With reference to the greenhouse gas emissions framework, both limits exist. Moreover, it is well-known that, in the case of *Commission v. Italy*³⁵, the Court of Justice ruled in favour of a general principle according to which the discretionary power of member states to fulfil their obligations from a directive halts when the instruments adopted by a Member State do not satisfy public interests because of the uncertainty of their application. Conclusively, the CO₂ gas emissions permits infringe on the general principle of administrative simplification, leading to conclude that in this framework public interests still another prevail over private ones, even if the former avail themselves of the latter.

³¹ See Lolli 2008, p. 45, who coins the concept of “subsidiary administration”.

³² On this point see D’Auria 2006, pp. 268–269; R.B. Stewart, ‘Il diritto amministrativo nel XXI secolo’ (2004) *RTDP (Rivista trimestrale di diritto pubblico)* 1, 18; Clarich 2007, 237–239; Gaspari 2011, 1163.

³³ Cf. Article 19 statute 241/1990.

³⁴ Cf. Article 20 statute 241/1990.

³⁵ Case C-360/87 *Commission v. Italy* [1991] ECR 791.

6. Conclusions

The Italian CO₂ gas emission permits framework had difficulties in finding a stable, coherent definition, even if now it is sufficiently in line with the EU and the other member states.³⁶ At the same time the present-day economic crisis, which is not only financial, should not be neglected because it could provoke renewed resistance to an advanced development of the cap and trade model, causing further delays of its faithful application.

Critics can easily argue the substantial failure that this mechanism has registered so far. Economic interests, particularly the existing operators, have had a strong representative ability to “catch” the regulators. The evaluation of operators’ investments in new technologies and their impact on gas emissions require a high level of expertise, which the present institutional arrangement is partially able to ensure.

As for procedural transparency, the Italian general principles partially work. The legislative framework seems to privilege open, plural confrontation of the interests within the administrative procedure more than judicial review did. The court is prudent in its thorough control over highly complex administrative decisions, even if it insists on demanding that the regulatory authorities respect their obligation to sufficiently motivate and verify their inquiries.³⁷ As for the traditional distrust of the Italian legal system towards the alternative dispute resolution, it is remarkable to note that the domestic legislation does not provide any specific administrative redress. The outcomes recorded are hitherto disappointing in terms of reducing greenhouse gas emissions. The correct functioning of emission allowances transfers is based on self-certified controls, making it particularly hard to verify actual levels of gas emissions.³⁸

The current substantially compliance with the EU law will be a significant test for understanding if failure depends on bad implementation of the regulatory framework on CO₂ gas emission permits, or if the idea that the market can be an artificial instrument for achieving public interests has failed.³⁹ In the second hypothesis it will be appropriate to go back to more traditional approaches between the administration and the market but, given the close links that this framework has with European administrative law and Global administrative law, this result cannot be taken for granted.

³⁶ For this purpose see the comments A. Gerbeti, ‘La nuova direttiva europea sullo scambio delle quote di emissione: luci ed ombre’ (2010) *RGA* 183, 186; Pozzo 2010, pp. 66–80.

³⁷ See again the case *Tar Lazio, II-bis*, 5292/2010, *ENI v. National Committee*.

³⁸ See again *Jacometti* 2010, pp. 126–130.

³⁹ Cf. the notable work by J. van Zeben, *The Allocation of Regulatory Competence in the EU Emissions Trading Scheme*, Cambridge, Cambridge University Press, 2014.

6. THE ALLOCATION OF GAMBLING
LICENCES, RADIO FREQUENCIES
AND CO₂ EMISSION PERMITS
IN THE NETHERLANDS

6.1. THE ALLOCATION OF GAMBLING LICENCES IN THE NETHERLANDS

1. Introduction

In the Netherlands, there are still a limited number of licence holders. The vast majority of the gambling activity is monopolized by the Dutch State. In 2011 the former Dutch State Secretary Teeven of Security and Justice intended ‘for Dutch gaming policy to move with the times’.¹ The Council of Ministers, made up of the government’s cabinet members, submitted a draft legislative proposal, the Remote Betting and Gaming Bill (Wetsvoorstel kansspelen op afstand (KOA), hereinafter: KOA), to the House of Representatives in July 2014.² KOA stipulates under which conditions online gambling will be allowed in the Netherlands and amends the current Dutch betting and Gaming Act (Wet op de Kansspelen 1964, hereinafter; WoK). The details of the new proposed gambling-regime will be laid down in secondary legislation. This secondary legislation has not been made public yet. In 2014, next to the regulation of online gambling a letter³ on the future of the lottery market and a policy paper⁴ on the casino market, were made public.⁵ The cabinet takes a step-by-step approach. This means that: first the online gambling will be regulated than the reform of the lottery market and the offline casino market will take place. In 2015, however, the modernization of the gambling policy and

* Professor of sports and law at VU University Amsterdam, the Netherlands.

¹ 5686253, Ministerie van Veiligheid en Justitie, 19 maart 2011, *Beleidsvisie kansspelen*. <https://www.rijksoverheid.nl/documenten/kamerstukken/2011/03/19/5686253-beleidsvisie-kansspelen>, accessed 30 September 2015.

² 33996, Tweede Kamer der Staten-Generaal, Voorstel van wet. Wijziging van de Wet op de Kansspelen, de Wet op de kansspelbelasting en enkele andere wetten in verband met het organiseren van kansspelen op afstand, ‘Kabinet moderniseert kansspelbeleid’, 11 juli 2014, www.rijksoverheid.nl/nieuws/2014/07/11/kabinet-moderniseert-kansspelbeleid.html, accessed 30 september 2015.

³ 531363, Ministerie van Veiligheid en Justitie, <https://www.rijksoverheid.nl/documenten/kamerstukken/2014/07/11/brief-over-herijking-loterijstelsel>, ‘Herijking Loterijstelsel’, 11-07-2014, accessed 30 September 2015.

⁴ 521416, Brief over herinrichting speelcassinoregime, Ministerie van Veiligheid en Justitie, <https://www.rijksoverheid.nl/documenten/rapporten/2014/07/11/beleidsvisie-herinrichting-speelcasino-regime> ‘Beleidsvisie herinrichting speelcassinoregime’, 11-07-2014, accessed 30 September 2015.

⁵ Report of Research voor Beleid, *Raising the stakes: the casino market in the Netherlands*, Leiden, 25 October 2002.

the legislative process is still underway and the outcome of this process is uncertain.⁶ It is presumed that modernization of the gambling market will take place, but when and under what conditions remains unclear. During a period of reform and legal ‘uncertainty’ it’s difficult to identify the future structural themes and elements that are important for the allocation of limited authorizations in the Netherlands. Therefore, this article touches upon the most complex issues and examines the various elements, which will illustrate overall an incoherent, diffuse Dutch policy.

This article is divided in six paragraphs. Paragraph 2 analyzes the WoK (also referred to as “current law”). Paragraph 3 analyzes relevant CJEU case-law with regard to gambling in the Netherlands, paragraph 4 highlights the aspects of the pending infringement procedure, paragraph 5 deals with relevant national case-law. Paragraph 6 shifts to the new proposed new legal regime and paragraph 7 deals with national case-law relevant for the current period of reform. Paragraph 8 provides concluding remarks.

2. The Current Gambling Regime

2.1. WoK: *The Dutch Betting and Gaming Act (Law of 1964)*

The Dutch betting and Gaming Act (Wet op de Kansspelen, WoK), prohibits offering games of chance unless a Licence has been granted for this purpose. Some games of chance fall outside the scope of the prohibition, such as small-scale gambling or promotional gambling. The WoK allows for a licensing scheme for certain gambling activities, such as good causes lotteries, state lottery, instant lotteries, sports betting, lotto, horserace betting and casinos (including poker). Holland Casino holds an exclusive Licencee for (off line) casino gambling. The Dutch government has granted a Licence for the organization of lotto games, instant lotteries and sports bets, to the ‘Stichting Nationale Sporttotalisator’ (hereinafter: De Lotto). De Lotto is a non-profit-making foundation governed by private law. The Licence for the organization for horse race betting was granted to a limited company, Sportech PLC. The charity lotteries; Nationale Postcode Loterij, Vriendenloterij and the BankGiro Loterij are incorporated in the public limited liability company the Nationale Goede Doelen Loterijen NV.

According to article 1 of the WoK the following are prohibited:

- (a) providing an opportunity to compete for prizes if the winners are designated by means of any calculation of probability over which the participants are generally unable to exercise a dominant influence, unless a Licence therefor has been granted pursuant to this Law;*
- (b) promoting participation either in an opportunity as referred to under (a), provided without a Licence pursuant to this Law, or in a similar opportunity, provided outside the Kingdom in*

⁶ ‘Kabinet moderniseert kansspelbeleid’, 11 juli 2014. www.rijksoverheid.nl/nieuws/2014/07/11/kabinet-moderniseert-kansspelbeleid.html, accessed 30 september 2015.

Europe, or to maintain a stock of materials intended to publicize or disseminate knowledge of such opportunities.

2.2. WoK does not provide for Licences for Remote Gambling

Pursuant to article 1 (A), all non-licenced games are forbidden. Although the gambling landscape has changed substantially the last decade, due to Internet, the WoK in itself does not offer possibilities for playing games of chance on the Internet. According to the WoK, there is no possibility at all of offering games of chance interactively via the Internet. So no licences for remote gambling are available. Some incumbent operators however, like De Lotto, are allowed to offer their services online, which is ‘viewed’ as e-commerce. E-commerce is defined as an offline game of chance for which the Internet is used as an alternative distribution channel. Remote gaming or “e-gaming,” is defined as a game of chance that is offered online. Koa will create a legal basis to obtain a licence for offering online games of chance.

2.3. Aim of the WoK

In the absence of EU harmonization the Member States have sufficient discretion to determine the level of protection sought in relation to games of chance. The WoK aims to regulate and control games of chance in order to combat fraud and other crime and to protect consumers. The CJEU confirmed in *Sporting Exchange Ltd.* (hereinafter: *Betfair*)⁷ that the Dutch Law and policy contributes, in view of its provisions and the rules for its application to the:

- a) Protection of consumers and
- b) Combating both crime and gambling addiction.

It is for the national courts to determine whether Member States’ legislation is actually necessary and proportionate to achieve the objectives sought and, in addition, isn’t applied in a discriminatory way.⁸

2.4. Slot Machine, Legal Regime

In 1986 the Netherlands legalized the slot machine market. Apart from Holland casino, bars, restaurants, or gaming arcades might be given a licence, when certain criteria are met. Two licences are needed, i) in situ licence and ii) slot machine licence. Ad i) the in situ licence must be obtained from the municipality in which the slot machines are to be installed. The local government can set extra requirements. Ad ii) Slot machines may only been put on the market if the model is approved.

⁷ Case C-203/08, *Sporting Ex- change Ltd / Minister van Justitie*, [2010], ECR I-4695, para. 37.

⁸ Raad van State, *Betfair tegen de minister van justitie*, 23 maart 2011, ECLI:NL:RVS:2011:BP8768.

3. CJEU Relevant Case Law

3.1. General Remarks

Since the principle of mutual recognition is not to be applied in the gambling sector, the regulation is the discretionary power of the Netherlands as EU Member State. The Netherlands can opt for a restrictive system in accordance with its own moral, religious, socio-economic and cultural factors.⁹ It is common ground that restrictions on EU law may be justified by the objectives of the Member State. These objectives might be consumer protection, prevention of both fraud and incitement to squander money on gambling and the need to preserve public order. Online games entail a greater risk for crime and fraud and gambling addiction compared to the traditional markets for such games (f.e land based lotteries), because of the lack of direct contact between consumer and gambling operator the particular ease and permanence of access to games offered over the Internet, the potentially high volume and frequency of such an international offer, in an environment which is moreover characterised by isolation of the player, anonymity and an absence of social control.¹⁰ In *Schindler, Läärä* and *Zenatti* the CJEU made clear that a public interest objective could only be justified on condition that the restrictive policy contributes to limiting betting activities in a *consistent and systematic* manner.¹¹ As far as consumer protection is concerned, it's important that a 'particularly high level of protection' is 'accompanied by a legislative framework suitable for ensuring that the holder of the said monopoly will in fact be able to pursue, in a consistent and systematic manner, the objective thus determined by means of a supply that is quantitatively measured and qualitatively planned by reference to the said objective ...'.¹² It is for the national courts to determine whether the restrictions serve the objectives and whether the restrictions are proportionate in light of those objectives. Two cases are particular important in this perspective for the Netherlands, the cases *Ladbrokes and Betfair*.

3.2. Ladbrokes

De Lotto started proceedings against Ladbrokes in 2002.¹³ De Lotto argued that Ladbrokes was illegally offering betting (sports, lotto and instant lotteries) over the

⁹ C-46/08 Carmen Media group Ltd, 8–9–2010, par. 100.

¹⁰ C-42/07 Liga Portuguesa de futebol Profissional and Bwin International, 8–9–2009, par. 70.

¹¹ C-67/98, zenatti, 21–10–1999, par. 35, C-124/97, Laara, 21-9-1999, par 37, C-501/11P, Schindler 18-7-2015, C-124/97.

¹² C-67/98, zenatti, 21–10–1999, par. 35, C-124/97, Laara, 21-9-1999, par 37, C-501/11P, Schindler 18-7-2015, C-124/97.

¹³ Cases: Rb. Arnhem 27 januari 2003, *Stichting De nationale Sporttotalisator /Ladbrokes*, LJN AF 3374; Hof Arnhem 2 september 2003, *Stichting De nationale Sporttotalisator /Ladbrokes*, LJN AJ 9996; HR 18 februari 2005, *Ladbrokes/ Stichting De nationale Sporttotalisator*, LJN AR 4841, Rb. Arnhem 31 augustus 2005, *Stichting De nationale Sporttotalisator / Ladbrokes*, LJN AU1924, Hof Arnhem 17 oktober 2006 *Ladbrokes/ Stichting De nationale Sporttotalisator* LJN AZ0222, HR 13 juni 2008 *Ladbrokes/Stichting De nationale Sporttotalisator*, LJN BC8970. Case C-258/08, *Ladbrokes Betting & Gaming Ltd, Ladbrokes International Ltd v. Stichting de Nationale Sporttotalisator*. [2010], ECR I-4757.

Internet and telephone to Dutch citizens. Ladbrokes lost the case on 27 January 2003. Against this judgment, both parties appealed to the district court. The district court upheld the decision and made clear that Ladbrokes was not allowed to accept bets from Dutch citizens, since Ladbrokes did not have a Dutch betting Licence. The Dutch Supreme Court (Hoge Raad) upheld this decision on 18 February 2005. In 2005 the court of the first instance ordered Ladbrokes to take measures to block Dutch citizens from accessing games on Internet and telephone upon the pain of penalties. Ladbrokes appealed again this decision to the Supreme Court. The Supreme Court referred the matter to the Court of Justice of the European Union (hereinafter 'CJEU') in its interlocutory judgment of 13 June 2008.¹⁴

In its decision of 24 February 2012¹⁵ the Supreme Court took into account the judgment of the CJEU in the *Ladbrokes* Case of 3 June 2010.¹⁶ The Supreme Court considered that, in line with EU case law, the prohibition of Article 1 of the WoK needed to be viewed in the context of the Dutch gaming policy. This policy needs to be consistent and systematic to attain the objectives pursued.¹⁷ The Supreme Court refers to the two objectives of the WoK since the two objectives are, according to the Supreme Court, interdependent and both need to be considered.¹⁸ Still the Supreme Court questioned the 'consistent and systematic nature' of the WoK. It is to determine whether the Dutch authorities control *the expansion of gaming effectively* and control *the amount of advertising* by holders of an exclusive Licence. The Supreme Court considers in paragraph 2.4.2 that on the basis of *developments in the gambling market* in the Netherlands it can be established that the authorities control the expansion of gaming effectively. The Supreme Court focuses on the advertising and the introduction of new games.¹⁹ The Supreme Court summarizes the facts as follows: a) There are fewer opportunities for players to play games of chance in case of a restrictive policy. b) The supply market is (much) smaller in size than without this national restrictive system. c) Allowing a limited supply legally discourages the public to move to 'illegal' gaming. d) According to the Court of Appeal there is a greater risk of addiction with 'illegal' gaming.²⁰ Conclusion, WoK isn't contrary to EU law. In this procedure the Supreme Court concludes that the Court of Appeal gave a substantiated verdict and the authorities control the expansion of gaming effectively.

¹⁴ LJN BC8970, NJ 2008/337.

¹⁵ Hoge Raad, *Ladbrokes tegen Stichting nationale Sporttotalisator*, 24 februari 2012, ECLI:NL:HR:2012:BT6689.

¹⁶ Case C-258/08, *Ladbrokes Betting & Gaming Ltd, Ladbrokes International Ltd v. Stichting de Nationale Sporttotalisator*, [2010], ECR I-4757.

¹⁷ Hoge Raad, *Ladbrokes tegen Stichting nationale Sporttotalisator*, 24 februari 2012, ECLI:NL:HR:2012:BT6689, Para. 2.4.2.

¹⁸ Case C 0275/92, *H.M. Customs and Excise v. Schindler*, [1994] ECR I-1039, Para. 58.

¹⁹ Hof Arnhem, *Ladbrokes/ Stichting De nationale Sporttotalisator*, 17 oktober 2006, LJN AZ0222, para. 4.15.

²⁰ Hof Arnhem, *Ladbrokes/ Stichting De nationale Sporttotalisator*, 17 oktober 2006, LJN AZ0222, para. 4.15.

3.3. *Betfair*

In April 2004, the Minister refused to give betting operator Betfair a licence to organize sports related prize competitions and a totalisator on the outcome of horse races. In 2004 and 2005 Betfair objected to the renewal of licences granted to Dutch licence holders (e.g. Lotto). These objections were dismissed. In 2006 the district court The Hague upheld the decision to dismiss the objections. Betfair appealed against that judgment to the Council of State (Raad van State). The Council of State referred several questions to the CJEU.²¹ The CJEU stated that the requirements of equal treatment and transparency must be observed.²² The CJEU refers to the Opinion of AG Bot and considers in par. 47: “As the Advocate General stated in points 154 and 155 of his Opinion, the obligation of transparency appears to be a mandatory prior condition of the right of a Member State to award to an operator the exclusive right to carry on an economic activity, irrespective of the method of selecting that operator. Such an obligation should apply in the context of a system whereby the authorities of a Member State, by virtue of their public order powers, grant a licence to a single operator, because the effects of such a licence on undertakings established in other Member States and potentially interested in that activity are the same as those of a service concession contract.” The CJEU refers again to AG Bot and states in reference to point 161 of his opinion “that it is important to distinguish the effects of competition in the market for games of chance, the detrimental nature of which may justify a restriction on the activity of economic operators, from the effects of a call for tenders for the award of the contract in question”. The detrimental nature of competition arises from the fact that gaming operators would be led to compete with each other in inventiveness in making what they offer more attractive and, in that way, increasing consumers’ expenditure on gaming and the risks of their addiction. On the other hand, AG Bot stated that such consequences are not to be feared at the stage of issuing a licence. The CJEU decides that the restrictions may be regarded as being justified if the Member State concerned decides to grant a licence to, or renew the licence of, 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.²³ In short, in a situation of granting an exclusive right to an operator whose activities are under ‘strict control’ by the state, the granting or renewal of such rights, without any competitive tendering procedure would not appear to be disproportionate in the light of the objectives pursued by the WoK.

3.3.1. Lack of strict state control

The Council of State (Raad van State) stated in reference to the *Betfair* case that De Lotto Licence was awarded in a manner incompatible with EU law. The CJEU put forward that

²¹ Case C-203/08, *Sporting Ex- change Ltd / Minister van Justitie*, [2010], ECR I-4695, para. 21.

²² Case C-203/08, *Sporting Ex- change Ltd / Minister van Justitie*, [2010], ECR I-4695, para. 39, 46 and 47.

²³ Case C-203/08, *Sporting Ex- change Ltd / Minister van Justitie*, [2010], ECR I-4695, para. 62.

the conditions of transparency also apply when a licence is to be renewed.²⁴ The Council of State put forward that there was no strict control²⁵ by the state over the activities of the Lotto. Although the Minister appointed that time one of the five commissioners in the supervisory Board of De Lotto, this did not reveal that there was ‘strict control’ because this appointed board member had no sufficient ‘control’. In the view of the Council of State the appointed member was just one out of the five members, and had the same voting rights as the other members of the supervisory board. Next to this there was no direct State supervision. With the lack of ‘strict control’ there was no justification to grant licences to De Lotto and SGR without any call for competition.

After this case adjustments were made in order to ensure ‘strict control’. De Lotto announced board changes by changing its statutes and appointing a government member in the supervisory board with extensive veto rights related to decisions with regard to Dutch gambling policy applicable to De Lotto.²⁶ Next to this an amendment to the WoK was adopted which introduced the Netherlands Gaming Authority (Kansspelautoriteit, hereinafter, Ksa). Thus amendment widened the scope of enforcement.²⁷

4. European Commission: Infringement Procedure

In 2006 the European commission started an infringement procedure after complaints made by a number of service providers and on information gathered by the European Commission against the Netherlands. The procedure relates to the promotion of sports betting services only. The European Commission formally requested the Netherlands to amend the law following the consideration of their replies to official requests for information in which the Commission sought to verify whether the restrictions in question are compatible with the freedom to provide services within the EC Treaty.²⁸ According to CJEU case law restrictions are allowed if they are consistent and systematic. “A Member State cannot invoke the need to restrict its citizens’ access to gaming services if at the same time it incites and encourages them to participate in state lotteries, games of chance or betting which benefits the state’s finances.”²⁹ Again this shows that the Netherlands like other Member States must not “undertake, facilitate or tolerate measures that would run counter to the achievements of the objectives”.³⁰ Since the Dutch government planned to reform the gaming laws, the infringement procedure is still pending.

²⁴ Case C-203/08, *Sporting Ex- change Ltd / Minister van Justitie*, [2010], ECR I-4695, para. 54.

²⁵ Case C-203/08, *Sporting Ex- change Ltd / Minister van Justitie*, [2010], ECR I-4695, para. 62.

²⁶ Kamerstukken II 32 264 nr. 25. Statutes De Lotto, article 11.2.

²⁷ *Parliamentary Papers II*, 2008/09, 24 557, no. 93.

²⁸ Free movement of services: *Commission acts to remove obstacles to provision of of sports betting services in France, Greece and Sweden*. IP/07/909, 27 June 2007.

²⁹ Free movement of services: *Commission acts to remove obstacles to provision of of sports betting services in France, Greece and Sweden*. IP/06/436 and IP/06/1362, 27 June 2007.

³⁰ European Commission, press release, *Gambling services: Commission refers Sweden to Court for lack of compliance with EU law*, 16 October 2014.

5. Relevant Case Law at a National Level

5.1. Slot Machine Market, the Granting of Licences: *Hommerson*

The transparency principle is a fundamental principle within EU law, at a national level administrative level though, the principle plays a more indirect role. Since transparency as such is not explicitly recognized as a general principle of proper administration.³¹ This shows in particular the case *Hommerson* that dealt with the granting of a licence for slot machines.³² The licences for slot machines are granted following a mandatory administrative procedure.³³ There is an increasing attention to the authorization of licences by the local government. Within the framework of proper administration it is important that the allocation takes place in a transparent, objective, non-discriminatory manner, to prevent arbitrary decisions and to select the best entity for the service.³⁴

The *Hommerson* case in short: Article 10, paragraph c of the Regulation slotmachines ('speelautomatenhallen') contented a maximum number of eight slot machine halls for the entire municipality of The Hague. The Hague had already granted the relevant licences for an indefinite duration to slot machine operators. Given this situation a slot machine operator could only successfully apply for a licence if one of the former authorizations already granted would expire or would be withdrawn. *Hommerson*, a slot machine operator, had two licences for a slot machine hall. *Hommerson* had submitted an application for a new licence in the centre of The Hague. *Hommerson* would give up the licence in Scheveningen and was willing to reduce the total number of slot machines, to meet the criteria in the by-law, so the total amount of slot machines should stay the same.³⁵ The government met this request. Third parties were not informed in advance of the fact that a licence was granted to *Hommerson* for The Hague centre.

³¹ H.M. Stergiou, Het Hof van Justitie: Engelbewaarder van het transparantiebeginsel, *NtER*, 2011, nr. 3 p. 85.

³² College van Beroep voor het bedrijfsleven, *Swiss Leisure Group Holland B.V. tegen Burgemeester van den Haag*, 3 juni 2009, LJN: BI6466.

³³ See also the granting of for example parking permits and taxi Licences.

³⁴ Compare the system to grant subsidies.

³⁵ Article 10.

1. De Vergunning Wordt Geweigerd, Indien:
 - a. de speelautomatenhal waarop het verzoek om vergunning betrekking heeft zal worden gevestigd buiten één van de drie op de bij deze verordening behorende kaart aangewezen gebieden;
 - b. ten gevolge van de vestiging van de speelautomatenhal waarop het verzoek om vergunning betrekking heeft het volgende per gebied maximaal toegestane aantal vestigingen wordt overschreden:
 - voor gebied 1, vier speelautomatenhallen;
 - voor gebied 2, drie speelautomatenhallen;
 - voor gebied 3, één speelautomatenhal;
 - c. door verlening van de vergunning het hier ter stede maximaal toegestane aantal van acht speelautomaten wordt overschreden.

The Court and Industry Appeals Tribunal held that there is no room for providing a (third) permit, as long as the previously granted authorization is to expire or to be withdrawn. At the time that there is room to grant a Licence other entrepreneurs need to have the opportunity to compete for this scarce licence. The court put forward that both, Community law as well as the Dutch administrative law, is in essence based on general principles of proper administration. The court considered that the granting of the licence to Hommerson for the centre of The Hague was against the general principles of proper administration and lacks adequate justification.

In this case there was a clear authorization ceiling based on a legal provision.³⁶ The justification for this ceiling is, however, not at all very clear. In light of the European non-discrimination requirements this ceiling should be justified by reasons of overriding public interest and needs to pass the suitability and necessity test. The indefinite duration of the Licences is questionable as well, because of the proportionality principle. Potential new entrants are in a disadvantaged position to the licence holder. Because of the indefinite duration interested parties are rejected from entering the market. Although the proportionality test is integrated in procurement law, this case shows that there is no clear proportionality test in Dutch public law.³⁷ In addition to these requirements, the public administration needs to inform interested parties in a proper way and in advance. Interested parties need to have the information beforehand and the opportunity to compete. The Dutch administration does not base the obligation to place a call for competition directly upon the European transparency obligation but seems to integrate the principle in the principle of proper administration.³⁸

5.2. *Off-Line Casino, Abuse of Dominance Holland Casino? Pontonnier*

In a competition law case, party centre Pontonnier filed a complaint against Holland Casino at the Dutch Competition Authority.³⁹ As stated before, Holland Casino has the monopoly on organizing off line casino games in the Netherlands. Pontonnier claimed that Holland Casino would benefit from the profits from the casino and could use these profits to offer entertainment from “famous artists” below the normal market prices. Pontonnier considered this behaviour a form of prohibited state aid, Article 107 TFEU (ex Article 87 TEC), or an abuse of a dominant position (in the Netherlands, Article 24 Mw). The Dutch Competition Authority saw no reason for a closer analysis and rejected this claim. An investigation, so stated the Dutch Competition Authority had no priority. Pontonnier appealed this decision and requested an inquiry.

³⁶ Compare 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.

³⁷ C.E.C. Jansen, *De Gereguleerde aanbesteding van overheidsopdrachten en de verdeling van schaarde publieke recht: een vergelijking.*; in *Schaarse publieke rechten* 2011, p. 309–311.

³⁸ Compare A. Drahmman, *Tijd voor een Nederlands transparantiebeginsel*, in: *Europees offensief tegen nationale rechtsbeginselen? Over legaliteit, rechtszekerheid, vertrouwen en transparantie* VARreeks 8 Den Haag: Boom Juridische uitgevers 2010, p. 145–196.

³⁹ Besluit Nederlandse Mededingingsautoriteit, *De Pontonnier vs Holland Casino* [2007], 5964/21.

Only the European Commission can investigate a claim of state aid, as the Dutch Competition Authority did not examine the claim about state aid. The Dutch Competition Authority stated further that there is no violation of Article 24 Mw (abuse of a dominant position). The mere fact that Holland Casino offers services in two different markets and offers prices below market is not in itself an infringement of the law. There is, according to the Dutch Competition Authority, no reason to assume beforehand that the effects are to the detriment of the consumer. Further research is therefore necessary. In an investigation the relevant market should be defined. Also the entertainment activities by Holland Casino in the relevant market should be investigated. The outcome of this investigation should determine whether there is an exclusionary effect to the detriment of the consumer. The Dutch Competition Authority took into consideration the fact that, according to WoK, Holland Casino may organize other entertainment activities, provided these activities meet certain criteria. The Council concluded that displacement and/or exclusion effects could only be established after a thorough investigation. This investigation had no priority.

Although the enforcement of state aid law and competition law is important to allocate authorizations in a fair, objective, competitive manner, the Dutch Competition Authority is reluctant when it comes to the investigation into the (still monopolized) Dutch gaming market. In the end it is hard to balance the public interest arguments underpinning the Dutch gaming policy with other important public interest arguments that justify the competition laws, such as consumer welfare and efficiency considerations. It remains difficult to discern which general interest objective must yield to the process of market integration and the safeguarding of consumer welfare.⁴⁰ This discussion concerns no longer a legal/economic discussion, but a political/social discussion.

6. Reform of the Gambling System since 2011

6.1. Step 1: Gaming Authority Since 2012

An amendment to the WoK was adopted on 20 December 2011, to establish the Netherlands Gaming Authority, (Kansspelautoriteit, Ksa).⁴¹ The Ksa started 1 April 2012. The Ksa replaced the Netherlands Gaming Control Board and has the power to allocate, withdraw and amend Licences referred to in the WoK.⁴² The Ksa monitors and enforces the gaming and betting rules and is responsible for the enforcement under administrative and criminal law. Violations of the Betting and Gaming Law will in the first instance be subject to administrative enforcement and, in severe cases, to criminal action by the Public Prosecution Service. The State Secretary remains responsible for the

⁴⁰ The same goes for other sectors, see f.e. M. Olfers *Sport en Mededingingsrecht*, Deventer, Kluwer, 2009, p. 464.

⁴¹ *Parliamentary Papers II*, 2008/09, 24 557, no. 93.

⁴² The Netherlands Gaming Control Board, contrary to the Ksa, only had advisory powers.

overall gaming policy.⁴³ The Ksa will exercise supervision by attaching conditions to the Licences to be granted.⁴⁴

While the new law, Koa, is underway the Dutch authorities made clear that enforcement actions would be taken in case illegal (online) providers aim prominently at the Dutch gaming market. The gaming providers are not supposed to target Dutch citizens. The authorities set criterion, so called prioritization criteria, for enforcement, which include:

- i. the web address has a domain with.nl and/or
- ii. the gaming website is in Dutch language and/or
- iii. a provider advertises on Dutch radio, television, or printed media aimed at Dutch citizens.

The Ksa announced that 40 gaming providers had been afforded the opportunity to adjust their offer to the criteria of the Ksa. The Dutch authorities gave the gaming providers two months to adjust their sites or advertising accordingly the criterion. Providers who do not adjust to the criteria will be subject to enforcement measures.⁴⁵

6.2. Step 2: KOA, Remote Betting and Gaming Bill ('New' Proposed Law)

The Council of Ministers, made up of the government's cabinet members, submitted a Remote Betting and Gambling bill to the House of Representatives in 2014 (Kansspelen op Afstand, KOA). Lotteries are excluded from the scope of the bill. The lottery system will be reformed in 2017. Remote gambling, is gambling in which the player participates through electronic means of communication and without physical contact with (personnel of) According to the Remote Gaming Bill there is no restriction on the number of Licences. The licensing conditions are not made public yet. Koa gives some guidance on the imposed requirements. Koa provides for a) a fee expected to amount to approximately 40,000 euro, due for the processing of a licence application, b) a financial guarantee c) the Licencee needs to be a public or a private limited liability company according to the laws of any Member State of the European Economic Area (EEA), or an European limited company; d) the legal person need to have its seat in the Netherlands or any other EU or EEA Member State. The Board of Directors of the Gaming Authority can waive this last requirement. Furthermore Licencees (remote gambling) in the Netherlands need to pay 20% gaming tax (compared with the 29% Holland Casino and the other Licencees have to pay) and next to this Licencees need to pay 0.5% and 1.5% to a gambling addiction fund. The gambling addiction fund is meant to contribute to the prevention of gambling addiction. The percentages are based on gross turnover. The bill

⁴³ *Parliamentary Papers II*, 2009/10, 32 264, no. 3, p. 2; *Parliamentary Papers II*, 2009/10, 32 264, no. 6, p. 4.

⁴⁴ In this connection reference is also made to the new – general – article 4a in which it is stipulated that holders of Licences granted pursuant to the WoK, must take the necessary measures and create necessary provisions to prevent gaming addiction with respect to the games that they organize as much as possible, and they must structure recruitment and advertising activities in a careful and well-balanced manner.

⁴⁵ The prioritization criteria are among the debated issues, see f.e. Questions MP Mei Li Vos, 29-8-2015.

proposes a central register for problem gamblers. Gambling providers may temporarily exclude problem players from participating in any game, whether the game is offered online or offline. The bill will extend the enforcement powers of the Ksa.

6.2.1. Severe criticism from the Council of State

Before sending the bill to parliament, the Council of State (Raad van State) needed to review the bill.⁴⁶ Council of State in short, advised the government to reconsider the liberalization of the gambling market.

The Council of State questioned the effectiveness and enforceability of Koa, both in terms of a) a high degree of channeling gamblers, gambling on the ‘illegal market’, into lawful activities and b) the prevention of problem gambling. The Council of State refers in particular to the international nature of the remote gambling market and the limited effectiveness of the enforcement measures since enforcement measures can only be taken in the Netherlands. In addition, the Council of State questions the lack of consistency between the three types of gambling (land based casinos, remote gambling and (online) lotteries) and is opposed to a differentiated tax rate (20% for remote gambling providers and 29% for Holland casino and the other current Licences), which affects the neutrality of taxation and leads to unequal treatment.⁴⁷ Furthermore, in the light of European law requirements the Council of State comments on the consistency of the gambling policy in the Netherlands. The gambling market will be opened for online operators. Offline casinos are also still part of the monopoly system, since the reform of the off line casino market as well as the lottery market is scheduled in 2017. The Council of State also questioned consistent en systematic nature of the gambling policy with regard to EU law. There are three different regimes, next to slot-machine system: a) an absolute ban on online lotteries, b) a state-monopoly for offline casinos and offline lotteries after acceptance of the bill c) an open licensing system for remote gambling, including sports betting. The differences between the nature of the markets (online/offline), is in the opinion of the Council “no justification to regulate the market for online gambling in a different way than the offline market.” The Council of State believes that the bill should be reconsidered. The Council put forward that the question is whether “the proposed method of regulation is not worse than the disease, a ban on online gambling with limited enforcement options”.

Although the Council of State severely criticized the proposed bill, its opinion is not binding. The State Secretary did make some minor amendments and send the bill to

⁴⁶ One of the amendments was the scope of the bill; Advies afdeling advisering van de Raad van State, 7 mei 2014 en nader rapport 11 juli 2014.

⁴⁷ Compare the discussion during the Hearing; Hoorzitting, Tweede Kamer 21 mei 2015. Videos from Parliamentary Hearing May 21st via www.gaminginholland.com/nl/1965.

parliament.⁴⁸ The Council of State, however, highlighted important issues, which will be subject of an intensified upcoming debate in Parliament.

6.2.2. Next steps

In April 2015 the succeeding State Secretary Dijkhoff published a more than 170 pages response to the questions of Members of Parliament on the Remote Gaming Bill. The most important debated issues concern at this moment

- i. tax rates
- ii. the exclusion of operators, which unlawfully operate on the Dutch market and
- iii. sports integrity issues like match-fixing.

Ad i) In line with the criticism of the Council of State, the differentiated tax rate: 20% for remote gambling providers and 29% for the current Licencees, is among the highly debated issues.⁴⁹

Ad ii) The motion “Bouwmeester” states that providers who persist in offering gambling which unlawfully aim at the Dutch market will be excluded from obtaining a licence under the new bill. It’s up to the Ksa to examine whether the operators meet the requirements set out by the Ksa.⁵⁰ It is still unclear which operators in the future will qualify for a Licence and which operators will not qualify.⁵¹

Ad iii) The sports federations, e.g. the Dutch Olympic Committee (NOC*NSF) and the Royal Dutch Football association (KNVB) call for intensified action and strict regulation to fight match-fixing.⁵² Among the issues the sports bodies strive for are the prohibition of bets that are contrary to the integrity of sports (red cards, yellow cards), and restrictions on the betting offer, for example a prohibition to bet on amateur sports, friendly matches and incidents during matches that can easily be influenced.⁵³

The Ministry of Security and Justice answered over 580 questions by the Dutch parliament’s lower house about the remote gaming bill. In May 2015 the Dutch House of

⁴⁸ Short odds bingo falls within the scope of the bill. Long odds bingo will be treated as a lottery and will be excluded from the new legislation.

⁴⁹ Hearing: Hoorzitting, Tweede Kamer 21 mei 2015. Videos from Parliamentary Hearing May 21st via www.gaminginholland.com/nl/1965. Questions from MP Oskam, ‘Gokbranche wil lagere belasting’, 18 April 2013.

