

**ADMINISTRATIVE ALLOCATION OF LIMITED PUBLIC
RIGHTS: SOME KEYSTONES FOR A GENERAL THEORY**

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1. INTRODUCTION

The protection and neat allocation of certain categories of scarce resources has traditionally been a defining task for public authorities. Both in the European Union and in its Member States, administrative law regulates the creation and the allocation of different types of limited public rights in rather diverse policy areas. To illustrate the extent to which this is a widespread and heterogeneous reality, several examples can be brought up: allocation of greenhouse gas emission permits; award of public contracts; concession of subsidies and other State aids; the granting of public employment places; procedures for alienation of certain public assets; and, finally, the allocation of scarce entitlement administrative decisions (authorizations, licenses, quotas, permits, concessions and so on), the object of which can also be quite diverse: provision of a (public) service, utilization of public goods, production of a certain amount of goods or, more generally, the development of a given activity under certain conditions.

These manifestations of the administrative activity of allocation of limited public rights are subject to their own specific legal regime. The pluralism in the regulation of the corresponding administrative procedures and decisions stems from the existing differences among the rights to be allocated in each case (contracts, authorizations, property rights, subsidies, public benefits...). Even within each of these manifestations, the regulation of this kind of administrative activity must conform to the specific features of the sector in which it develops, as well as to the relevant demands it imposes on administrative law understood as an instrument of social direction (*Steuerungsinstrument*). The differential treatment of this administrative activity can also find its basis on EU law (for instance, with regards to public procurement: Directives 23, 24 and 25/2014/EU), or in the relevant domestic constitution of each Member State [for example, articles 103(3) and 45 of the Spanish Constitution define specific requirements in relation to access to public sector posts and the rational use of natural resources].

In spite of the fact that these regulations have been produced from a sector-based perspective, it can be noticed that the various kinds of limited public rights to which they refer raise some common regulatory problems. In addition, the solutions provided in response

thereto by special administrative law tend to converge, at least to a certain extent. This can be explained by the fact that in all of these areas the Administration performs an identical activity consisting in the allocation of scarce resources in situations of concurrency. Due to this structural similarity, the legal regime of these different manifestations of administrative action tends to present some similar characteristics, yet it still features diversity and pluralism. Moreover, from a normative standpoint, it can be argued that these transversal elements account for the embodiment of certain constitutional principles, and thus they should be regarded and systematically developed as part of general administrative law.¹

Indeed, the proper dogmatic treatment of this type of administrative activity requires the development of proposals for interpretation and improvement of the sector-based regulation corresponding to each of the manifestations of the relevant category. However, alongside this it is also necessary to incorporate the administrative activity of allocation of limited public rights to the system of administrative law. Such an approach will provide a better understanding of current law as well as useful items for its review and improvement. With that aim, this paper is specifically focused on the analytical and constitutional premises for the development of a comprehensive theory on the administrative allocation of limited public rights. Therefore, both the scope and the main forms of this kind of administrative activity (section 2) and some of its main constitutional requirements (section 3) will next be tackled.

2. DEFINING THE ISSUE

¹On the methodological premises, see E. SCHMIDT-ASSMANN, *Das Allgemeine Verwaltungsrecht als Ordnungsidee*, Springer, Berlin 2004, pp. 10 ff., 43 ff.

The boundaries of the administrative activity of allocation of limited public rights are to be marked by taking into account two criteria. The first one refers to the subject-matter or object² of the rights to be allocated (below 2.1), while the second alludes to how these legal positions are awarded to the selected candidates (below 2.2). The combination of both elements allows for a complete picture of the type of administrative activity under examination, enabling its differentiation from other kinds of administrative action that may seem somewhat similar.³

2.1 Limited public rights

From the perspective of its object, the administrative activity under consideration is characterized by reference to the attribution of legal positions which simultaneously show two main features: they are subjective public rights and they are limited in number.

2.1.1 Subjective public rights

Within this context, the notion of subjective public right is used in its broadest sense, to refer to any active legal position held by a subject vis-à-vis public authorities, irrespective of their structure and of the degree of protection they provide to the rightholders. It is

² The terms ‘subject-matter’ and ‘object’ will henceforward be used as synonymous (so for instance R. ALEXU, ‘Rights and liberties as concepts’, in M. ROSENFELD and A. SAJÓ (eds.), *The Oxford Handbook of Comparative Constitutional Law*, OUP, Oxford 2012, 285).

