

Leiden Law School
Institute for Public Law
Department of Constitutional and Administrative Law

To Members of the EGPA Studygroup on Law and Public Administration

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Subject Conference proposal to be discussed in the EGPA Study Group and call for information
Topic: Allocation of scarce public rights. Careful decision-making and effective legal protection

Introduction to the topic and objectives

Scarce public rights are rights which can be derived from public law and for which demand is greater than supply – subjected to a maximum by the government. Clear examples are the right to use certain air frequencies, the right to emit greenhouse gases, and the right to park your car with a permit in the inner-city. As a rule a public right becomes scarce when the government – the legislator – subjects its availability to a maximum. Hence, actual scarcity does not exist by definition, but it rather concerns maximisation of the number of rights with a view to certain policy objectives. For instance, the freedom to emit greenhouse gases has been made into a scarce right in order to implement the Kyoto Protocol, with the objective to reduce the global emission of greenhouse gases. The allocation of scarce frequency licences intends to achieve ‘allocative efficiency’ and to promote competition. Controversial in several countries seem at present the scarce licenses to operate gambling casinos.

It can be established that the number of public law regulations which introduce and regulate a scarce right has increased in the past decades, among other things as a consequence of the choice to liberalise and privatise parts of government activities and of more attention for market forces within the public administration. This has made the (classic economic) question of the distribution of scarcity also a current issue within public law. After all, if demand for public rights, such as permits, subsidies, concessions and exemptions, is greater than the supply, an allocation problem will automatically arise. The government must decide to which parties it allocates rights, and to which it does not. In order to make a decision in a careful, non-arbitrary, transparent manner, in practice governments use various allocation procedures. In the Netherlands we distinguish roughly public-law systems whereby the available rights are allocated according to the

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order of application (first come, first served), the drawing of lots, the auction, the allocation based on a comparative review and the tender procedure.

Whichever allocation system the government chooses for distributing a scarce public right among the prospective candidates, there will always be parties that have to be disappointed. This gives rise to an increasing number of legal proceedings, which give reason to believe that the decision-making about the allocation of scarce public rights is not always implemented as carefully as needed and that the effectiveness of the legal protection for interested parties who want to challenge the set-up of the allocation procedure or its results is not always guaranteed. A lot of questions can be raised. Which standards must be laid down in public law for allocation systems, which demands can be derived from European law? How to deal with the fact that procedures take a very long time before giving clarity about the definitive legal position of parties? And what to think of the fact that information is not always accessible for all parties due to the protection of interests of competitors and the fact that legal rehabilitation is often difficult to provide for the courts?

In the Netherlands, recently, an expert meeting has been organised to discuss these kinds of questions among specialists in various fields of law. We would like to share and discuss our findings with experts from other member states during an international conference to be organised at Leiden University in September 2011. We are looking forward to hear from comparable or other legal problems that might occur in other member states.

The objectives of the proposed conference are:

- to provide a legal forum for direct exchange of knowledge in relation to allocation of scarce public rights;
- to identify and tackle common legal problems in the allocation of scarce public rights;
- to provide a basis for future cooperation and exchange among the participants.

Questions to be discussed during the EGPA conference in Toulouse

It would be very interesting to discuss this project also in the EGPA Studygroup. Solutions for problems, uncertainties, and gaps identified in the Dutch legal system as regarding public-law allocation systems, could be compared with solutions that have been found in other legal systems. In particular, we would like to address the following questions to the members of the Studygroup:

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- Are you aware of any legal problems which occur in your country with regard to the allocation of scarce public rights?
- Are these problems influenced by European law, and if so, in what way? E.g. what is the role of public procurement or European State aid law?
- Which particular scarce public rights seem to be most problematic in your country?
- Do you have any references to relevant case law or literature on allocation of scarce public rights in your country?
- Which persons in your country are specialized in this field of law and should therefore be invited for the conference in 2011?

Contact information

We look very much forward to hearing from experiences from other Member States during the EGPA Conference. Should one wish to send us relevant information in advance, please use the following contact details:

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