⁵⁰ Motie Bouwmeester, 7-9-2011. www.eerstekamer.nl/behandeling/20110907/motie_bouwmeester_c_s_over_geen/document3/f=/visjfskj9fx5.pdf.

⁵¹ Questions from MP Mei Li Vos, to Fred Teeven, State Secretary of Justice on the subject of British bookmakers on the Dutch online gambling market, 27 February 2014.

⁵² Position papers for the hearing of the KNVB en NOC*NSF, 21-05-2015.

⁵³ See also Partij van de Arbeid, ‘De aanpak van matchfixing in Nederland, October 2014 and A.C. Spapens, M. Olfers, ‘Matchfixing in Nederland’, 2013.

Representatives held a hearing on the proposed bill.⁵⁴ Next the bill will be debated in Parliament.

6.3. *Future Step: Reform of Lottery System*

On 11 July 2014 former State Secretary Teeven announced the outline for the reform of the lottery system.⁵⁵ The licences are extended, for now till 2017. It is proposed to give in the future more room for innovation. The compulsory rate for the charity lotteries will be reduced from 50% to 40%. The Dutch competition authority investigates at this moment whether the State Lottery can take over De Lotto in the light of competition law.⁵⁶ The cabinet approved the plan to merge.⁵⁷ The revenues of the new organization, a state participation, will benefit the state, sports and charities.

The allocation of the licences will take place in a transparent manner and in line with EU law. Under what conditions, is still uncertain. The Ksa extended in 2014 the exclusive licences for the lotteries in the Netherlands till 2017.⁵⁸ In principle, it is open to the Netherlands to choose a single-operator licensing system.⁵⁹ Gaming companies like Lottovate, Unibet, Betfair, Betclic however, recently appealed this decision and argument that the renewal of these licences is contrary EU law, because the renewal took place without any competitive tendering procedure. The question is whether the Ksa will confirm the legality of the decision based on the premise that there is strict state control over De Lotto.

6.4. *Future Step: Reform of the Offline Casino Market*

Holland Casino will be privatized.⁶⁰ For that reason the WoK will be amended.⁶¹ The licences for the offline establishments will be sold. Ten Licences will be granted to the then privatized body: Holland Casino. The market will be opened up only to a limited extend. 16 licences, two more than now, will be provided for organising a gaming casino. The licences will presumably be sold via auction and the Minister can add further conditions. The Dutch Competition Authority (Autoriteit Consument en Markt, ACM) criticized the way the privatization presumably will take place, because it expressed

⁵⁴ Hearing: Hoorzitting, Tweede Kamer 21 mei 2015. Videos from Parliamentary Hearing May 21st via www.gaminginholland.com/nl/1965. Also S. KINGMA, *Trouw*, Legalisier gokken op Internet, maar niet zo. 21-5-2015. www.trouw.nl/tr/nl/5133/Media-technologie/article/detail/4036611/2015/05/21/Legaliseer-gokken-op-internet-maar-niet-zo.dhtml?cw_agreed=1.

⁵⁵ State Secretary Teeven, Herijking loterijstelsel, 11 July 2014.

⁵⁶ ACM/DM/2015/204582, Besluit Autoriteit Consument en Markt, 18 August 2015.

⁵⁷ Staatsloterij en Lotto fuseren, 9 October 2015, www.rijksoverheid.nl/actueel/nieuws/2015/10/09/staatsloterij-en-lotto-fuseren accessed 7 October 2015.

⁵⁸ Besluiten van de raad van bestuur van de kansspelautoriteit, 25 November 2014.

⁵⁹ Case C-203/08, *Sporting Ex- change Ltd / Minister van Justitie*, [2010], ECR I-4695, para. 48.

⁶⁰ See also FIN/2012/00266 U, the answers to questions (2012Z04202) of MP Bouwmeester about the privatisation of Holland Casino, 20 april 2012.

⁶¹ Wijziging van de Wet op de kansspelen in verband met de modernisering van het speelcasinoregime, www.internetconsultatie.nl/casino, accessed 30 September, 2015.

concern over the possibility that Holland Casino may dominate the casino gaming market and that it will be hard for new parties to enter the Dutch casino market.⁶² The Dutch Competition Authority advised the cabinet to reconsider the amendment and take into consideration to grant Holland Casino less than ten licences and to shorten the period of validity of the licences from fifteen to ten years.

7. Important Recent Case Law, during the Reform of the Dutch System

7.1. *X Against Unibet*⁶³

A gambler X, who suffered heavy losses, seeks to take action against Unibet. X claims that Unibet breached its duty of care to him and needs to repay his gambling debts of over 170.000 Euro. X states that the agreement between him and Unibet is invalid, because Unibet has no Licence to offer online games of chance in the Netherlands, which is illegal and against the WoK. Although Unibet denies aiming prominently at the Dutch gambling market, the district court rejects its argument. A) The domain unibet.com is routed to the Unibet.com site. B) In 2010 Dutch consumers were approached by Unibet, C) Communication was in Dutch and D) Unibet held a Dutch bank account. The Court states however that online gambling is “socially accepted”. To underline this statement the Court refers to the letter of the Ksa to Unibet. In this letter the Ksa confirms that Unibet meets the prioritization criteria (betting operators should not be offering bets via. nl extension, no Dutch-language, or advertising on radio, TV or in print.) Next to this there is a legislative proposal for remote gambling underway. So in short, remote gambling isn’t undesirable, illegal or punishable and therefor the agreement isn’t invalid. The court recognizes a duty of care but by weighing the several aspects, the court concludes that Unibet has met its duty of care. It is at this moment uncertain whether the decision will be appealed.

Unibet was in Court proceedings in the Netherlands before. That time the court prohibited its services in the Netherlands.⁶⁴ Furthermore Members of Parliament asked an enormous amount of questions⁶⁵, about the bill, the prioritization criteria, the lack of enforcement actions of the Ksa, etc. It’s disputable whether the proposed bill and the criteria stress that online gambling is indeed ‘socially accepted’.

⁶² Autoriteit Consument en Markt, 1 april 2015, www.acm.nl/nl/publicaties/publicatie/14711/Advies-over-uitwerking-privatisering-Holland-Casino/, accessed 7 October 2015.

⁶³ ECLI:NL:RBAMS:2015:1452, Rechtbank Amsterdam, 18–3–2015.

⁶⁴ See f.e. ECLI:NL:RBUTR:2008:BC7139, Rechtbank Utrecht, *Unibet v. Stichting Nationale Sporttotalisator*, 19-3-2008,.

⁶⁵ Since there are too many questions and documents to refer to. All document scan be find at: www.rijksoverheid.nl/onderwerpen/kansspelen/documenten-en-publicaties.

8. Concluding Remarks

Since the principle of mutual recognition is not to be applied in the gambling sector, the regulation is the discretionary power of the Netherlands as EU Member State. The Netherlands is allowed to prohibit and restrict market access for foreign gambling operators also in case this operator has a licence in another Member State. The Netherlands can opt for a restrictive system in accordance with their own moral, religious, socio-economic and cultural factors.⁶⁶ It is for the Netherlands to decide what objectives will be pursued, what is required to ensure consumer protection, including the number of gambling operators, the types of games of chance, etc.

It is impossible to assert at this moment the full scope of the legal framework now and in the future in the Netherlands. This article reflects the current discussions and the discussions in the months ahead.

There are still too many debated issues. Notwithstanding, I identified some common structural elements among the Dutch regulation on the allocation of authorizations in this field. Formally, in the Netherlands the majority of the gambling market is still generally monopolized by the State. A monopoly can be justified only in order to ensure a particularly high level of consumer protection, which must be accompanied by a suitable legislative framework.⁶⁷ An unbridled expansion does not reconcile with a policy of consumer protection. The current situation is that, there is a sole-licensing system for lotteries and off line casino, versus an open market for the most risky part of the gambling sector, the online sector, due to ‘prioritization’ criteria, a lack of enforcement and new *proposed* legislation on remote gambling. In short, the current situation shows the consequences of an ineffective and incoherent gaming policy. This problematic situation was stressed by the Amsterdam Court that made clear that “online gambling is no longer socially undesirable, illegal and punishable”. Next to this, there is no impact study, which means the risks and benefits of the proposed liberalization measures aren’t thoroughly studied.⁶⁸ This leads to the conclusion that right now major decisions on the future of the authorizations should reflect an open debate over all the relevant issues, including fiscal, consumer protection and sports integrity issues.

⁶⁶ ???

⁶⁷ Case C-410/07, *Markus Stoß* [2010] ECR I-8069, para. 83.

⁶⁸ Hearing: Contributions, Philip Vlaeminck and Sytze Kingma during the hearing. Hoorzitting, Tweede Kamer 21 mei 2015. Videos from Parliamentary Hearing May 21st via www.gaminginholland.com/nl/1965, accessed, 30 September 2015.

6.2. THE ALLOCATION OF RADIO FREQUENCIES IN THE NETHERLANDS

1. Introduction

‘Frequency policy deals with the question of allocation of finite (and sometimes scarce) resources among a huge number of different categories of use and, within these categories, the question of allocation among different candidates.’¹

This phrase in the 1995 Memorandum on Frequency Policy (*Nota Frequentiebeleid*) reflects in unambiguous terms that the allocation of scarce resources is at the very heart of frequency policy. Given this close connection between frequency policy and scarcity, it is not surprising that telecommunications law has always been part of the forefront in administrative law when exploring new steps on the allocation of scarce resources within the Netherlands.² For example, in 2002, after the first experiences with spectrum auctions for mobile telecommunications, the general governmental report ‘Auctions and other allocation mechanisms’ referred amply to the experiences with these spectrum auctions in order to promote their use in other areas as well, e.g. to allocate emission rights.³ More recently, experiences with regard to the allocation of radio frequencies have been said to be an important source of inspiration for the revision of the Dutch gambling regulation.⁴

This article provides for a comprehensive overview of Dutch frequency policy in order to contribute to the drawing of more general lines on the allocation of limited rights by the public administration. Therefore, this article contains general observations that might be relevant for *any* allocation of scarce resources instead of detailed descriptions of the most recent or most important radio spectrum allocations. To that end, this chapter will deal consecutively with a short overall characterization of Dutch

* Johan Wolswinkel LL.M., M.Sc., Ph.D. is Associate Professor of administrative law at Tilburg University (e-mail: c.j.wolswinkel@uvt.nl).

¹ *Kamerstukken II* (Parliamentary Papers) 1994/95, 24095, nr. 2, p. 3.

² F.J. van Ommeren & C.J. Wolswinkel, ‘Schaarse vergunningen’ [‘Limited licences’], (2011) 4 *Mediaforum*, p. 93.

³ *Kamerstukken II* 2001/02, 24036, nr. 254.

⁴ *Kamerstukken II* 2008/09, 24557, nr. 93, p. 7. Into more detail on Dutch gambling regulation, see the contribution of Olfers in this book.

telecommunications law (§2), limitation issues (§3), allocation issues (§4), competition issues (§5) and issues of judicial protection (§6). When providing for these general observations, main attention will be given to the new legal regime provided for by the Telecommunications Act since its revision in 2013. Although this national regime has been influenced unmistakably by European legislation, this article will not discuss separately which elements of this legal regime are a direct implementation of the European legal framework and which elements are not.⁵

2. Telecommunications Law and Frequency Management

The allocation of radio frequencies in the Netherlands is governed by the Telecommunications Act (TA).⁶ The main objective of this act, which came into force at the end of 1998, was to (further) liberalize the telecommunications market in line with the European telecommunications directives. Therefore, the licensing system disappeared as a general method to regulate entry to the telecommunications markets. Instead, as a main rule, the supply of telecommunications networks and services became free. However, due to scarcity considerations, a licensing system remained to apply in case of the allocation of scarce resources, such as radio frequencies or numbers.⁷

Chapter 3 of the Telecommunications Act has been entitled ‘Frequencies’. The original provisions of this chapter aimed to implement the *Nota Frequentiebeleid* 1995 (Memorandum on Frequency Policy), which sketched the future lines for radio spectrum policy.⁸ According to this memorandum, a more market-oriented approach to spectrum allocation issues was necessary to ensure a more efficient use of frequency space. As part of this market-oriented approach, the auction, the tradability of licences and the possibility of a so-called ‘scarcity fee’ have been introduced as important new allocation mechanisms.

Ten years after the adoption of the first Memorandum on Frequency Policy, a new *Nota Frequentiebeleid* 2005 was published in 2005.⁹ This second memorandum marked a new era on frequency management, emphasizing ‘flexibilisation’ in addition to the initial objective of an efficient use of frequency space. In order to implement this new frequency policy, a legislative proposal to amend Chapter 3 of the Telecommunications Act was submitted in 2008.¹⁰ These amendments, however, did not come into force before March 2013.¹¹ Two years later, in 2015, a new evaluation of frequency policy was

⁵ On this European framework, see the contribution of Oberst in this book.

⁶ Legislative act of 7 April 1998, *Statute Book* 1998, 610, as amended afterwards.

⁷ Into more detail on the initial Telecommunications Act, see P.V. Eijssvoogel & H.J. de Ru, *Dutch Telecommunications Law*, Kluwer Law International, The Hague, 2000. This introductory book to Dutch telecommunications law provides for English translations of Dutch telecommunications legislation, including the 2000 versions of the Telecommunications Act and the Frequency Decree. A more recent translation of the Telecommunications Act (2012) can be found on the website of the central government, but does not incorporate the 2013 amendments. See www.government.nl/documents-and-publications/notes/2012/06/07/dutch-telecommunications-act.html.

⁸ *Kamerstukken II* 1994/95, 24095, nr. 2.

⁹ *Kamerstukken II* 2005/06, 24095, nr. 188.

¹⁰ *Kamerstukken II* 2007/08, 31412, nr. 2.

¹¹ Legislative act of 10 May 2012, *Statute Book* 2013, 48.

carried out, which should result in the adoption of a new Memorandum on Frequency Policy in 2016.

The Telecommunications Act has been designed as a framework act.¹² Consequently, many rulemaking powers have been delegated to the government (acting by means of governmental decrees) and individual ministers (acting by means of ministerial orders). With regard to frequency management, a new Frequency Decree 2013 (FD) has been adopted in 2013,¹³ which replaced the initial Frequency Decree of 1998.¹⁴ On the basis of Chapter 3 of the Telecommunications Act and this Frequency Decree, many ministerial orders have been adopted in order to fine-tune the allocation of radio frequencies.

3. Maximum

3.1. Frequency Bands

The national frequency plan is the primary instrument to realize an allocation of frequency space. This plan divides the frequency space available into several frequency bands. For each frequency band, the Minister of Economic Affairs, if necessary after consulting other ministers involved, assigns its designated use, e.g. broadcasting or mobile communications.¹⁵ As a result, the amount of frequency space available for a certain use, e.g. broadcasting, is limited.

Three kinds of frequency bands can be distinguished: (i) the *public* domain, (ii) the *licensing-free* domain and (iii) the *licensing* domain. The public domain consists of the frequency bands necessary for the performance of public tasks (e.g. defense, State security or traffic safety). The Minister of Economic Affairs assigns frequencies within these bands to other ministers in accordance with their needs, which have to be duly substantiated. Although there is no licensing regime in the public domain, this ‘direct assignment’ of frequencies for public tasks shares some characteristics of a licence, since this assignment also takes place at request and can be made subject to restrictions.¹⁶

For the frequencies in the licensing-free domain, there is no requirement of prior licensing. The 2005 Memorandum on Frequency Policy declares a preference for this use of frequency space without prior licensing if possible.¹⁷ Licensing-free use of frequency space can still be made subject to general rules of use as provided for in delegated rulemaking, *inter alia* on the use of designated frequency space, requirements for users of frequency space and (sometimes) notification and registration obligations.¹⁸

Within the licensing domain, a licence granted by the Minister of Economic Affairs is necessary to use frequency space.¹⁹ The object of this licence is the right to use part of

¹² Eijssvoogel & de Ru 2000, p. 28.

¹³ Governmental decree of 8 February 2013, *Statute Book* 2013, 49.

¹⁴ Governmental decree of 10 November 1998, *Statute Book* 1998, 638, as amended afterwards.

¹⁵ Article 3.1 TA.

¹⁶ Articles 3.2 and 3.5 TA.

¹⁷ See also Article 5(1) Authorisation Directive.

¹⁸ Article 3.9 TA.

¹⁹ Article 3.13 TA.

the radio spectrum in conformity with the designated use of that frequency band in the frequency plan.²⁰ This licensing domain can be subdivided into two main categories: licences for public broadcasting and ‘other’ licences. With regard to licences for public broadcasting, the Telecommunications Act stipulates the number of licences to be granted as well as their recipients: one to the national public broadcasting company and one to each regional or local public broadcasting company.²¹ For the latter category of ‘other’ licences, the Telecommunications Act neither stipulates the number of licences available nor gives guidance how to assess this number of licences.²² However, it is clear that the limited amount of frequency space available within a particular frequency band might give reason to limit the number of licences available in that band.

3.2. *Size of Individual Licences*

The number of licences available within a particular frequency band is the result of the overall size of this frequency band divided by the individual size of the licences within this band. Therefore, instead of establishing the number of licences available within a particular frequency band, the key issue is to assess the spectrum size of an individual licence.

The establishment of this individual (*spectrum*) size of a licence is governed by Article 3.14 TA. The specific frequencies of a licence are considered specific conditions attached to that licence.²³ Such conditions may be attached to a licence in the interest of an optimal distribution of frequency space or in the interest of an efficient use of frequency space.²⁴ As a result, the delineation of the spectrum size of a licence is determined primarily by technical considerations: how much frequency space is needed to facilitate the designated use of frequency space within a particular band? These technical considerations might conflict with economic considerations advocating an increase of the number of licences available as much as possible.²⁵

Considering experiences with two decades of spectrum allocations for mobile communications into more detail, the minimal size of individual licences seems to decrease due to technological developments facilitating a more efficient use of frequency space. Accordingly, the number of licences available in the same frequency band increases, although without the number of interested market parties increasing as well.²⁶ Hence, the number of licences available is neither given by nature nor cast in stone.

²⁰ High Administrative Court of Trade and Industry 3 March 2006, ECLI:NL:CBB:2006:AV3464.

²¹ Articles 3.6, 3.7 and 3.8 TA.

²² Article 5(5) Authorisation Directive states that Member States shall not limit the number of rights of use to be granted except where this is necessary to ensure the efficient use of radio frequencies.

²³ High Administrative Court of Trade and Industry 3 March 2006, ECLI:NL:CBB:2006:AV3464.

²⁴ Article 3.14(1) TA.

²⁵ See for instance High Administrative Court of Trade and Industry 29 March 2004, ECLI:NL:CBB:2004:AO7734.

²⁶ For example, in the 2000 UMTS auction five licences were available with a bandwidth of (at least) 2x10 MHz in the 2100 MHz-band. In the 2012 Multiband auction, instead of one licence for 2x10 MHz, two licences of 2x5 MHz were available for grant in the 2100 MHz band. Likewise, the two GSM licences granted in 1995 had a size of more than 2x10 MHz in the 900 MHz band, whereas similar licences in the 2012 Multiband auction had a size of 2x5 MHz only.

Article 3.14 TA is not only relevant for establishing the spectrum size of a licence, but also for establishing its *areal* or *geographical* size. Whereas most licences for mobile communications have a nation-wide scope, several licences for commercial broadcasting only have regional scope. As a result of this limited scope, the same frequencies can be granted simultaneously for different regions. Consequently, more but smaller licences are available for grant.

Among the most important additional conditions to be attached to a licence are – apart from technical frequency conditions – obligations to use a prescribed technology or service and the obligation to use the frequencies within a certain period and within a certain area (‘roll-out obligation’). Since the current policy is to grant licences ‘technology and service neutral’,²⁷ new licences do not contain such obligations on prescribed technology or service anymore, whereas these obligations may be removed at request from existing licences as well. The roll-out obligations, by contrast, still play an essential role in frequency management, in particular in the area of mobile communications.²⁸

The *temporal* size of a licence is dealt with in a specific provision in the Telecommunications Act. Article 3.17 TA requires licences to be awarded for a fixed period related to the service provision concerned and the licensing objective, while taking account of an appropriate period necessary to recoup the costs of investments.²⁹

In case of a comparative test or an auction (see §4 below), the Minister of Economic Affairs has to publish the conditions that will be attached to the licence in advance *as far as possible*.³⁰ Of course, this prior publication is not possible if some obligation is the result of the applicant’s bid in an allocation procedure. Such obligations following from commitments by the applicant in his bid in a comparative test or auction, can be attached to the licence *after* the execution of the allocation procedure, even if he was the only applicant satisfying the licensing requirements.³¹

4. Allocation Procedures

4.1. Initial Allocation: Choice of the Allocation Procedure

With the exception of licences for public broadcasting, which – as mentioned before – are granted with priority to national, regional or local public broadcasting companies, the Telecommunications Act distinguishes six possible allocation procedures for the award of licences for the use of frequency space:³²

(a) allocation in the order of receipt of the applications (‘first come, first served’),

²⁷ *Nota Frequentiebeleid* 2005, p. 17.

²⁸ See in recent case-law e.g. Court Rotterdam 2 October 2014, ECLI:NL:RBROT:2014:7917.

²⁹ Within mobile communications, the average duration is between 15 and 20 years (see also *Strategic Memorandum on Mobile Communications* (2010), annex to *Kamerstukken II* 2010/11, 24095, 264), whereas licences for commercial broadcasting have been awarded for 8 years (and renewed afterwards).

³⁰ Article 3.10(3) TA.

³¹ Article 17 FD.

³² Article 7(3) Authorisation Directive.

- (b) allocation in the order of receipt of the applications or by means of an auction, dependent on the number of applications that has been submitted ('allocation on demand'),
- (c) a comparative test without a financial bid (also known as 'tender' or 'beauty contest'),
- (d) a comparative test with a financial bid,
- (e) a comparative test, if necessary followed by an auction, and
- (f) an auction.³³

The Telecommunications Act gives little guidance as to the choice between these six procedures. The only rule is that the comparative test and the auction shall not be used if it can reasonably be expected that the frequency space available will be sufficient to meet demand thereof.³⁴ In other words, if scarcity is (probably) lacking, the Minister of Economic Affairs has to choose between allocation on a 'first come, first served' basis or allocation 'on demand', where 'allocation on demand' is considered appropriate for those situations where it is not clear in advance whether or not scarcity will occur.³⁵ The minister has to publish in the frequency plan his choice for (a) 'first come, first served' allocation, (b) allocation 'on demand' or (c-f) allocation by means of comparative test or auction.³⁶

However, the frequency plan does not make a final choice between (a variant of) the comparative test and the auction in case of expected scarcity. Instead, the choice for a particular allocation procedure out of (c-f) and the determination of the start of this procedure³⁷ require a separate decision of the Minister of Economic Affairs 'in order to guarantee optimal use of frequency space'.³⁸ The reason to distinguish several variants of the comparative test and the auction in the Telecommunications Act has to do with legal certainty for the applicants: since the minister has to choose one out of four allocation procedures (c-f), this decision makes clear whether (and how) a financial bid will be part of the comparative test.³⁹

Until 2013, two important rules have guided the choice between the auction and the comparative test. The *first* rule, laid down in the Frequency Decree, was that the comparative test shall be followed only if this is in 'the general societal, cultural or economic interest'.⁴⁰ This exception of 'the general societal, cultural or economic interest' had to be interpreted restrictively, thereby supporting the preference for auctioning as a

³³ Article 3.10(1) TA.

³⁴ Article 3.10(2) TA.

³⁵ *Kamerstukken II 2007/08, 31579, nr. 3, p. 17.*

³⁶ Until now, the minister has not assigned frequency bands that are to be awarded by means of allocation on demand.

³⁷ There is no need to announce the start of the two other allocation procedures separately, since applications can be submitted continuously under 'first come first served' allocation or allocation on demand.

³⁸ Article 3.10(3) TA.

³⁹ Initially, the Telecommunications Act of 1998 merely distinguished (a) allocation in order of receipt of the applications, (b) a comparative test and (c) an auction. Consequently, it was not clear whether the choice for a comparative test included a financial bid. See High Administrative Court of Trade and Industry 16 December 2005, ECLI:NL:CBB:2005:AU861, para. 6.3.1.

⁴⁰ Article 3(2) FD.

main rule.⁴¹ This ‘hierarchy’ between the auction and the comparative test was debated intensely during the preparations of the so-called ‘zero base’ allocation of frequencies for commercial broadcasting (2003), which resulted in a new provision in the Frequency Decree putting the auction and the comparative test on an equal footing when it comes to commercial broadcasting.⁴² As a result of this (amended) first rule, from 1998 onwards, allocations for mobile telecommunications have been based on the account of an auction, whereas allocations for frequencies for (commercial) broadcasting have been based mostly on the outcome of comparative tests.

The second important rule, laid down in the Telecommunication Act itself, was a formal one: once a licence for a particular designated use has been granted on the basis of some allocation procedure, as long as there are still holders of licences for that designated use of frequency space, a *comparable procedure* shall be applied for each following allocation of frequency space, unless this no longer leads to the optimum use of frequency space due to changed circumstances regarding the use of that frequency space.⁴³ Although this rule did not imply an obligation to apply exactly the same procedure in subsequent allocations, it has been interpreted such as to exclude the replacement of an auction by a comparative test (and vice versa).⁴⁴

In the new regulatory framework which is the result of the amended Chapter 3 and the new Frequency Decree 2013, both rules have been removed. As a result, the decision to apply a certain allocation procedure is within the full discretion of the Minister of Economic Affairs.⁴⁵ Until recently, the minister has expressed a clear preference for the auction, since this procedure is supposed to lead to the most efficient outcome.⁴⁶ However, the recent announcement that the re-allocation of frequencies for commercial broadcasting (2017) will take place by means of an auction caused much debate in parliament such that the Minister of Economic Affairs has announced to renew these frequency licences for six years (until 2023).⁴⁷

4.2. Design of the Allocation Procedure

Since the Telecommunications Act has been designed as a framework act, most rules on the contents of the different allocation procedures have to be established in delegated rulemaking.⁴⁸ Nonetheless, apart from the list of allocation procedures in Article 3.10 TA, Article 3.18 TA contains some guidance by providing for a set of refusal grounds: a licence shall be refused, *inter alia*, because of violation of the frequency plan, because of the interest of the efficient use of frequency spectrum or if a licence has already been

⁴¹ Court Rotterdam (interim relief) 24 July 2002, ECLI:NL:RBROT:2002:AE5810.

⁴² Article 3(4) FD.

⁴³ Article 3.3(7) TA (old).

⁴⁴ *Kamerstukken II* 2000/01, 27607, nr. 3, p. 3.

⁴⁵ *Kamerstukken II* 2007/08, 31412, nr. 3, p. 4–5.

⁴⁶ *Kamerstukken II* 2007/08, 31412, nr. 3, p. 18. As a result, the first auction for broadcasting licences was conducted in 2013.

⁴⁷ *Kamerstukken II* 2014/15, 24095, nr. 391.

⁴⁸ On the basis of Article 3.16 TA.

granted for the use of the requested frequency space, unless shared use of frequency space is possible. Moreover, a licence shall be refused if granting the licence would be contrary to the rules set by or pursuant to the Telecommunications Act, such as the Frequency Decree 2013 and ministerial orders based on this decree.

As for the comparative test and the auction, the Frequency Decree 2013 supposes a two-stage procedure. In the selection stage, which leads to the admission of certain applicants to the second stage, requirements on *inter alia* the financial position and the knowledge and experience of the applicant can be applied.⁴⁹ With regard to the consecutive comparison stage, rules on the allocation format, the pricing rule, etcetera, need to be established. As for the comparative test, the Frequency Decree 2013 gives some extra guidance. First, the criteria used to evaluate the quality of the application or the quality of the applicant, need to be mentioned in a ministerial order that should be published within seven days after the decision to apply this particular allocation procedure (see section 4.1). Next, when establishing these comparative criteria, the minister needs to take into account the European objectives of (a) promoting competition in the provision of electronic communications networks, electronic communications services or associated facilities, (b) contributing to the development of the internal market, and (c) promoting the interests of end-users as regards choice, price, and quality.⁵⁰ As a result, the application of a comparative test or an auction is – or should be – the result of a tailor-made decision.⁵¹

By contrast, there is a ‘one size fits all’-format available for allocation in order of receipt of the applications. In this respect, the Frequency Decree 2013 provides for a limited list of possible refusal grounds, the most important being that the applicant does not have a reasonable interest in the intended use of the frequency space requested. Only to the extent that ‘the nature, scope or societal significance of the licence’ gives reason to do so, the selection grounds applying in case of a comparative test or an auction may be applied in case of ‘first come first served’ allocation as well. Moreover, in those cases, the ministerial order can establish additional rules in the interest of a balanced allocation or an efficient use of frequency space.⁵²

In case of ‘allocation on demand’, there is a uniform allocation format available as well. The possible selection criteria in this procedure are similar to those being applied in a comparative test or an auction.⁵³ This is not surprising, since the choice for this allocation procedure may result in the application of an auction if demand exceeds supply. The application of this procedure starts with the receipt of an application and is

⁴⁹ Article 9 FD.

⁵⁰ See Article 10 FD referring to Article 1.3 TA. These objectives are mentioned in Article 8 Framework Directive. For example, the comparative tests for commercial broadcasting in 2003 contained (at most) three criteria: an assessment of the feasibility of the proposed business case, a programmatic bid and a financial bid.

⁵¹ See for example (the English translation of) the Dutch auction rules for the 2012 multiband auction: <https://www.agentschaptelecom.nl/sites/default/files/courtesy-translation-auction-rules.pdf>.

⁵² Article 11(3) FD 2013. The applicable ministerial order, *Regeling aanvraagprocedure bij verlening op volgorde van binnenkomst*, shows that these additional refusal grounds are to be applied in case of licences for public electronic communications networks or services.

⁵³ Article 14 FD.

therefore dependent on the initiative of a market party. If this application meets the selection criteria, then the Minister of Economic Affairs launches a public invitation for concurring applications to be submitted within nine weeks.⁵⁴ If after this period of nine weeks the size of frequency space available is sufficient to meet the size of frequency space requested, then licences are granted on a first come first served basis. If, by contrast, the size of frequency space available is insufficient to meet the size of frequency space requested, then these licences are awarded by means of an auction.⁵⁵

4.3. Scarcity Fee

In order to guarantee an optimal use of frequency space, the Minister of Economic Affairs may determine that the holder of a licence must pay a once-only amount for the use of frequency space at (a) the grant, (b) the amendment, (c) the renewal or (d) the extension of the possibilities of use of a licence. The amount of this fee should be related to the economic value of the expected benefits during the licensing period from utilisation of the licence.⁵⁶

Although the explanatory notes of the Telecommunications Act mainly refer to a scarcity fee in combination with an auction or a comparative test, the Telecommunications Act does not exclude in advance the imposition of a scarcity fee in case of first come first served allocation.⁵⁷ However, in case of a comparative test or an auction, there is an additional rule that the application of a scarcity fee should be announced just after the decision to apply this particular allocation procedure (see section 4.1).⁵⁸

Until now, the scarcity fee has been used in cases of comparative tests for commercial broadcasting and in cases of the renewal of licences. In the former cases, this fee has been interpreted as a 'reserve price'. The application of such a reserve price in addition to a financial bid in the comparative test has been approved, since both instruments have their own function in the allocation of frequencies.⁵⁹ In the latter case, the fees have been based on the value of the licence for an 'averagely efficient entrant',⁶⁰ which methodology has been approved by the administrative courts as well.⁶¹

⁵⁴ Article 15 FD.

⁵⁵ Article 16 FD. The *Regeling verdeling op afroep* provides for a uniform auction format, a combinatorial clock auction.

⁵⁶ Article 3.15 TA.

⁵⁷ See already *Kamerstukken II 2000/01, 27607, nr. 3, p. 4.*

⁵⁸ Article 7 FD.

⁵⁹ High Administrative Court of Trade and Industry 4 April 2007, ECLI:NL:CBB:2007:BA2169, para. 9.2.4.

⁶⁰ Into more detail, see M. Kerste, N.A.N.M. van Eijk and J.P. Poort, 'Valuing commercial radio licences' (2015) 39 *European Journal of Law and Economics*, 331, and J.P. Poort and M. Kerste, 'Setting licence fees for renewing telecommunications spectrum based on an auction', *Telecommunications Policy* (2014) 38, 1085.

⁶¹ Court Rotterdam 26 January 2009, ECLI:NL:RBROT:2009:BH1202, and High Administrative Court of Trade and Industry 8 October 2015, ECLI:NL:CBB:2015:318, para. 4.6.3.

4.4. Amendments and Transfers

As a counterpart of the set of refusal grounds in Article 3.18 TA, Article 3.19 TA contains a set of grounds for the withdrawal of a licence. Some withdrawal grounds relate explicitly to the initial grant of a licence: a licence may be withdrawn *inter alia* if the holder of the licence no longer fulfils the licensing requirements or if the grounds on which the licence was granted, have ceased to exist. In addition, a licence *shall* be withdrawn if the holder so requests.⁶² The withdrawal grounds of Article 3.19 TA can be applied *mutatis mutandis* to amendments of licences.⁶³ However, according to the explanatory notes of the old Frequency Decree, an amendment of the licence at the request of the holder is possible only if this amendment does not influence his obligations in as far as they played an important role in the decision to grant the licence to this party and if this amendment does not have other negative consequences for other parties.⁶⁴

Unsurprisingly, the withdrawal and refusal grounds of the Telecommunications Act coincide to some extent, e.g. the ground of an efficient use of frequency space. However, case-law has added an important rule to this regime: in case of a request for *additional* frequency space, it is necessary to distinguish between an application for the grant of a new licence and an application for the amendment of an existing licence. If an amendment would change the *object* of the licence, *i.e.* the *nature and scope* of the assigned right of use, this amendment amounts to the award of a new licence which should be evaluated on the basis of the refusal grounds of Article 3.18 TA, such as violation of the frequency plan. Since new licences have to be granted in accordance with this frequency plan,⁶⁵ such additional frequencies cannot be awarded on a 'first come first served' basis if the frequency plan requires these frequencies to be granted on the basis of a comparative test or an auction.⁶⁶ On the other hand, if the amendment does not change the object of the licence, e.g. because it does not extend the distributional area of the licence, this amendment should be evaluated on the basis of the amendment grounds of Article 3.19 TA, such as efficient use of frequency space.⁶⁷ As a result of this case-law, the possibilities for amending licences are more limited than the text of the Telecommunications Act might suggest.

Modifications to allocations can take place not only by the amendment of licences, but also by the transfer of licences. With the consent of the Minister of Economic Affairs, licences for radio frequencies may be transferred wholly or partly to another party.⁶⁸ According to Article 3.20 TA, the refusal grounds of Article 3.18 apply *mutatis mutandis* to the transfer of a licence.⁶⁹

⁶² Article 3.19 TA.

⁶³ Article 3.19(3) TA.

⁶⁴ *Statute Book* 1998, 638, p. 21. See also Court Rotterdam 14 April 2011, ECLI:NL:RBROT:2011:BQ1298, with regard to a request for spectrum exchange.

⁶⁵ Article 3.13(2) TA.

⁶⁶ High Administrative Court of Trade and Industry 26 April 2007, ECLI:NL:CBB:2007:BA3858.

⁶⁷ High Administrative Court of Trade and Industry 18 September, ECLI:NL:CBB:2009:BJ9298.

⁶⁸ Article 3.20 TA.

⁶⁹ As a result of these transfer possibilities, the mobile communications market which had started with five market players after the 2000 UMTS auction ended with three market parties just before the 2012 multiband auction.

Article 3.19a Tw offers a new legal instrument⁷⁰ that is somewhere between the withdrawal (or amendment) of a licence and the transfer of a licence: the obligatory transfer. If there is a legal ground to withdraw a licence, the Minister of Economic Affairs can instead oblige the holder of the licence to transfer (part of) his licence to another party with the consent of the minister. If this transfer does not take place voluntarily, then the minister will take up this transfer by executing an allocation procedure on his own behalf. The allocation format applicable is an ‘allocation on demand’ or ‘an auction’, dependent on the number of candidates.⁷¹

4.5. *Renewal*

The choice of the initial allocation procedure has important consequences for the possibilities of renewal. If the initial allocation has taken place on the basis of the order of receipt of applications (first come, first served), then – as a main rule – the licences shall be automatically renewed for a period of five years.⁷² If, on the other hand, licences have been awarded on the basis of one of the other five allocation procedures, then licences shall *not* be renewed, unless such a renewal is in ‘the general societal, cultural or economic interest’.⁷³ Again, this condition should be interpreted restrictively, being an exception to the main rule of non-renewal in case of scarcity.⁷⁴

During the last decade, several licences for mobile communications and commercial broadcasting have been renewed. Each of these recent renewals has been accompanied with the obligation for the licensee to pay an additional fee for the period of renewal, based on the value of the licence for an averagely efficient entrant (see section 4.3).⁷⁵

5. Level Playing Field

5.1. *Asymmetric Measures*

On the basis of chapter 3 of the Telecommunications Act, there are several instruments available to introduce some asymmetry between applicants when applying allocation procedures.

An applicant can be refused a licence *after* the execution of an allocation procedure, if it turns out during this execution that granting the licence to the applicant would

⁷⁰ This new instrument has not been applied in practice until now.

⁷¹ See into more detail *Regeling selectieprocedure bij gedwongen verkoop*. The auction has a ‘second price, sealed bid’-format: the licence is being transferred to the party with the highest bid, who should pay the second-highest bid.