³ On these analytical premises, see L. ARROYO and D. UTRILLA, ‘La actividad administrativa de adjudicación de derechos limitados en número. Bases conceptuales y metodológicas’ in L. ARROYO and D. UTRILLA (eds.), *La administración de la escasez. Fundamentos de la actividad administrativa de adjudicación de derechos limitados en número*, Marcial Pons, Madrid 2015, pp.25 ff.

necessary to separately refer to these three dimensions of the right to be allocated: its public character, the degree of protection that it provides, and its legal structure.

A subjective right has a public character if the holder of the reciprocal legal obligation is a public subject (or a private person who is assigned the exercise of a public function or service for and behalf of its holder). Sometimes the law enables the transfer of the awarded rights to third parties. In certain circumstances, the creation of a secondary market is precisely the goal pursued by public authorities when they decide to limit the number of rights to allocate.⁴ However, this does not turn the awarded right in a legal position of a private nature, because what is incorporated into the private law domain is a subjective right vis-à-vis a public authority.

Secondly, once it has been granted (*ex post* perspective), the active legal position can provide different degrees of protection to its holder. The allocated position may have a full character (perfect subjective right), or it may be conditioned (mere legitimate interest). However, the limitation in the number of rights to grant brings along that prior to the allocation (*ex ante* perspective), the legal position of the applicants is always defined as a legitimate interest, since scarcity prevents such positions from functioning as definitive reasons, i.e., regardless of the outcome of the allocation procedure. This applies regardless of the fact that, at times, such interest is connected with the exercise of a pre-existing right, eventually with constitutional rank (for example, the position of a college applicant where education is a constitutional right, or of an applicant for an authorization related to the exercise of a constitutional freedom).

Thirdly, it is here immaterial whether the public right has its correlate in an obligation to do something, to refrain from doing something or to give something on the part of a public entity. The examples offered at the beginning of this work demonstrate the

⁴ J. Esteve Pardo, 'El mercado de títulos administrativos' in L. COSCULLUELA (coord.), *Estudios de derecho público económico. Libro homenaje al prof. Dr. D. Sebastián Martín-Retortillo*, Civitas, Madrid 2003, pp. 743 ff.

considerable heterogeneity of legal positions that may be subject to an administrative decision of allocation. One possible systematization could be the following:

(i) Allocation of faculties for the exercise of freedoms, i.e. rights to negative actions of a public power. In spite of the different names used by special administrative law to refer to them (authorizations, concessions, licenses, permits, waivers, allowances, etc.), they can be labelled as limited authorizations in the broad sense,⁵ or, more precisely, as limited entitlement administrative decisions.⁶ Their legal regime is characterized by a great diversity, but they all are legal entitlements conferred on a firm or individual by the public Administration through the use of a public power prerogative. The exercise of the freedom triggered by the right to be allocated may refer to starting an activity (entitlement administrative decisions in the strict sense), or may refer to a particular way of developing it, defined by reference to a certain volume of activity, production or external effects. As further references within this paper will show, limited entitlement administrative decisions are a qualified reference field for the development of a general theory on the allocation of limited public rights.

(ii) Allocation of public benefits or services, i.e. rights to positive actions by a public power where the potential demand for them exceeds the available supply, so that the

⁵ European Parliament and Council Directive 2006/123/EC of 12 December 2006 on services in the internal market [2006] OJ L376/36, Recital (39): 'The concept of "authorization scheme" should cover, inter alia, the administrative procedures for granting authorizations, licences, approvals or concessions, and also the obligation, in order to be eligible to exercise the activity, to be registered as a member of a profession or entered in a register, roll or database, to be officially appointed to a body or to obtain a card attesting to membership of a particular profession'.

⁶ The use of this expression in a research on general administrative law in Europe can be useful due to the pluralism of European administrative law traditions within this context: while in EU law and in some national legal orders (e.g. UK) all administrative decisions with such an entitlement effect are called "authorizations" or "licenses", in other Member States (e. g. Germany, France, Spain or Italy) the term "authorization" is reserved for a specific kind of them.

Administration assumes the task of their assignment (for instance, selection procedures for admission to colleges or for the provision of certain medical services).