⁷² Article 3.17(2) TA jo. art. 18(1) FD.

⁷³ Article 18(2) FD.

⁷⁴ Since this renewal ground could not justify the renewal of licences for commercial broadcasting in 2011, a specific renewal ground has been added in case of commercial broadcasting licences, being the need to encourage the transition from analogue to digital broadcasting techniques (Article 18(2) FD).

⁷⁵ See in particular on this methodology Court Rotterdam 26 January 2009, ECLI:NL:RBROT:2009:BH1202 (GSM renewal).

significantly restrict effective competition in the relevant market.⁷⁶ This *ex post* refusal ground has been used during the UMTS auction (2000) proactively to limit the bidding behavior in auctions: since the award of more than one licence to a market party might distort competition, each applicant was allowed to bid for one licence only in each auction round.⁷⁷

Secondly, there is the possibility to exclude certain applicants *ex ante* from (further) participation in the allocation procedure at issue.⁷⁸ Unlike the first instrument, this second instrument can be combined with all allocation procedures with the exception of ‘first come first served’ allocation. Exclusion *ex ante* can be applied only (i) if this is necessary to promote or safeguard effective competition or (ii) if applicants have obtained already the maximum amount of frequency space established under Article 3.11 TA.

Thirdly, according to Article 3.11 TA, the amount of frequency space that an applicant can receive may be limited to a maximum in the interest of an optimal allocation or an efficient use of frequency space. Such ‘frequency caps’ prevent one applicant from obtaining all frequency space available in an allocation procedure. Since this frequency cap may also cover frequency space that an applicant has obtained in previous allocation procedures or by transfer of licences, this cap can be used as an instrument to favor new entrants. However, since this instrument can also be used to promote diversity, there is no strict connection with competition law, as is the case with the first two instruments.

Finally, the Frequency Decree 2013 allows for the possibility to reserve a certain amount of frequency space for a specific category of applicants, although without providing for specific grounds to do so.⁷⁹ Since this category has not been defined in advance, this instrument can be applied in favor of both newcomers and incumbents. When reserving frequency space for a specific category of applicants, the Minister of Economic Affairs can limit the maximum amount of reserved frequency space an applicant can obtain in that particular allocation procedure.⁸⁰

This catalogue of four instruments can be seen as the result of two decades of experiences with frequency policy. The initial Telecommunications Act in 1998 only provided (explicitly) for the possibility of refusal *ex post*. Already during the UMTS auction (2000), the question rose whether it was possible to introduce other asymmetric measures in the design of the allocation procedure.⁸¹ Case-law affirmed that it would have been possible to reserve certain licences for new entrants on the basis of the general legal basis in the Telecommunications Act that rules shall be set with respect to the grant of licences by or pursuant to a governmental decree.⁸² Moreover, the legal power mentioned

⁷⁶ Article 3.18(2)(c) TA.

⁷⁷ *Kamerstukken II* 2000/01, 24095, nr. 55, pp. 41–42.

⁷⁸ See also Art. 10(7) FD, leaving this opportunity for a ministerial order.

⁷⁹ Article 6 FD.

⁸⁰ In the recent multiband auction (2012), the minister used the instruments of a frequency cap and the reservation for new entrants, in particular, two (out of six) licences in the 800 MHz band and one (out of seven) licences in the 900 MHz band. See Court Rotterdam 2 October 2014, ECLI:NL:RBROT:2014:7917 (multiband auction).

⁸¹ *Kamerstukken II* 2000/01, 24095, nr. 55, pp. 41–42.

⁸² High Administrative Court of Trade and Industry 29 March 2004, ECLI:NL:CBB:2004:AO7734 (UMTS auction).

above to exclude an applicant entirely from participation in an allocation procedure, implies less restrictive possibilities, such as the imposition of frequency caps.⁸³ Therefore, several of these asymmetric instruments have been implemented first in the Frequency Decree before having been implemented in the Telecommunications Act itself.⁸⁴

It should be emphasized that these asymmetric measures are also important *after* the grant of licences. First of all, the need to promote or safeguard effective competition is not only a ground to refuse a licence, but also to withdraw a licence or to refuse consent in case of transfer of licences.⁸⁵ Besides, since a frequency cap can cover frequency space that has been granted before, this cap can also restrict the possibilities for transfer of additional frequency space.⁸⁶

5.2. Competition Law

The instruments mentioned above show that there is some overlap, but no complete coincidence between frequency policy and competition law. In particular, when introducing the asymmetric measure of frequency caps, the explanatory remarks in the Frequency Decree referred explicitly to the *shortcomings* of general competition law in its application to frequency allocation. In particular, it was argued that general competition law offers insufficient possibilities to guarantee a balanced allocation of frequency space or an efficient use of frequency space, since competition law cannot always exclude that one party is able to obtain all frequencies within a certain category. A frequency cap, by contrast, allows more than one party to obtain frequencies, without requiring the existence of a threat for effective competition.⁸⁷ As a result, frequency caps can be used to promote innovation as well.

Nonetheless, competition law is very important in the area of frequency management. When preparing the Telecommunications Act, the legislator addressed this relationship between telecommunications law and general competition law explicitly.⁸⁸ Apart from a substantive component, as exhibited by the refusal ground of effective competition on the relevant market, the connection between specific telecommunications law and general competition law has also a procedural component. The Minister of Economic Affairs is required to enable the Netherlands Authority for Consumers and Markets (ACM) to advise him on the proposal to exclude one or more providers from obtaining a licence⁸⁹ or on the draft of an order to refuse or withdraw a licence⁹⁰ in so far as this exclusion or

⁸³ Court Rotterdam 2 November 2011, ECLI:NL:RBROT:2011:BU3331.

⁸⁴ This might give tension between different legal bases for the same asymmetric instrument. See High Administrative Court of Trade and Industry 24 May 2012, ECLI:NL:CBB:2012:BW7152 (2,6 GHz auction).

⁸⁵ Article 3.19(2)(f) TA and Article 3.20(2) TA.

⁸⁶ Article 3.19(2)(g) TA.

⁸⁷ See the explanatory notes to Article 6a FD, *Statute Book* 2008, 407.

⁸⁸ *Kamerstukken II* 1996/97, 25533, nr. 3, pp. 58–64.

⁸⁹ Pursuant to Article 3.16(2)(b).

⁹⁰ Pursuant to Articles 3.18(2)(c) and 3.19(2)(f).

refusal is related to significant restriction of effective competition on the relevant market.⁹¹ This advice may cover a rich variety of elements in the allocation design, e.g. the number of licences, the scope of the individual licences, the conditions attached to these licences, frequency caps, reservations and the timing of the start of the allocation procedure.

Moreover, case-law on the allocation of frequency licences shows that considerations of competition law turn out to be relevant in evaluating asymmetric instruments.⁹² In the *Multiband auction* case, the administrative court ruled that European legislation does not preclude imposing a frequency cap to applications and thereby limiting the number of licences an applicant can obtain. In particular, the reservation of frequency space for newcomers in the interest of *efficient use of frequency space*, fits within the general objective in European legislation of promoting *competition*. Moreover, the court approved the reservation of radio spectrum for new entrants with reference to the advice of (the predecessor of) the ACM that although there exists effective competition within the mobile communications market, there is a risk on silent coordination of market behavior and the development of collective significant market power, as a result of which the entrance of newcomers needs to be facilitated.⁹³ In the *2.6 GHz auction* case, the court approved the imposition of individual frequency caps in order to facilitate the entry of three newcomers, because such a measure may promote competition, whereas entry of newcomers would not happen in the absence of such a measure.⁹⁴ By contrast, in the *UMTS* case, the court approved the decision *not* to reserve licences for newcomers, since it was not necessary to create extra safeguards as to the entry of newcomers from a competition perspective.⁹⁵

This case-law shows that considerations of competition law play an important role, not only in the design of the allocation procedure, but also in the evaluation of the chosen allocation procedure by administrative courts. However, the general competition law provisions of Article 101–106 TFEU do not seem to play a significant role in the case-law on the award of frequencies.⁹⁶

5.3. State Aid Law

State aid law has played a modest role in a variety of cases on the allocation of radio frequencies. In order to classify as State aid within the meaning of Article 107(1) TFEU,

⁹¹ Article 18.3 TA.

⁹² High Administrative Court of Trade and Industry 29 March 2004, ECLI:NL:CBB:2004:AO7734, High Administrative Court of Trade and Industry 24 May 2012, ECLI:NL:CBB:2012:BW7152 (2.6 GHz auction), Court Rotterdam 2 October 2014, ECLI:NL:RBROT:2014:7917.

⁹³ Court Rotterdam 2 October 2014, ECLI:NL:RBROT:2014:7917.

⁹⁴ Court Rotterdam 2 November 2011, ECLI:NL:RBROT:2011:BU3331.

⁹⁵ High Administrative Court of Trade and Industry 29 March 2004, ECLI:NL:CBB:2004:AO7734, para. 6.5.

⁹⁶ These provisions played a minor role in the 1998 DCS 1800 auction (Court The Hague 25 July 2001, ECLI:NL:RBSGR:2001:AB2893) and the 2000 UMTS auction (Court Rotterdam 29 November 2002, ECLI:NL:RBROT:2002:AF2577). Moreover, Article 106 TFEU might be relevant in case of measures favoring public broadcasting companies versus commercial broadcasting companies (Court Rotterdam 1 June 2006, ECLI:NL:RBROT:2006:AY6273).

(i) there must be an intervention by the State or through State resources, (ii) the intervention must be liable to affect trade between Member States, (iii) it must confer a selective advantage on the recipient,⁹⁷ and (iv) it must distort or threaten to distort competition. Several of these criteria turn out to be important in legal cases on the allocation of radio frequencies.

The first issue appearing in case-law on frequency licences concerns the *free (and preferential) grant* of a licence for the use of frequency space. According to the administrative court, the grant of a licence for digital broadcasting to the national public broadcasting company did not constitute state aid, since the use of frequency space for digital broadcasting could not be considered a profitable activity.⁹⁸ In particular, there was no advantage being conferred to the licensee. In another case concerning the grant of frequencies for a local public broadcasting company, the administrative court stressed the essential differences between public broadcasting companies, which are obliged to provide for services of general economic interest, and commercial broadcasting. As a result, there could be no State aid when frequencies were awarded free of charge to this local broadcasting company.⁹⁹

A second issue of state aid might rise in case of a *different treatment of parties in different allocation procedures*. This issue rose in the context of mobile communications under the predecessor of the Telecommunications Act. Whereas in 1995 two companies had obtained licences for GSM 900 without the obligation to pay a fee, either by means of a preferential right or after a comparative test, similar licences for GSM 1800 were auctioned in 1998.¹⁰⁰ Without disputing as such this licensing for free in 1995, the absence of an additional fee in 1998 for these two incumbents was claimed to constitute state aid. According to the (civil) court of first instance, however, there was no legal obligation to impose an additional fee, as a result of which it was impossible to state that charges would have been mitigated which are normally included in the budget of an undertaking. Hence, there was no advantage being conferred to these undertakings (criterion iii).¹⁰¹ Moreover, even if it had been possible to impose an additional fee, then in any event the condition that the measure must distort or threaten to distort competition would not have been satisfied (criterion iv).¹⁰² The (civil) court of appeal stressed, by contrast, that there was no legal obligation to impose an additional fee, as a result of which it was impossible to consider the absence of an additional fee as a waiver of State revenues (criterion i).¹⁰³

A third claim of state aid can rise with regard to the *symmetric design of an allocation procedure*, disputing the equal treatment of unequal parties in that procedure. In the

⁹⁷ Measures which, whatever their form, are likely directly or indirectly to favour certain undertakings or are to be regarded as an economic advantage which the recipient undertaking would not have obtained under normal market conditions (Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 60, and Case C-342/96 *Spain v. Commission* [1999] ECR I-2459, paragraph 41) are regarded as aid.

⁹⁸ Court Rotterdam 1 June 2006, ECLI:NL:RBROT:2006:AY6273 (T-DAB).

⁹⁹ Court Rotterdam 12 March 2007, ECLI:NL:RBROT:2007:BA5115.

¹⁰⁰ Court The Hague 25 July 2001, ECLI:NL:RBSGR:2001:AB2893, para. 5.4.4.

¹⁰¹ Court The Hague 25 July 2001, ECLI:NL:RBSGR:2001:AB2893, paras 5.4.4 and 5.4.5.

¹⁰² Court The Hague 25 July 2001, ECLI:NL:RBSGR:2001:AB2893.

¹⁰³ Court of Higher Appeal 5 June 2008, ECLI:NL:GHSGR:2008:BD6256.

UMTS auction case, the issue was whether the allocation design (in particular the determination of the number and size of the licences) resulted in state aid, since these licences would have been sold below market value because the five incumbents were not effectively competing in the auction. The court did not follow this reasoning, because there was no evidence that the licences had been sold below market value. Moreover, there was no indication of selective mitigation of charges or other selective advantages for these incumbents.¹⁰⁴

Fourthly, the *unequal treatment of applicants* within an allocation procedure can be claimed to amount to state aid. The court did not agree with this conclusion as regards the design of the multiband auction in 2012, since the reservation of licences for newcomers was made exactly in the interest of promoting competition within telecommunications markets. In other words, the measure did not threaten competition (criterion iv).¹⁰⁵

Last but not least, the issue of state aid is important in cases of *renewal* of licences. In his recent renewal decisions, the Minister of Economic Affairs justified the imposition of a scarcity fee with reference to the need to avoid state aid. The court considered that these fees indeed reflected market value and could therefore not constitute state aid.¹⁰⁶

In sum, although many claims of state aid have been made in several contexts of allocations of radio frequencies, these claims have not been successful until now.

6. Judicial Protection

6.1. Variety of Allocation Decisions and Lengthy Procedures

The exposition above shows that, partly due to the framework character of the Telecommunications Act, a rich variety of decisions needs to be taken before an allocation of radio frequencies can be realized. These decisions include *inter alia* the establishment of the national frequency plan, the choice between the auction and the comparative test, the ministerial order for the imposition of a scarcity fee, the ministerial order implementing the format of an allocation procedure, the individual decisions to refuse or grant licences, etcetera. Since interested parties have the right to appeal against a ‘decision’,¹⁰⁷ many legal proceedings can be expected.

However, under the Dutch General Administrative Law Act (GALA), it is not possible for an interested party to lodge an appeal against *every* decision. In particular, decisions containing general rulemaking are excluded from the right of appeal.¹⁰⁸ As a result, it is not possible for interested parties to dispute all decisions in an allocation procedure

¹⁰⁴ Court Rotterdam 29 November 2002, ECLI:NL:RBROT:2002:AF2577, para. 2.3.6.

¹⁰⁵ Court Rotterdam 2 October 2014, ECLI:NL:RBROT:2014:7917 (multiband).

¹⁰⁶ Court Rotterdam 26 January 2009, ECLI:NL:RBROT:2009:BH1202. See also High Administrative Court of Trade and Industry 8 October 2015, ECLI:NL:CBB:2015:318, para. 5.6.3, referring to Case C-431/07 P, *Bouygues Télécom* [2009] ECR I-2665.

¹⁰⁷ Article 8:1 General Administrative Law Act (GALA). Article 1:3(1) GALA defines a ‘decision’ as a ‘written decision of an administrative authority constituting an act of public law’.

¹⁰⁸ Article 8:3 GALA.

directly. For example, the ministerial orders containing the design of the allocation procedure or the establishment of a scarcity fee, are considered to be general rulemaking.¹⁰⁹ Nonetheless, once an individual decision has been based on this general rulemaking, e.g. the decision to impose a scarcity fee on a particular applicant, then administrative courts can evaluate this general rule indirectly when evaluating the applicant's appeal against the individual decision.

As long as there is uncertainty about the legal classification of the different decisions, it should not be surprising that interested parties tend to lodge an appeal against every decision. This has been the case with Dutch frequency management as well. However, after two decades of experiences with the new legal regime in the Telecommunications Act, this classification seems to have been clarified to a great extent, thereby provoking fewer proceedings.¹¹⁰

Many allocations of radio frequencies are preceded by a request for interim relief, in which similar legal issues are addressed as in the substantive proceedings.¹¹¹ However, because of the three stages that characterize proceedings in administrative law (internal appeal to the Minister of Economic Affairs, appeal to the administrative court of first instance and higher appeal to the High Administrative Court of Trade and Industry), a final judgment on the allocation of radio frequencies cannot be expected but far after the final allocation. As a solution, it has been suggested that interested parties should have the possibility to appeal to one court only, which should strive for expedited proceedings.¹¹²

6.2. *Judicial Review*

Considering judicial review into more detail, it is necessary to follow the distinction made above between general rulemaking on the one hand and individual decisions on the other hand.

According to settled case-law, derogation from *general rulemaking* is possible only if this rulemaking is in breach of superior legislation or if, while respecting the legislator's discretion and therefore evaluating this matter with restraint, this rulemaking cannot be considered to comply with general principles of law.¹¹³ Case-law with regard to this judicial review of general rulemaking seems to focus mostly on the compliance of delegated rulemaking with superior legislation, in particular the Telecommunications

¹⁰⁹ High Administrative Court of Trade and Industry 9 December 2005, ECLI:NL:CBB:2005:AU8634, and High Administrative Court of Trade and Industry 4 April 2007, ECLI:NL:CBB:2007:BA2174, respectively.

¹¹⁰ Into more detail, see P.M. Waszink, 'Rechtsbescherming bij de verdeling van schaarse radiofrequenties. Eerste deel van een tweeluik', (2013) *Mediaforum*, 242, and P.M. Waszink, 'Rechtsbescherming bij de verdeling van schaarse radiofrequenties. Tweede deel van een tweeluik (aanbevelingen voor veranderingen)', (2014) *Mediaforum*, 270.

¹¹¹ See e.g. Court Rotterdam (interim relief) 25 October 2012, ECLI:NL:RBROT:2012:BY2637.

¹¹² Waszink 2014.

¹¹³ See e.g. High Administrative Court of Trade and Industry 24 May 2012, ECLI:NL:CBB:2012:BW7152 (2,6 GHz auction).

Act and European telecommunications directives. The additional role of general legal principles seems to be limited, although superior legislation, in particular the EU regulatory framework, does incorporate some legal principles, such as the requirement that the selection criteria should be 'objective, transparent, non-discriminatory and proportionate'.¹¹⁴ When implementing these European directives,¹¹⁵ the Dutch legislator has chosen to adopt more concrete rules on frequency policy, e.g. the specific rule guiding the choice between a comparative test and an auction. This explains why the primary issue under this marginal judicial review seems to be whether the *design* of an allocation procedure is in accordance with higher legislation. The marginal review of general rulemaking seems to be strengthened further by the complexity of the matter. For example, in the case on the multiband auction of 2012, the administrative court emphasized the huge amount of discretion in case of delegated rulemaking, implying that the relevant issue is not whether from a scientific point of view better choices in the allocation format would have been possible, but whether the administration has made reasonable choices.¹¹⁶

When it comes to the judicial review of *individual decisions* within a certain allocation procedure, it should not be surprising that the comparative test generates more legal disputes than an auction, whereas legal disputes in case of allocation in order of receipt of the applications have been almost absent.¹¹⁷ In case of a comparative test, the administrative court needs to evaluate not only the design of the comparative test, but also the concrete assessment of an application in terms of the selection criteria established. The administrative court has ruled that the very essence of the application of the requirements of transparency, objectivity and verifiability is that the allocation procedure, including the selection criteria, are known in advance to the undertakings concerned and that it can be reviewed afterwards whether the execution of the procedure has been in accordance with the rules set before. However, this essence does neither exclude a qualitative comparison between applications nor the circumstance that the exact conduct of this comparison is unknown in advance. As least as important as the choice of the selection criteria in the case-law on comparative tests, seems to be the application of these selection criteria.¹¹⁸ In those cases, the central issue is whether the applicant should have received a higher score or whether other applicants should have received a lower score. Although the annulment of one allocation decision might have far-reaching consequences for the overall allocation of frequency licences, case-law shows that the administrative court has been willing to annul a decision, even a long time after these licences have been granted.¹¹⁹

¹¹⁴ Article 7(3) Authorisation Directive.

¹¹⁵ Cf. CJEU 31 Januari 2008, C-380/05, [2008] ECR I-349 (Centro Europa 7), para. 116.

¹¹⁶ Court Rotterdam 2 October 2014, ECLI:NL:RBROT:2014:7917.

¹¹⁷ High Administrative Court of Trade and Industry 22 March 2006, ECLI:NL:CBB:2006:AW2516.

¹¹⁸ High Administrative Court of Trade and Industry 21 March 2007, ECLI:NL:CBB:2007:BA1095, para. 8.5.

¹¹⁹ High Administrative Court of Trade and Industry 30 May 2007, ECLI:NL:CBB:2007:BA5525.

7. Concluding Remarks

Considering two decades of experiences with ‘modern’ frequency management, the best characterization of Dutch telecommunications law is that of ‘work in progress’. The characterization of the Telecommunications Act as a framework act, delegating many rulemaking powers to the government and to individual ministers, applies in particular to Chapter 3 on frequencies, which has been elaborated upon in the Frequency Decree 2013 and several ministerial orders.

In order to draw more general lines on the allocations of limited rights, some general observations can be made. First of all, the level of detailedness of the Telecommunications Act has increased in the course of time. While the contents of Chapter 3 can be characterized as modest in 1998, distinguishing only three allocation procedures and hardly containing instruments for asymmetric treatment of applicants, frequency allocation has become more sophisticated. A recurring tendency is that new elements in allocation design are being introduced first *ad hoc* in inferior legislation, after which these elements find their way upwards to superior legislation. As a result, whereas the initial Telecommunications Act of 1998 did only contain the regular provisions on grant, amendment, withdrawal and transfer of licences, this act has been enriched with new legal figures, such as ‘allocation on demand’ and ‘obligatory transfer’.

Secondly, it follows from the legal structure of Dutch telecommunications law that the choice of the allocation procedure has important consequences for other legal instruments relevant for the allocation of scarce resources. In particular, this choice turns out to be the central pivoting point for other allocation decisions, such as the conditions to be attached to a licence, the possibility of renewal of licences, the imposition of a frequency cap, etcetera.

Thirdly, case-law has played an important additional role in the interpretation of legal provisions in the context of the allocation of radio frequencies. Where some legal provisions have been drafted in a quite neutral way, for example with regard to amendments of licences, case-law has developed additional rules limiting these amendment possibilities, exactly because the grant of licences for the use of frequency space amounts to an allocation of scarce resources.

The current legal framework can be expected to evolve further and further. In particular, the upcoming revision of the European telecommunications directives might have important consequences for Dutch frequency management. Besides, the expected new Memorandum on Frequency Policy in 2016 might give reason to stress other elements of allocation design, for example by blurring the distinction between mobile communications and (commercial) broadcasting.

6.3. THE ALLOCATION OF CO₂ PERMITS IN THE NETHERLANDS

“There is the sky, which is all men’s together.”
– Euripides

The sky belongs to all. However, this does not mean that everyone can just use ‘the sky’ as they see fit. There is broad scientific consensus on the direct impact that anthropogenic greenhouse gas emissions are having on our climate system. The same scientific consensus says that the risk of dangerous and possibly catastrophic changes occurring in the global environment increases dramatically if average global temperatures rise by 2° Celsius from pre-industrial era temperatures.¹

These warnings from the scientific community have prompted the world to make global arrangements to counter climate change. The key tool at the European level for achieving the goals underlying these arrangements is the EU emissions trading system (hereinafter: the ‘ETS’). The installations falling within the scope of the ETS² are required to monitor their greenhouse gas emissions and to surrender so-called ‘emission allowances’ to cover those emissions. Emission allowances are scarce (a ‘limited right’) now that the emission allowances available have been capped at the European level. Contrary to – for example – silver, gold or platinum, the scarcity of emission allowances is not due to natural limitations but ensues from limitations that the (European) legislature has imposed on companies’ use of the atmosphere. This has made emission allowances ‘artificially scarce allowances.’³

* Jan Reinier van Angeren and Laurens Westendorp are both attorneys-at-law at Stibbe, Amsterdam. Jan Reinier and Laurens specialise in administrative law and are members of the Amsterdam Bar Association.

¹ For a detailed overview of the scientific consensus see: the *Urgenda* decision rendered by the District Court of The Hague. The Hague District Court 24 June 2015, ECLI:NL:RBDHA:2015:7145.

² In this chapter on the implementation of ETS regulations in the Dutch legal system, we will consistently use the (European) term ‘installations’ and *not* ‘establishments’ (*inrichtingen*), which latter term is more common in Dutch legislation.

³ Or would it be more accurate to state that the limitation on emission allowances has, rather, resulted from legitimate ‘artificial’ reasons aimed at preventing an increase in the scarcity of a natural resource (*i.e.* clean air)? See: the contribution of P. Adriaanse et al., ‘The Allocation of Limited Rights by the Administration: A Quest for a General Legal Theory’, in: P. Adriaanse, F. van Ommeren, W. den Ouden and J. Wolswinkel, *Scarcity and the State I. The Allocation of Limited Rights by the Administration*, Intersentia, Antwerp 2016, p. 3.

The purpose of this chapter is to describe how the ETS regulations have been implemented within the Dutch legal system and to see in what way the distribution of scarce emission allowances is subject to (public-law) safeguards against favouritism and randomness. In order to keep the length of this chapter somewhat within bounds, we are confining ourselves in that analysis to the implementation of the ETS regulations concerning (ground-based) installations. In other words, we will not be considering the ETS regulations on aviation activities.⁴

This chapter is structured as follows. In Section 1, we will discuss the background, functioning and evolution of the ETS in general and highlight the most important measures taken by the Dutch legislature to implement the ETS regulations. In Sections 2 and 3, we will go into this implementation in more detail. In Section 2, we will discuss how the installations falling within the scope of the ETS can obtain emission allowances under Dutch law. In Section 3, we will discuss how emission allowances, once obtained, can be used or extinguished pursuant to Dutch law. In both chapters, we will discuss the public-law safeguards introduced by the Dutch legislature to give proper force and effect to the ETS regulations within the Dutch legal system. As an aside, we will discuss – for the sake of completeness – two examples of sanctions that may be imposed in the event that an installation breaches the ETS regulations, and address the legal protection procedures available in respect of such an imposition of sanctions.⁵ Finally, in Section 4 we will present some concluding remarks.

1. Introduction

The ETS may be regarded as Europe's contribution to the realisation of arrangements made at the global level to curtail the emission of greenhouse gases. The foundations of these global arrangements were laid with the United Nations Framework Convention on Climate Change of 9 May 1992, adopted by the Council of the European Union (hereinafter: the 'Council') by decision of 15 December 1993.⁶ On 11 December 1997 the Kyoto Protocol, approved by Council Decision of 25 April 2002, was adopted to further specify the Framework Convention principles.⁷

Article 3(1) of the Kyoto Protocol is a key provision within the global climate change arrangements. Briefly put, this paragraph provides that the parties to the Protocol are

⁴ In that respect, see: Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community: *OJ EU* 2009, L 8.

⁵ After all, the preventive effect of sanctions that may be imposed due to a breach of ETS regulations also warrants the 'fair functioning' of the system of emission allowance distribution.

⁶ Council Decision 94/69/EC of 15 December 1993 concerning the conclusion of the United Nations Framework Convention on Climate Change: *OJ EU* 1994, L 33.

⁷ Council Decision 2002/358/EC of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder: *OJ EU* 2002, L 130.

required to ensure that in the period from 2008 to 2012 greenhouse gas emissions are reduced to below the emissions of the reference year 1990. Pursuant to Annex B to the Kyoto Protocol, the European Union has undertaken to reduce emissions by 8%.⁸

During the climate change conference in Doha (December 2012), the parties to the Kyoto Protocol adopted the Doha Amendment establishing the second commitment period, running from 1 January 2013 to 31 December 2020. The Doha Amendment includes – among other things – an amendment to Annex B to the Kyoto Protocol. The Council approved the Doha Amendment by decision of 13 July 2015.⁹ The European Union has committed itself to a reduction target of 20% in 2020 compared to 1990 emission levels.¹⁰

The ETS, set up with Directive 2003/87/EC,¹¹ is the fundamental pillar in the European Union's policy to comply with the obligations the EU has undertaken based on the Kyoto Protocol. As a lengthy explanation of the functioning of the ETS would fall outside the ambit of this report about the Netherlands, a concise description will suffice here. Two elements are of vital importance within the functioning of the ETS: emissions and emission allowances. 'Emission' is understood to mean the actual release of a greenhouse gas, while 'emission allowance' refers to the transferable right to emit one tonne of carbon dioxide equivalent into the atmosphere.¹² Installations subject to the ETS must monitor their emissions and annually surrender a number of emission allowances sufficient to cover the emissions they caused in that year. As we will explain later on, there are three ways in which installations can obtain the emission allowances they need, specifically: (i) free allocation of emission allowances, (ii) acquisition of emission allowances at auctions

⁸ Although the Netherlands is also a signatory to the Framework Convention and the Kyoto Protocol and has its own obligation to reduce emissions (8%), the Member States of the European Union have agreed to jointly meet their obligations concerning the reduction of anthropogenic greenhouse gas emissions, as follows from Article 2 of Decision 2002/358/EC (mentioned in the previous footnote). Article 4(1) of the Kyoto Protocol offers a basis for this joint compliance with the reduction obligation.

⁹ Council Decision (EU) 2015/1339 of 13 July 2015 on the conclusion, on behalf of the European Union, of the Doha Amendment to the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder: *OJ EU* 2015, L 207.

¹⁰ From 30 November to 11 December 2015, inclusive, Paris has hosted the most recent annual United Nations climate change conference. The conference negotiated the Paris Agreement, a new global agreement on the reduction of climate change which will become legally binding when at least 55 countries accounting in total for at least 55% of the global greenhouse gas emissions will have adopted it within their own legal system (Article 21(1) of the Paris Agreement). The Paris Agreement is available at: <unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf> (accessed on 4 January 2016). For a more detailed description of the United Nations conferences on climate change, please refer to the Urgenda decision cited in footnote 2.

¹¹ 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: *OJ EU* 2003, L 275. The authors note that Directive 2003/87/EC has been amended several times (*OJ EU* 2004, L 338; *OJ EU* 2008, L 8; *OJ EU* 2009, L 87; *OJ EU* 2009, L 140). Every mention of Directive 2003/87/EC in the remainder of this chapter refers to the version of the Directive that includes all amendments.

¹² Article 3 of Directive 2003/87/EC.

and (iii) acquisition of emission allowances in the secondary market.¹³ Because installations have to buy additional emission allowances if they do not have enough allowances to cover their emissions and because, in the opposite situation, they can sell surplus emission allowances, installations are encouraged to introduce (cost-efficient) emission-reducing measures.¹⁴

The ETS is implemented in several trading periods. The first ETS trading period (2005–2007) comprised a three-year trial period in preparation for the second trading period (2008–2012), which coincided with the first commitment period of the Kyoto Protocol. Typical of the first two phases was that both the maximum number of emission allowances to be issued and the criteria to be applied in the allocation were determined at the national level based on a National Allocation Plan (hereinafter: the ‘NAP’) adopted by the Member State concerned and assessed by the European Commission (hereinafter: the ‘Commission’).¹⁵ As this chapter serves to describe how the European regulations for the third ETS trading period (2013–2020) have been implemented in the Netherlands, here we will merely refer to the general remarks made above regarding the first two trading periods.¹⁶

The third ETS trading period commenced on 1 January 2013. The functioning of the ETS was changed dramatically in the third trading period compared to the previous trading periods as a result of Directive 2009/29/EC amending Directive 2003/87/EC.¹⁷ The implications that Directive 2009/29/EC has had for the functioning of the ETS will be briefly touched upon in the remainder of this chapter. Here, the following remarks will suffice:

- (1) the maximum number of emission allowances to be issued is no longer determined by the individual Member States; there is now a single EU-wide cap that is decreased annually;¹⁸

¹³ Acquisition in the secondary market means: acquisition other than by means of free allocation and by auction bids. See: Article 3, opening words and at 11, of 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: *OJ EU* 2010, L 302.

¹⁴ Cf. *Parliamentary Documents II*, 2010–2011, 32 667, no. 3, pp. 6 – 7.

¹⁵ Special Report of the European Court of Auditors: ‘The integrity and implementation of the EU ETS’, p. 15, available at: <www.eca.europa.eu/nl/Pages/DocItem.aspx?did=31989> (accessed on 4 January 2016).

¹⁶ For a description of the implementation of the ETS regulations in the first two trading periods, we refer to the following publications: R. Teuben, *Verhandelbare emissierechten: Juridische aspecten van emissiehandel voor CO₂ in Nederland en de Europese Unie* (Kluwer 2005); J.R. van Angeren, ‘Bestuursrechtelijke aspecten van de CO₂-emissiehandel’, in S.T. Ramnewash-Oemrawsingh and P.T. de Kramer (ed.), *Klimaatverandering en rechtsontwikkeling anno 2005* (Boom Juridische uitgevers 2006); J.R. van Angeren, ‘Emissiehandel en schaarse publieke rechten’, in F.J. van Ommeren et al. (ed.), *Schaarse publieke rechten* (Boom Juridische uitgevers 2011).

¹⁷ 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: *OJ EU* 2009, L 140.

¹⁸ Article 9 of Directive 2003/87/EC.

- (ii) the free allocation of emission allowances is no longer effected on the basis of criteria laid down at the national level in the NAPs but on the basis of EU-wide harmonised allocation rules;¹⁹
- (iii) due to the progressive decrease of the quantity of emission allowances allocated free of charge, auctioning will become the default method for allocation of allowances in the third trading period;²⁰ and
- (iv) the scope of the ETS will be extended to include new sectors and new gases.²¹

In the Netherlands, the ETS regulations for the third trading period have been implemented mainly in Chapter 16 of the Environmental Management Act (*Wet milieubeheer*). When Directive 2003/87/EC took effect on 25 October 2003, the Dutch legislature chose to implement the provisions of that Directive in a new chapter of the Environmental Management Act.²² The Dutch legislature decided to include the provisions of the Directive in the Environmental Management Act rather than draft a separate statute because the Environmental Management Act is, in principle, the appropriate place for rules on environmental policy, according to the legislature.²³ As, in the legislature's view, the emissions trading provisions constituted a 'new tool' that could not be properly included in an existing chapter of the Environmental Management Act, it was decided to lay down the ETS regulations in a new Chapter 16 of that Act: 'Emission allowance trading'.²⁴

The Environmental Management Act has been amended several times since the implementation of Directive 2003/87/EC to reflect changes in European emissions trading regulations. One of the main amendments was introduced in the Act Revising the EC Directive on Greenhouse Gas Emission Allowances of 19 April 2012 (*Wet herziening EG-richtlijn handel in broeikasgasemissierechten*), which Act served to implement the provisions of Directive 2009/29/EC in the Environmental Management Act.²⁵

¹⁹ See in particular: Article 10a of Directive 2003/87/EC and Commission Decision 2011/278/EU of 27 April 2011 determining transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of Directive 2003/87/EC of the European Parliament and of the Council (*OJ EU* 2011, L 130).

²⁰ Article 10(1) in conjunction with Article 10a(11) of Directive 2003/87/EC.

²¹ For a more detailed description, see: *Parliamentary Documents II*, 2010–2011, 32 667, no. 3, pp. 35 – 36. Since the start of the third trading period, the ETS has covered around 50% of all greenhouse gas emissions in the European Union: COM(2012) 652 final, p. 3.

²² Directive 2003/87/EC has been implemented in the Dutch legal system by means of the Act Amending the Environmental Management Act for Purposes of Implementing Directive 2003/87/EC (*Wet tot wijziging van de Wet milieubeheer ten behoeve van de implementatie van Richtlijn 2003/87/EG*; hereinafter: the 'Implementation Act'): *Bulletin of Acts and Decrees* 2004, 551. This Act took effect on 20 October 2004 (*Bulletin of Acts and Decrees* 2004, 516).

²³ *Parliamentary Documents II*, 2003–2004, 29 565, no. 3, p. 12.

²⁴ *Ibid.*

²⁵ *Bulletin of Acts and Decrees* 2012, 195. Some other important amendments are: the Emission Allowance Trading Amendment Act (*Aanpassingswet handel in emissierechten*; *Bulletin of Acts and Decrees* 2006, 611), the Act Implementing the EC Regulation on Greenhouse Gas Emission Allowance Trading Registries (*Uitvoeringswet EG-verordening register handel in broeikasgasemissierechten*; *Bulletin of Acts*

Another set of rules that is key in the implementation of the ETS regulations in the Dutch legal system is the Emission Allowance Trading Regulation (*Regeling handel in emissierechten*; hereinafter: the ‘Regulation’), which took effect on 1 January 2013.²⁶ The Regulation further details the emissions trading provisions of the Environmental Management Act, for example by setting rules with regard to the full or partial termination of an installation’s operations and rules concerning emissions data reporting and accountability. The Regulation has greatly simplified matters compared to the situation prior to 1 January 2013 by combining a number of ministerial regulations that have been adopted over the years with a view to the system for greenhouse gas emission allowance trading.²⁷ In order to conclude this enumeration of Dutch measures introduced to implement the ETS regulations, it is also necessary to mention the Emission Allowance Trading Decree (*Besluit handel in emissierechten*), which includes some provisions that are important for the scope of Chapter 16 of the Environmental Management Act.²⁸

2. Acquisition of Emission Allowances

In this section of our chapter on how the ETS regulations have been implemented in the Dutch legal system, we will describe how the installations falling within the scope of the ETS can obtain emission allowances under Dutch law. To this end we will successively discuss the acquisition of emission allowances by means of free allocation (2.1), at auctions (2.2) and, finally, in the secondary market (2.3).

2.1. Acquisition of Emission Allowances by Means of Free Allocation

The introduction to this chapter already noted that the auctioning of emission allowances is to be regarded as the primary method of allowance distribution in the third ETS

and Decrees 2007, 90), the Emission Allowance Trading (Aviation) Act (Wet handel in emissierechten luchtvaart; Bulletin of Acts and Decrees 2010, 61) and the Act of 28 March 2013 Amending the Environmental Management Act and the Economic Offences Act (Wet van 28 maart 2013 tot wijziging van de Wet milieubeheer en de Wet op de economische delicten; Bulletin of Acts and Decrees 2013, 130).

²⁶ *Government Gazette 2012, 25395 (most recently amended by Government Gazette 2015, 20416).*

²⁷ These are: the Regulation on the Appointment of an Auctioneer of Greenhouse Gas Emission Allowances (*Regeling aanwijzing veiler broeikasgasemissierechten; Government Gazette 2012, 11952*), the Regulation on the Interpretation of Aviation Activities Subject to Emission Allowance Trading (*Regeling interpretatie luchtvaartactiviteiten handel in emissierechten; Government Gazette 2010, 2547*), the Regulation on Monitoring Emission Allowance Trading (*Regeling monitoring handel in emissierechten; Government Gazette 2004, 250*) and the Regulation on Emission Allowance Trading Registries (*Regeling register handel in emissierechten; Government Gazette 2011, 20064*). Further, by amendment of the Regulation of 22 October 2013 (*Government Gazette 2013, 28862*), the Regulation on Permission to Participate in Kyoto Project Activities (*Regeling instemming deelname aan Kyoto-projectactiviteiten; Government Gazette 2006, 79*) and the Regulation Amending the Regulation on Permission to Participate in Kyoto Project Activities (Change of Permission Requirements for Hydroelectric Project Activities) (*Wijzigingsregeling Regeling instemming deelname aan Kyoto-projectactiviteiten (aanpassing instemmingsvereisten hydro-elektrische projectactiviteiten); Government Gazette 2009, 17195*) were incorporated in the Regulation.

²⁸ *Government Gazette 2004, 737 (most recently amended by Government Gazette 2015, 229).*

trading period. In accordance with Article 10(1) of Directive 2003/87/EC, Article 16.23(1) of the Environmental Management Act therefore provides that “greenhouse gas emission allowances that are not allocated free of charge in accordance with this paragraph are to be auctioned”. The manner in which emission allowances are allocated free of charge under Dutch law is regulated in Section 16.2.1.3 of the Environmental Management Act.

Article 16.24 of the Environmental Management Act contains the basis for the free allocation of emission allowances. Free allowance allocation is effected on the basis of a National Allocation Decision (hereinafter: the ‘NAD’), taken *ex officio* by the Minister of Infrastructure and the Environment (hereinafter: the ‘Minister’).²⁹ The NAD is a decision as referred to in Article 1:3(1) of the General Administrative Law Act (*Algemene wet bestuursrecht*), which means that legal protection can be sought against such decisions under administrative law.³⁰

Article 16.30(1) of the Environmental Management Act provides that the preparations for the NAD are subject to Part 3.4 of the General Administrative Law Act: the so-called ‘uniform public preparation procedure’ (hereinafter: the ‘UPPP’). Contrary to the ‘regular decision-making procedure’ – the administrative body taking a decision and interested parties then (usually) having the option to have recourse to legal remedies against a ‘final’ decision – the UPPP first makes a *draft* decision available for inspection. Under Article 3:15(1) of the General Administrative Law Act, interested parties are given an opportunity to present their views on the draft. As regards the NAD, all people – not just interested parties – may submit views.³¹ This approach is conducive to a careful weighing of interests during the UPPP³² as all interests that might be affected by the government action are identified before a final decision is made. Article 16.30(3) of the Environmental Management Act provides that the Minister is required to adopt the NAD within a period of 12 weeks once the draft decision has been made available for inspection. As the period for submitting views is 6 weeks,³³ the Minister likewise has a 6-week period in which to make a decision.

²⁹ Article 16.24(1), Environmental Management Act. In the first two ETS trading periods, the NAD was based on a national allocation plan containing rules for the free allocation of emission allowances. In view of the policy choices that had to be made in that regard, the power to adopt the allocation plan and the NAD in the first two trading periods was vested in the Minister of Economic Affairs and the Minister of Housing, Spatial Planning and the Environment jointly. As NAD adoption in the third trading period had practically become a ‘circumscribed power’ due to the harmonised allocation rules of Decision 2011/278/EU, the legislature no longer deemed it necessary to vest this power in two ministers. The circumscribed nature of this power ensues from the fact that free allocation must take place in accordance with the implementing measures adopted by the Commission pursuant to Article 10a(1) of Directive 2003/87/EC. This ensues from Article 16.24(4) and Article 16.25 of the Environmental Management Act. Cf. *Parliamentary Documents II*, 2010–2011, 32 667, no. 3, pp. 22 – 23. *Parliamentary Documents II*, 2010–2011, 32 667, no. 3, p. 23.

³⁰ Article 16.30(2), Environmental Management Act. See also: Article 3:15(2), General Administrative Law Act.

³² Cf. Part 3.2 of the General Administrative Law Act.

³³ Article 3:16(1), General Administrative Law Act.

On 24 January 2012, notice was given in the Government Gazette that the draft NAD for the third trading period had been made available for inspection.³⁴ In accordance with Article 16.30(4) of the Environmental Management Act,³⁵ notice of the *final* NAD was given in the Government Gazette (on 4 July 2012) and the NAD was submitted to the Commission for assessment.³⁶ As the NAD is a decision made with application of the UPPP, interested parties cannot submit an administrative objection (*bezwaarschrift*) to the NAD, but do have the option of directly appealing the NAD to the administrative court.³⁷ In derogation of the main rule of the General Administrative Law Act that decisions may be appealed before two judicial bodies, the NAD may be appealed at the first and only instance before the Administrative Jurisdiction Division of the Council of State (hereinafter: the ‘Division’).³⁸

As noted above, the final NAD was submitted to the Commission for assessment.³⁹ As the Commission still had to approve the NAD and might set a correction factor pursuant to Article 10a(5) of Directive 2003/87/EC, which the Member States would then have to incorporate in their respective NADs,⁴⁰ no legal protection could be sought against the NAD of 2 July 2012 (for the time being).⁴¹ In that regard, the legislature noted that “*there is little use in conducting national legal protection procedures as long as there is no clarity regarding the results of the Commission’s scrutiny*”.⁴² As a result of this scrutiny by the Commission, the Netherlands had to recalculate the allocation for one installation and had to apply a uniform correction factor to the NAD because the European cap for free allocation of greenhouse gas emission allowances had been exceeded.⁴³ The NAD was

³⁴ *Government Gazette* 2012, 202. All this in accordance with Article 3:12(2), General Administrative Law Act.

³⁵ This in derogation of Article 3:41(1), General Administrative Law Act, under which the NAD should have been sent to the individual installations.

³⁶ *Government Gazette* 2012, 13404.

³⁷ Article 7:1(1), opening words and at d, General Administrative Law Act.

³⁸ Article 8:6(1), General Administrative Law Act in conjunction with Article 2 of Annex 2 to the General Administrative Law Act.

³⁹ In accordance with Article 11(1) of Directive 2003/87/EC. Cf. Article 16.30(4), Environmental Management Act.

⁴⁰ Article 10(9) of Decision 2011/278/EU.

⁴¹ Article 20.1(3) of the Environmental Management Act provides that the period in which an appeal may be lodged against the NAD commences at the time that – briefly put – an announcement is published in the Government Gazette of an NAD amended following the Commission’s scrutiny (Article 16.30a(2), General Administrative Law Act) or at the time that notice is given in the Government Gazette of the fact that the NAD need not be amended following the Commission’s scrutiny (Article 16.30a(1), General Administrative Law Act).

⁴² *Parliamentary Documents II*, 2010–2011, 32 667, no. 3, p. 30.

⁴³ For the latter, see: Commission Decision 2013/448/EU of 5 September 2013 concerning national implementation measures for the transitional free allocation of greenhouse gas emission allowances in accordance with Article 11(3) of Directive 2003/87/EC of the European Parliament and of the Council: *OJ EU* 2013, L 240.

adopted with amendments following the aforementioned changes,⁴⁴ notice of which was given in the Government Gazette on 30 October 2013.⁴⁵

No fewer than twenty appellants took an appeal to the Division against the NAD adopted in amended form on 29 October 2013.⁴⁶ It is interesting to note in this context that the Dutch legislature has taken a few measures to ensure that clarity is obtained on the lawfulness of the NAD as soon as possible. Particularly important here is Article 20.1(1) of the Environmental Management Act, in which the legislature provides that the Division is required to render a decision on the appeals lodged against the NAD within a period of 40 weeks from the end of the appeal period.⁴⁷

On 11 June 2014, the Division rendered a decision in the appeal proceedings against the NAD.⁴⁸ The Division has decided to suspend the handling of this case and stay every decision until the Court of Justice has expressed an opinion on the six questions that the Division has referred to the Court of Justice for a preliminary ruling regarding the validity of Decision 2013/448/EU, which determines the uniform correction factor.⁴⁹ For

⁴⁴ This amendment decision was *not* subject to the procedure of Part 3.4 of the General Administrative Law Act. This follows from Article 16.30a(3) of the Environmental Management Act, which states that Article 16.30(1) of the Environmental Management Act (among other Articles) is not applicable with regard to the amendment decision.

⁴⁵ *Government Gazette* 2013, 30507.

⁴⁶ The amended NAD is available at <www.emissionsauthority.nl/mediatheek/emissierechten/toewijzing-emissierechten/toewijzingsbesluiten> (accessed on 4 January 2016).

⁴⁷ For the sake of completeness, we note here that the legislature – in the interest of speedy, final dispute resolution – prescribed the mandatory application of the so-called ‘administrative loop’ in the NAD procedure (Article 20.5a(2), Environmental Management Act). The ‘administrative loop’ has been codified in the General Administrative Law Act since 1 January 2010 in order to promote final dispute resolution in administrative law. If an administrative court intends to set aside a decision on account of – for example – a formal defect, the administrative court may render an interlocutory decision giving the administrative body concerned an opportunity to remedy this defect (Article 8:51a(1) in conjunction with Article 8:80a(1), General Administrative Law Act). This ensures that the decision-making process need not be conducted all over again on formal grounds. As stated, the Dutch legislature’s intention with Article 20.5a(2) of the Environmental Management Act was to make the application of the administrative loop mandatory in the NAD procedure. In that respect, the legislature determined that if the Division were to decide to apply the administrative loop, it must do so by means of an interlocutory decision rendered within 18 weeks of the end of the period in which the NAD may be appealed (Article 20.5a(2), Environmental Management Act). Moreover, the legislature prescribed that, in that event, the Minister would be required to make an amendment decision within 10 weeks of such an interlocutory decision (Article 16.31(2), Environmental Management Act). The period in which an appeal may be lodged against the amendment decision is four weeks, in derogation of the main rule of Article 6:7 of the General Administrative Law Act (Article 20.1(3), Environmental Management Act). The legislature also set all of the aforementioned periods in view of Article 20.1(1) of the Environmental Management Act: even if the administrative loop is applied, the Division is required to render a (final) decision within a period of 40 weeks from the end of the (original) appeal period.

⁴⁸ Administrative Jurisdiction Division 11 June 2014, ECLI:NL:RVS:2014:2130.

⁴⁹ These proceedings are pending under case number C-295/14. At the time that this book went to press, an oral hearing had already taken place (3 September 2015) and Advocate General Kokott had already

the time being, therefore, the appellants that have litigated against the NAD have not been given any clarity as yet regarding the final quantity of emission allowances that will be allocated to them free of charge.⁵⁰

Finally, we note for the sake of completeness that the actual provision of emission allowances based on the NAD (the ‘payment’) is only the execution of that allocation decision, which means that this provision is *not* a decision within the meaning of the General Administrative Law Act. As a result, legal protection can be sought from the civil court for disputes arising in the context of the issue of the actual ‘payment’ of emission allowances.⁵¹

Dutch installations identified as so-called ‘new entrants’⁵² – which, as such, did not obtain any emission allowances allocated free of charge on the basis of the NAD – can still ask the Minister to allocate free emission allowances to them pursuant to Article 16.32(1) of the Environmental Management Act. Further rules on how such a request is to be submitted are laid down in Article 42 of the Regulation. New entrants may be eligible for allowance allocation from a central, Europe-wide ‘new entrants reserve’ that is maintained pursuant to Article 10a(7) of Directive 2003/87/EC. In the negotiations about Directive 2003/87/EC, the Netherlands advocated a single European new entrants reserve rather than separate, national reserves as maintained in the first and second trading periods.⁵³

Article 16.32(2) of the Environmental Management Act declares some provisions concerning the NAD applicable by analogy to individual allocation decisions for new entrants. However, Article 16.30(1) of the Environmental Management Act has *not* been declared applicable by analogy, which means that an individual allocation decision are not prepared using the UPPP but by applying the regular procedure of Chapter 4 of the General Administrative Law Act. In other words, an interested party must first file an objection to a decision taken pursuant to Article 16.32(1) of the General Administrative Law Act before it may file an appeal with the administrative court.⁵⁴ Individual allocation decisions, too, must be submitted to and assessed by the Commission.⁵⁵ By analogy with the NAD, the period for filing an objection against an individual allocation

delivered an opinion (12 November 2015, ECLI:EU:C:2015:754) but the Court of Justice had not yet rendered a decision.

⁵⁰ For the sake of completeness, it is noted that the quantity of emission allowances *has* been conclusively determined for interested parties that have *not* lodged an appeal against the NAD. Based on the doctrine of formal legal force applicable in Dutch administrative law, for such parties the NAD is deemed to be lawful both in terms of its content and as regards the manner of its creation.

⁵¹ *Parliamentary Documents II*, 2010–2011, 32 667, no. 3, p. 34. It is also noted here that no legal action was taken regarding the actual provision of emission allowances in the Netherlands during the first and second ETS trading periods.

⁵² For a definition, see: Article 3, opening words and at h, of Directive 2003/87/EC.

⁵³ *Parliamentary Documents II*, 2010–2011, 32 667, no. 3, p. 25.

⁵⁴ Article 8:1 in conjunction with Article 7:1, General Administrative Law Act.

⁵⁵ Article 16.32(3), Environmental Management Act.

decision only commences when the interested party has been informed of the fact that the decision need not be amended or when the Minister has adopted the decision in amended form with due observance of the Commission's directions.⁵⁶ If an objection procedure does not have the effect intended by an interested party, the decision on the objection may be appealed before the Division at the first and only instance.⁵⁷

2.2. *Acquisition of Emission Allowances at an Auction*

In accordance with Article 10(1) of Directive 2003/87/EC, Article 16.23(1) of the Environmental Management Act provides that emission allowances that are not allocated free of charge are to be auctioned.⁵⁸ The purchase of emission allowances on an auction platform is the second method by which Dutch installations subject to the ETS may obtain emission allowances.

Article 10(4) of Directive 2003/87/EC provides that the Commission is required to adopt a Regulation on timing, administration and other aspects of auctioning to ensure that it is conducted in an open, transparent, harmonised and non-discriminatory manner. On 12 November 2010, the Commission adopted Regulation (EU) No 1031/2010 (hereinafter: the 'Auctioning Regulation') in order to implement that paragraph.⁵⁹ As a Regulation is binding and directly applicable in the Member States in every respect, only a few national measures were required to implement the Auctioning Regulation in the Netherlands.⁶⁰

An extensive description of the content of the (European) Auctioning Regulation and the extent to which it contains safeguards to prevent nepotism and favouritism in the distribution of scarce allowances would be beyond the ambit of this chapter about the Netherlands. Nevertheless, we note the following. Firstly, as noted above, the Union legislature has instructed the Commission to ensure in the Auctioning Regulation that auctions are conducted in an open, transparent and non-discriminatory manner. To that extent, safeguards against favouritism and nepotism have been secured by means of the Auctioning Regulation. Secondly, Article 35(1) of the Auctioning Regulation provides that – briefly put – auctions may only be conducted by a regulated market appointed in accordance with the Markets in Financial Instruments Directive (hereinafter: the 'MiFID Directive').⁶¹ Under the provisions of Chapter VII of the Auctioning Regulation, the 'European Energy Exchange AG' in Leipzig (hereinafter: the 'EEX') has been appointed

⁵⁶ Article 20.1(3) in conjunction with Article 16.32(4) and (5), Environmental Management Act.

⁵⁷ Article 8:6(1), General Administrative Law Act in conjunction with Article 2 of Annex 2 to the General Administrative Law Act.

⁵⁸ The number of emission allowances that the Netherlands may auction follows from Article 10(1) and (2) of Directive 2003/87/EC.

⁵⁹ See: footnote 13.

⁶⁰ *Parliamentary Documents II*, 2010–2011, 32 667, no. 3, p. 8.

⁶¹ Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/

as the common auction platform following a procurement procedure.⁶² Title III of the MiFID Directive provides safeguards for trade on regulated markets. Under Article 36(2) of that Directive, the (in the case of the EEX: German) competent authority is obliged to supervise the operation of a regulated market. Said provisions, too, provide those participating in allowance auctions with safeguards against favouritism and nepotism in the distribution of scarce emission allowances.

As stated, the concept of auctioning emission allowances has prompted few implementation measures in the Netherlands. Pursuant to Article 22(1) of the Auctioning Regulation, however, the Netherlands was required to appoint an auctioneer. The auctioneer appointed by a Member State is responsible for auctioning the emission allowances allocated to that Member State.⁶³ In the Netherlands, this provision of the Auctioning Regulation has been implemented in Article 16.23(2) of the Environmental Management Act. Pursuant to this paragraph, rules may be set by ministerial regulation for the purpose of implementing the Auctioning Regulation.⁶⁴ On 18 June 2012, the Dutch government adopted the Regulation on the Appointment of an Auctioneer of Greenhouse Gas Emission Allowances pursuant to Article 16.23(2) of the Environmental Management Act.⁶⁵ The regulation appointed the board of the Dutch Emissions Authority (*Nederlandse Emissieautoriteit*) as the auctioneer for the Dutch emission allowances, because the Authority “holds an independent position with statutory duties in the area of emissions trading [...].] operates as an independent administrative body and [...] has over six years’ experience with the implementation of emissions trading systems and the emission allowance registry.”⁶⁶

Finally, we note that Article 16.34 of the Environmental Management Act provides that actions contrary to Articles 37 and 42 of the Auctioning Regulation are prohibited. Said provisions are aimed at countering market abuse. Under Article 18.16a(1) of the Environmental Management Act, the board of the Dutch Emissions Authority has the discretionary power to impose an administrative penalty in the event of a breach of Article 16.34. Article 18.16g(1) of the Environmental Management Act in conjunction with Article 5:53 of the General Administrative Law Act provides that a penalty report must be drawn up before an administrative penalty may be imposed. In addition, the (alleged) infringer must always be given an opportunity to present its views about the

EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC: *OJ EU* 2004, L 145.

⁶² Contract award notice 2012/S 173–285290, available at: <ted.europa.eu/udl?uri=TED:NOTICE:285290–2012:TEXT:NL:HTML> (accessed on 4 January 2016).

⁶³ Article 3, opening words and at 20, of the Auctioning Regulation.

⁶⁴ Article 16.33(2) of the Environmental Management Act offers a basis for setting further rules for the auctioning of emission allowances from the new entrants reserve.

⁶⁵ *Government Gazette* 2012, 11952, p. 1. See now: Article 31 of the Regulation, which includes the appointment of the auctioneer.

⁶⁶ *Government Gazette* 2012, 11952, p. 2.

intention to impose the penalty.⁶⁷ Based on the main rule of the General Administrative Law Act, any administrative penalty to be imposed may, after an administrative objections procedure (*bezwaarprocedure*), be opposed before the administrative court at two instances: the decision rendered after the administrative objections procedure may be challenged before the District Court of the Hague and the District Court's judgment may be appealed before the Division.⁶⁸

2.3. *Acquisition of Emission Allowances through Secondary Market Trading*

The third and last way in which an installation subject to the ETS may obtain emission allowances is the option of acquiring allowances in the secondary market. After all, Article 1.1 of the Environmental Management Act explicitly states that emission allowances are transferable.⁶⁹ In the parliamentary history to the Environmental Management Act, the legislature noted that the fact that an emission allowance is transferable (and, moreover, can be expressed in monetary terms) entails that an emission allowance is a property right as referred to in Article 3:6 of the Dutch Civil Code (*Burgerlijk Wetboek*).⁷⁰ This also means that an emission allowance is property as referred to in Article 3:1 of the Dutch Civil Code.

One may be right to expect that, once emission allowances have been acquired in the primary market, the marketability of such allowances in the secondary market is solely governed by the rules of private law. However, with a view to a proper functioning of the emissions trading system, the Dutch legislature wished to add some public-law safeguards to the transferability of emission allowances under private law. These public-law safeguards sometimes infringe upon the general rules of private law.

Article 16.40(1) of the Environmental Management Act limits the transferability of emission allowances. Emission allowances can only be transferred between persons having an account in their name in the Union Registry for emissions trading as referred to in Regulation (EU) No 389/2013 (hereinafter: the 'Registry Regulation').⁷¹ Another limitation of the option of allowance transfer ensues directly from Article 36(1) in

⁶⁷ This follows from Article 18.16g(1) of the Environmental Management Act in conjunction with Article 5:53(3) of the General Administrative Law Act.

⁶⁸ The exclusive competence at first instance of the District Court of the Hague ensues from Article 8:7(3) of the General Administrative Law Act in conjunction with Article 6 of Annex 2 to the General Administrative Law Act.

⁶⁹ Article 12(1) of Directive 2003/87/EC obliges Member States to ensure that national law allows the transfer of emission allowances. Under Dutch law, it was necessary to regulate explicitly that emission allowances can be transferred, since Article 3:83(3) of the Dutch Civil Code provides that rights other than rights of ownership, restricted rights or rights of claim are only transferable if they are so by law.

⁷⁰ *Parliamentary Documents II*, 2003–2004, 29 565, no. 3, p. 71.

⁷¹ Commission Regulation (EU) No 389/2013 of 2 May 2013 establishing a Union Registry pursuant to Directive 2003/87/EC of the European Parliament and of the Council, Decisions No 280/2004/EC and No 406/2009/EC of the European Parliament and of the Council and repealing Commission Regulations (EU) No 920/2010 and No 1193/2011: *OJ EU* 2013, L 122.

conjunction with Article 10(2) of the Registry Regulation: if, on 1 April of the year [X+1], no verified emissions have been entered for an installation in the Union Registry for the year [X], this installation's account will be 'blocked' so that no more allowances can be transferred. After all, allowance transfer requires the deletion of an emission allowance from the alienator's account and its addition to the acquirer's account, according to Article 16.41(1) of the Environmental Management Act.

This is how Article 16.41(1) of the Environmental Management Act further details the (general) requirements of Article 3:84(1) of the Dutch Civil Code in case emission allowances are transferred. Article 3:84(1) of the Dutch Civil Code provides that the transfer of property requires delivery pursuant to a valid title, effected by the person who is authorised to dispose of the property. Chapter 16 of the Environmental Management Act specifies the act of delivery in case of a transfer of emission allowances: the valid transfer of an emission allowance requires that deletion and addition in the Union Registry have been completed. If this registration has not taken place or has not taken place in full, there has been no valid delivery and no transfer has been effected.⁷² As the delivery under private law now coincides with its recognition under public law by entry in the Union Registry, a link has been created between reality under administrative law and reality under private law.⁷³

Article 16.40(3) of the Environmental Management Act provides that emission allowances may also pass by means other than transfer. Examples are a passing by universal title – for instance – pursuant to inheritance law or by a merger. Article 16.40(3) declares the first two paragraphs applicable by analogy to a passing other than by transfer. This means that, in the event of a merger, it is not possible to have emission allowances pass to a legal entity that has no account in the Union Registry.⁷⁴ Since, however, anyone may open a Union Registry account, this will not be much of a problem in practice. Article 16.41(2) of the Environmental Management Act declares the special delivery requirements for emission allowances applicable by analogy to a passing other than by transfer. It is true that, under Dutch law, an allowance that passes by universal title need not be delivered in order to complete the transfer, but Article 16.41(3) of the Environmental Management Act provides that the transfer does not have effect in respect of third parties until it has been registered in the Union Registry.

According to the legislature, the fact that the transfer of an emission allowance requires entry in the Union Registry does not mean that an emission allowance is registered property as referred to in Article 3:10 of the Dutch Civil Code.⁷⁵ This Article provides that registered property is property the transfer of which requires entry in the appropriate public registers. Article 3:16(2) of the Dutch Civil Code provides that the law regulates

⁷² *Parliamentary Documents II*, 2003–2004, 29 565, no. 3, p. 72.

⁷³ *Parliamentary Documents II*, 2003–2004, 29 565, no. 3 p. 112.

⁷⁴ *Ibid.*

⁷⁵ *Parliamentary Documents II*, 2003–2004, 29 565, no. 3, p. 72.

which registers will be regarded as public registers. Article 8(1) of the Land Registry Act (*Kadasterwet*) – which Article implements Article 3:16(2) of the Dutch Civil Code – regulates which registers are public registers. As the Union Registry is not listed in Article 8 of the Land Registry Act,⁷⁶ an emission allowance is *not* registered property within the meaning of Article 3:10 of the Dutch Civil Code.

Finally, Article 16.42 of the Environmental Management Act, which – among other things – regulates buyer protection, needs to be discussed here. Article 16.42(1) provides that nullity or annulment of the agreement in which the allowance is alienated has *no* consequences for the validity of the transfer after the transfer has been completed. This constitutes a breach of the causal system of Article 3:84 of the Dutch Civil Code. Without a provision such as Article 16.42(1), annulment of a contract of sale would lead to the relevant transfer losing a valid title with retroactive effect. The emission allowances delivered pursuant to that contract would then revert to the assets of the original alienator. The legislature has given two reasons for the departure from the causal system of Article 3:84 of the Dutch Civil Code. Firstly, the legislature deemed it important that the buyer of emission allowances must be certain that he can actually use these emission allowances without potentially facing an unforeseen shortage of emission allowances due to annulment of the contract of sale in the future. Secondly, the legislature created Article 16.42(1) of the Environmental Management Act to make sure that the Union Registry accurately reflects the actual distribution of emission allowances at all times.⁷⁷

Annulment of the contract of sale is, however, not made impossible by Article 16.42(1) of the Environmental Management Act; the paragraph merely precludes attaching property-law consequences to the annulment and does not affect any claim for (alternative) damages coming into being on the part of the alienator.⁷⁸ Article 16.42(1) also provides that if the alienator does not have the power of disposition, this will have *no* consequences for the acquirer's claims under property law.⁷⁹ The alienator has lost its emission allowances and is only left with a claim for damages under the law of obligations.⁸⁰

Article 16.42(3), (4) and (5) of the Environmental Management Act provide that no rights of pledge or usufruct can be created on emission allowances and that emission allowances cannot be seized. The legislature considered this undesirable because

⁷⁶ The legislature notes in this respect that the function of public registers is to provide information to parties and third parties about the property-law status of an allowance. The function of the Union Registry, on the other hand, is to facilitate the supervision of emissions trading. *Parliamentary Documents II*, 2003–2004, 29 565, no. 3, p. 72.

⁷⁷ *Parliamentary Documents II*, 2003–2004, 29 565, no. 3, p. 73 and p. 112.

⁷⁸ *Parliamentary Documents II*, 2003–2004, 29 565, no. 3 p. 112.

⁷⁹ Just like the lack of a valid title, a transfer by a person who does not have the power of disposition leads to the conclusion that there has been *no* valid transfer within the causal system of Article 3:84 of the Dutch Civil Code.

⁸⁰ *Parliamentary Documents II*, 2005–2006, 30 694, no. 3, p. 16.

emission allowances are hardly a suitable recourse asset due to their temporary nature and because, in view of their value, emission allowances are not material assets compared to the rest of the debtor's assets. Furthermore, a practical problem would arise as regards the rights of pledge and usufruct. Article 3:98 of the Dutch Civil Code provides that, in principle, restricted rights are created in the same way as the property to which it relates is created. In the case of emission allowances, this would mean that rights of pledge and usufruct must be entered in the Union Registry. The Dutch legislature considered this undesirable.⁸¹

In conclusion of this section about how the Dutch legislature has placed the private-law transferability of emission allowances in a framework by means of public-law provisions, we would note the following. The parliamentary history reveals that all provisions of Chapter 16 of the Environmental Management Act that regulate the transferability of emission allowances under private law were regarded by the legislature as being of a mandatory nature.⁸² This entails that parties who conclude an agreement for the purchase or sale of emission allowances may *not* deviate from the provisions of Chapter 16 of the Environmental Management Act.

3. The Validity of Emission Allowances

According to Article 16.36(2) of the Environmental Management Act, the emission allowances to be surrendered by an installation subject to the ETS to cover its emissions are valid as from the date on which they have been issued in accordance with the Registry Regulation. Under Article 11(2) of Directive 2003/87/EC, emission allowances must be issued annually no later than 28 February. An emission allowance that has been issued does not remain valid in perpetuity. For the third ETS trading period, Article 16.36(1) of the Environmental Management Act provides that emission allowances issued on or after 1 January 2013 are valid for the trading period for which they have been issued.⁸³ This means that emission allowances issued in the third trading period can be used to cover emissions that have been caused between 1 January 2013 and 31 December 2020. Under Article 16.37(1) of the Environmental Management Act, the operator of an installation subject to the ETS must surrender a quantity of emission allowances before 1 May of the year [X+1] to cover its emissions from the year [X].⁸⁴ As emission allowances can thus be used up to and including 30 April 2021 to cover emissions for the year 2020, Article 13(2) of Directive 2003/87/EC provides that – briefly put – unused emission allowances are cancelled by the competent authority – in the Netherlands: the board of the Dutch Emissions Authority – four months after the end of the third trading period. The Dutch legislature did not deem it necessary to include a specific statutory basis for

⁸¹ *Parliamentary Documents II*, 2003–2004, 29 565, no. 3, p. 74.

⁸² *Parliamentary Documents II*, 2003–2004, 29 565, no. 7, p. 26.

⁸³ See: Article 13(1) of Directive 2003/87/EC, from which this also follows.

⁸⁴ With this paragraph, the Netherlands has implemented the obligation of Article 12(3) of Directive 2003/87/EC.

this cancellation because the relevant rules are included in the Registry Regulation, which applies directly to all Member States.⁸⁵

Installations that are subject to the ETS and that still have unused emission allowances at the end of the third trading period *are* compensated for the cancellation of their emission allowances; replacement emission allowances are allocated to them for the next trading period.⁸⁶ The Dutch version of Directive 2003/87/EC is ambiguous on this point. Article 13(2) of Directive 2003/87/EC provides that: “[d]e lidstaten [...] personen emissierechten [kunnen] verlenen voor de lopende periode ter vervanging van emissierechten die zij bezaten en welke krachtens de eerste alinea zijn geannuleerd.” The versions in other languages speak of an *obligation* to compensate installations in the next trading period for the cancellation of unused allowances.⁸⁷ The Dutch legislature has noted that the obligation to issue, and the terms for issuing, replacement allowances are laid down in the Registry Regulation, which means that there is no need to implement the relevant provisions in Dutch law.⁸⁸

Emission allowances may become ‘useless’ to emitters in two other ways. We distinguish (i) ‘loss of validity as a result of emissions cover’ and (ii) ‘loss of validity other than as a result of emissions cover’.⁸⁹ We will discuss this in more detail in the subsections below. We note here that one of the ways in which the operator of an installation may lose valid emission allowances other than by covering emissions is the option to sell its emission allowances in the secondary market. As we have already extensively discussed secondary market trading in the section above, we will disregard this manner of losing valid emission allowances here.

3.1. Loss of Validity as a Result of Emissions Cover

Article 16.37(1) of the Environmental Management Act provides that the operator of an installation subject to the ETS must surrender a quantity of emission allowances before 1 May of the year [X+1] to cover its emissions from the year [X]. In the parliamentary history, the Dutch legislature referred to this paragraph as ‘the key provision’ of emissions

⁸⁵ *Parliamentary Documents II*, 2010–2011, 32 667, no. 3, p. 50.

⁸⁶ Before the third trading period, the choice of whether or not to issue replacement emission allowances was made by the Member States themselves. In this regard, see: Article 13(2) of Directive 2003/87/EC (old).

⁸⁷ English version: “Member States shall issue allowances [...]”. French version: “Les États membres délivrent des quotas [...]”. German version: “Die Mitgliedstaaten vergeben Zertifikate [...]”. Emphasis added.

⁸⁸ *Parliamentary Documents II*, 2010–2011, 32 667, no. 3, p. 50.

⁸⁹ We have placed this description in quotation marks, because we realise that the second category of cases does not, strictly speaking, involve loss of validity. If, for example, an emitter sells surplus emission allowances in the secondary market, such emission allowances will not have lost their validity after that sale; all that has happened is that the seller no longer has those valid emission allowances at its disposal. For the readability of this part of the chapter, we have nevertheless opted to speak of ‘loss of validity’, even though, strictly speaking, this is not always true.

trading legislation.⁹⁰ Article 16.37(2) provides how the quantity of emission allowances to be surrendered is to be determined: this must be done on the basis of the information included in the Union Registry in accordance with the Registry Regulation.

According to Article 16.39 of the Environmental Management Act, if the operator of an installation subject to the ETS surrenders insufficient emission allowances in any given year, the number of emission allowances it is to surrender the next year will be increased *by operation of law* by the number of emission allowances it thus failed to surrender the year before.⁹¹ The Dutch legislature noted that this obligation ensues directly from the law, which means that no further decision-making by the board of the Dutch Emissions Authority is required for this.⁹² Consequently, *no* legal protection under administrative law can be sought against the increase in the number of emission allowances to be surrendered.

Article 16(1) of Directive 2003/87/EC requires that Member States lay down rules on penalties applicable to infringements of the national provisions adopted pursuant to the Directive. These penalties must be effective, proportionate and dissuasive. As regards the penalties that must be imposed in the event that insufficient emission allowances are surrendered, the Union legislature has specified these in more detail. Article 16(3) of Directive 2003/87/EC provides that, in such a case, a monetary penalty must be imposed. The amount of the penalty is also prescribed at the European level. The excess emissions penalty is € 100 for each tonne of carbon dioxide equivalent emitted for which no emission allowances have been surrendered.⁹³

The Dutch legislature codified the aforementioned obligation from Directive 2003/87/EC in Chapter 18 of the Environmental Management Act. Article 18.16a(2) of this Act provides that the board of the Dutch Emissions Authority imposes a penalty in the event that Article 16.37(1) of this Act is breached. The wording of Article 18.16a(2) shows that the imposition of an administrative penalty is *not* a discretionary power, as the obligation to impose a penalty ensues directly from Article 16 of Directive 2003/87/EC. For this reason, Article 18.16a(2) of the Environmental Management Act provides that Article 5:41 of the General Administrative Law Act – which provides that no administrative penalty is imposed if the infringer cannot be blamed for the infringement – does not apply.

⁹⁰ *Parliamentary Documents II*, 2003–2004, 29 565, no. 3 p. 111.

⁹¹ This implements Article 16(3), last sentence, of Directive 2003/87/EC.

⁹² *Parliamentary Documents II*, 2003–2004, 29 565, no. 3 p. 111.

⁹³ All this has been codified in Article 18.16e of the Environmental Management Act. Article 18.16e(2) of the Environmental Management Act declares Article 5:46(3) of the General Administrative Law Act to be inapplicable. The latter paragraph provides that if the amount of a penalty has been fixed in a statutory provision, an administrative body is bound to nevertheless impose a lower penalty if the infringer makes a convincing case that the penalty as fixed is excessive on account of special circumstances. The fact that the court and the administrative body are, in principle, *no* longer free to impose another penalty now that the amount of the penalty is fixed precisely was not considered contrary to Article 6 of the European Convention on Human Rights by the legislature. *Parliamentary Documents II*, 2003–2004, 29 565, no. 3 p. 123.

Incidentally, the legislature has noted in the parliamentary history that this does not detract from the requirement that all safeguards of Article 6 of the European Convention on Human Rights must be observed when the penalty is imposed.⁹⁴ Article 18.16a(4) of the Environmental Management Act furthermore clarifies that the imposition of a penalty does not release the operator of an installation subject to the ETS from the compensation obligation of Article 16.39 of this Act.⁹⁵

Article 18.16a(5) of the Environmental Management Act contains an additional sanction for breach of Article 16.37(1) of this Act, which is known as the '*naming and shaming*' sanction. This sanction, too, ensues directly from Directive 2003/87/EC.⁹⁶ Article 18.16k of the Environmental Management Act provides that the decision to impose an administrative penalty due to breach of Article 16.37(1) must also state the intention to include the infringer's name in the list referred to in Article 18.16p(1). The latter paragraph provides that, every year before 1 October, the board of the Dutch Emissions Authority is bound to prepare a list of persons who breached Article 16.37(1) of the Environmental Management Act and for whom the decision to impose an administrative penalty has become irrevocable. The list is published in the Government Gazette. Although the imposition of a penalty on the one hand and the inclusion of the infringer's name in the list of Article 18.16p of the Environmental Management Act on the other are procedurally connected, they nevertheless pertain to two *separate* decisions.⁹⁷ For an explanation of the legal protection that can be sought against sanctions that are imposed on account of (alleged) breach of Article 16.37(1) of the Environmental Management Act, we refer to what we wrote in Section 2.2 of this chapter on the legal protection in the event of (alleged) breach of Article 16.34 of this Act.