(iii) Allocation of *in rem* rights of use and enjoyment exercised over third-party property,⁷ like those that entitle their holders to use public goods (for example, rights for the privative use of the spectrum where it is set up as a public good).

(iv) Allocation of credit claims, such as subsidies or other types of aids offered by a public body.

(v) Allocation of complex legal positions that comprise both rights and duties, obligations or charges (for example, the position of the recipient of a grant, the winner of a public contract or a public employee).

2.1.1 Scarcity

The second distinctive feature of the object of the administrative activity under consideration is that the rights to grant are limited in number, and therefore the Administration must allocate them within a context of concurrence. The reasons explaining the scarcity (and which may justify it, where appropriate) can be systematized in a threefold scheme.⁸ Firstly, the exercise of some activities requires the use of certain resources that are

⁷ L. Díez-Picazo, *Fundamentos del Derecho civil patrimonial*, vol. I, Civitas, Madrid 2007, pp. 75 ff.

⁸ D. Kupfer, *Die Verteilung knapper Ressourcen im Wirtschaftsverwaltungsrecht*, Nomos, Baden-Baden 2005, pp. 103 ff.; M. Martini, *Der Markt als Instrument hoheitlicher Verteilungslenkung. Möglichkeiten und Grenzen einer staatlichen Verwaltung des Mangels durch Marktmechanismen*, Mohr Siebeck, Tübingen 2008, pp. 19 ff.; F. Wollenschläger, *Verteilungsverfahren. Die staatliche Verteilung knapper Güter: verfassungs- und unionsrechtlicher Rahmen, Verfahren im Fachrecht, bereichsspezifische verwaltungsrechtliche Typen- und Systembildung*, Mohr Siebeck, Tübingen, 2010, pp. 1 ff.

scarce due to natural or technical reasons. This can lead public authorities to exclude decisions on their allocation from the scope of private autonomy and to subject them to public law regimes in order to ensure they are used efficiently. The configuration of natural scarcity and its management may be heterogeneous: the relevant scarce resource can be a public good (for example, the spectrum), a private property (such as a private infrastructure), or a good not amenable to appropriation (for example, the environmental capacity of reception of greenhouse gases, which can be regarded as a *res nullius*). Secondly, scarcity may result from a decision adopted by public authorities to correct the relevant market's functioning. Scarcity arises here from a political decision based on a certain interpretation of the requirements stemming from the public interest, such as the need to correct a market failure related to the efficient allocation of resources (for example, a natural monopoly, a situation of excessive competition or an externality) or to ensure justice in their distribution (securing a certain volume and quality of supply in a given territory, for example).⁹ Finally, scarcity may also be rooted in the limited amount of resources demanded or offered by public authorities.¹⁰ In contrast to the preceding cases, in the latter the Administration affects the activity involving the use of scarce resources from the inside of the market where such resources are exchanged. This form of scarcity has two variants, depending on the role played by the Administration in each case. On the one hand, public contracts and public employment places are examples of goods which are scarce due to the restricted nature of the administrative needs to be covered. On the other hand, scarcity may stem from the finite character of the public resource to grant, as exemplified by public subsidies and other monetary transfers as well as by public services the amount or volume of which has been previously limited.

⁹ L. Arroyo, *Libre empresa y títulos habilitantes*, CEPC, Madrid 2004, pp. 444 ff.; A. Ogus, *Regulation. Legal form and economic theory*, Hart, Oxford 2004, pp. 320 ff.

¹⁰ Kupfer 2005, pp. 113 ff.

After identifying the different causes of scarcity, attention must also be paid to the way in which it is expressed. First, subjective public rights are limited if the total amount of available rights has been limited in advance and if such an amount is exceeded by the sum of requested rights. In the simplest case each applicant can obtain a single right and scarcity emerges when the number of applicants exceeds the number of rights to grant (e.g. public employment places, public contracts). On the contrary, if each applicant can get more than one of such rights, the decisive factor is not the number of applicants but the volume or amount of requested legal positions (e.g. greenhouse emission rights), or the existence of qualitative differences among the needs satisfied by the rights to allocate (e.g. school admissions). Thus, for the purpose of marking boundaries for this kind of administrative activity what matters is that the resource is either limited in the strict (quantitative) sense, so that only some applicants can obtain the requested number of rights, or that it is heterogeneous in nature, i.e., that all applicants may receive rights but these can meet their preferences to a different extent.¹¹ Scarcity is apparent in case of allocation of public employment places, public contracts, or shares in state companies' capital. Similarly, the prior establishment of a ceiling and its subsequent progressive reduction is one of the central elements of the European trading scheme for greenhouse gases allowances. A previous quantitative limitation also characterizes the granting of subsidies and the admission of users of public services to those centres and facilities the capacity of which is subject to a *numerus clausus* system.