3.2. *Loss of Validity other than as a Result of Emissions Cover*

A major change effected by Directive 2009/29/EC is that in the third ETS trading period – unlike in the first two trading periods – it is possible to adjust the allocation of emission allowances to an installation during the trading period.⁹⁸ There may be various reasons for interim adjustments to the allocation. We will discuss here, in succession: adjustment on account of a change in the carbon leakage list (3.2.1), adjustment on account of the full or partial cessation of operations of the greenhouse gas installation or a significant capacity reduction of this installation (3.2.2) and adjustment on account of the provision of incorrect information or evident inaccuracies in the allocation decision (3.2.3). Section 3.2.4 will address the consequences that an adjustment of the allocation of emission allowances may have.

⁹⁴ *Parliamentary Documents II*, 2003–2004, 29 565, no. 3 p. 119.

⁹⁵ This follows directly from Article 16(3), last sentence, of Directive 2003/87/EC.

⁹⁶ Article 16(2) of Directive 2003/87/EC.

⁹⁷ *Parliamentary Documents II*, 2003–2004, 29 565, no. 3 p. 119.

⁹⁸ *Parliamentary Documents II*, 2010–2011, 32 667, no. 3, p. 16.

3.2.1. Change in the carbon leakage list

Emission allowances were allocated free of charge in the third ETS trading period on the basis of harmonised European benchmarks. However, not all installations subject to the ETS actually (fully) received the quantity of emission allowances to be allocated free of charge as calculated on the basis of the benchmarks. Pursuant to Article 10a(11) of Directive 2003/87/EC, in 2013 installations subject to the ETS received a quantity of emission allowances allocated free of charge that was equal to 80% of the quantity to which they would be entitled on the basis of the benchmark calculation. This percentage is reduced by equal steps every year, leaving only 30% free allocation for the year 2020. The Dutch legislature has codified this in Article 16.27(1) of the Environmental Management Act.

However, the above reduction does not apply to installations subject to the ETS in sectors or sub-sectors where the risk of *carbon leakage* is significant.⁹⁹ Consequently, Article 16.27(2) of the Environmental Management Act provides that such companies are allocated a quantity of emission allowances (for the entire trading period) that equals 100% of the quantity to which they are entitled on the basis of the benchmark calculation.¹⁰⁰

Article 10a(13) of Directive 2003/87/EC provides that the Commission may annually change the carbon leakage list and that, in any event, it will determine a new list every five years. It is conceivable that an installation subject to the ETS that was on the carbon leakage list when its emission allowances were allocated is no longer on the list at a later point in time, following a decision by the Commission pursuant to Article 10a(13) of Directive 2003/87/EC. Article 16.34a of the Environmental Management Act provides that, in such a case, the initial allocation decision must be amended to reduce the quantity of emission allowances allocated free of charge correspondingly. If the Minister intends to apply Article 16.34a of the Environmental Management Act, on the basis of Article 43(1) of the Regulation the board of the Dutch Emissions Authority may request that operators of installations provide data for the recalculation of the number of emission allowances to be allocated free of charge and that they do so within 13 weeks of receipt of that request. The data requested must be accompanied by a verification report.¹⁰¹

An adjustment of the carbon leakage list may lead to both (i) an amendment of the NAD and (ii) an amendment of an individual allocation decision. Dutch administrative law provides for what is known as the ‘*actus contrarius*’ principle. This principle entails that the rules of procedure applicable to the original decision also apply to decisions to withdraw or amend the original decision. This would mean that an amendment of the

⁹⁹ This is the case when there is a risk that installations will relocate their production to outside European Union borders, where they may ‘freely’ emit greenhouse gases.

¹⁰⁰ See: Article 10a(12) of Directive 2003/87/EC.

¹⁰¹ Article 43(2) of the Regulation.

NAD is subject to Part 3.4 of the General Administrative Law Act,¹⁰² while Chapter 4 of the General Administrative Law Act applies to the amendment of an individual allocation decision.¹⁰³ The legislature considered this undesirable.¹⁰⁴ For this reason, Article 16.34e of the Environmental Management Act provides that decisions taken pursuant to Article 16.34a that lead to an amendment of the NAD are *not* subject to Part 3.4 of the General Administrative Law Act. This means that both the amendment decision mentioned at (i) and the amendment decision mentioned at (ii) in the first sentence of this paragraph require that an objection be raised with the Minister first, before an appeal can be filed with the Division at the first and only instance.¹⁰⁵ As Article 16.34e of the Environmental Management Act declares Article 16.30(4) of that Act to be inapplicable, an amendment decision must always be announced – in accordance with the main rule of Article 3:41(1) of the General Administrative Law Act – by means of submission to the installations whose interests are affected.

3.2.2. The full or partial cessation of operations of the greenhouse gas installation or a significant capacity reduction of this installation

In accordance with the measures adopted by the Commission pursuant to Article 10a(20) of Directive 2003/87/EC,¹⁰⁶ Article 16.34b(1) of the Environmental Management Act provides for a mechanism for adjusting allocation decisions if a greenhouse gas installation fully or partially ceases its operations or significantly reduces its capacity.

In accordance with Article 10a(19) of Directive 2003/87/EC, Article 16.34b(2) of the Environmental Management Act provides that a greenhouse gas installation is considered to have ceased operations in full if its emissions permit is withdrawn or if its operation is technically impossible. The third notion of the aforementioned paragraph from Directive 2003/87/EC – i.e. that an installation is considered to have ceased operations when the emissions permit has expired – has not been codified in the Environmental Management Act as that situation cannot arise under Dutch law. This is because emissions permits are granted for an indefinite period of time. If an installation has ceased operations in full as referred to in Article 10a(19) and (20) of Directive 2003/87/EC in conjunction with Article 22(1) of Decision 2011/278/EU, the permit holder must notify the board of the Dutch Emissions Authority in writing.¹⁰⁷ This notification is to be made within six weeks after the greenhouse gas installation has ceased operations. If, however, the installation has ceased operations in the month of December of any year, the notification must be made before 20 January of the next year.¹⁰⁸

¹⁰² See: Article 16.30(1), Environmental Management Act.

¹⁰³ See: the final paragraph of Section 2.1 of this chapter.

¹⁰⁴ *Parliamentary Documents II*, 2012–2013, 33 466, no. 3, p. 8.

¹⁰⁵ Article 8:6(1), General Administrative Law Act in conjunction with Article 2 of Annex 2 to the General Administrative Law Act.

¹⁰⁶ Adopted in Decision 2011/278/EU.

¹⁰⁷ Article 44(1) of the Regulation.

¹⁰⁸ Article 44(2) of the Regulation.

Article 16.34b of the Environmental Management Act does not define when a greenhouse gas installation is considered to have ceased operations or significantly reduced its capacity. Article 16.34b(3) does provide that rules may be set by ministerial regulation to implement this Article. This was done through the Regulation. Article 45(1) and Article 47(1) of the Regulation refer to Article 23(1) and Article 3, at j, of Decision 2011/278/EU as regards the definitions of ‘partial cessation’ and ‘significant capacity reduction’, respectively. An installation has partially ceased operations if a sub-installation representing at least 30% of the emission allowances allocated to the installation free of charge or contributing to the allocation more than 50,000 allowances reduces its activity level by at least 50% in any given calendar year. Briefly put, a significant capacity reduction occurs when the capacity of a sub-installation is reduced by at least 10% or when the capacity reduction leads to a reduction of at least 50,000 emission allowances allocated free of charge.

In the event of a partial cessation of a greenhouse gas installation’s operations, the permit holder must notify the board of the Dutch Emissions Authority of this in writing.¹⁰⁹ This written notification is to be made before 20 January of the year following the calendar year in which the operations were partially ceased.¹¹⁰ Article 47(1) of the Regulation provides that a permit holder is obliged to inform the board of the Dutch Emissions Authority as soon as possible if it intends to make changes to the greenhouse gas installation that may result in a significant capacity reduction. If the capacity is indeed reduced significantly, it must notify the board of the Dutch Emissions Authority of this within six weeks of that reduction.¹¹¹ The permit holder must submit a methodology report with this notification.¹¹²

All amendment decisions taken in accordance with Article 16.34b of the Environmental Management Act may be declared to have retroactive effect¹¹³ and, on the basis of Article 16.34e of that Act, an objection must first be raised before an appeal can be filed with the Division at the first and only instance. All amendment decisions must be announced by means of submission to the installations whose interests are affected.¹¹⁴

3.2.3. Adjustment on account of the provision of incorrect information or evident inaccuracies in the allocation decision

The Dutch legislature has determined that an allocation decision may also be amended if (i) incorrect or incomplete information was provided within the framework of the allocation procedure or if (ii) the allocation decision was otherwise incorrect and the

¹⁰⁹ Article 45(1) of the Regulation.

¹¹⁰ Article 45(2) of the Regulation.

¹¹¹ Article 47(2) of the Regulation.

¹¹² Article 47(3) of the Regulation.

¹¹³ Article 16.34d, Environmental Management Act.

¹¹⁴ Article 16.34e, Environmental Management Act in conjunction with Article 16.30(4), Environmental Management Act in conjunction with Article 3:41(1), General Administrative Law Act.

operator of the installation knew this or should have known this.¹¹⁵ Exemplifying the situation referred to at (i), the legislature pointed out the possibility of the board of the Dutch Emissions Authority concluding in the course of the third trading period, during its regular supervision, that the basic data supplied by the installation is materially inadequate within the framework of preparations for the NAD.¹¹⁶ We add that Article 16.34c(1), opening words and at a, of the Environmental Management Act may obviously also apply if material inadequacies are discovered in the proceedings that led to an individual allocation decision. Exemplifying the situation referred to at (ii), the legislature pointed out the possibility of an incorrect product benchmark erroneously being used in the allocation decision, resulting in more allowances being allocated to the installation than the quantity that follows from the Commission's harmonised implementing measures.¹¹⁷ The legislature emphasised that, in the application of Article 16.34c(1) of the Environmental Management Act, the general principles of good governance and the general decision-making requirements of Chapter 3 of the General Administrative Law Act will have to be observed. This sets limits on the cases in which Article 16.34c can be applied.¹¹⁸

Article 16.34c(3) provides that the authority to amend an allocation decision lapses when eight years have passed since the day on which the decision was announced. According to the Dutch legislature, this term strikes a reasonable balance between the government's interest in cancelling incorrect allocation decisions on the one hand and the interest of the relevant installation in legal certainty on the other hand.¹¹⁹

As regards the option of declaring an amendment decision to have retroactive effect, the prescribed manner of announcing such a decision and the legal protection against this, reference is made here to what Section 3.2.2 states about decisions taken on the basis of Article 16.34b(1) of the Environmental Management Act.

3.2.4. The consequences that an amendment of an allocation decision may have

Now that it is possible to amend an allocation decision during the third ETS trading period and, moreover, certain amendment decisions may be declared to have retroactive effect,¹²⁰ some emission allowances may have been issued unduly. In such a situation, the authority exists to recover emission allowances on the basis of the general principle of law – which also applies in administrative law – that undue payments may be recovered, even if there is no statutory basis to that effect.¹²¹ For the sake of clarity, however, the Dutch legislature has included an explicit statutory basis to that end in Article 16.35c(1)

¹¹⁵ Article 16.34c(1), Environmental Management Act.

¹¹⁶ *Parliamentary Documents II*, 2010–2011, 32 667, no. 3, p. 27.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ *Parliamentary Documents II*, 2010–2011, 32 667, no. 3, p. 85.

¹²⁰ In this regard, see: Article 16.34d of the Environmental Management Act.

¹²¹ *Parliamentary Documents II*, 2010–2011, 32 667, no. 3, p. 28.

of the Environmental Management Act. The board of the Dutch Emissions Authority is authorised to decide to recover allowances.

A recovery decision pursuant to Article 16.35c(1) of the Environmental Management Act is a decision within the meaning of Article 1:3(1) of the General Administrative Law Act that is open to objection and appeal.¹²² After an objection has been raised with the board of the Dutch Emissions Authority against a recovery decision,¹²³ an appeal may be filed with the Division at the first and only instance.¹²⁴ A recovery decision is always preceded by an amendment decision; the amendment decision is the legal basis for assuming that allowances have been issued unduly.¹²⁵ It should be noted that recovering emission allowances that have been issued unduly is a discretionary power of the board of the Dutch Emissions Authority.¹²⁶

If the operator of an installation has insufficient emission allowances at its disposal to comply with the recovery decision, there are two options. Firstly, the board of the Dutch Emissions Authority may decide to deduct the emission allowances that were unduly issued from the allowances still to be issued in the third trading period or from the allowances that will be issued in a subsequent trading period.¹²⁷ Secondly, the board of the Dutch Emissions Authority may decide to recover a monetary amount corresponding to the value of the allowances that were unduly issued.¹²⁸

Article 16.35c(5) of the Environmental Management Act provides that if the board of the Dutch Emissions Authority decides to recover a monetary amount corresponding to the value of the allowances that were unduly issued, this amount will be based on the average market price of an emission allowance at the time of recovery. The same paragraph provides that rules will be set by ministerial regulation for determining that average market price. This was done in Article 43a of the Regulation: “*The average market price of a greenhouse gas emission allowance [...] is determined by multiplying the quantity of greenhouse gas emission allowances to be recovered by the average of the auction prices of the ten auctions at which the demand for greenhouse gas emission allowances in any event leads to an auction price above the reserve price, immediately preceding the date of the writ of execution, referred to in Article 16.35c(2) of the Act, at which the Netherlands has offered greenhouse gas emission allowances.*” By starting from an average auction price of successful auctions at which Dutch allowances were offered, the value of emission

¹²² *Parliamentary Documents II*, 2010–2011, 32 667, no. 3, p. 87.

¹²³ Article 7:1 in conjunction with Article 1:5(1), General Administrative Law Act.

¹²⁴ Article 8:6(1), General Administrative Law Act in conjunction with Article 2 of Annex 2 to the General Administrative Law Act.

¹²⁵ *Parliamentary Documents II*, 2010–2011, 32 667, no. 3, p. 87.

¹²⁶ *Parliamentary Documents II*, 2010–2011, 32 667, no. 3, p. 28.

¹²⁷ Article 16.35c(3), Environmental Management Act. Cf. *Parliamentary Documents II*, 2010–2011, 32 667, no. 3, p. 28.

¹²⁸ Article 16.35c(1), Environmental Management Act.

allowances is determined in a reliable and transparent manner, according to the Dutch government.¹²⁹

Article 16.35c(2) of the Environmental Management Act provides that allowances may be recovered by means of a writ of execution. A writ of execution constitutes an enforceable order that may be enforced in compliance with the rules of the Dutch Code of Civil Procedure.¹³⁰ Article 435 of the Dutch Code of Civil Procedure provides that all of the debtor's property eligible for seizure may be seized, and the board of the Dutch Emissions Authority is authorised to do so to recover its claim. This includes, for instance, the debtor's movable and immovable property. These may subsequently be sold, following which the proceeds from the sale may be used to pay the debt.¹³¹ The recovery is subject to a limitation period of eight years.¹³²

4. Conclusion

The Dutch legislature decided to implement the ETS regulations in the Environmental Management Act because that Act is, in principle, the appropriate place for provisions on environmental policy, in the legislature's opinion. To this end, the Dutch legislature added a new Chapter 16 – entitled 'Emission allowance trading' – to the Environmental Management Act in 2004. Several provisions of Chapter 16 of the Environmental Management Act offer the government a basis for setting further rules by ministerial regulation to implement the ETS regulations. With the entry into force of the Emission Allowance Trading Regulation on 1 January 2013, a number of ministerial regulations that were adopted over the years with a view to the system for emission allowance trading have been combined into a single new ministerial regulation. In our opinion, the Dutch legislature has thus succeeded in implementing the ETS regulations in the Dutch legal system in an orderly fashion. The heart of the Dutch emissions trading rules is found in a single chapter of the Environmental Management Act and in a single ministerial regulation.

In view of the high degree of harmonisation that is typical of the third ETS trading period, the national legislature had only limited freedom to make 'national choices' in implementing the ETS regulations. Nevertheless, we have identified a few aspects of the implementation of the ETS regulations here that are 'characteristic' of the Dutch legal system.

Firstly, there is the manner in which the legal protection has been shaped. The Dutch legislature has opted to declare the extensive public preparation procedure applicable to the preparations of the NAD for the third trading period. We believe that this choice the

¹²⁹ *Government Gazette* 2014, 31699, p. 5.

¹³⁰ Article 4:116, General Administrative Law Act.

¹³¹ *Parliamentary Documents II*, 2010–2011, 32 667, no. 3, p. 87.

¹³² Article 16.35c(4), Environmental Management Act.

Dutch legislature has made was beneficial to the careful NAD preparations, as the installations subject to the ETS were given an opportunity to express their wishes and reservations about the (draft) NAD before a final allocation decision was taken. Another choice we feel positive about is that, in derogation of the main rule of the General Administrative Law Act, the Dutch legislature opted to make ‘emission decisions’ – with the exception of decisions to impose a fine due to (alleged) breach of ETS regulations – open to appeal with the Division at the first and only instance. As the distribution of scarce allowances often involves major economic, financial and policy-related interests, it is desirable to have certainty as soon as possible about the question whether those allowances may in fact be used.¹³³ The potentially drawn-out legal proceedings that would ensue if appeal is open to two judicial bodies would undermine this point of departure.¹³⁴ As noted above, however, decisions to impose a fine due to (alleged) breach of ETS regulations are subject to review by two judicial bodies – which is equally desirable on account of the punitive nature of such decisions.

Secondly, we point out the ground for amendment of Article 16.34c of the Environmental Management Act derived from subsidy regulations. If an operator of an installation has provided incorrect emission data or if the allocation decision contains another (evident) inaccuracy, this constitutes a ground for amending the allocation decision. The Dutch legislature has sought to bring the wording of Article 16.34c of the Environmental Management Act in line with Part 4.2.6 (‘Withdrawal and amendment’) of Title 4.2 (‘Subsidies’) of the General Administrative Law Act.¹³⁵ The manner in which the option of recovering unduly issued emission allowances pursuant to Article 16.35c of the Environmental Management Act has been worked out is rooted in Dutch subsidy regulations as well. Also in view of the broad experience the Division has with the application of Title 4.2 of the General Administrative Law Act, the legislature has done well to charge the Division with the legal protection offered against emission decisions.

Thirdly and lastly, the legislature has infringed upon Dutch private law and its effect to a certain extent by implementing Chapter 16 of the Environmental Management Act. The Dutch legislature has breached, among other things, the causal system of Article 3:84 of the Dutch Civil Code to promote a proper functioning of the emission allowance trading system. This, too, is a ‘characteristic’ feature of the Dutch implementation of the ETS regulations and this choice, too, is a good one in our opinion. We have already noted that

¹³³ In their contribution, P. Adriaanse et al. have also emphasised the great importance (expressed in terms of large economic value) that limited public rights often represent for applicants and those authors have stressed the need for a general legal approach to the allocation of limited public rights. We believe that the Dutch legislator’s choice to promote speedy, final dispute resolution should be considered a ‘best practice’ that is to be taken into consideration when developing a general legal approach governing limited public rights.

¹³⁴ When prescribing the mandatory application of the administrative loop and when prescribing periods to be observed by the board and the court in the NAD procedure, the legislature acted in consideration of the desire to obtain certainty about the lawfulness of the NAD, and thereby about the definitive distribution of scarce emission allowances, as soon as possible. See: Section 2.1 of this chapter.

¹³⁵ *Parliamentary Documents II*, 2010–2011, 32 667, no. 3, p. 85.

– in view of the major financial interests involved – in the distribution of emission allowances it is desirable to have certainty as soon as possible about the question whether any allowances obtained may in fact be used. The interplay of – in particular – Article 16.41(1) and Article 16.42(1) of the Environmental Management Act ensures, on the one hand, that the operator of an installation to whom emission allowances were lawfully issued may indeed be certain that it will have those allowances at its disposal in the future and, on the other hand, that the Union Registry provides an accurate overview of the actual distribution of emission allowances at all times. In this way, the Dutch legislature has contributed substantially to the proper functioning of the emission allowance trading system.

We will now conclude this issue. The ETS regulations were changed dramatically in the last decade and the scope of the ETS was expanded several times. In our opinion, the Dutch legislature has coherently consolidated the evolution of the ETS in the national legal system. The concentration of the relevant rules in a single chapter of the Environmental Management Act and in a single ministerial regulation, combined with the concentration of legal protection (at the first and only instance) with the Division, has resulted in a clear-cut and future-proof implementation of the effect of the ETS in the Dutch legal system. In this respect, we believe that the Dutch legislature has struck the right balance between the various interests it was to consider in the framework of the implementation of the ETS regulations.

7. THE ALLOCATION OF GAMBLING LICENCES, RADIO FREQUENCIES AND CO₂ EMISSION PERMITS IN ROMANIA

1. Public Rights and Authorizations under the Romanian Administrative Law

1.1. *Definitions*

The Romanian administrative law currently lacks the sophistication from other legal systems and the legal theory often lags behind the socio-economic developments in society. There is limited discussion in our public law doctrine about public rights and about specific types of public rights, as described in the context of this book. Of course, public rights and authorizations are present in different laws and addressed by the doctrine but there is no coherent and unitary theory on this topic. The definition of *authorization* in the Romanian law implies that the applicant has the right to be granted the authorization once all the conditions laid down by the supporting legislation are met. There is a margin of discretion when assessing *in concreto* the fulfilment of certain requirements for authorization, but generally there is no discretion in granting the authorizations when the conditions are met. Almost no reference can be found for example with regard to grants or subsidies, which are funds that the administrative authority can award to private or public entities, under certain conditions. The public law literature often ignores the policy dimension of certain legal topics. The granting of public rights/authorizations cannot be completely separated from economic, social, moral and other policy objectives that the state aims to implement when regulating the legal regime of certain public rights. In conclusion, the public law doctrine on the topic of the allocation of public rights in Romania is of limited importance in the context of our research topic.

* Dacian C. Dragoș is Jean Monnet Professor of Administrative and European Law at Babes Bolyai University, Faculty of Political, Administrative and Communication Sciences, Public Administration Department, Romania. Bogdana Neamțu is Associate professor at Babes Bolyai University, Romania. Raluca Suciu is Teaching assistant, PhD at Babes Bolyai University, Romania.

1.2. *Different Types of Scarcity with Respect to Public Rights*

The three areas analysed in this book with respect to limited public rights are quite different and the limitation of certain rights pertaining to these three areas is also differently constructed. A first question to be answered is whether there is real scarcity in gambling, radio frequencies, and CO₂ emissions. In the fields of gambling and CO₂ emissions, scarcity is artificially created, in order to promote various policy objectives. Most often in the case of gambling the protection of the public moral is invoked by public authorities but one should not forget that this can be a very lucrative activity for the state, which can generate additional revenues for other socially accepted policies such as education or culture. In the case of CO₂ emissions, the protection of the environment and the mitigation of climate changes are the core objectives, together with the underlying justification of using market-based mechanisms for achieving these objectives. In Romania, in the field of gambling, there is no ceiling for the number of operators that are allowed at a certain moment on the market – all operators which meet the conditions for obtaining the licence can enter the market. The only limitation regards certain gambling activities that are reserved for the National Company ‘Romanian Lottery’. However, as of 2015, this limitation was significantly reduced. In the field of gambling, the national states have a lot of discretion in whether or not they allow gambling and how they construct scarcity and authorization procedures. This is due to the fact that, as consistently held by the Court of Justice of the European Union, the legislation on gambling is one of the areas in which there are significant moral, religious and cultural differences between the Member States. In the absence of EU harmonization in this field, it is for each Member State to determine in those areas, in accordance with its own scale of values, what is required in order to ensure that the interests in question are protected.¹ In the field of CO₂ emissions, in theory there is limitation (EU ceiling) but in effect the role of scarcity is diminished by the fact that supply is higher than demand. There is general consensus that, currently, there is over-allocation of tradable permits. In this case, as opposed to gambling, the ceiling is constructed in a complex manner, with input from the Member States and adjustments made by the European Commission. The involvement of other actors besides the Member States in setting the ceiling is justified in the case of CO₂ by the common goal underlying the scheme and the fact that for the scheme to be effective it needs a trans-national unitary approach. In the field of radio frequencies, scarcity is natural but also technologically driven. As technology progresses, more frequencies, which would have not been exploitable in the past, become available for networks and services. The way in which scarcity is constructed and managed in the field of radio frequencies lies between CO₂ emissions and gambling. On the one hand, there is a relatively high degree of harmonization at the international and European level, one of the reasons being that the spectrum is a global resource, similar to climate/atmosphere. On the other hand, national states can also pursue their own objectives when they set aside certain portions of the spectrum – for example for military uses or when they decide to use direct award and not competitive procedures for the granting of certain frequencies.

¹ Case C-42/07, *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-7633, para. 57.

It must be said that from both a policy and legal perspective there is a significant difference between the three areas analysed with regard to how scarcity and/or limitation are created and allocated. In the field of gambling from the very beginning (immediately after 1989) there was a presumed consensus among policy-makers that gambling should be allowed without significant restrictions. The 'Romanian Lottery' was assigned certain gambling activities that could not be operated by other enterprises; other gambling activities were to be performed by all operators meeting the conditions from the law. However, regulating gambling proved to be very problematic. First, in the absence of a harmonized European framework, the Romanian legislator set up various institutions and mechanisms that can be described as 'innovations'. However, often, very limited attention was paid to how these innovations would impact competition from a European-wide perspective (despite lack of European harmonization, the Treaty principles need to be complied with) or how they would be implemented in practice (private monitors for online gambling). All these have determined numerous changes to the legal and institutional framework. The law currently in place represents an effort to incorporate all the concerns voiced by the European Commission and the economic operators. However, the large public feels that significant public consultations should have been carried out in the context in which betting agencies are spreading to poor rural areas and minors have easy access to locations with slot machines. Second, the Romanian law on gambling until recently had ignored the reality of online gambling, brought about by rapid technological developments. The old provisions and monitoring mechanisms were not ideal for dealing with online gambling operators established offshore. Even now, under the current legal regime, it is not certain whether all the conditions are met for curbing illegal online gambling. The situation is drastically different in the field of radio frequencies. Given the high degree of European harmonization in this field, the Romanian legal framework has developed over time rather smoothly. The problem regarding the lack of independence of the regulatory agency was quickly remedied by the legislator once concerns in this respect had been voiced by the European Commission. At least at a first glance there seems to be a better cooperation between the regulatory agency and the Competition Council on the one hand, but also between the regulatory agency and the networks and services providers on the other hand. Despite significant press coverage of the 2012 competitive bid for the allocation of frequencies for mobile communications and of its implications from the consumers' perspective, the large public seems unaware that decisions concerning the quantity of the spectrum to be awarded, how the frequencies are set, can directly influence the number of operators on the market and implicitly prices and the quality of the services offered.

In the field of CO₂ emission allocations, the entire effort at policy, legislation and implementation level is the result of implementing the EU Climate and Energy package in Romania. If for the second phase of the EU Emissions Trading System (EU ETS 2008–2012) there was an important role for Member States in determining the ceiling (cap), designing allocation mechanisms at national level and, overall, determining the level of scarcity in the field of CO₂ emissions, starting with 2013 (the third phase of EU ETS) the system is 'owned' by the EU (the cap is EU-wide and established by the EU, the allocation principles and rules are harmonized, auctioning is controlled by the EU). The consequence

of Europeanization of national climate change policies is that there is little influence from the Member States in the relevant aspects of the CO₂ emissions trading system – cap, limitations, scarcity, free allocation, and auctioning. Romania implemented the EU rules for the 2013–2020 phase without major interventions from the Commission and with minimal efforts for innovations, even where it was allowed and recommended (detailing of the allocation procedure, express consideration of legal principles involved, monitoring and verification, facilitating transparency and public understanding of trading issues).

2. Examples of Scarcity and Allocation Procedures in Romania: Gambling

2.1. Background

Various forms of gambling have been allowed under the Romanian legislation starting with 1990, immediately after the fall of the communist regime. The very first regulation addressed the diversification of the leisure activities offered to tourists in resort-type locations, thus allowing for casino-type activities.² Other pieces of legislation followed in the next years, however it wasn't until 1997 when the first comprehensive piece of legislation in this field was adopted – The Framework Act for the authorization, organization and exploitation of gambling, as well as for the updating of licensing fees.³ The Romanian legislation in this field can be best described as lagging behind the social and technical realities surrounding gambling in Romania. Despite being a relatively poor country, the number of people involved in various types of gambling is on the rise and the prevalence of gambling among certain vulnerable groups (such as teenagers) is higher than in other Central and Eastern European Countries.⁴ Moreover, there seems to be a correlation between poverty and people's involvement in gambling – betting agencies are currently spreading to poor rural locations and poor urban communities (former mining towns) and according to the representatives of the gambling industry, most customers only bet small amounts of money with the hope of replacing the revenues lost from other sources (such as employment).⁵ Even though the social dangers associated with gambling are tremendous, no governmental data or studies are available on this topic and all the analyses presented in various newspapers use data provided by

² Government Decision no. 958/1990, published in the Official Journal of Romania no. 102/25.08.1990.

³ Approved through Government Decision no. 130/1997, published in the Official Journal of Romania no. 70/18.04.1997.

⁴ V. Lupu and I.R. Todirita, 'Updates of the Prevalence of Problem Gambling in Romanian Teenagers' (2013) 29(1) *Journal of Gambling Studies* pp. 29–36.

⁵ Digi 24, 'From the Inside: Hundreds of Thousands of Romanians are Investing Daily into Sport Bets. Can You Make a Living Out of This? What Do the Experts Say?' 23.02.2014 (in Romanian), <www.digi24.ro/Stiri/Digi24/Special/Reportaj/DIN+INTERIOR+Sute+de+mii+de+romani+baga+zilnic+bani+la+pariuri+s> accessed 08.03. 2015.

representatives of this industry or working in close connection with it.⁶ Despite the fact that online gambling was illegal until 2010 and that the absence of a proper legal framework created the impossibility of economic operators to get licenced for online gambling after the legislative change in 2010, online gambling is a reality in Romania and is the sector with the fastest development in this industry (it is estimated that there are 400,000 users, out of which 100,000 are high frequency users).⁷

2.2. The 2009 Legal Framework and Subsequent Secondary Legislation: The Road toward an Infringement Procedure

In 2009, after more than a decade from the adoption of the previous regulation on the licensing/authorization of gambling, Government Emergency Ordinance no. 77/2009⁸ (hereafter GEO no. 77/2009) on the organization and operation of gambling activities was finally adopted. It was complemented by the Government Decision no. 870/2009⁹ for the approval of the methodological norms for the implementation of GEO no. 77/2009. In the following years, GEO no. 77/2009 has been amended several times. It still represents the regulatory act which currently governs gambling in Romania; however, it was drastically amended through GEO no. 92/2014 for the regulation of certain fiscal-budgetary measures and the modification of certain regulatory acts.¹⁰ GEO no. 20/2013¹¹ on the organization and functioning of the National Office for Gambling is also contributing to the framework regime currently in place for the licensing/authorization of gambling in Romania.

The 2009 regulation on gambling, together with the secondary implementing rules (Government Decision no. 823/2011),¹² was criticized rather harshly by the European Commission and some of the other Member States. In accordance with the notification procedure established under Directive 98/34/EC, in November 2010 the Romanian Government notified the Commission with regard to this regulation. The European Commission and Malta issued detailed opinions, while the UK issued comments on the provisions of this law, stating that they are not in accordance with EU law. The Default Notice/Infringement no. 2013/4216 issued by the European Commission should not have been a surprise for the Romanian authorities, since nothing was done to remedy the

⁶ S. Constantinescu, president of the Association of Casinos Organizers in Romania and CEO of Gaming Consulting is often cited in the national mass media when it comes to statistical data about the number of gamblers in Romania, frequency, profile, etc.

⁷ P. Vrabie, 'Over 1 Million Romanians are Trying Their Luck at the Casino – Which Is the Most Popular Game?' 22.01.2005 *Wall Street Journal* (in Romanian) <www.wall-street.ro/articol/Social/178694/peste-un-milion-de-romani-isi-incearca-norocul-la-cazino-care-este-cel-mai-popular-joc.html> accessed 08.03. 2015.

⁸ Published in the Official Journal of Romania no. 439/26.06.2009.

⁹ Published in the Official Journal of Romania no. 528/30.07.2009.

¹⁰ Published in the Official Journal of Romania no. 957/30.12.2014.

¹¹ Published in the Official Journal of Romania no. 187/3.04.2013.

¹² Published in the Official Journal of Romania no. 616/31.08.2011.

deficiencies signalled during the notification procedure in relation to GEO no. 77/2009 and the subsequent legislation establishing the implementation norms. It wasn't until April 2013 and then the end of December 2014 when more serious steps have been made toward amending the gambling legislation from Romania as to be in accordance with the EU law principles.

The Commission argued that several provisions from GEO no. 77/2009 regarding the organization and operation of gambling seem to raise some issues of compatibility with the fundamental principles of the freedom to provide services, regulated by article 56 from the Treaty on the Functioning of the EU. There were two main provisions directly criticized.¹³

a) Article 6 of GEO no. 77/2009 requires that all economic operators who want to organize and to exploit various gambling schemes must be legal persons established according to the Romanian law (in fact the text creates an obligation imposed on all licence holders to be located on the national territory of Romania). The Commission considered that the justification of the Romanian state regarding this provision is rather weak and not sufficiently explained. It is difficult in the Commission's opinion to understand how the requirement of location on the national territory contributes to the fulfilment of the policy objectives invoked by Romania which include the protection of the vulnerable categories against the negative effects of gambling and fighting fraud and money laundering. The Commission's conclusion was that article 6 from GEO no. 77/2009 represents a restriction of the freedom to provide services under article 56 of TFEU and that its enforcement does not fulfil the requirements of proportionality established by the Court with regard to the restrictions imposed to the freedoms in the internal market.

b) Article 18 of GEO no. 77/2009 designates the state company 'Romanian Lottery' as the sole economic operator who can organize and exploit lotto and mutual betting. Concerning this provision, the Commission argued that the Romanian legal framework for gambling lacks coherence. This conclusion was reached based on the fact that the Romanian Lottery has the exclusive right to organize mutual betting, video lotteries and other lottery games, while similar games such as slot machines and betting with a fixed value are open to competition. Moreover, video games and slot machines are operated rather similarly, which does not justify the difference in the gambling regime applicable to these two categories. The Romanian Government argued in response that EU law does not provide dispositions for overall consistency on the rules on gambling and that compliance with the EU law of a state monopoly should be evaluated solely on the gambling sector concerned. Moreover, the government argued that in order to fulfil some public interest objectives, the 'Romanian Lottery' does not engage in aggressive

¹³ For a more in-depth discussion on this topic please see M. Pantea and O.C. Nestor, 'Reflections Regarding the State Monopoly in the Field of Gambling within the EU. Romania's Case – 2013/4216' (2013) 2 *Journal of Criminal Investigations* pp. 12–18.

publicity of betting, which is supposed to limit the number of people addicted. The Commission concluded that by creating a system in which the supply of slot machines and betting with fixed value are subject to a system of issuing licences, while other similar gaming like video lotteries and mutual bets are subject to an exclusive right, Romania does not achieve the overall objective of the national legal framework in the field of gambling, namely preventing incitement to spending money on gambling, combating addiction and crime prevention, in a consistent and systematic manner. Therefore, the restrictive measures cannot be justified by article 56 of the TFEU.

In addition to the problems signalled by the Commission (breach of the Treaty principles), the 2009 regulation also presented a major limitation with respect to online gambling.¹⁴ The initial text did not include provisions concerning the organization of online gambling. The law, however, qualified the activity of organizing gambling activities through the internet or intranet communication systems, as well as through other communication systems (landline or mobile telephony), as a criminal offence (article 23/2). The restriction was removed in 2010 when the Government adopted Law no. 246/2010,¹⁵ reflecting the market reality in Romania. Despite this step ahead, the law did not contain any specific conditions related to the licensing and operation of online gambling in Romania (subsequent secondary legislation was needed). It was in 2011, through Government Decision no. 823/2011, when the licensing conditions for economic operators offering online gambling were clearly spelled out. Among the licensing conditions, applicants are required to be set-up as a Romanian legal entity and to hold directly or indirectly (through a shareholder/partner) a Romanian offline licence for gambling activities. Another provision requires the applicants to hold all the technical equipment which supports the organization and the streaming of the online gambling activities in Romania, except for the operators who are licenced in an EU Member State and hold their equipment in an EU Member State. Nonetheless, the latter are obliged to connect their equipment to the system of the public or private bodies that will monitor online gambling activities in Romania. One important provision which practically blocked for several years the online gambling market has to do with monitoring. Government Decision no. 823/2011 states that the Romanian online gambling market is going to be monitored by one or several monitoring and reporting operators. Such prerogatives may be entrusted to both public authorities and to privately-owned companies. The applicants for a Romanian online gambling licence must have had a valid contract (as endorsed by the former Romanian Gambling Authorization Commission) concluded with a monitoring and reporting operator in order to be able to organize online gambling on the Romanian territory. In order to limit the presence of foreign-based operators on the market of online gambling, Government Decision no. 823/2011 included several indirect strategies, which didn't target the foreign online

¹⁴ For a detailed analysis on this issue see C. Radu, 'Romania's Gambling Law Amendments: A Lawyer's Analysis, Gambling Compliance', October 2011, Tuca, Zbarcea and the Associates <www.legal500.com/assets/images/stories/firmdevs/tuca_romania_gambling_law_amendments.pdf> accessed 08.03. 2015.