Hence, scarcity is a real premise for the allocation activity and not the mere result of the exercise of the relevant administrative authority. This criterion allows for distinguishing limited public rights schemes from those administrative procedures where the public body is empowered to grant or reject the requested right on a discretionary basis, thus

¹¹ J. Elster, *Local Justice. How Institutions Allocate Scarce Goods and Necessary Burdens*, Cambridge University Press, Cambridge, 1992, pp. 21 ff.

enjoying a scope for assessment which is sometimes called *Entschliessungsermessen*¹² or discretion regarding the *an* of the prerogative.¹³ *A priori* limited public rights schemes shall also be differentiated from admission procedures, in which the Administration simply checks whether the applicants meet a set of predetermined requirements, awarding the requested right to each and every applicant who complies with the said requirements.¹⁴ There is no allocation, yet there is admission, where rules governing the attribution of a right set a requirement which only certain applicants meet (for example, a certain degree of expertise or solvency),¹⁵ as long as all subjects in compliance with such a requirement perceive one of the rights to grant.

2.2 Administrative allocation

2.2.1 Scope

The administrative activity analysed herein is conducive to administrative decisions adopted in the exercise of authority powers and through an administrative procedure by which the Administration grants the available number of rights to one or more applicants. For the purposes of conceptual demarcation of this kind of administrative activity, it is immaterial whether the relevant administrative authority is discretionary or not, in what legal

¹² H. MAURER, *Allgemeines Verwaltungsrecht*, CH Beck, München 2009, pp. 135 ff.

¹³ J.L. VILLAR PALASÍ, *La intervención administrativa en la industria*, Instituto de Estudios Políticos, Madrid 1964, p. 381.

¹⁴ W.K.B. Hofstee, 'Allocation by lot: a conceptual and empirical analysis' (1990) 29 *Social Science Information*, 4, 745 ff.; Elster 1992, p. 25.

¹⁵ C.J. Wolswinkel, 'The allocation of a limited number of authorisations. Some general requirements from EU law' (2009) 2 *Review of European Administrative Law* 61, 65.

form it is exercised and whether the procedure has a multipolar or bipolar structure (i.e., if all competitors take place in the same allocation procedure, or if the Administration simultaneously conducts several procedures in which only one applicant participates).¹⁶ What characterizes this kind of administrative activity is the existence of a situation of concurrence among applicants the resolution of which rests with the public Administration.

This feature allows to differentiate the allocation of limited public rights from two other close yet different forms of administrative activity. The first one relates to cases where the problem of scarcity is not managed through the limitation of the number of rights and their subsequent administrative allocation, but rather by means of admission procedures such as the ones which have already been mentioned.¹⁷ A clear example is the administrative grant of public benefits or services which entails a *distribution* of scarce public resources among those subjects who meet the *legally* required conditions. As can be observed, in this kind of scenarios the Administration identifies the beneficiaries of the services or benefits at stake, but in doing so it does not resolve a situation of genuine concurrence. The reason is that in these sort of contexts the problem of scarcity has already been solved by the law through the definition of the subjective and objective scope of the relevant rights, so that in the subsequent administrative procedure each applicant meeting the relevant conditions will receive a quota or predetermined portion of the granting rights. The second type of contexts are those of allocation of limited public rights by *private subjects*. Secondary commerce of the awarded rights falls outside the scope of the administrative allocation activity, even when both are closely connected from a substantive standpoint. As regards primary allocation, the decisive criterion is not the public or private nature of the decision-making subject, nor the legal

¹⁶ On the structure of allocation procedures, see WOLLENSCHLÄGER, F. (2015), 'El procedimiento administrativo de adjudicación de derechos limitados en número en el Derecho administrativo general', in L. ARROYO and D. UTRILLA (eds.), *La administración de la escasez. Fundamentos de la actividad administrativa de adjudicación de derechos limitados en número*, Marcial Pons, Madrid, pp. 139 ff.

¹⁷ Wollenschläger 2010, p. 4.

regime (whether public or private law) by which it may be governed in sector-based legislation, but rather the fact that the resources to allocate are public rights. Therefore, there may exist administrative activity of allocation exerted by a private subject to whom such activity has been delegated (for example, a public subsidy indirectly managed by a private collaborating entity).

2.2.2 Allocation criteria

The administrative allocation of scarce resources can be accomplished through the implementation of very different rules. Allocation criteria can be split into two categories, depending on whether the allocation decisions are adopted taking into account the characteristics of the right to assign or those of the different applicants (substantive criteria) or without regard to such considerations (formal criteria).¹⁸ Each of these criteria has specific advantages and disadvantages, particularly from the perspective of their constitutional foundations, and depending *inter alia* on the features of the limited public right at stake and the context where its allocation takes place. It must be taken into account that in most cases the applicable allocation criteria are intensely predetermined by the kind of allocation procedure to be conducted, so that certain procedures distinguish from others precisely based on the relevant allocation criteria.¹⁹

Some of the most widespread formal criteria are the following: (i) allocation by heads or quotas, so each applicant obtains the same portion of the scarce right, the amount of which is fixed by reference to the total amount of rights to allocate and the number of applicants; (ii) proportional or *pro rata* allocation, according to which scarce rights are

¹⁸ Martini 2008, pp. 94 ff.; Wollenschläger 2010, pp. 554 ff.

¹⁹ For example, the order of receipt of applications is at the same time an allocation criterion and a type of allocation procedure.

distributed among the different candidates on the basis of a common parameter, so that they do not all get an equal amount of resource, but rather an amount proportional to the one applied for in each instance; (iii) drawing of lots or lottery, whereby the scarce rights are randomly allocated, be it directly or alternatively (i.e. as a consequence of the failure of other criteria to justify an allocation decision); (iv) principle of temporal priority ('first come first served'), that results in allocations based on the order of receipt of the different applications and which can also be used in a direct or alternative fashion.

In contrast with formal criteria, material or substantive ones take into account the particular characteristics of the candidates and/or of the project they lodge with regard to the utilization of the resource at stake. The most common substantive criteria account for derivations from the notions of necessity or capacity. On the one hand, limited resources may be allocated to those applicants demonstrating a higher degree of necessity concerning their utilization. This criterion is usual in contexts where the allocation of limited public rights has become independent from the criterion of formal equality, as happens with the public provision of certain welfare services (e.g. housing benefits). On the other hand, the allocation may be performed according to the applicants' aptitude to make better use of the scarce resource from the perspective of one or more given parameters. The comparative assessment ('beauty contest') usually takes into account one or more characteristics of the candidates and/or of their applications (technical ability, reliability...), the relative weight of which can be configured in many different ways. Two allocation criteria regarding the idea of aptitude shall be pointed out. The first one links the ability to efficiently use the scarce resource to temporal parameters, which can refer to the applicants' age, to their experience or to their previous exercise of the same limited public right. The second criterion, which accounts for a defining feature of auctions, connects the aptitude of efficient use of the scarce right with the willingness to pay on the part of the applicants.

The diversity of the mentioned criteria clearly shows that the allocation of limited public rights, broadly understood, comprises two subcategories, which lead to different outcomes and the use of which raises different regulatory and constitutional issues. On the one hand, when limited public rights are indivisible their allocation will consist in the selection of one or more applicants, so that the rest of them will be totally rejected. Public

contracts, public employment places, entitlement administrative decisions and certain public benefits or services (such as transplants) are clear examples of this category. On the other hand, if the scarce resource is divisible its allocation may also take place through its distribution among the different applicants, so that they all receive a given portion measured in units (e.g. pro rata allocation of a grant) or in time (e.g. turnover among the applicants).²⁰ These two types of allocation in the broad sense may be designated as, respectively, allocation in the strict sense (or selection), and distribution of limited public rights. When the rights to allocate refer to heterogeneous subject-matters, the distinction between distribution and selection fades away, because even if all interested parties get a portion of the resource, it does not necessarily satisfy their preferences to the same extent.