¹⁵ Published in the Official Journal of Romania no. 854/21.12.2010.

provider, but the local intermediaries (internet services providers (ISPs) and banks) or the end-users. Government Decision no. 823/2011 provided that the monitoring and reporting operators had the power to identify websites operating games of chance without a licence in Romania as well as websites advertising such activities, and notify such information to ISPs in order to allow the blocking of access to such websites. There seems to be no obligation for the ISPs to actually block access. However, the same provision mentioned that in case ISPs fail to block access to illegal websites for which the blocking was requested, the monitoring and reporting operator could inform the Romanian Gambling Authorization Commission. Similar obligations are established also for banks which were obliged to refuse to process any payment order from Romanian nationals to foreign online gambling providers by the relevant supervising authority, that is, the National Bank of Romania.

The provisions described above have had tremendous practical implications for the licensing and authorization of economic operators offering online gambling. In the first place, no public or private operator was established for the monitoring of online gambling (a prerequisite that needed to be in place before economic operators applied for licensing). The Romanian Government has repeatedly invoked budgetary constraints for appointing a public authority to exert such tasks. Private operators, on the other hand, showed no interest in this regard. According to one expert in the field, such lack of interest was also a consequence of the Romanian legislation, which imposes certain licensing conditions for online operators that are seen as deterrents by large international companies seeking to get licenced in Romania. Taking into consideration that the main source of revenues for these private monitoring bodies would have been represented by the fees paid by the applicants and licence holders, it is easy to understand why a market likely to attract few large international companies held no appeal to them.¹⁶ But the lack of a monitoring body is only partially responsible for the lack of licenced operators on the Romanian market. It was believed that after the creation in 2013 of the National Office for Gambling (see the next section), the licensing of online operators will start. However, no operator was interested as of now (March 2015). The low interest of operators to obtain a Romanian licence has to do with the restrictive conditions imposed for licensing together with the taxation regime of the players' winnings. These two elements make the Romanian licence very unattractive.¹⁷

2.3. *Steps Toward a Gambling Regime Compatible with Treaty Principles*

Starting with 2013, the Romanian Government has made the steps toward harmonizing the Romanian legislation on gambling with the EU rules. In April 2013, the National Office for Gambling was created and at the end of 2014, a new Government Emergency

¹⁶ C. Radu, 'Developments to "Unblock" the Romanian I-Gaming Sector: Q&A' World Online Gambling Law Report <www.e-comlaw.com/world-online-gambling-law-report/hottopic.asp?id=1354> accessed 08.03. 2015.

¹⁷ C. Radu, footnote 16.

Ordinance was adopted. It significantly amends the 2009 act and the subsequent secondary legislation.

2.3.1. National Office for Gambling

The newly created Office is the regulatory authority for the whole gambling industry. The Office retains the rights and duties of the former Gambling Authorization Commission (within the Ministry of Finances) but will act in addition as licensing authority as well as monitoring body for the online industry. GEO no. 20/2013 also introduced a key responsibility for the Office, namely that of requesting information from other entities – payment institutions and Internet services providers, having direct or indirect links with the industry. Despite scepticism concerning the enforceability of such a provision in the absence of a comprehensive legal framework addressing these issues, this law represents the first attempt of the Government to increase the powers of the regulatory authority over these intermediaries.¹⁸

The Romanian Government created this authority in order to comply with an European principle which deals with the unitary management/administration of the field of gambling. It was for the first time in Romania when licensing/authorization, control and monitoring of gambling was performed by a single institution. Another reason for creating an independent authority was to end the competition concerns raised by the dual quality of the Ministry of Finances – the main shareholder of the National Company Romanian Lottery and supervising body for the gambling industry, through the Gambling Authorization Commission.

The Government Decision no. 298/2013¹⁹ which regulates the organization and functioning of the Office was intended to eliminate bureaucratic barriers by establishing the possibility to accept the electronic submission, with the use of the electronic signature, of documents by the gambling operators seeking licensing/authorization. Also, the new Decision establishes general criteria for the monitoring activity of online gambling, as well as the main rules concerning the functioning of the Surveillance Committee, an entity with both deliberative and decision-making attributes in the field of gambling. In order to ensure the proper organization and functioning of the Office, as well as to improve the activity of the Committee, Decision no. 298/2013 established a Consultative Committee comprising representatives of the gambling industry, which will have the opportunity to inform the authority with regard to key issues and developments from the field.²⁰

The creation and the functioning of the Office was based on the experience of European states with a longstanding experience in this field – France, UK, Italy, and Malta, and

¹⁸ C. Radu, footnote 16.

¹⁹ Published in the Official Journal of Romania no. 710/19.11.2013.

²⁰ Official website of the National Office for Gambling <www.onjn.gov.ro/> accessed 08.03. 2015.

they allow for an efficient administration of various aspects regarding budgetary revenues from gambling, the prevention of and the fight against illegalities in this field, as well as the establishment of measures necessary for the protection of minors and other groups at risk of gambling addiction.²¹

2.3.2. GEO no. 92/2014

As already mentioned, in December 2014, the Romanian Government adopted a new Government Emergency Ordinance dealing with the regulation of certain fiscal-budgetary measures and the modification of existing regulations. This piece of law modifies and completes the existing GEO no. 77/2009 dealing with the framework regime for gambling in Romania.²² Some of the main goals the Government intends to reach with the adoption of this law are: compliance with the requirements of the European Commission and harmonization of the regime of licensing/authorization with the fundamental principles of the freedom to provide services (article 56 from TFEU); a more efficient protection of minors and of the population groups at risk; an increase of the state revenues generated from this activity (new rules concerning the taxation of economic operators as well as new procedures for a better collection of taxes on winnings from natural persons); tourism development supported through the issuing of licences for temporary gambling activities from tourist areas; limitation of fiscal fraud in this field by introducing the requirement of mandatory connection of gaming equipment to the servers controlled by the National Office for Gambling; unblocking of the online gambling market and the creation of the prerequisites for both economic operators and players to engage in these online gambling activities in a legal manner.

2.4. *Licensing and Authorization Regime Currently in Place (As of February 2015)*

Under the new law, the products and gambling activities to be offered on the Romanian gambling market have significantly increased (no public debate on values to guide such a policy decision in a country already experiencing the negative effects of excessive gambling). Under the 2009 regulation, the gambling products included: (i) lotto games, (ii) betting (mutual bets and fixed-odds bets); (iii) gambling specific to casino activities; (iv) slot machine games; (v) bingo games; and (vi) online gambling. Lotto games and mutual betting, both offline and online, were under the legal monopoly of the National Company 'Romanian Lottery'. Under the 2014 regulation, these gambling activities were maintained but others were added: land based and remote (online) betting exchanges; (ii) remote casino-type games; (iii) poker games carried out in poker clubs; (iv) raffles; (v) temporary gambling activities carried out in resorts. Mutual betting activities, both

²¹ National Office for Gambling, footnote 20.

²² For an in-depth analysis see A.-M. Baciu and O. Albu, 'The Romania chapter', in *The International Comparative Legal Guide to: Gambling 2015*, 1st edition, Global Legal Group <www.nndkp.ro/publications/articles/gambling-2015> accessed 08.03.2015.

online and offline, were removed from the monopoly of the National Company 'Romanian Lottery' which means that other economic operators will be able to offer them starting with 2015.

Under the 2014 law, in light of the criticism of the European Commission, the economic operator applying for a licence/authorization to organize gambling games will be either: a Romanian legal person established under the Romanian law; or a legal person duly established in a Member State of the European Union, a contracting state of the Agreement on the European Economic Area, or the Swiss Confederation. GEO no. 92/2014 establishes the requirement for obtaining a licence from the Supervisory Committee of the National Office for Gambling by economic operators which conduct activities pertaining to online gambling. Such operators include: (i) operators which offer management and hosting facilities on their gambling platform; (ii) manufacturers, importers, exporters, intra-community suppliers of gambling machinery and related components; (iii) payment processors; (iv) manufacturers and distributors of gambling software; (v) affiliates; (vi) certifiers; and (vii) auditors. Another new provision of the law is that the software, including its updated versions, used for conducting online gambling activities will be subject to the Office's preliminary approval, based on tests which are to be performed by authorized laboratories.

For each type of gambling activity that the applicant intends to operate, a licence must be obtained from the Office upon request from the applicant. The licence is valid for 10 years (under the previous law it was only valid for 5 years), subject to the payment of annual fees ranging between 10,000 Euros and 115,000 Euros. In addition, an authorization must be obtained annually and implies the payment of fees ranging from as low as 650 Euros (for temporary games based on slot machines, Class A) to 180,000 Euros (traditional lotto games) or, for certain activities, a fee expressed as a percentage of the amounts collected from the respective activity. One important novelty introduced by the new law refers to the calculation of gross gambling revenue (for the purpose of determining the authorization fee). The gambling revenue of a licenced operator is computed as the difference between the amounts cashed from players as tax for participating in the game and the prizes granted to players, including the jack-pot, for each type of game per day/month. For games where the organizer collects a commission from the gambling participants/winners, the revenue of the licenced operator is represented by the collections (commissions retained from the participants), respectively the quota of the amount charged by the organizer, as per the specific gaming regulations for a day/month. The annual authorization tax for online gambling will be calculated as 16% of the gambling gross revenues while the tax for offline betting will be calculated as 16% of the gambling gross revenues, but no less than 90,000 Euros. Both the annual licensing fee and the annual authorization fee need to be paid in order for economic operators to be able to operate gambling activities in Romania. The new law also provides for special taxes such as: (i) 2% applied on the video-lottery operator's revenues; a vice tax for slot machines in amount of 400 Euros/authorized post/year; administrative fees for obtaining the licence for online games, namely a 2,500 Euros fee for processing the file, and a fee for the issuance of the licence in the amount of 8,500 Euros/licence/year.

In addition to the licensing and authorization fees, there are certain other conditions that have to be met for licensing/authorization. The organizers of gambling activities must have a subscribed and paid-up share capital ranging between 100,000 RON and 2,000,000 RON, depending on the type of activity for which the licence is requested. The law also imposes a minimum number of game means, locations and technical equipment for which an authorization can be requested. These requirements, while they do not limit the number of applicants *per se*, create barriers concerning access (in most cases the objectives pursued by the Government are in the public interest).

Additional licensing requirements are established under the law for operators organizing online games. These include: organizers must provide evidence that they hold a bank account for depositing the players' money as well as the players' winnings at (i) a bank which is licenced in Romania, or at (ii) a bank authorized in another Member State of the EU, in a Contracting State of the Agreement on the European Economic Area, or in the Swiss Confederation, but which operates on the Romanian territory; in case of organizers established in a Member State of the European Union, in a Contracting State of the Agreement on the European Economic Area or in the Swiss Confederation, they must have an 'authorized representative' of the company; the representative must have the residence in Romania (thus he/she has to be a natural person) and must be empowered to represent the organizer in front of State authorities and the Romanian courts; the organizer must hold all the technical equipment (which ensures support for organizing and transmitting these type of gambling games) that is mandatory on the Romanian territory. The exception to this rule are the gambling organizers which are authorized in a Member State of the EU and which hold all the necessary technical equipment in a Member State of the EU, subject to connecting the equipment to a mirrored centralizing computerized system connected to the Office; the organizers must constitute a guarantee fund for the players' deposits; all payments to players should be made only through a payment processor which is licenced by the Office; the organizers of online gambling activities must also create a guarantee fund in order to cover the risk of non-payment of the operator's financial obligations to the Romanian State of 100,000 Euros; and the operators carrying out unauthorized online gambling activities will be blacklisted, along with their unlawfully websites.

Both the licence and the annual authorization can be annulled, revoked or suspended by the competent authorities. The Office can decide the annulment of the licence/authorization if the information provided by the applicant was incorrect or inaccurate and it would have prevented the granting of the licence/authorization. Another re-application is possible only after a minimum of 5 years from the date of the annulment.

The Office may decide to revoke the licence to organize gambling games under the following circumstances: (i) failure to comply with the payment obligations to the general consolidated budget or payment of the respective obligations with a delay of more than 30 days from the date on which they are due in accordance with the law; (ii) the organizer no longer has the organizing of gambling games as its main object of activity; (iii) if the approval issued by the police authorities for the legal representatives of the organizer has been withdrawn and the representatives maintain their respective positions for more

than 30 days from the date on which the withdrawal of the approval was communicated; (iv) a final judgment of conviction without rehabilitation was issued against the legal entity; (v) the legal representatives of the economic operator are in a situation of incompatibility for more than 30 days calculated from the date on which the incompatibility occurred; (vi) any of the shareholders or legal representatives of the legal entity keep their position for more than 30 days, when a final judgment of conviction without rehabilitation was issued against the respective entity, in Romania or in a foreign state, for a crime stipulated by the Romanian gambling legislation or for any other crime committed with intent for which a minimum two-year prison sentence was applied; (vii) the organization of fraudulent gambling games; other breaches of the current regulation such as the lack of information in Romanian from the website of an organizer of online games.

The Office can also suspend the licence/authorization for a period of up to 6 months.

2.5. Other Relevant aspects Pertaining to the Allocation Procedure in Gambling

One interesting aspect in this field regards the protection of newcomers. In theory, since the number of licences is not limited (no ceiling), the protection of newcomers should not represent a significant problem. However, especially with regard to online gambling, serious concerns were voiced by economic operators in terms of equal access to the market. They claimed that if illegal gambling is a reality and the Government does little or nothing to stop it, this might discourage legal operators from entering the market (high licensing fees, investments in a certain number of gaming equipment, legal provisions applicable to the clients' winnings). In this case, the fair treatment is limited by the fact that illegal operators are tolerated on the market, due to a deficient legal framework and/or limited enforcement capacity of the existing authorities responsible with monitoring of the gambling market. The new law from 2014 tried to address the issue of illegal operators by setting up a black list, comprising all operators which have performed or are currently engaged in illegal gambling activity. Besides making this list public, it is not very clear yet if these operators (especially active in the field of online gambling) will be banned from obtaining a future licence.

With regard to the applicable legal principles, the field of gambling is interesting because on the one hand the Member States seem to have a large margin of discretion in deciding which gambling activities are permitted and in setting up licensing requirements; on the other hand, despite the fact that the EU recognizes the right of the Member States to monopoly and a large margin of discretion, they are still bound by Treaty principles. There is, however, little debate over what these principles imply. Transparency is a good example in this respect. In a top-down manner, as a requirement under Directive 98/34/EC, laying down a procedure for the provision of information in the field of technical standards and regulations, Member States, including Romania, must notify to the European Commission and other Member States the draft regulations regarding products and Information Society services (such as online gaming and betting) before

adopting them. Also in terms of transparency, a Consultative Committee comprising representatives of the gambling industry was set up, which will have the opportunity to inform the authority with regard to key issues and developments from the field. No specific provisions are comprised in the law regarding public consultations or other transparency mechanisms specific for gambling.

Under the Romanian law, the legal protection afforded to participants is often not tailored to the specific policy field in question. The special legislation in this case makes reference to the general Law on judicial review from 2004 and the latter to the Civil Procedure Code. In the field of gambling, a special review procedure was established. Economic operators dissatisfied with the decision of the Office regarding the granting of the licence and other aspects for which the entity is responsible, can challenge the decision with administrative appeal, to the Surveillance Committee (structure within the Office), working now as a review body. Once the Committee reaches its final decision, this can be challenged in front of the administrative courts, in 30 days (Law on judicial review no. 554/2004). There is limited litigation in the field of gambling which makes it impossible to assess if legal protection afforded to participants is effective.

3. Examples of Scarcity and Allocation Procedures in Romania: Radio Frequencies

3.1. *Introduction*

Radio frequencies represent an interesting example of limited rights. In this case the scarcity is both natural but also technologically driven – some limitations are built into the level of technological development that exists at a certain moment in society. In the same time, the regulatory regime for the use of the radio spectrum is soundly developed under the EU law, as opposed, for example, to gambling. The regime includes both national regulations as well as the EU rules concerning electronic communications: Law no. 504/2002 on the audio-visual field, GEO no. 111/2011 on electronic communications, secondary legislation issued by ANCOM, Directive 2002/21/CE and Directive 2009/140/CE, etc. It is worth noting that in the field of radio frequencies the law and the regulatory agency in this field clearly mention the concept of scarce or limited public rights. It is to our knowledge the only reference to this concept in the Romanian legislation. Also, the regime and the procedures underlying the allocation of these limited rights are constructed with the observance of the principle of transparency, non-discrimination and proportionality but also with a clear orientation toward the meeting of public policy objectives.

3.2. *Institutional Framework*

3.2.1. ANCOM: Overview

The administration of the full radio spectrum, on the territory of Romania as well as in the aerial space and in the territorial waters, represents one of the main objectives of the

National Authority for Managing and Regulating the Communications Sector (hereafter ANCOM, the Romanian acronym).²³ In fulfilling this objective, the Authority implements the policy and the long-term administration strategies for the radio spectrum drafted by the Ministry of Communication and of the Information Society. The operation and regulation of the radio spectrum are bound by the principles of objectivity, proportionality, transparency, impartiality, and when possible, technological neutrality.

ANCOM is the institution which protects the interests of the communications' users from Romania, by promoting competition on the communication market, by managing limited resources, and by encouraging efficient investments in infrastructure and innovation. The institution was established following a rather long and complicated process of institutional reorganization after 1990, but mostly after 2002, in light of Romania's accession to the European Union, through the merger of two institutions – the General Inspectorate for Communications and the Technology of Information and the National Authority for Regulating the Communications and Information Technology Sectors.

The creation of the ANCOM has not been without controversy – there have been two infringement procedures in 2009 and 2010 regarding the lack of independence of the regulatory agency in the field of communications, as requested by the EU norms. The National Authority functions under parliamentary control; it is financed exclusively from its own revenues.

3.2.2. Legal principles underlying the regulatory activity of ANCOM

ANCOM has published at the beginning of its regulatory activity (in 2003), a code of good practices²⁴ which represents a set of principles with practical applicability, meant to ensure the efficiency of the implementation of the regulatory framework. Some of these principles are found in the laws currently in force;²⁵ others are the result of good practices and regulatory expertise at the international level:

- (a) *Transparency*: ANCOM acts transparently both with regard to the providers that exist on the market and to the users, ensuring that all interested parties are fully informed, by using tools specific to communication – public consultations, its own website, PR activities, press releases. The regulatory activity (actions plus tools) needs to be transparent, allowing providers to base their economic decisions on reliable information. Every time ANCOM intends to adopt a measure that will

²³ See for details ANCOM's web site (in Romanian) <www.ancom.org.ro/scurt-istoric_919> accessed 28.06.2012. The Authority was established through GEO no. 22/2009 and its functioning, attributions, role are detailed through a Regulation issued by ANCOM, approved through Decision no. 109 from 18.02.2010.

²⁴ ANCOM, 'Document de poziție privind strategia de reglementare a sectorului comunicațiilor electronice din România pentru perioada 2007–2010 [Position Document Regarding the Regulatory Strategy for the Electronic Communication Sector, Romania, 2007–2010], pp. 49–51 <www.ancom.org.ro/uploads/links_files/strategie_2007-2010.pdf> accessed 25.06.2012.

²⁵ Law no. 504/2002 (on audio-visual activities), GEO no. 111/2011 on electronic communications.

produce a significant impact on the market, the said proposal should undertake a public consultation, where each interested person can send observations and proposals. The Authority will respond in writing, by offering a detailed presentation of the institution's position vis-à-vis the received recommendation. Consultation is a key dimension of transparency. It is regulated in detail in the GEO no. 111/2011 regarding electronic communications. ANCOM has the obligation to publish on its website the document that is the subject of consultations, together with detailed information regarding the way in which comments can be submitted, including the deadline for the consultation period. The consultation period as a general rule cannot be shorter than 30 days. The suggestions/recommendations resulting from the consultation need to be published on the Authority's website no later than the date when the measure adopted is also published.

- (b) *Proportionality*: ANCOM's action on the electronic communication market needs to be, simultaneously, flexible and proportional, adapted to the objectives that need to be achieved, so that a minimum of regulations is imposed in order to ensure the functionality of the market mechanisms. The tools adopted by the Authority should have the lowest intervention level possible compared to the existing deficiencies, in accordance with the stated regulatory objectives, policies, and principles.
- (c) *Opportunity*: regulatory decisions will be adapted to the conditions that exist on the market; their timing (issuance or termination) should take into account the level of development and the dynamic of the market. The Authority should take into account the fact that any delays or error can impact the business plans of the important players on the market.
- (d) *Mandatory character*: ANCOM's decisions are mandatory for the targeted providers. If these decisions are breached, enforcement of sanctions needs to be firm and immediate.
- (e) *Technologic neutrality*: according to the principle of non-discrimination, regulatory decisions need to be neutral with regard to the technologies used or targeted by regulations, in order not to affect the competition among providers and to stimulate the innovation and the development of the most effective technologies, for the benefit of users.
- (f) *Predictability and stability*: The regulatory framework needs to be transparent, stable on the long term, and with a predictable dynamic, so that operators have the possibility to make informed decisions regarding their business plans, investments and commercial strategies. The Authority needs thus to make public in advance the regulatory policies and principles not only through the annual plan and the motivation of the drafts undergoing public consultation but also through published strategies on the medium and long term.
- (g) *Efficient use of resources*: The way in which the Authority uses the human and financial resources available needs to be established following a cost-benefit analysis because the Authority is financed by the providers operating in the sector of electronic communications and implicitly by the end users who need to obtain a maximum of benefits from the regulatory activity of ANCOM. This principle needs to be considered when establishing the opportunity, the priority, the complexity and the duration of the regulatory activities.

(h) *Necessity*: ANCOM will only intervene vis-à-vis its area of competence, when necessary, in order to accomplish a regulatory objective which has economic or social justification, and which cannot be met through market mechanisms. Economic justification exists when a public interest is invoked (defined either as the enhancement of social wellbeing of both consumers and providers or the promotion of innovation and development) or when economic efficiency is promoted. Social reasons which justify the regulatory activity include the necessity to have a fair treatment of consumers in their relations with the dominant operators, the balanced distribution of power, and the impact of the revenue transfer from consumers to investors upon the balance of social well-being.

3.3. *General Authorization Requirements for the Provision of Networks and Electronic Communication Services*

The provision of networks and electronic communication services is constructed under the conditions of a general authorization regime, adopted by ANCOM, which sets the rights and the obligations of the providers of networks and electronic communication services.²⁶ The general authorization can be changed/updated or even revoked by ANCOM under a limited number of circumstances expressly stated in the law and only after a certain consultation procedure took place. Any person who intends to provide networks or electronic communication services needs to notify ANCOM.²⁷ The applicant who notifies ANCOM within the timeframe and with the fulfilment of the conditions indicated in the law becomes a provider of networks or electronic communication services but only for the networks or services indicated in the notification. As a result, the provider becomes the holder of the rights and obligations detailed in the general authorization, for the types of networks and services notified to ANCOM. The right to provide networks and services based on the general authorization does not allow the provider to use radio frequencies, numbering, and other technical resources, provided these are needed for the provision of networks and electronic communication services. The use of these resources requires a special licensing procedure, in accordance with special legislation (see below).

3.4. *Licensing for the Use of Radio Frequencies*

In order for the provision of networks and electronic communication services to be possible, ANCOM manages at the national level limited resources which are under state property such as radio frequencies, resources regarding numbering, and other associated technical resources.

ANCOM's attributions regarding the administration and coordination at the national level of the radio frequencies spectrum contributes to the achievement of the objective of

²⁶ GEO no. 111/2011 concerning electronic communication approved through Law no. 140/2012, with subsequent changes, published in the Official Journal of Romania no. 925/27.12.2011.

²⁷ The procedure is regulated in detail through the decision of the ANCOM President no. 987/2012.

promotion of competition based on infrastructures and the objective of maximization of the value derived from the use of electronic communication services. These attributions are performed in accordance with the National Table of Frequencies Bands Allocation (NTFBA), adopted by the Ministry of Communications and of Information Technology, and with the international agreements that Romania is part of.

As a general rule, the use of the radio spectrum can be done employing any type of technology available for each type of application established by NTFBA and in accordance with the EU legislation. Also, the spectrum can be used for the provision of any electronic communication service. It is worth mentioning that ANCOM can establish, upon a sound motivation, in certain bands, proportional and non-discriminatory restrictions concerning specific services. Some valid motivations based on the protection of the public interest can include: safety of life; promotion of social, regional or territorial cohesion; avoidance of inefficient use of radio frequencies; and promotion of cultural and linguistic diversity and media pluralism, for example through the provision of services concerning radio or TV programs.

Radio frequencies can be used only after a licence for the use of radio frequencies is issued by ANCOM and under conditions meant to ensure the efficient exploitation of the limited resource, the avoidance of interferences that could cause prejudices for networks operated by other persons who use the radio spectrum under legal conditions, the assurance of technical quality, and the fulfilment of other objectives of general interest. ANCOM grants, individually, the right to use the radio frequencies comprised in NTFBA, either through allocation or assignment and keeps track of the status of how the licences are used.

The licence for using radio frequencies is defined in the Romanian legislation as the administrative act through which ANCOM grants to an authorized provider the right to use one or more radio frequencies, in order to provide networks or electronic communication services, under the condition to fulfil certain technical parameters, and for a limited time period. The licence comprises the conditions under which the right to use radio frequencies can be exercised and include: a) designation of the type of network, service or technology for which the right to use the radio frequencies was granted, including, if applicable, the exclusive use of a frequency for the transmission of a certain audio-visual media service; b) the efficient and rational use of frequencies, including, if applicable, quality requirements concerning the service provided and its territorial coverage; c) deadlines for the actual use of the frequencies; d) operational and technical requirements necessary for the avoidance of interferences which might cause prejudices and for the limitations of the effects of electro-magnetic field, in cases when these requirements are different from those included in the general authorization; e) the duration for which the right to use the frequencies is granted f) the possibility and the conditions under which the right to use the radio frequencies can be transferred; g) the fee for the use of the spectrum; h) any obligations for the provider resulting from a competitive or comparative bidding; i) obligations generated by international agreements

concerning the use of frequencies; and j) obligations generated by the experimental or occasional use of radio frequencies.

The number of licences for the use of radio frequencies which are to be awarded in a certain band can be limited provided that it is necessary to ensure the efficient use of the spectrum or to avoid the occurrence of interferences which generate prejudices. The limitation of the number of licences can be achieved only if the following conditions are met: a) ANCOM takes into consideration the necessity that the measure brings the users a maximum of benefits and facilitates the development of competition; ANCOM grants to all interested parties, including users and consumers, the possibility to express their opinion regarding this measure; and the publication of all decisions which limit the number of licences, together with the motivation of this measure.

The award of licences for the use of radio frequencies is made through an open, objective, transparent, non-discriminatory, and proportional procedure. When the number of licences to be awarded is limited, the allocation is based on a competitive or comparative selection, based on an objective, transparent, non-discriminatory, and proportional procedure, which should not limit, impede upon or distort competition. The competitive selection is the procedure for the award of the licence to use radio frequencies through which the right to use these frequencies is awarded to the winner of the bid who offers the highest amount of money for the licence. The minimum price is set by the government through a decision. In the same time, the winner must comply with some technical, administrative or financial requirements which represent prequalification criteria. The comparative selection on the other hand, is the procedure for the award of the licence to use radio frequencies through which the right to use these frequencies is awarded to the applicant who ranks first following the evaluation of the bids, which is based on a set of pre-established technical, administrative or financial criteria. The first procedure is to be used in general once the market had reached a certain maturity and the infrastructure is quite developed. The latter is generally employed when the governments pursue, in addition to financial gains, other public goals that are related to the development of the infrastructure, penetration rate, coverage, etc. Under specific circumstances, the direct award of radio frequencies can be employed, for the operators which provide public radio and TV programs. The direct award needs to be necessary for the fulfilment of an objective of general interest. In addition, the award of the frequencies needs to be justified in an objective manner and to be transparent and proportional.

The right to use radio frequencies following a comparative or competitive selection is granted for a period of maximum 10 years. The right can be granted for a period of up to 15 years in order to make sure that the validity period of the licence is in accordance with the type of electronic communication service for which it was granted, by taking into consideration the objective to be met and it also considers the proper duration for the amortization of the investment. The holder of the licence can transfer the rights granted through the licence to another authorized person. The transfer needs to be pre-approved by ANCOM.

The licence for the use of radio frequencies can be revoked, totally or partially, under the following circumstances: a) the rights granted through the licences are not exercised within the time limits set in the licence; b) the measure is necessary in order to implement objectives concerning harmonization at European level and international cooperation for the use of radio frequencies; c) the measure is necessary in order to comply with the international agreements that Romania is part of; d) the measure is necessary in order to implement the development strategy for electronic communications and the policy for the administration of the radio frequencies spectrum; e) when the exercise of the right to use the spectrum is interrupted, for reasons attributable to the holder of the licence, for more than six months and if this fact has as direct effect the limiting of ANCOM's possibility to grant other use rights under certain conditions; f) in order to avoid the setting aside of the radio spectrum, manifested through the non-use of the limited resource up to the ceiling allowed through the licence, when this measure is necessary for assuring a real competition on the market or in order to eliminate certain barriers for entering the market, which have as an effect the limitation, restriction, or distortion of competition. When the licence needs to be revoked due to objectives regarding European or international cooperation or due to the need to implement national strategies, a consultation procedure is needed.

3.5. The First Competitive Bid held in Romania for the Allocation of Radio Frequencies (for Mobile Communications)

3.5.1. Overview of the procedure

In 2012 ANCOM awarded for the first time the right to use the radio spectrum for the bands 800, 900, 1800, and 2600 MHz through a competitive and open procedure. The bid was necessary because of several cumulative circumstances:²⁸ Three existing licences were about to expire (2 GSM licences for the 900 and 1800 MHz band – end of 2012; one GSM licence for the 900 and 1800 MHz band – April 2014); New frequencies made available by the Ministry of Defence and adapted for the LTE technology, adapted to higher frequencies; Increase of data traffic in mobile communications (over 200MB/active SIM card/month); New technologies in mobile communications (HSPA+ and LTE/4G). The competitive procedure was chosen because in 2012 several mobile communication networks already covered Romania and the penetration rate was 110%. Under these circumstances, the comparative selection procedures, which emphasize speed and infrastructure development, seemed to no longer provide a significant advantage at this point in time. In addition, the spectrum volume to be awarded was extremely significant – a plus of 210 MHz, or 77% more compared to the existing available frequencies before the bid.²⁹ Before this bid was initiated, a major concern expressed by

²⁸ C. Marinescu, ANCOM President, 'The Results of the Spectrum Bid for Mobile Electronic Communications', Press conference, 24.09.2012 <www.ancom.org.ro/en/uploads/links_files/Rezultate_licitatie_-_final_EN.pdf> accessed 15.03.2015.

²⁹ C. Marinescu, footnote 28.

the operators was the lack of competition on the market due to the impossibility of new operators to enter it (no frequencies available in the 900 and 1800 bands). Until the bid from 2012, the RCS&RDS operator was not able to enter the market. It was able to only be present on the market for the 3G mobile phone segment, following an award procedure that had taken place in 2006.

The award documentation was published in July and the entire procedure was finalized on September 24, 2012. The procedure used can be described as open, ascending, multi-bands and multi-rounds. The four stages included: 1) Qualification: the tenderers were evaluated based on a mandatory minimum professional level, the existence of a bank guarantee notice, and the technical project concerning the development of the network. 2) Open award procedure, with multiple rounds (ascending award procedure – three primary rounds; 2 supplementary rounds). 3) Setting of the actual blocks of frequencies (7 allocation rounds). 4) Issuance of the licences for using the frequencies, which ended after the payment of the corresponding fee (until 2013, depending on the licence).

Through the competitive bid two types of licences were awarded: long-term licences (15 years, until April 2029) and short term licences (one year and three months, until April 2014). For the long-term licences there were 42 paired blocks of 5 MHz (6 in the 800 band, 7 in the 900 band, 15 in the 1800 band, and 14 in the 2600 band) and 3 unpaired blocks of 15 MHz in the 2600 band available. For the short-term licences, there were 10 paired blocks of 2.5 MHz in the 900 band and 6 paired blocks of 5 MHz in the 1800 band available.

Some data concerning the outcome of this bid are presented below:³⁰ a) 5 operators obtained licences for 485 MHz, which represents 85% of the total volume of the spectrum offered in the bid by ANCOM (as a result the available quantity of the spectrum for mobile communications increased by 77%). b) Total revenues from the awarded licences – 682,136,036 Euros. c) Advantages for the users (new high speed services, better coverage, and 676 rural communities not covered by 3G, which now benefit from HSPA/HSPA+ and LTE coverage). d) Sustainable development of the competition in this field. e) Support for technological progress (prerequisites for the commercial launching of LTE/4G), etc.

Currently, it is worth considering if there is still interest among network and services providers for the remaining frequencies which were not allocated in 2012. Following the bid from 2012, there are still available 1 2x5 MHz block in the 800 band and 8 2x5 MHz blocks in the 2600 band. These frequencies will be allocated for the provision of broadband mobile communications. In January 2014 ANCOM launched a consultation procedure to determine if the providers are interested in acquiring these frequencies. ANCOM, in the motivation of the consultation procedure, claims that the level of use for broadband mobile Internet has increased constantly and the revenues obtained from the

³⁰ C. Marinescu, footnote 28.

provision of these services had increased in the first semester of 2013 with 45%.³¹ Despite ACOM's positive estimations, the response/interest of the operators is rather weak. It remains to be seen if ANCOM will go ahead and organize in 2015 a new competitive award for these remaining frequencies.

3.5.2. Competition issues tackled by the Competition Council within the framework of the competitive bid

Given the novelty and the complexity of the proposed bidding procedure, the public consultation and the input received from the industry following the consultation, together with the position of the Competition Council in response to critiques coming from the operators, played a significant role in the process of adjusting the requirements of the bid and implicitly the way in which the spectrum was allocated. In this section we examine the main critiques of the requirements of the bid based on the position of the Competition Council³² and the complaints of several operators. It is worth noting that the final award documentation issued by ANCOM for the bid included most of the recommendations of the Competition Council and/or operators.

As a general statement, the Competition Council argued that the granting of the rights of use for the radio spectrum should not be based exclusively on financial reasons – collection of licensing fees to the state budget but rather on the evolution of the entire industry of mobile communications for the duration of the licences. The mobile communications industry is important both for consumers – who should benefit from the best services at the lowest prices possible, as well as for other economic fields for which these communications represent an essential infrastructure.

A first issue tackled refers to the coverage obligation imposed by ANCOM – the operators who win blocks of frequencies in the 800 MHz or 900 MHz need to cover, until April 2015, the localities which have not been covered thus far by mobile communications networks. The problem refers to the allocation procedure which implies that the winning bidders need to agree among themselves with regard to which localities they are going to cover, each of them being forced to cover a number equal to the number of blocks awarded multiplied by 107. Exchanging information with regard to business plans targeting the extension of the network may distort competition. The recommendation of the Council was to use a different mechanism for the coverage of these localities, which will take place only after the award of the use rights. Each winning tenderer will make a proposal to the National Authority regarding coverage options. If certain localities remain uncovered, then the operators will be required to cover those localities based on

³¹ ANCOM, 'Consultation Concerning the Award of Use Rights for the Radio Frequencies in the Sub-Bands of 791–796MHz/832–837MHz and 2530–2570 MHz/2650–2690 MHz' <www.ancom.org.ro/en/mobil/january-20-2014_5156> accessed 12.03.2015.

³² Competition Council, 'Position Document RG 6632/16.05.2012' <www.consiliulconcurentei.ro/uploads/docs/items/id7437/interventia_consiliului_concurentei_asupra_documentatiei_ancom_aferente_licitatiei_frecvente_2012.pdf> accessed 12.03.2015.

a random assignment. In the case of this provision, the Council acknowledged the public interest ANCOM tried to protect (access to services for a large variety of people and localities, especially in the rural areas) but suggested a different strategy to achieve it. The mechanism was changed in the final award documentation.

A second issue addressed refers to the restrictions applicable to the temporary blocks of frequencies in the 900 MHz band, as a result of the dimension of these blocks (paired blocks of 5 MHz). The restrictions set may lead on the one hand to the setting aside of a paired sub-block of 2.5 MHz by the third operator who wins the third sub-block of 5 MHz in the 900 band, or on the other hand to the artificial increase of the costs regarding the clearing of the bands by the operator who loses the bid for the said frequencies block. The licences of Vodafone and Orange for the use of the spectrum in the 900 MHz and 1800 MHz would expire in December 2012; therefore these enterprises would be forced to bid for a higher quantity of spectrum than needed (3 blocks of 2 x 5 MHz while they currently use only 12.5 MHz). This impacts competition because it leads to an inefficient use of the spectrum by setting aside frequencies. This is correlated also with a higher degree of market concentration and a lower number of operators. The solution of the Council, suggested also by operators and finally adopted by ANCOM, was to modify the dimension of the temporary blocks in the 900 MHz band – from 2 x 5 MHz to 2 x 2.5 MHz. In this way the existing operators got the temporary licence for the exact dimension of the spectrum that they use, while a new applicant will get at least 5 MHz in this band.