3. CONSTITUTIONAL REQUIREMENTS

3.1 Justification

The constitutional approach to limited public rights schemes consists in the deduction of normative findings from a set of higher principles which operate as structural building blocks of the legal system to which they belong.²¹ Those principles do not only contain legal requirements of administrative regulation, but they also have a systematic function and thus an important role in the development of general administrative law.²² For

²⁰ On the divisibility of the resource, see Elster 1992, p. 22.

²¹ On the methodological premises, see, among others, A. VON BOGDANDY, 'Constitutional Principles' in A. VON BOGDANDY and J. BAST (eds), *Principles of European Constitutional Law*, Hart Publishing, Oxford 2005, pp. 3 ff.

²² SCHMIDT-ASSMANN 2004, pp. 11 ff.

that reason, we suggest that this constitutional approach might be useful for the development of a limited public rights general legal framework.

In EU Member States, limited public rights schemes are subject to certain constitutional requirements stemming from both EU law and each relevant domestic Constitution. Academic literature has mainly focused on the former, probably due to the fact that the main transformations suffered by the legal framework of this kind of administrative action have their origin in the evolution of EU law, particularly of secondary legislation,²³ and of case-law on gambling,²⁴ and on services concessions.²⁵ Nonetheless, such transformations have been primarily faced from the perspective of sector-based regulation, competition law, and the internal market, while that of constitutional principles remain less

²³ Alongside the Public Procurement Directives, see the Services Directive (above n. 7); European Parliament and Council Directive 2003/87/EC of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC [2003] OJ L275/32; European Parliament and 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 L140/63; and European Parliament and Council Directive 2002/20/EC of 7 March 2002 on the authorisation of electronic communications networks and services [2002] OJ L108/21.

²⁴ Among the most relevant judgments relating to gambling, see Case C-42/07, *Liga Portuguesa de Futebol Profissional and Bwin International Ltd. v. Departamento de Jogos da Casa da Misericórdia de Lisboa* [2009] ECR I-7633; Case C-64/08, *Ernst Engelmann* [2010] ECR I-8219; and Case 203/08 *Betfair* [2010] ECR I-4695. See also S. VAN DEN BOGAERT and A. CUYVERS, “‘Money for nothing’: The case-law of the EU Court of Justice on the regulation of gambling” (2011) 48 *Common Market Law Review*, pp. 1175 ff.

²⁵ See, among others, Case C-324/98, *Telaustria Verlags GmbH and Telefonadress GmbH v. Telekom Austria AG* [2000] ECR I-10745; Case C-231/03, *Coname* [2005] ECR I-7287; Case C-458/03, *Parking Brixen GmbH* [2005] ECR I-8585; Case C-410/04, *Associazione Nazionale Autotrasporto Viaggiatori (ANAV) v. Comune di Bari, AMTAB Servizio SpA* [2006] ECR I-3303; Case C-507/03, *Commission v. Ireland* [2007] ECR I-9777; Case 412/04, *Commission v. Italy* [2008] ECR I-619; Case C-220/06, *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v. Administración General del Estado* [2007] ECR I-12175; Case C-347/06, *ASM Brescia SpA v. Comune di Rodengo Saiano* [2008] ECR I-5641.

widespread.²⁶ It is important to note at this point that EU law does not affect the administrative allocation of every limited public right, but only the allocation of some of such rights, and particularly of those which have a greater impact on the functioning of the internal market: public contracts, concessions, authorizations and, to a lesser extent, subsidies.

On the other hand, Member States Constitutions do also contain some general principles which provide for the obligation to design and implement the administrative allocation of limited public rights according to certain criteria.²⁷ These constitutional principles primarily bind the legislature as long as it is called upon to produce administrative law in the first place, but they also do bind the Administration itself where their decisions cannot be regarded as the plain execution of the legislator's will. Therefore, this set of constitutional principles is also directly binding on the public Administration where there is no parliamentary piece of law or where it does exist yet it lacks a comprehensive regulation of the administrative decision. The national constitutional basis of the administrative allocation can also be of interest in terms of EU law for two reasons. Firstly, they guarantee the application of certain legal requirements that are also enshrined in EU law, even when the conditions for the application of the latter are not met, thus contributing to the prevention of asymmetries between EU and non-EU law cases. Secondly, these principles are also

²⁶ See for example S. PRECHAL and M.E. DE LEEUW, 'Transparency: A General Principle of EU Law?' in U. BERNITZ, J. NERGELIUS and C. CARDNER (eds), *General Principles of EC Law in a Process of Development*, Kluwer Law International, Alphen aan den Rijn 2008, pp. 201 ff.

²⁷ This approach has been particularly used in Germany. Among recent contributions see WOLLENSCHLÄGER 2010; N. MALAVIYA, *Verteilungsentscheidungen und Verteilungsverfahren. Zur staatlichen Güterverteilung in Konkurrenzsituationen*, Mohr Siebeck, Tübingen 2010; H.C. RÖHL, 'Ausgewählte Verwaltungsverfahren', in W. HOFFMANN-RIEM, E. SCHMIDT-ASSMANN and A. VOSSKUHLE, *Grundlagen des Verwaltungsrechts II*, C. H. Beck, München 2008, pp. 696 ff. See also C. KOENIG, *Die öffentlich-rechtliche Verteilungslenkung. Grund und Grenzen einer Deregulierung am Beispiel der Vergabe von Konzessionen, Kontingenten und Genehmigungen zur unternehmerischen Nutzung öffentlich verwalteter Güter*, Duncker & Humblot, Berlin 1994, and M. SCHMIDT-PREUSS, *Kollidierende Privatinteressen im Verwaltungsrecht*, Duncker & Humblot, Berlin 2005.

contained in EU primary law (Article 6 TFEU) and even though as a part of it they have to be interpreted autonomously, national sources are also of interest with respect to the development of such an interpretation.²⁸

The requirements deriving from EU law and from national Constitutions with respect to limited public rights schemes deploy over public decisions limiting the number of rights to grant, over the scheme's regulation and over the administrative allocation itself. Such requirements can be divided into two groups, depending on their scope. On the one hand, there are certain general principles which apply to the allocation of any limited public right, irrespective of their object and legal nature. Such general requirements can be traced back to the principles of transparency, equality, impartiality, objectivity and efficacy (below 3.2). On the other hand, EU law and some national Constitutions enshrine some principles which set limits on the allocation of certain specific types of limited public rights, depending on their subject-matter (below 3.3).²⁹ In the sections below, Spanish and German law will be used in an instrumental way.

3.2 General requirements

3.2.1 Transparency

One of the main general requirements for the allocation of limited public rights stemming from EU law and from national Constitutions is the need to grant those rights by

²⁸ VON BOGDANDY 2005, p. 10.

²⁹ A further development of these issues from the point of view of Spanish law in L. Arroyo, 'Las bases constitucionales de la actividad administrativa de adjudicación de derechos limitados en número' in L. ARROYO and D. UTRILLA (Dirs.), *La administración de la escasez. Fundamentos de la actividad administrativa de adjudicación de derechos limitados en número*, Marcial Pons, Madrid 2015.

means of transparent administrative procedures. Transparency is quite an open and ambiguous legal concept which has been described as an umbrella notion.³⁰ However, when it comes to allocating scarce resources, transparency can be assessed, at least, at three different moments. First, before the allocation begins transparency seems to call for some kind of *ex ante* publicity or information about the procedure at stake. Secondly, transparency can also be weighted within the allocation procedure both with respect to those taking part in it, and to the public. Finally, transparency also has a great deal to do with the content and form of the administrative decision once it has been taken, as is clearly shown by the duty to give reasons. Transparency is expressly enshrined as a constitutional principle in some Member States (e.g., articles 1(1) and 105 Spanish Constitution), and at least in its *ex ante* dimension it can be traced back to other general principles of EU law (for example, the fundamental freedoms) and national constitutional law (in particular, the principles of equality, impartiality, and objectivity).

EU law is going through a noteworthy evolution in this context, especially regarding the obligation of *ex ante* transparency. On the one hand, taking as a starting point the freedoms of establishment and to provide services (Articles 49 and 56 TFEU) the EUCJ has developed this dimension of transparency with respect to service concessions,³¹ in a process which has recently culminated with the codification of this requirement (Articles 3 and 30 *et seq.* Directive 23/2014/EU). On the other hand, the requirement of *ex ante* transparency has been provided for by Article 12(1) of the Services Directive with respect to a specific kind of limited entitlement administrative decisions (authorisations limited in number because of

³⁰ See PRECHAL and DE LEEUW 2008. See also A. BUIJZE, *The principle of transparency in EU law*, Utrecht University, Utrecht 2013.