A third issue addressed from a competition standpoint refers to the limitations regarding the quantity of radio frequencies that operators can have in the 800 MHz, 900 MHz, and 1800 MHz bands. According to the initial draft of the award documentation, both for the 800 MHz (long term licences and 900 MHz (short term and long term licences alike), the maximum quantity of radio frequencies is 2 x 15 MHz. No upper ceiling was set for the 1800 MHz. The Council observed that while the 800 and 900 MHz frequencies have similar characteristics, they differ substantially in terms of the technology needed for their operation and exploitation. Also the Council stated that if the limitations described above are to be maintained, then it is possible to only have three operators in the 900 MHz band. Thus, the holders of the licence might gain on the short and medium run a commercial advantage over the holders of a licence in the 800 MHz band. This advantage is even greater given the fact that following the award procedure the operators operating in the 900 MHz band will stay in the same band in the future. Also, the fact that there are no limitations for the 1800 MHz band means that there is no competition pressure on the market of mobile electronic communications. If following the bid, there are no more spectrum resources available, new entries on the market will not be possible, with the exception of the cession of frequencies. At that time the Council claimed that this was especially worrying in the case of the licences awarded for 15 years. Therefore, the recommendation of the Council was to limit the amount of spectrum one operator can use to 2 x 10 MHz in the 900 band, given the vital character of this band for the development of electronic mobile communications. As a recent study shows, extending the number of operators from 3 to 4 in the 900 band leads to an increased competition

which in turn determines an increased surplus for consumers.³³ ANCOM followed the recommendation of the Council in the final award documentation, limiting the quantity to 2×10 MHz in the 900 band. No upper ceiling was set in the final documentation for the 1800 band, despite the suggestion of the industry to limit it to 2×20 MHz.

One final issue considered by the Competition Council concerns the possibility granted by ANCOM to the new providers which entered the market in 2012 to have access to the national roaming services of the other providers only if the former succeed to cover with their own network at least 30% of the population. The recommendation of the Council was to eliminate this requirement or to limit it to a lesser percentage (20%). The Council acknowledged however that from a competition standpoint this requirement is not necessarily discriminatory; but from a policy perspective, if ANCOM will limit the percentage, a more immediate and sustainable competition pressure will be created on the market. The final bid did not incorporate this recommendation and the coverage was maintained at 30%.

3.6. *Other Relevant aspects Pertaining to the Allocation Procedure of Radio Frequencies*

The entry of newcomers to the market is highly significant in this field. Regulatory agencies have to carefully consider the length of the period for which the radio frequencies are allocated to a specific provider. Especially in cases when the spectrum (a certain band) is fully occupied, licences awarded for long periods of time (over 10 years) can make entrance on the market for new operators virtually impossible. In Romania, with regard to mobile communications, it was estimated that licences granted for 15 years are in accordance with the necessary investments made by the providers and that the entry of newcomers is not a valid concern. Only time will tell if in five or ten years more economic operators will be interested to enter the market. The regulatory agency claims that when assessing scarcity we also need to take into consideration future technological progress. Today providers might be confined to certain bands but this may change in the future, thus making possible the entry of newcomers.

The principle of transparency is of paramount importance in the management of the radio spectrum. As opposed to gambling and CO₂ emissions (other policy fields as well), ANCOM, in its role of regulatory agency, maintains a website that offers almost all relevant information in this field. Most documents are also available in English, which makes the access of interested foreign operators possible. Besides the mandatory consultation procedures set in the law, ANCOM also carries various surveys and inquiries meant to determine the opinion of the economic operators with regard to future policy decisions and allocation procedures for the spectrum. The results of the 2012 competitive

³³ 'Study Concerning the Impact of the Use of the 900 MHz Band for the Provision of 3rd Generation Electronic Communication Services Using UMTS Services on the Competition on the Market of Mobile Communications', Report part 1 (project number: CON 4297), March 2011.

bid were covered at length by the press but this was also due to the extensive information offered by ANCOM, including comprehensive press releases.

With regard to the legal protection of the applicants, it is worth mentioning that in the field of radio frequencies, the Competition Council rather than the courts has played a significant role. This is due to the fact that the field is highly technical and the economic operators know that administrative judges, often performing a mere legality review, are poorly equipped to address highly specialized issues. By lodging complaints with the Competition Council, the economic operators were able to change for example some critical provisions from the award documentation for the 2012 bid described in the previous section. Of course, this was possible also because ANCOM invited the interested parties in the bid to express opinions based on the draft award documentation. In the absence of this transparency measure, most likely some economic operators would have challenged the award procedure/decision in court after the procedure was finalized. The review procedure established by ANCOM in the case of the competitive/comparative procedures is quite simple: aggrieved economic operators can lodge a complaint with ANCOM, which acts as a review body. Members of the award commission cannot be also members of the review commission. The final resort is the court, administrative law unit, according to the 2004 Law on judicial review.

4. Examples of Scarcity and Allocation Procedures in Romania: CO₂ Emission Allowances

4.1. The Interaction of the EU Emissions Trading System (EU-ETS) and the Kyoto Protocol System

With regard to climate policies of Member States and the European Union, in 2015 we are in the second commitment period (CP2: 2013–2020) under the Kyoto Protocol and the third phase of the EU Emissions Trading System (EU ETS: 2013–2020). Individual Member States (including Romania) are members of the Kyoto Protocol, having individual targets covering all CO₂ emitting sectors, but the EU climate policy emission reduction targets are more ambitious, imposing stricter emission reduction policies and measures. Since 2002 the European Union (then the European Community with 15 Member States) stated that it will fulfil the EU's emissions commitment under Kyoto jointly.

As a consequence, under the Kyoto Protocol, the EU is treated as a bubble, meaning that the relevant reduction target is that of the EU as a whole, rather than the reduction targets of individual countries. An important element of the EU strategy for meeting its Kyoto commitment is the EU Emissions Trading System (EU ETS). This mechanism places a cap on emissions from the power sector and heavy industries (trading sectors), covering about 50% of total EU emissions. To ensure consistency with the Kyoto Protocol both systems work in parallel. Under Kyoto, states are allocated Assigned Amount Units (AAUs), as CO₂ emissions permits equivalent to 1 metric ton of CO₂, while under the European ETS Member States allocate to their national economic operators in the

regulated sectors European Union Allowances (EUAs), also equivalent to 1 metric ton of CO₂.

With regard to compliance mechanisms, each EUA (EU Allowance) is equivalent to, and is shadowed by, a corresponding AAU (Assigned Amount Unit under Kyoto) in EU governments' national registries. When at EU level, through the EU ETS, EUAs were allocated to each member state an equal amount of AAUs was locked in their national accounts. Starting with 2008, entities (economic operators) covered under the EU ETS can use EUAs (but not AAUs) for compliance, but each EUA is shadowed by an AAU. So only the AAUs that remain over the EUA-AAU correspondence can be used by member states for compliance with Kyoto targets for other sectors. For emission reductions in sectors not covered through the EU ETS (such as transportation or agriculture) the EU member states can meet the obligations by reducing emissions in those sectors or by purchasing AAUs or offset credits.

Currently, the EU is oversupplied by about 2 billion EUAs, and the total AAUs surplus owned by EU member states is about 4 billion.³⁴ Even if exact numbers are hard to determine, the general opinion is that the EU's need for additional AAUs is quite limited. The European Union legislation on Climate and Energy Package for the implementation of its emission reduction targets for the period 2013–2020 does not allow the use of surplus AAUs carried over from the first commitment period (CPI: 2008–2012) to meet these objectives.

4.2. *Source of Scarcity and Ceilings*

Romania signed the UN Framework Convention on Climate Change in 1992, at the Rio Earth Summit and ratified the convention in 1994.³⁵ Romania's participation to the Kyoto Protocol was finalized in 2001, following the ratification of the protocol,³⁶ thus committing itself to reduce the greenhouse gas emissions with 8% in the first commitment period 2008–2012, compared to the base year 1989 (established on Romania's express requirement in order to better reflect its economic potential). For the second commitment period the reduction target for each individual Member State is 20%, but the EU renews its commitment to jointly fulfil the CP2 targets.

In assessing the scarcity of the CO₂ emission rights in Romania a key element is the reference to 1989 as the base year. Under the communist regime the planned economy resulted in the high industrialization of the economy, and virtually no interest for the effects of the consumption of natural resources or for controlling pollution. After the fall

³⁴ A. Kollmuss, Carbon Market Watch, 'Doha Decisions on the Kyoto Surplus Explained', Carbon Market Watch Policy Brief, March 2013 <http://carbonmarketwatch.org/wp-content/uploads/2013/03/CarbonMarketWatch-CO18-Surplus_decisions_explained_4March20131.pdf> accessed 05.03.2015.

³⁵ Law no. 24/1994 on the ratification of the United Nations Framework Convention on Climate Change signed at Rio de Janeiro on June 5, 1992, published in the Official Journal of Romania, no. 119/12.05.1994.

³⁶ Law no. 3/2001 on ratification of the Kyoto Protocol to the UN Framework Convention on Climate Change, adopted on December 11, 1997, published in the Official Journal of Romania, no. 81/16.02.2001.

of the communist regime in 1989, the transition to the market economy triggered a relatively long period of economic decline and, implicitly, the decrease of the greenhouse gas emissions, as it is emphasized in 'Romania's Initial Report under the Kyoto Protocol (Assigned Amount Calculation)'.³⁷ According to the UN review of the report submitted by Romania, 'GHG emissions from stationary combustion accounted for 55.5% of total national emissions in the base year and 53.2% in 2004. These emissions decreased by 46.2% between 1989 and 2004, mostly due to a general decline in economic activity after 1989'.³⁸

Preceding Romania's accession to the EU, a number of measures were taken in order to comply with the EU legal requirements in the environmental field and these measures triggered policies and actions that directly or indirectly impacted the carbon footprint of the Romanian economy. Resulting from an express EU requirement, Romania adopted the 'National Allocation Plan for the periods 2007 and 2008–2012'.³⁹ This document explicitly states that there is no risk for Romania in complying with the Kyoto requirements of reducing greenhouse gas emissions, with total estimated emissions comfortably beneath the first commitment period (CPI) targets. In 2008 Romania could not sell surplus AAUs (at very favourable market prices) because it lacked the legal framework to sell the credits.⁴⁰ Later, in 2011 and until July 2012 Romania was suspended from the official market by the UN Kyoto Protocol Compliance Committee, as it was found in breach of the calculation and reporting mechanisms of the protocol. According to data available at the end of 2014, Romania did not sell any surplus AAUs. At the end of CPI Romania is the fourth largest surplus holder of AAUs, after Russia, Ukraine and Poland.⁴¹

The scarcity of the CO₂ emission units must also be assessed with reference to the EU ETS. For the first two phases, the cap on allowances was set at national level through national allocation plans. While the EU scheme was designed as a mechanism based on commercial principles meant to encourage emission reduction in a technical and cost-effective manner, the reported results of the mechanism are conflicting. In general, the entire EU carbon market is reported to have a significant excess of certificates. This is the

³⁷ Romania, Ministry of Environment and Sustainable Development, 'Romania's Initial Report under the Kyoto Protocol, (Assigned Amount Calculation)' May 2007 <www.mmediu.ro/protectia_mediului/schimbari_climatice/1_Documentatie/Romania_Initial_Report_Kyoto_Protocol.pdf> accessed 05.03.2015.

³⁸ United Nations, UNFCCC, 'Report of the Review of the Initial Report of Romania' 16.05.2008 <<http://unfccc.int/resource/docs/2008/irr/rou.pdf>> accessed 05.03.2015.

³⁹ Romania, Ministry of Environment and Water Management, 'Romanian National Allocation Plan for the Periods 2007 and 2008–2012' 12.12.2006 <http://ec.europa.eu/clima/policies/ets/allocation/2008/docs/nap_romania_final_en.pdf> accessed 05.03.2015.

⁴⁰ The legal framework was created by Government Emergency Ordinance no. 29/2010 regarding the administration of the surplus Assigned Amount Units, attributed to Romania through the Kyoto Protocol (published in the Official Journal of Romania no. 231/13.04.2010), approved with amendments by Law no. 145/2010 (published in the Official Journal of Romania no. 497/19.07.2010) and Government Decision no. 423/2010 on the initiation and development of green investments schemes (published in the Official Journal of Romania no. 303/10.05.2010).

⁴¹ A. Kollmuss, footnote 34.

result of at least two factors: the ‘generosity’ of the member states in allocating them, starting with ‘high’ ceilings (this propensity of the Member States to over-allocate is generated by concerns regarding the competitiveness of the EU-ETS scheme sectors on the global market), and the economic recession that started after the certificates for the 2008–2012 period were allocated.

In its proposal for the National Allocation Plan for the periods 2007 and 2008–2012, submitted to the Commission, Romania proposed higher ceilings than those finally approved by the Commission. Subsequently, Romania filed for annulment of the Commission’s decisions, arguing that the Commission exceeded its competence in determining the overall volume of certificates that can be allocated by Romania, while also infringing the principles of transparency and non-discrimination.⁴² Similar complaints were lodged by Poland, Estonia, Hungary, Bulgaria, Lithuania, and the Czech Republic. All these states were dissatisfied with the Commission which found that the National Allocations Plans (NAPs) were incompatible with the conditions of the Directive 2003/87 and reduced the annual quantity of emission allowances (by around 25% in the case of Poland, 47% in the case of Estonia, and 20.7% for Romania). The General Court found that the Commission had exceeded its powers by using an assessment method of its own. Also, the drawing up of the NAPs was a matter which fell within the competence of the Member States and the Commission had only limited power to oversee relevant decisions. The final decision of the Court (in the appeal made by the European Commission against the first instance decision in the litigation between the Commission and Poland)⁴³ ruled that the Commission did exceed its competence and ended the conflict in March 2012. All the other cases were removed from the court; the Member States were permitted to use their own allocations for the first two EU ETS phases. The outcome of the legal battle has important implications for the success of the EU ETS not only in the first and second phase, but also for the third phase.

For the current third trading period (2013–2020) there is a single EU-wide cap and allowances will be allocated on the basis of harmonized rules. National allocations plans are not needed but are relevant as a starting point for the third phase. From 2013, the total number of allowances will decrease annually in a linear manner. The starting point of this line is the average total quantity of allowances (phase 2 cap) issued by Member States for the 2008–2012 period, adjusted to reflect the broadened scope of the system from 2013.⁴⁴ The linear factor by which the annual amount shall decrease is 1.74% in relation to the phase 2 cap. The reduction goal for the EU ETS sectors is 21% compared to 2005, by 2020.

⁴² Action brought on 22.12.2007 – *Romania v Commission of the European Communities* (Case T-483/07) (2008/C 51/102) and Action brought on 22.12.2007 – *Romania v Commission of the European Communities* (Case T-484/07) (2008/C 51/103) published in the Official Journal of the European Union, C 51/56–57, 23.02.2008.

⁴³ Case C-504/09 P, Judgement of the Court (second Chamber) of 29.03.2012, Appeal Case before the general court T-183/07.

⁴⁴ European Commission <http://ec.europa.eu/clima/policies/ets/faq_en.htm>.

However, the Member States' tendency of over allocation discussed above should be understood in the context of national concerns about the significant increase in the costs of the operators participating in the EU ETS scheme, resulted from strict monitoring and reporting rules in order to meet the legal requirements for receiving the certificates, administration and transaction costs related to certificates' transactions, costs derived from the increased prices of energy. These are complemented by costs incurred by the acquisitions of certificates in order to comply with the requirement that a number of certificates equal to the emissions generated must be returned each year to the national Registry.

The CO₂ market conditions in Romania are also relevant in assessing scarcity. There is a small but functioning secondary market for CO₂ emission permits, traded exclusively through exchanges (until 2010 auctions and other competitive procedures were also used). Romanian operators have realized the potential of these financial instruments for financing the companies, but also their impact on the future of their business. For instance, the largest Romanian state-owned thermal energy producer (Elcen) tried to use the certificates as collateral for their loans and, later, in 2009 sold 2.5 million EUAs to finance its current activities. Initially, the decision of the company not to sell from the 26 million certificates allocated for 2008–2012 was the uncertainty regarding the evolution of the energy demand in the future and the vital importance of these certificates for their operations. Other companies (e.g. Termoelectrica) operating in the same sector declared a significant deficit of certificates for the same period of time, but later, in 2011 and 2012 sold a large amount of EUAs. Although they are aware that the money from trading emission rights should be used for investments, the companies report that they sold EUAs in order to have cash flow or for company's consumption.

It can be noted that data coming from the sectors directly affected by the scheme are contradictory when it comes to estimating the CO₂ emission permits deficit. Their performance in managing the certificates reserve is surely influenced by factors more complex than solely government's allocation system (e.g. green investments, financing decisions, administration of the certificates, and the overall environmental performance of the company). The position of the banks is also interesting: they were reluctant to accept EUAs as collateral for loans, given the volatility of the carbon markets, but were very interested in buying EUAs at the same low market prices, considering such investment 'clean money'.

Regarding the current ceiling for Romania, according to article 10 of GD no. 780/2006,⁴⁵ for the third phase of EU ETS (2013–2020) the number of GHG emission certificates allocated each year are linearly reduced starting from the middle of the second phase (2008–2012). The quantity of certificates is reduced by a linear factor of 1.74% compared

⁴⁵ The Romanian legal act establishing the Greenhouse Gas Emissions Trading Scheme, Government Decision (GD) no. 780/2006, published in the Official Journal of Romania no. 554/27.06.2006, last amended on 23.04.2013 (GD no. 204/2013).

to the average annual quantity of GHG emission certificates allocated according to the National Allocation Plan (2007, 2008–2012). The ceiling for the current third phase of EU ETS is linked to the emissions and allocations from the second phase (2008–2012) and Romania, as many other Member States, oversupplied the Romanian operators with EUAs which can be used in the current phase of EU ETS for compliance. Although it is clear from the evolution of the European mechanism that in 2020 the issue of scarcity will be very different for EU operators, the present context (both the oversupply from the previous phases, the rather large allocations in the present and the low market prices) offers little arguments for the ‘scarcity’ issue. There is limitation with regard to allocations in the third phase, the limitation is even stronger with regard to free allocation of emission rights (which will decrease to 30% by 2020 and no free allocation by 2027), but there is little evidence with regard to scarcity in the present. On the other hand, climate policies are long term public policies and such an incremental approach with regard to ceilings, limitations and scarcity are important in order to allow adaptation of economic operators (technology, alternative solutions or costs).

4.3. *The Allocation Procedure*

According to the EU Emission Trading Scheme (EU ETS), in its first two phases (2005–2007; 2008–2012) the Member States were responsible for the implementation rules of the scheme, including determining the maximum volume of certificates at national level and the methodology and principles in place for their allocation. For the first two periods of implementation each member state has established, based on its own calculations, a national maximum ceiling of greenhouse gas emissions for industrial activities under the mechanism. Given this discretion in determining rules and principles, as well as the essential issue of scarcity of these rights by setting a national ceiling, it is understandable why different Member States tried to set generous ceilings. Currently we also know that the EUAs allocated in the previous phases can be carried-over in the third phase and that ceilings established in the second phase are the baseline for emission reduction targets and thus the new ceiling.

The Romanian legal act establishing the Greenhouse Gas Emissions Trading Scheme is Government Decision (GD) no. 780/2006.⁴⁶ The main provisions required by the EU ETS are in place since 2006. The scheme was further detailed in order to be implemented through the National Allocation Plan for the periods 2007 and 2008–2012. Amendments were made in 2010 and 2011 in order to extend the mechanism to aviation and in 2013 to align legislation to phase 3 requirements.

The allocation procedure, as detailed in the GD no. 780/2006 starts with issuing an authorization regarding greenhouse gas emissions (effective since January 1, 2007) for each operator conducting an activity under the incidence of the EU ETS scheme. This

⁴⁶ Published in the Official Journal of Romania no. 554/27.06.2006, last amended on 23.04.2013 (GD no. 204/2013).

authorization is issued by the authority competent for environmental protection (the National Environmental Protection Agency). In order to obtain the authorization the operator has to file a request accompanied by relevant documents for assessing the greenhouse gas emission sources that the company uses in its operations. The authorization is issued by the competent authority if it positively appreciates the capacity of the operator to monitor and report the emissions correctly. Operators not holding the authorization cannot participate in the EU ETS. They are not allocated free CO₂ emission permits and they cannot conduct operations under the incidence of the scheme.

For the first two phases of EU ETS, Government Decision no. 780/2006 and the National Allocation Plan established an allocation system in which the total amount of allowances was granted for free. The allocation procedure was not competitive. Also, the National Allocation Plan expressly stated that allocations are not based on a bottom-up approach – operators determining their needs and being awarded accordingly with the required emission allowances, but rather top-down – data on production and consumption estimates provided by operators are used to complete already available data and determine the sectors projections. Also, data is used to determine the proportion of the operators' emissions in the total sector's emission. Allocations were made based on top-down projections (based on historic data and estimated progress of macroeconomic indicators at national level) – this resulting in the determination of a national cap – the total number of CO₂ emission allowances awarded at national level. Then top-down estimates are made with regard to the emissions of sectors under the incidence of the EU ETS, considering data provided by operators in those sectors.

In the third phase allocations were based on calculations made by the National Agency for Environmental Protection. The Agency's competences in free allocation of CO₂ emission certificates are: identification of installations subject to EU ETS; collecting data necessary for determining the number of certificates for each installation; asking for additional information from the economic operators; establishing the total preliminary number of certificates for each installation; transmitting the proposal for free allocation for all the national installations to the European Commission; establishing the final total number of certificates allocated for free; other measures and activities related to newcomers. However, free allocation is calculated according to entirely harmonized rules, established by the European Commission (Commission Decision 2011/278/EU).⁴⁷

For the implementation of the third phase of EU ETS, Romania issued a number of legal acts in order to establish the institutional framework for application of Commission Decision 2011/278/EU (Order no. 1.883/2011),⁴⁸ to approve the mechanism for the final annual free allocation of GHG emission allowances for the third phase of ETS from

⁴⁷ Commission Decision 2011/278/EU of 27 April 2011 determining transitional Union-wide rules for harmonized free allocation of emission allowances pursuant to Article 10a of Directive 2003/87/EC of the European Parliament and of the Council (notified under document C(2011) 2772), published in the Official Journal of the European Union, OJ L 130, 17.05.2011.

⁴⁸ Published in the Official Journal of Romania no. 535/28.07.2011.

stationary sources (Government Decision no. 881/2014,⁴⁹ allocating the free allowances to a number of 266 operators), to establish the institutional framework and authorize the Government, through the Ministry of Public Finance, to auction GHG emission allowances allocated to Romania at EU level (Government Emergency Ordinance no. 115/2011).⁵⁰ Other Minister Orders and Government Decisions were adopted to regulate specific aspects required for the operation of EU ETS in Romania (e.g. the organization of verification activities and verifiers' accreditation, the methodology on allocating the GHG emission certificates from the newcomers' reserve, for operators with significant capacity modifications and closed installations).

All these national legal acts are only implementation measures (all the essential aspects of the legal act are referenced to the EU ETS relevant directives and regulations). The subsequent legislation analysed for Romania addresses only the procedure to obtain the GHG emission authorization, monitoring, reporting and verification of emissions from EU ETS sectors. For this third phase of EU ETS decisions regarding ceilings, free allocation mechanism, auctioning and trading procedures are fully harmonized.

To conclude, the allocation procedure has two parts: the free allocation and the auctioning procedure. Free allocation excludes competitive procedures. However, the proportion of EUAs to be auctioned from Member States' total allowances will incrementally increase from 20% to 70% by the end of 2020. Romania issued the legislation necessary for auctioning procedures with EUAs in 2011. Government Emergency Ordinance no. 115/2011⁵¹ establishes the institutional framework and institutional authorizations for conducting the auctioning procedures through the common platform. This is a competitive procedure of allocation but it is still dependent on the factors relative to scarcity (previous oversupply, still generous free allocations, the still relative low price of EUAs). There is no debate in Romania with regard to these procedures, Romanian companies did not use this market context in order to invest in EUAs (for later use, either as compliance or as financial investment instruments), especially given the fact that Romanian electricity producers benefitted from a derogatory free allocation of EUAs (a total number of 71,409,917 CO₂ emission units were allocated to the Romanian electricity generation sector for 2013–2020, conditioned by investments in modernizing their technology and diversifying their energy mix).

4.4. *Verification Methodology*

GD no. 780/2006 establishes an independent verification procedure for each operator, for each activity reported under the scheme. The emissions generated by each activity of an operator must be subjected to verifications conducted by independent auditors. Their report must expressly address the security and credibility of monitoring systems and data reported by the operator regarding emissions. The level of precision of the operator

⁴⁹ Published in the Official Journal of Romania no. 811/17.09.2014.

⁵⁰ Published in the Official Journal of Romania no. 926/28.12.2011.

⁵¹ Published in the Official Journal of Romania no. 926/28.12. 2011.

in monitoring emissions must be ranked as ‘high’ (in order for the operator’s report to be validated), meaning that reported data is conclusive, data were scientifically collected, registration regarding the installations are complete and concluding. The auditor must have full access to the activities and information. Supplementary to the process analysis (determining that data and information are correct), the auditor must perform a strategic analysis (meaning that the verification must be based on a strategic analysis of all the activities conducted by an installation) and a risk analysis (based on the credibility of data for each source of emissions). The auditor must expressly classify the risk level of the operator. The auditor issues a validation report, mentioning expressly whether the operator’s report is satisfactory. By declaring the report as satisfactory the auditor validates the total volume of emissions declared by the operator. All these data transmitted to the National Environmental Protection Agency are available to the public. The certified auditors list and professional records are public as well. County Environmental Protection Agencies can perform additional verifications.

4.5. *Trading Issues – The Official Kyoto Carbon Market*

In 2010, the UN Kyoto Protocol Compliance Committee suspended Romania from trading its surplus carbon emission rights for breaching Kyoto Protocol rules on reporting emissions (Report of the individual review of the annual submission of Romania, 2010).

In 2011, after hearing Romania’s case, the Kyoto Protocol Compliance Committee, (more accurately its Enforcement Branch – EB-CC),⁵² determined that ‘Romania is not in compliance with the *‘Guidelines for national systems for the estimation of anthropogenic greenhouse gas emissions by sources’* and thus Romania’s eligibility to participate in the mechanisms is consequently suspended. In other words, Romania was suspended from trading in the official Kyoto carbon market set up by these mechanisms. In March 2012 Romania submitted a *Request for reinstatement of eligibility* and the *Third progress report*. In June 2012 the EB-CC sought expert advice and on 13 July 2012 the final decision, considering all improvements made and subsequent data provided by Romania and also the expert advice received, stated that ‘there no longer continues to be a question of implementation with respect to Romania’s eligibility, and that Romania is now fully eligible to participate in the mechanisms under Articles 6, 12 and 17 of the Protocol.’⁵³ The final decision, while allowing Romania to participate in the mechanism, concludes that measures presented by Romania need to be fully implemented.

⁵² Kyoto Protocol Compliance Committee, Enforcement Branch of the Compliance Committee, CC-2011-1-6/Romania/EB, 08.07.2011 <http://unfccc.int/files/kyoto_protocol/compliance/questions_of_implementation/application/pdf/cc-2011-1-6_romania_eb_preliminary_finding.pdf> accessed 05.03.2015.

⁵³ A final decision on this matter was made on 13.07.2012 when the EB-CC adopted, by consensus, a final decision concerning Romania’s non-compliance with the scheme. For the entire documentation concerning Romania’s non-compliance with the Kyoto Protocol see <http://unfccc.int/kyoto_protocol/compliance/questions_of_implementation/items/6030.php>.

At the same time, the Eastern European Countries lobbied to obtain the extended validity of their certificates into the second Kyoto commitment period (2013–2020). The final decisions tackling this issue were made at the COP 18 in Doha, at the end of 2012. On the one side, the countries can fully carry-over their surplus AAUs from the first commitment period (CP1) but there are limitations regarding their use in the second commitment period. Also, countries without a reduction target in CP2 cannot sell their surplus. A country's surplus is put into a reserve and it can be used as a country's own compliance units with CP2 or sold to another country that has a commitment in CP2. On the other hand, the buyer can comply with the commitment in CP2 within a limit of maximum 2% of the initial AAUs for CP1. Although the limitation is on the buyer, the implication of this limitation is the low demand for AAUs from CP1. This mechanism must also be understood in the context of the significant surplus of AAUs from CP1 and political statements of countries that they will not purchase CP1 surplus or the EU statement that CP1 AAUs cannot be used for compliance under its current climate legislation, all in the attempt to avoid further build-up for new surplus AAUs.

4.6. *Trading Issues – The National Market*

The Romanian market for tradable permits is still very small. Until 2010, the only form of trading these certificates was in the over-the-counter derivatives market (unlike the rest of the EU where they are traded on an exchange).

In January 2010 the Sibiu Monetary Financial and Commodities Exchange reported the first transaction with EUAs. In 2010 the National Securities Commission, Romania's securities regulator, introduced legal requirements (mainly classifying these certificates as equity securities) that resulted in a ban of trading EU carbon emissions allowances in forms other than on an exchange; foreign traders also have to comply with these provisions. Romanian authorities justified these measures (which, according to some opinions, restrict competition in trading the emission certificates) as efforts to prevent tax fraud (VAT in particular) and to limit the risks of fraud on this market. This last concern emerged following reports of fraudulent transactions with European Union carbon emissions allowances and the fact that EU wide market participants were worried that they could be holding fraudulent EUAs. In 2010 an important incident in Romania resulted in the illegal accessing of certificate accounts of one of the largest holder of CO₂ emissions allowances; 1.6 million such allowances were stolen, amounting to a total value of € 15 million. The Romanian operator (Holcim) initiated a lawsuit against the European Commission over the theft, for failing to freeze the accounts containing stolen units and allowing other companies to turn them in for compliance under EU ETS, asking for compensations (€ 17.6 million) for damages suffered. Around 695,000 allowances were later returned by various European authorities, but the Commission refused to reveal the location of the allowances since such details are confidential and could only be passed to European authorities. The Court rejected the complaint and ruled that Holcim must bear the losses resulting from the theft and pay the Commission

legal costs.⁵⁴ Holcim lodged an appeal against this decision, emphasizing the legal principles involved (proportionality and protection of legitimate expectations, the duty of care and the right to an effective judicial protection with regard to property rights) and also important implications for the security, confidentiality and functioning of the EU ETS (case pending).⁵⁵ This incident (followed soon by two other similar cases in other Member States) had EU wide ramifications since the European Commission, National Registry operators, traders and Member States' police authorities needed to prevent the stolen certificates from being sold and used.

4.7. Other Relevant Aspects Pertaining to Allocation: Transparency, Legal Principles, Access to Market of Newcomers

Every decision regarding CO₂ emission allocations, all information regarding Romania's (or Romanian operators') participation in projects for emission reduction under the Kyoto Protocol, monitoring reports on CO₂ emissions transmitted by the operators to the National Environmental Protection Agency are available to the public, according to regulations regarding public access to environmental information⁵⁶ and express provisions of GD no. 780/2006. The law also covers annual reports on verified GHG emissions (to be made available online by the central environmental authority).

All the documents issued by national competent authorities (reports transmitted to the European Commission or the UN monitoring bodies, plans, strategies, decisions regarding operators etc.) are available to the public.

In the context of this research we concluded that although information is indeed available it is not presented in a 'user friendly' format, it is difficult to articulate in order to obtain answers to simple questions (such as the supply of certificates for a period of time). We consider that national competent authorities are complying only with the minimum transparency requirements. There are no carbon market data, no official figures regarding transactions with certificates on the secondary market, no official estimations regarding certificates deficit/surplus, and no comprehensive explanations regarding how the entire scheme really works (information must be extracted from different legal and reporting documents, operators complain of the same difficulties in understanding guidelines for monitoring and reporting). Even some relevant Romanian implementation legislation (Annexes to Ministry Orders) cannot be found online on official sites, they are only available hard copy from the Official Journal of Romania.

⁵⁴ General Court, Case T-317/12, *Holcim (Romania) SA v European Commission*, judgement delivered on 18.09.2014.

⁵⁵ Case C-556/14 P: Appeal brought on 01.12.2014 by Holcim (Romania) SA against the judgment of the General Court (Eighth Chamber) delivered on 18.09.2014 in Case T-317/12: *Holcim (Romania) SA v European Commission*, published in the Official Journal of the European Union, C 65/22, 23.02.2015.

⁵⁶ Government Decision no. 878/2005 on public access to environmental information, published in the Official Journal of Romania no. 760/22.08.2005.

In Romania there was no debate with regard to the legal principles reflected by the allocation procedures. There is no jurisprudence on free allocation, the allocation procedure or the final list of free EUAs allocations until 2020 was not contested in court by economic operators from Romanian EU ETS sectors. We assume that any complaints were addressed by administrative procedures in the allocation process, before submitting the list to the European Commission. However, the Holcim (Romania) litigation with the European Commission⁵⁷ brings forth some interesting issues with regard to the legal principles that should be preserved by the EU ETS. The Holcim plea in the appeal procedure before the ECJ is relevant for issues related to good administration and transparency of the EU ETS. Since the third phase of EU ETS is almost entirely harmonized this debate is relevant for the EU level and not the individual member states. Holcim had also initiated a lawsuit against the Romanian environmental authorities but, given the European nature of transactions, the European rules governing the EU ETS with regard to security, confidentiality and functioning of the mechanism this litigation is irrelevant from the perspective of addressing the core issues (balance between confidentiality and security of transactions, transparency). The Holcim appeal places the allegations of misinterpretation and breach of specific EU ETS legal requirements by the European Commission in the larger context of general principles of law that should be guaranteed by the EU: '(...)breaches of several general principles of law (the principle of proportionality and of protection of legitimate expectations, the duty of care and the right to an effective judicial protection with regard to property rights), when deciding not to disclose or allow disclosure of the location of stolen European Emission Allowances (EUAs) in the framework of the European Union Emissions Trading Scheme (EU-ETS)'.

With regard to the newcomers, the law expressly states (article 15) that the access of new entrants to emission certificates must be considered in the allocation process. As such there is a New Entrants Reserve (NER) of CO₂ emission allowances for newcomers and for existing operators who have significantly increased capacity. This also is not an issue of public debate in Romania, since there was no public debate on how this procedure relates to equal/fair treatment or competition issues.

5. Conclusions

The Romanian Government and other relevant policy makers, such as regulatory agencies, are more and more often confronted with the issue of creating or managing limited public rights in various policy areas. The three areas discussed in the paper should be regarded as mere examples. Even sub-national decision-makers, such as local authorities, have to decide if a ceiling must be created for parking spaces, taxi licences or building permits for supermarkets, and if the answer is yes, then they must decide which allocation procedures are best suited for their goals.

⁵⁷ Footnote 55.

Often, in fields where there is high degree of harmonization with EU legal rules, the policy discretion for the national governments and legislators is limited. In the case of Romania, harmonization/Europeanization is a top-down process, implying the mere transposition of the EU rules, without a proper reflection on how the national context should be accommodated under the EU rules. As an advantage, the existing of a European framework means less room for errors for the Romanian Government. In the field of gambling, the ‘innovative’ solutions proposed by our Government in the 2009 act were in breach of the EU rules and principles and had to be removed. As we move toward sub-national levels of government, they will be able to rely less on an existing legal framework, validated by the EU, and will have to design their own mechanisms and to justify them in light of EU and national good administration principles.

While public decision-makers are forced by economic and social realities to cope with the scarcity of public rights and their allocation, the legal doctrine is lagging behind. A coherent legal theory of public rights, scarcity, and allocation procedures in context of scarcity, informed by the economic and policy literature, would tremendously improve the practice of regulatory agencies. The principles applicable to various legal regimes should be explored and detailed by the doctrine. In the context of limited case law, the doctrine is the only one which can inform decision-makers, discuss possible scenarios and offer best practices from other jurisdictions.

8. THE ALLOCATION OF GAMBLING LICENCES, RADIO FREQUENCIES AND CO₂ EMISSION PERMITS IN SPAIN

1. Introduction

The aim of this chapter is twofold. On the one hand, it is intended to provide an overview of the Spanish regime of allocation of limited public rights through the systematic exposition of its legal regime in three specific fields of administrative activity: gambling licences, entitlements for the use of radio frequencies and greenhouse gas emission permits. On the other hand, it is aimed at identifying some structural or horizontal features of administrative activity of allocation under Spanish law.

The three mentioned policy areas constitute clear examples of the granting of limited authorizations by administrative authorities. In this paper, the term *limited authorization* is used in its broadest sense, as one of the main types of limited public rights, and it covers any administrative decision that makes an exception limited in number to a statutory prohibition or injunction. Thus, the term covers here any entitlement granted with the referred purpose by an administrative body: licences, permits, allowances, or authorizations in the narrow sense. Concessions are also included among these figures, with the peculiarity that under Spanish law they constitute the mandatory entitlement for the privative use of a public good (*concesiones de dominio público*) or for the managing by private operators of a public service which has been reserved to the public authorities (*concesiones de servicio público*). Both kinds of concessions attribute the entitled person the exclusive right to economic exploitation of the good or activity for a limited time, after which the facility reverts for free to the administration itself.

The analysis of the legal regime of allocation of limited authorizations in concrete policy areas can be of interest in order to build a general theory on limited public rights, since such specific areas operate as reference fields (*Referenzgebiete* in the German legal terminology) for the construction of institutions of general administrative law. In this

* Isabel Fernández Torres is Professor of commercial law at Complutense University of Madrid, Spain. Dolores Utrilla Fernández-Bermejo is Assistant of administrative law and Research Fellow of the Center for European Studies at University of Castilla-La Mancha, Spain.

sense, it will be shown that it is possible to identify, in each of the analyzed sectors, certain structural elements that are traceable to abstract elements of a general system of allocation of any limited authorization.

With this target, the Spanish regime of allocation of limited authorizations in the three alluded sectors will first be exposed, distinguishing between those which are just regulated at a national level given the absence of European harmonization (section 2) and those whose regulation responds to secondary EU law (section 3). Thereafter the horizontal or structural elements that cross the exposed legal regimes will be highlighted (section 4).

2. Allocation in Case of Lack of Harmonization at a European Level: The Gambling Industry

In Spain, the gambling activity was monopolized by the State until 1977, moment up to which there only existed the ‘National Lottery’ as well as weekly sports betting based on the results of football’s league matches. From 1977 on the possibility was opened for private companies to operate in this sector, by obtaining an administrative authorization either for the opening of casinos or, in a much less restrictive manner, for the installation of the so-called ‘slot machines’ in bars and cafes. The scenario has substantially changed during the last decade, due to the increasing accessibility to the Internet by the public, circumstance which has led to improved possibilities for the online gaming industry, especially with regard to sports betting and poker. Until 2011 there was not a general legal framework for online gaming at the State’s level, but only legal rules issued by some Autonomous Communities for their respective territorial scope. Under this factual situation of freedom, about 2,000 companies have developed their gambling activity statewide, some of them having a special social visibility.

Finally, on 2011 the Spanish legislator passed the Gambling Act¹ (*Ley del Juego*, hereinafter LJ), which sets a regulatory framework both for online gambling and for certain traditional offline games, in so far as they are developed statewide. These two major types of gambling are subject to a different legal regime. The purposes of LJ are the safeguard of public order, the protection of the rights of under-aged and players, the fight against fraud and the prevention of addictive behaviours.²

Regarding traditional offline games, the LJ regulates the statewide lottery, establishing that its exercise is reserved to certain entities: the *Sociedad Estatal Loterías y Apuestas del Estado* and the *Organización Nacional de Ciegos Españoles*.³ To operate lotteries, these entities require only the obtainment of the corresponding administrative authorization

¹ Law 13/2011, of 27.05.2011.

² Article 1 LJ.

³ First Additional Provision of the LJ.

by the Ministry of Economy and Finance.⁴ With regard to online gambling (the one developed by electronic, interactive or telematic means), the games covered by the LJ are betting, raffles, contests and other games that involve a risk of patrimonial values, as well as their publicity, promotion, or sponsorship. These games are not reserved, but neither are they free: their exercise is subject to the previous obtainment of an entitlement, which can take the form of an authorization or a licence.⁵ Gambling operators that do not meet this requirement are strictly prohibited and their conduction is punishable.⁶ The procedure for the obtainment of the alluded entitlements is regulated in the Development Regulation of the LJ concerning licences, authorizations, and registers.⁷

The required entitlement will take the form of an administrative authorization when it refers to the development of online games with occasional character. The number of authorizations to grant is unlimited, and they will be granted by an administrative body created by the LJ (the National Gaming Board or *Consejo Nacional del Juego*, which nowadays has been substituted by the *Dirección General de Ordenación del Juego*, henceforth DGOJ), in the term of one month from the receipt of the application. Beyond this deadline, if the DGOJ has not given a response, the authorization should be considered as denied.⁸ By contrast, the entitlement will have the form of a Licence when it refers to the operation of online games without occasional character. There are two types of Licences: general and singular ones.

General licences authorize their holders to conduct gambling activities on a permanent basis. They are granted by the DGOJ following the mandatory administrative procedure, which should comply with the principles of publicity, concurrence, equality, transparency, objectivity, and non-discrimination.⁹ Although this seems to suggest the contrary, the general principle is the unlimited number of general licences to grant. The procedure can be initiated by the DGOJ on a voluntary basis or on request of any interested subject. Once a procedure for the granting of general licences for a given type of game has taken place, the request for the celebration of a new procedure has to await eighteen months. Before the initiation of the procedure, the bases or sheets of conditions governing it must be approved. Such bases shall determine the criteria for the granting of the licences. Among these criteria it is possible to include the experience of the tenderers, their solvency or their availability of means for the exploitation of the licence. For the obtainment of a general licence it is necessary to be a limited company or *sociedad anónima*, and to have the gambling activity as sole purpose. Once the period of six months from the launch of the procedure has expired without specific resolution by the Administration, the licence will be considered as granted (positive silence). If granted, the general licence is valid for ten years, renewable for periods of another ten.

⁴ Article 5 LJ.

⁵ Article 9(1) LJ.

⁶ Article 9(2) LJ.

⁷ Approved by Royal Decree 1614/2011, of 14.11.2011.

⁸ Article 12 LJ.

⁹ Regulated in article 10 LJ.

By exception, the bases of the procedure can set a limit to the number of general licences to grant, when it is deemed as necessary to dimension the supply of the concerned game, on proposal of the DGOJ and after the conduction of a procedure in which the possible interested subjects must be heard. Such quantitative limitation can only be justified by reasons of protection of the public interest, protection of the rights of under-aged or prevention of addictive behaviours.¹⁰ The duration of general licences in case of limitation of their number is also of ten years. Nevertheless, their renewal after such a period will not take place: they should be reassigned by the Administration if there is a third party interested in obtaining the licence, who made a requirement at least twenty four months before the expiration date, and who demonstrates compliance with the requirements that were considered for the granting of the Licence to the previous holder.¹¹

Once a gambling company has been granted a general licence, it needs to obtain a singular licence for the exploitation of each concrete game included in the scope of the general one. Singular licences are granted according to the specific procedures established by means of administrative regulations by the DGOJ. Such procedures must respect the principles of transparency, objectivity and non-discrimination, and they should be proportionate to the purposes of protecting public health, under-aged and dependents, and of prevention of fraud, money laundering and terrorist financing. Singular licences will have a minimum duration of one year and a maximum of five, and they will be renewable for successive periods of the same duration.¹² Rules governing the procedure for the granting of singular licences allow for the simultaneous granting of general and singular licences and establish that any applicant fulfilling the required conditions has the right to obtain a licence.¹³

None of the entitlements regulated in the LJ can be transferred nor operated by third parties. By exception, the authorizations or licences may be transferred after allowance of the DGOJ in cases of fusion, excision or contribution of industry motivated by company restructuring.¹⁴ The entitlements granted by other Member States of the EU will not be valid in Spain,¹⁵ and the ones granted in Spain should get registered in the General Register of Gaming Licences (*Registro General de Licencias de Juego*).¹⁶

The first administrative procedure for the granting of both general and singular licences was opened in November 2011, setting a deadline of a month for the submission of applications. The applicants had to be registered in any State of the EU (Malta, in most cases). It was provided that the administrative procedure could take up to six months, in order to enable the Administration to verify the applications, particularly regarding the

¹⁰ Article 10(5) LJ.

¹¹ Article 10(6) LJ.

¹² Article 11 LJ.

¹³ DGOJ's Resolution of 10.10.2014.

¹⁴ Article 9(3) LJ.

¹⁵ Article 9(4) LJ.

¹⁶ The Register was created by article 22 LJ.

technical systems to be used, the financial solvency of the applicants and the means to prevent money laundering. The call of the procedure did not foresee a limitation of the number of licences to grant. This first procedure was finished in June 2012, when a total amount of 91 general licences was granted to 53 operators. At the same time 186 singular licences were granted, most of them for the operation of poker games, bingo, roulette and blackjack. A second administrative procedure for the granting of general licences, again without a limitation on their number, was opened in October 2014. Once the first licences were granted, the system of violations and penalties of the LJ began to be applicable; until that moment the companies acting without licence were not properly in lawlessness, but in a kind of official tolerance of an illegal situation. However, the tax regime of the LJ became applicable from the entry into force of the Law, imposing the payment of a special tax of twenty five percent of the profits obtained in Spain to gambling companies whatever their domicile tax is.

3. Allocation in Case of Harmonization at a European Level: Radiofrequencies and Greenhouse Gas Emission Permits

3.1. Radio Frequencies

The Spanish regulatory framework for the allocation of radio frequencies is composed by two sets of rules. Regarding the use of the radio spectrum for telecommunications, the most relevant norms are the State's Telecommunications Act¹⁷ (*Ley General de Telecomunicaciones*, hereinafter LGTel) and the Regulation on the usage of the radio electric spectrum¹⁸ (henceforth RUS). As for the use of the radio spectrum for broadcasting activities, the main rules are those contained in the State's Audiovisual Communications Act¹⁹ (*Ley General de la Comunicación Audiovisual*, hereinafter LGCA).

The above mentioned framework is chaired by three structural ideas. First, under Spanish law the radio spectrum is configured as a public good or *bien de dominio público*.²⁰ In Spain, public goods are characterized by their public ownership and by their submission to a special regime of administrative law. Thus, the spectrum's nature of state-owned public good prevents it from being subject of any kind of private property,²¹ so that individuals and undertakings can, at best, hold rights of use over it. Second, the allocation of such rights of use is performed in Spain through an administrative model (command-and-control approach), and thus the Government is addressed with the responsibility of

¹⁷ Law 9/2014, of 9.05.2014.

¹⁸ Approved by Royal Decree 863/2003, of 23.05.2003, in development of the recently derogated State's Telecommunications Act of 2003 (Law 32/2003, of 3.11.2003, henceforward (LGTel/2003). Pursuant to the First Transitory Provision to the LGTel, the regulations issued in implementation of LGTel/2003 shall remain in force as far as they do not oppose to the new Law, and until implementing regulations of the latter are approved.

¹⁹ Law 7/2010, of 31.03.2010.

²⁰ Article 60(1) LGTel.

²¹ Article 132(1) of the Spanish Constitution of 1978.

managing the radio spectrum and granting the rights for its use,²² guided by the principles of efficacy, efficiency, and foster of competition, technological neutrality, and spectrum's secondary market.²³ Finally, telecommunications and broadcasting activities involving use of radio spectrum require the obtainment of the corresponding administrative entitlement decisions. The attainment of rights of use of the radio spectrum is the sole constraint for the provision of telecommunication services, since the development of such activities is not subject as such to administrative authorization, requiring only the submission of prior notification to an administrative body.²⁴ On the contrary, broadcasting activities entailing the use of the radio spectrum require the obtainment of a prior administrative licence, whose granting involves the simultaneous concession of rights of use of the radio spectrum.²⁵ As will be shown, some divergences regarding the allocation of rights of use of the spectrum exist depend on their destiny to telecommunications or to broadcasting services.

Concerning telecommunications services, there are three possible types of use of the radio spectrum, which basically correspond to those traditionally allowed for any public good (common, special and privative use).²⁶ Each of these uses is subject to a different legal regime. The common use of the radio spectrum is free and does not require the obtainment of any legal entitlement. In turn, the special use (i.e., that performed in bands designed for shared exploitation by an unlimited number of operators) and the privative use of the radio spectrum (i.e., that performed through its exploitation by a single or a limited number of operators) require the prior obtainment of the corresponding entitlement administrative decision, which will take the form of a general authorization, an individual authorization, an affectation (*afectación demanial*) or an administrative concession, depending on its subject-matter.²⁷ In any case, the granted rights for the use of the radio spectrum may be used only to provide the services specified in the entitlement, the infringement of which constitutes a cause for its revocation.²⁸

Administrative entitlements allowing for the special use of the radio spectrum will take the form of general or individual authorizations. General authorizations allow for the special use of the radio spectrum through public telecommunication networks. For their obtainment it suffices to make a prior notification to the competent administrative body. Individual authorizations allow for special use of the spectrum for the development of activities without economic content.²⁹

²² Article 60 ff. LGTel.

²³ Article 60(3) LGTel.

²⁴ Article 6 LGTel.

²⁵ Article 24(2) LGCA.

²⁶ Article 62(1) LGTel.

²⁷ Article 62(2) LGTel.

²⁸ Article 62(2) LGTel.

²⁹ Articles 62(3) and 62(4) LGTel.

On their part, administrative entitlements enabling the privative use of the radio spectrum can be shaped in various forms. If they refer to the self-provision of services by the applicant, they will take the form of individual authorizations, except if the applicant is a public Administration, in which case the entitlement will take the form of an affectation or *afectación demanial* (legal figure by which a public good is declared affected to certain public purposes). In the rest of the cases of privative use of the radio spectrum – i.e. when there is not self-provision of services – the entitlement will take the form of an administrative concession.³⁰

The Government shall regulate the procedures, deadlines and conditions for the granting of administrative entitlements for the use of the radio spectrum.³¹ Such procedures shall be open and must be based on objective, transparent, non-discriminatory, and proportional criteria. Notwithstanding this, exceptions to the open nature of the procedure are allowed when the granting of such rights to radio or television contents' providers is necessary to achieve a goal of general interest. Apart from this general provision, the LGTel contain some specific rules regarding the allocation of spectrum concessions the number of which has been previously limited.

The establishment of a limitation to the number of concessions to grant is the responsibility of the competent Ministry (nowadays the Ministry of Industry, Energy and Tourism), and it must be based on the need to ensure the efficient use of radio spectrum, taking into account the need to benefit the users and to foster competition. The administrative decision limiting the number of concessions to grant shall be motivated and made public, and it may be reviewed if the reasons justifying it disappear.³² When a limitation has been made to the number of concessions to be granted within a specific frequency band, their allocation must be conducted by means of a tender procedure which shall be in accordance with the principles of publicity, concurrence, and non-discrimination,³³ and which must be solved within a maximum period of eight months from the invitation to tender.³⁴ The provisions regarding the invitation to tender, the bidding terms to be approved and the award of the concession must be established through administrative regulations.³⁵

Article 29(3) RUS, which applies until new development regulations of LGTel are approved, regulates the general tender procedure, establishing that it shall be initiated through a public call to tender. Such call must specify the frequency bands to be granted, the term for which they will be assigned, the deadline for submission of applications – which shall not be shorter than a month –, and the requirements to be met by the applicants. The allocation procedure can be a contest, an auction, or a

³⁰ Articles 62(4) and 62(5) LGTel.

³¹ Article 61 LGTel.

³² Article 63(1) LGTel.

³³ Article 63(2) LGTel.

³⁴ Article 63(3) LGTel.

³⁵ Article 63(2) LGTel.

combination of both. In case of choosing the contest, or a combination of contest and auction, the allocation criteria shall be the following: 1) the terms of network deployment and coverage; 2) the amounts to be spent on new investment; 3) the number of radio stations to be deployed; and 4) the techniques to allow for a more effective and efficient use of the radio spectrum. The assessment of the submitted applications is performed by an allocation board consisting of a minimum of seven members appointed by the Ministry.

As for their temporal scope, rights for the privative use of the radio spectrum which are not limited in number will be granted for an initial period of five years, renewable for periods of five years depending on the availability of radio frequencies and the provisions of the spectrum planning.³⁶ The maximum period of validity of concessions limited in number should be determined in the corresponding tender procedure, not exceeding twenty years and without a possibility of automatic renewal.³⁷ Modification of the granted administrative entitlements, which may include their prorogation beyond the referred maximum deadlines, must respect the principles of objectivity and proportionality, and specific formalities must be observed if the concerned entitlements were allocated through tender procedures.³⁸

With regard to the transmissibility of the radio spectrum, it has to be taken into account that its configuration as public domain good excludes all types of secondary market on the spectrum as such. However, the rights granted for its privative use are tradable according to the regime established by the LGTel.³⁹ There are two kinds of secondary market of spectrum's right of use: transfers and cessions.

Transfers imply the transmission of the entitlement itself, so that the receiving party becomes the new holder of the rights and obligations deriving from the entitlement,⁴⁰ whilst cessions entail the transmission or lending of the right to use certain frequencies related to the entitlement, which remains the property of the original holder.⁴¹ Both types of secondary market operations are subject to certain conditions. First, none of them can involve any alteration in the objective scope of the rights and obligations expressed in the original entitlement.⁴² Second, the new holder of the right of use must meet the conditions imposed on the original one prior to the granting of the entitlement, and he must comply with the technical conditions existing in the original entitlement, if

³⁶ Article 64(1) LGTel.

³⁷ Article 64(2) LGTel.

³⁸ Article 64(3) LGTel.

³⁹ Article 67 LGTel. This provision foresees that further administrative regulations must establish the conditions for the authorizations of transfers and cessions of rights of use of the radio spectrum. Until the approval of such norms, articles 39 to 59 RUS apply in so far as they do not contravene the LGTel.

⁴⁰ Articles 45 and 46 RUS.

⁴¹ Article 35 RUS.

⁴² Article 39(4) RUS.

any.⁴³ Third, each transfer or cession is subject to prior administrative authorization by the body who was competent for the granting of the entitlement, without which the transmission would be void.⁴⁴ In case of transfer of the entitlement, the administrative authorization should be granted in the term of three months, the lack of response within such deadline meaning the denial of the required permit. The same rule applies for cessions of rights for periods longer than six months. In turn, in case of cessions for periods shorter than six months, the deadline for the Administration to decide is one month, and if no resolution has been issued after that period, the authorization must be understood as granted.

There are certain exclusions from the possibility of transfer or cession of the rights of use of the radio spectrum.⁴⁵ Firstly, rights are not transferable if they were granted by means of a demanial affectation or an authorization. Secondly, both the transfer and the cession of rights related to public security, national defence or public service obligations are forbidden. Thirdly, the possibility of transmission is excluded where it may pose a restriction of the competition in the market. Fourthly, the transmission is not possible if the original holder of the rights or the recipient are involved in an administrative proceeding which may result in the withdrawal of the entitlement. Finally, the emergence of the so-called spectrum-managers is hampered through the prohibition of the total cession of all rights of use derived from the entitlement, for the total period of its validity and for all the geographical area for which it was awarded.⁴⁶

As for broadcasting, it has already been pointed out that the corresponding concessions for the privative use of the radio spectrum are granted through the allocation of the administrative licence which is necessary for the development of the respective broadcasting services.⁴⁷ Such licences, which entitle their holders for the performance of the activities to which they refer for a given territory and frequency band,⁴⁸ shall be allocated through a contest.⁴⁹

The LGCA contains certain specific provisions regarding the contest procedure for the allocation of broadcasting licences. Firstly, all the available licences with the same nature and territorial scope must be allocated simultaneously. In case a single licence becomes available, the procedure for its allocation must be initiated by the Administration within the maximum period of three months, and after that deadline any interested person may ask for the call of the allocation procedure. Secondly, the call of the procedure must specify the conditions for the provision of the broadcasting services to which each licence

⁴³ Article 42 RUS.

⁴⁴ Articles 40 and 43 RUS.

⁴⁵ Article 41 RUS.

⁴⁶ Article 55(3) RUS.

⁴⁷ Article 24(2) LGCA.

⁴⁸ Article 24(1) LGCA.

⁴⁹ Articles 22(3) and 27 LGCA.

refers.⁵⁰ No further references to the procedure are made in the LGCA, which merely refers to the legal regime contained in Law on the Public Goods of Public Administrations (*Ley de Patrimonio de las Administraciones Públicas*, hereinafter LPAP).⁵¹ In turn, LPAP limits itself to establish that concessions shall be allocated taking into consideration the public interest existing in the requested rights, which must be assessed in light of the criteria settled in the bases or sheet of conditions governing the contest.⁵² The Spanish Supreme Court (*Tribunal Supremo*) has so far declared the nullity of allocations of broadcasting Licences due to the lack of celebration of the required contest procedure,⁵³ the wrongful implementation of the allocation criteria,⁵⁴ or the lack of motivation of the allocation decision.⁵⁵

Broadcasting licences are granted for an initial period of fifteen years and may be automatically renewed for periods of the same length if certain conditions are met. Automatic renewal is excluded if there is no remaining radio spectrum and if there are third parties who express their interest in the obtainment of the licence at least twenty four months before its expiring date, provided that such subjects fulfil the same granting conditions which were imposed on the current holder of the Licence.⁵⁶

Secondary commerce of broadcasting licences is possible but requires prior administrative authorization, which can be denied only if the recipient does not fulfil the conditions imposed for the original allocation or if he does not accept the obligations imposed on the original holder of the licence. The transfer and the lease of broadcasting licences can only take place after two years of the original allocation, and sublease is forbidden.⁵⁷ Secondary commerce of licences referring to non-profit broadcasting services is excluded.⁵⁸

Finally, several Autonomous Communities have passed their own legislation on Audiovisual Communications within the scope of their competences.⁵⁹ In general, it is established that the allocation of broadcasting licences or concessions must be performed through a contest procedure; the allocation criteria are legally provided; the period of validity of the awarded licences differs in many cases from the one established by the LGCA; and secondary commerce is subject to different requirements or even gets to be excluded in certain Autonomous Communities.

⁵⁰ Article 27 LGCA.

⁵¹ Law 33/2003, of 3.11.2003.

⁵² Article 96(5) LPAP.

⁵³ E.g. Judgement of 27.11.2012.

⁵⁴ E.g. Judgement of 18.07.2012.

⁵⁵ E.g. Judgement of 8.11.2012.

⁵⁶ Article 28 LGCA.

⁵⁷ Article 29 LGCA.

⁵⁸ Article 32(5) LGCA.

⁵⁹ E.g. Law 22/2005 of 29.12.2005 in Catalonia, Law 1/2006 of 19.04.2006 in Valencian Community or Law 10/2007 of 29.03.2007 in Castilla-La Mancha.

3.2. *Greenhouse Gas Emission Permits*

Concerning the allocation of greenhouse gas emission permits in Spain, it is necessary to distinguish between two periods, each of them corresponding to a different European Directive. The first legal regime was governed by Directive 2003/87/EC,⁶⁰ whilst from 2013 a new one, headed by Directive 2009/29/EC,⁶¹ entered into force.

As already pointed out, the first Spanish regime of allocation of greenhouse gas emission permits was derived from Directive 2003/87/EC. This Directive was implemented in Spain by means of Law 1/2005, of 9 March, regulating the trading of greenhouse gas emission rights. The new legal regime of the European Union Emission Greenhouse Trading Emission, determined by Directive 2009/29/CE, together with Directive 2008/101/CE⁶² and Regulation 1031/2010⁶³ obliged to modify the Spanish Law. Rules were changed by Law 13/2010, of 5 July. In fact, this Law only partially repeals the previous legislation and some of their rules did not enter into force until 1 January 2013.

According to Directive 2003/87/EC, each Member State had to approve a National Allocation Plan (NAP) for the period 2005–2007 and another one for 2008–2012.⁶⁴ The NAP was configured as the central element in the allocation of gas emission allowances within the alluded periods: each Plan (NAP I for the period 2005–2007, and NAP II for 2008–2012) set the total number of allowances to be allocated in Spain. In NAP I, the total amount of allowances allocated was even higher than gas emissions produced in the previous period (2000–2005). NAP II reduced the amount allocated by 16.4% over the previous one, but such amount was still too high. The further reduction of emission allowances in NAP II took place, essentially, on the electricity sector (decreasing of 36.28% compared to NAP I). Each NAP established the rules that have to be applied for determining the amount of allowances to grant to each facility. It also established the existence of a reservation of rights for future facilities and for capacity expansions of existing ones, as well as the rules for managing such a reserve.

Due to the complexity and relevance of the Plans, the procedure for preparing and adopting each NAP included an obligation of following public information and

⁶⁰ Directive 2003/87/EC, of the European Parliament and of the Council, of 13.10.2003, establishing a scheme for greenhouse gas emission allowance trading within the Community.

⁶¹ Directive 2009/29/EC, of the European Parliament and of the Council, of 23.04.2009, amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community.

⁶² Directive 2008/101/CE, of the European Parliament and of the Council, of 19.11.2008, amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community.

⁶³ Commission Regulation 1031/2010, of 12.11.2010, 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.

⁶⁴ Articles 9 and 11 of Directive 2003/87/EC.

consultation phases.⁶⁵ The NAP I was approved by Royal Decree 1866/2004, of 6 September. It was notified to the European Commission on August 9, 2004. In its Decision of 27 December 2004, the Commission considered that some aspects of NAP I were not compatible with Directive 2003/87/EC,⁶⁶ urging Spain to amend such aspects, which was made through Royal Decree 60/2005, of 21 January.

Regarding NAP II, for its elaboration it was considered desirable to use multiple data source, given the experience acquired with the preparation of NAP I. Among such sources were, for example, the National Inventory of greenhouse gas emissions to the atmosphere, 2006 edition; questionnaires developed by industry associations; the National Register of Emission Rights (*Registro Nacional de Derechos de Emisión* or RENADE); and information obtained in public consultation procedures. Finally, NAP II was approved by Royal Decree 1370/2006 of 24 November. Once more, some of its provisions were considered incompatible with Directive 2003/87/EC by the Commission (Decision of 26 February 2007),⁶⁷ which resulted in the modification of the NAP II by Royal Decree 1030/2007 of 20 July and by Royal Decree 1402/2007 of 29 October.

As for the procedure for the individual allocation to each facility,⁶⁸ the applications had to be submitted, for the period of each NAP, before the competent regional body. The request had to be made within twelve months before the entry into force of each NAP. Each individual allocation was approved by resolution of the Council of Ministers on a proposal of three Departments of the Spanish Government (Economy and Finance; Industry, Tourism and Trade; and Environment, Rural and Marine Affairs) in a maximum term of three months after the submission of the application. If such a period elapses without response by the Government, the allocation should be considered as denied. The administrative resolution specifies the amount of allowances assigned to each facility for the period covered by the corresponding NAP and their annual distribution.

The method for the allocation of allowances in each period was to be determined in the corresponding NAP. Such method must avoid the existence of unjustified differences that pose an advantage or disadvantage among sectors of activity or among facilities included in the same sector of activity. Moreover, it had to be consistent with the technical and economical possibilities of gas reduction in each sector of activity.⁶⁹ The individual allocation of emission rights for each industrial facility was not done through a competitive method, but based on emissions and historical productions of each facility during the previous period and on the already determined assignation to each industrial sector. Moreover, all allowances were allocated free of charge in Spain, although Directive 2003/87/EC imposed the allocation for free only concerning a certain percentage of

⁶⁵ Article 14 of Law 1/2005.

⁶⁶ C(2004)5285: [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52005XC0915\(01\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52005XC0915(01)).

⁶⁷ C(2007)627/F1: http://europa.eu/rapid/press-release_IP-07-247_en.htm.

⁶⁸ Contained in Article 19 of Law 1/2005, modified by Law 13/2010.

⁶⁹ Article 17 of Law 1/2005.

emission rights (at least 95% of them in period 2005–2007, and 90% in 2008–2012), and thus it would have been possible to allocate a small amount of emission rights through auctions (so in Lithuania, Hungary, Ireland or Denmark). The decision to surrender allowances for free during the alluded periods was a political decision on how to distribute the income generated by the initial allocation of emission rights between producers and consumers.

Regarding new entrants, it was provided the establishment of a reservation of emission rights both for new installations and for upgrades of existing ones.⁷⁰ In enforcement of NAP II, an administrative regulation⁷¹ established the rights reserved for new entrants for the period 2008–2012, setting the principles and methodologies that should guide their allocation, which were analogous to that used for existing installations. The allocation to new entrants in the period 2008–2012 aimed at the incentive of cleaner technologies. The access of new entrants to the reservation's rights had to follow the criterion of the order of receipt of applications, taking into account that the allocation request had to be made within six months prior to the coming into operation of the facility.

The allocated greenhouse emission rights could be subject to transmission among facilities of the European Union, and also among them and facilities of third States where there was an international instrument by which the rights of the signatory parties are mutually recognized. In any case, the emission rights allocated in Spain could be transferred only if they had been entered into the National Registry of Emission Rights (Registro Nacional de Derechos de Emisión), a Registry accessible by the public which was created by Law 1/2005 to guarantee the permanent update and information relating the accountancy and ownership of the allocated emission rights. To purchase this kind of rights, the corresponding facility also had to be registered in the National Registry of Emission Rights.⁷²

Both individual allocations (administrative acts), which were formalized as decisions of the Council of Ministers, and Plans (regulations), which define the general criteria for the subsequent allocation, were subject to full judicial review and therefore might be challenged before the Courts. Moreover, as regulations, NAP could be challenged directly or indirectly (i.e. through an appeal against the subsequent administrative acts based upon the Plan), even though for reasons of legal certainty the estimation of an appeal against a NAP did not determine itself the invalidity of individual allocations based on it if they have become unappealable. By the beginning of 2012, the Spanish Supreme Court had published more than twenty judgments regarding individual assignments, and only three referring to the Plans (namely to NAP I). The low number of judgments relating to the Plans can be explained by the fact that their content derives

⁷⁰ Article 18 of Law 1/2005.

⁷¹ Royal Decree 1370/2006 (amended by Royal Decree 1030/2007 and by Royal Decree 1402/2007).

⁷² Article 21 of Law 1/2005.

largely from provisions of the Directive (and though they have to be addressed to the European Court of Justice) and from Law 1/2005 (which cannot be controlled by the Supreme Court but only by the Constitutional Court). The case law of the Supreme Court reveals that the main failure on the implementation of the system in Spain has been the lack of motivation: in a number of judgments the Court annulled individual assignments because the Council of Ministers did not make explicit the reasons for the allocation of a certain amount of rights.⁷³ As stated by the Supreme Court,⁷⁴ both Plans and individual allocations must be properly motivated, being the requirement of motivation applicable with respect to the two phases of assignments in accordance with EU law. Some of the Supreme Court Decisions referred to mistakes in the calculation of the allocation of allowances.⁷⁵ Finally, some Decisions referred to the increasing capacity of the undertakings and overallocation of allowances.⁷⁶

Directive 2003/87/EC was amended through Directive 2009/29/EC, which improved and extended the greenhouse gas emission allowance trading scheme of the Community. This new Directive was implemented in Spain by means of Law 13/2010, of 5 July, modifying Law 1/2005, of 9 March. By means of these modifications a new system has been established regarding both the determination of the total number of allowances to grant and the methodology for their allocation. The new legal regime entered into force on 1 January 2013.

One of the main changes in the new system is the disappearance of the NAP. The determinations contained in the Plans until 2013 would from then on be established directly at a European level. The allocation of emission rights in Spain remains within the competence of the Council of Ministers, and the allocation procedure⁷⁷ is basically the same as it was before 2013. Each allocation period is called “trading period” (*periodo de comercio*), and has a duration of eight years. There are two ways of allocating greenhouse gas emission permits: the auction and the allocation free of charge.

A percentage of the emission rights will continue to be allocated for free by the national government, albeit this allocation system will have a pure transitional character. According to Directive 2009/29/EC,⁷⁸ from 2013 on the quantity of allowances to be allocated for free will decrease each year by equal amounts resulting in 30% free allocation in 2020, with a view to reaching no free allocation in 2027. Pursuant to the new Spanish legal regime,⁷⁹ the transitional free allocation methodology will be determined by the harmonized standards adopted at European level. Such standards are

⁷³ So, among others, Judgments of 23.09.2008, 24.09.2008, 9.07.2010, 14.07.2010, 20.07.2010, 8.10.2010, 16.11.2010, 28.12.2010 and 25.01.2011.

⁷⁴ Judgment of 29.05.2009.

⁷⁵ So the Judgments of 30.09.2008, 1.10.2008, 6.10.2008, 3.12.2008, 8.04.2009 and 26.01.2011.

⁷⁶ Judgments of 27.11.2008, 1.12.2008, 2.12.2008, 3.12.2008 and 29.05.2009.

⁷⁷ Contained in Article 19 of modified Law 1/2005.

⁷⁸ Article 12.

⁷⁹ Article 17 of Law 1/2005 after its amendment by Law 13/2010.

contained in Decision 2011/278/EU of the Commission. Pursuant to this Decision, holders of existing facilities eligible for free allocation of allowances must submit the information and data necessary to calculate the allocation and a methodological report containing a detailed description of how these data have been obtained. The European Commission has developed an electronic form, a methodological report and an explanatory guide for the collection of data. Within the data collection process, Member States will only accept data that have been found satisfactory by a verifier, and the verification process must refer to the methodological report and to the parameters listed in Article 7 and Annex IV of the Decision. In Spain, the basic rules on the accreditation and verification of gas emissions are contained in Royal Decree 101/2011 of 28 January, which establishes that the check will be conducted by an accredited verifier under the trading scheme allowances, regardless of the scope of their accreditation, which should conform to the provisions of Community rules.

The general rule in the new system is the allocation through auctions. The distribution of the total number of emission rights among the Member States is conducted according to the criteria established in Directive 2009/29/EC. Once the number of rights to be allocated through auctions in Spain has been determined, the performance of such auctions shall be regulated by the Government. Such regulation must ensure the principles of free concurrence, publicity, transparency, non-discrimination, and efficiency; and it must be guaranteed, in particular, that any facility has a full, fair, and equitable access to the auction, and that all the participants have access to the same information at the same time.⁸⁰ Moreover, it is established that the Secretary of State for Climate Change must publish a report on the development of each auction within a period of one month after its celebration, detailing the implementation of the auction rules, the fair and open access of all operators, the transparency on the final decision, the calculation of prices and other technical aspects of the procedure.⁸¹

Under the current allocation regime there is also a reservation of rights for new entrants (5% of the total number of emission permits), which is established for the whole EU.⁸² From 1 January 2012, emission rights are registered in a unique Union Registry.⁸³

4. Concluding Remarks

From what has been exposed it is possible to assert that authorizations have a different legal construction in the three examined sectors: whilst they consist of an entitlement for the privative use of a public good in case of radio frequencies, they account for a permission to conduct a socially harmful activity in the scope of greenhouse gas emission permits, and a direct entitlement to conduct an economic activity in case of gambling.

⁸⁰ Article 14 of Law 1/2005.

⁸¹ Article 15 of Law 1/2005.

⁸² Article 18 of Law 1/2005.

⁸³ Article 25 of Law 1/2005.

Notwithstanding this, it is possible to identify some common structural elements within the Spanish legal regime governing the allocation of these three types of authorizations.

First, the problem concerning the limitation to the number of authorizations to grant shows up in the three analyzed sectors, although with different scope. Whereas in the context of greenhouse gas emission permits the general principle is the limited number of rights to be granted, in the areas of gambling and radio frequencies it is assumed that the number of authorizations will not be limited, unless certain reasons demand the setting of such a limit. Such reasons are legally rated and their appreciation rests with the relevant administrative authority, who will determine in each case the total number of authorizations to be awarded.

The examined legal regimes also reveal the existence of some general principles with which the allocation must comply. In case of radio frequencies, the allocation procedure should in any event be in accordance with the principles of publicity, concurrence and non-discrimination. Together with these principles, the relevant legal provisions on gambling Licences enshrine the principles of equality, transparency and objectivity. The legal regime of greenhouse gas emission permits refers in general only to the principle of publicity, and imposes respect for the principles of free concurrence, transparency, efficiency, and non-discrimination, when allocating rights by means of an auction.

With respect to the kind of allocation procedures to be conducted, and except for the greenhouse gas permits allocation system in force up to 2013, the examined legal rules foresee the auction and the contest, which are competitive by nature. In this context, objective criteria are established in order to prevent favouritism and nepotism by administrative authorities.

Finally, the granting of the examined limited authorizations is subject to a limited term, so that after the fixed deadline a new allocation of the respective right must take place. Under given conditions, the renewal of the granted rights is possible in certain cases. Limited authorizations are transferable in the areas of greenhouse gases and radio frequencies, but not in the context of gambling.

LIST OF CONTRIBUTORS

Paul Adriaanse

Associate Professor of constitutional and administrative law at Leiden University and practising lawyer at Justion Advocaten, the Netherlands

George Dellis

Associate Professor of public law at the Athens' Law Faculty; Attorney-at-law, Member of the Athens Bar Association, Greece

Willemien den Ouden

Professor of constitutional and administrative law at Leiden University, the Netherlands

Dacian C. Dragoş

Jean Monnet Professor of administrative and European law at Babes Bolyai University, Romania

Dolores Utrilla Fernández-Bermejo

Assistant of administrative law and Research Fellow of the Center for European Studies at University of Castilla-La Mancha, Spain

Isabel Fernández Torres

Professor of commercial law at Complutense University of Madrid, Spain

Fabio Giglioni

Associate Professor of administrative law at Sapienza University of Rome, Italy

François Lafarge

Senior Researcher at the French National School of Public Administration (ENA) and Senior Lecturer at the University of Strasbourg, France

Mario Martini

Professor of administrative science, constitutional law, administrative law and European law at German University of Administrative Sciences Speyer, Germany

Bogdana Neamțu

Associate Professor at Babes Bolyai University, Romania

Marjan Olfers

Professor of sports and law at VU University Amsterdam, the Netherlands

Marco Orofino

Assistant Professor of constitutional law and Jean Monnet Teaching Professor of electronic communication law / internet law at University of Milan, Italy

Nantia Sakellariou

Attorney-at-law, Member of the Athens Bar Association, Greece

Alexandrina Soldatenko

Lecturer at the French National School of Public Administration (ENA) and University of Strasbourg, France

Raluca Suci

Teaching assistant, PhD at Babes Bolyai University, Romania

Jan Reinier van Angeren

Attorney-at-law at Stibbe, Amsterdam, the Netherlands

Frank van Ommeren

Professor of constitutional and administrative law at VU University Amsterdam, the Netherlands

Laurens Westendorp

Attorney-at-law at Stibbe, Amsterdam, the Netherlands

Johan Wolswinkel

Associate Professor of administrative law at Tilburg University and senior member of the Tilburg Law and Economics Center (TILEC), the Netherlands