³¹ Case C-324/98 *Teleaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG* [2000] ECR I-10745, paras. 61-62; Case C-231/03 *Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti* [2005] ECR I-7287, paras. 17-21; Case C- 458/03 *Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG* [2005] ECR I-8585, para. 50.

the scarcity of available natural resources or technical capacity). For these cases, the aforementioned provision requires publicity to refer to ‘the launch, conduct and completion of the procedure’, so that the kind of allocation procedure has to be previously specified and adequately announced. Moreover, the Preamble of the Services Directive requires this procedure to include some kind of ‘open competition’.³² Finally, the EUCJ has extended the scope of the transparency requirement to other limited authorisations schemes which are not covered by the Services Directive.³³ From the foregoing it follows that both secondary legislation and case-law of the EUCJ have extended the obligation of transparency from the field of public procurement and services concessions to the allocation of other types of limited public rights, and specifically to the allocation of limited entitlement administrative decisions.³⁴ It should be taken into account that the legal regime of such a requirement is by no means identical in all those contexts, since important differences between them regarding scope, contents and admissible exceptions still remain.

3.2.2 Equality

One of the main features of limited public rights is that, as a result of scarcity, their allocation implies that interested individuals or firms will usually be treated differently by public authorities: whereas some of the applications will be accepted, others will be (at least partially) rejected. This confirms the need to explore the legal consequences of the equality

³² Recital (62).

³³ Case C-64/08, *Ernst Engelmann* [2010] ECR I-8219, para 58, and case 203/08 *Sporting Exchange Ltd (Betfair) v Minister van Justitie* [2010] ECR I-4695, para 54. See VAN DEN BOGAERT and CUYVERS 2011, pp. 1187 ff.

³⁴ WOLSWINKEL 2009, p. 96. See also PRECHAL and DE LEEUW 2008, p. 229.

principle with respect to the adoption of allocation administrative decisions, as well as the regulation of both allocation criteria and procedures.

Equality is acknowledged as a fundamental constitutional principle both in Member States and in EU law. For example, in article 3(1) of the German Constitution equality is expressly enshrined as a fundamental right with a twofold nature, thus operating both as a subjective right of individuals and as an objective norm.³⁵ Similarly, article 14 of the Spanish Constitution ensures the protection of equality as a fundamental right and therefore, according to the same view, as an individual guarantee and an essential element for the objective order of the community.³⁶ Within the academic literature of these two Member States, the equality principle is deemed as being one of the main substantive building blocks of the rule of law [article 20(1) of the German Constitution and article 1(1) of the Spanish Constitution].³⁷ In EU law, the principle of equality is nowadays enshrined as one of the Union's founding principles, i.e. as one of the values common to the Member States in which the EU is founded (Article 2 TEU) and as a fundamental right (Articles 20 and 21 CFREU). The principle of equality is recognized in EU law in a very broad sense, not only from the point of view of its scope, which moves beyond the particular areas of law in which the Treaties have established a specific non-discrimination clause,³⁸ but also from the perspective of its functions, since it has been pointed out that the principle of equal treatment plays at

³⁵ In reference to this double nature of fundamental rights in Germany see the Judgment of the Federal Constitutional Court in the *Lith* case (BVerfGE 7, 198).

³⁶ See the Judgment of the Spanish Constitutional Court n. 25/1981, para 5.

³⁷ See, for example, M. SACHS, 'Art. 20' in M. SACHS (ed.), *Grundgesetz Kommentar*, C.H. Beck, München 2009, and L.M. DíEZ-PICAZO, 'Sobre la igualdad ante la Ley' in F. REY MARTÍNEZ and others, *La democracia constitucional. Estudios en homenaje al Profesor Francisco Rubio Llorente. Vol. I*, Centro de Estudios Políticos y Constitucionales, Madrid 2002, pp. 469 ff.

³⁸ J. SCHWARZE, *European Administrative Law*, Sweet & Maxwell, London 2006, pp. 625 ff.

least three basic roles within the EU legal order: it first performs an instrumental role as a market-unifier, it also plays a regulatory role, and finally, equality acts as an autonomous constitutional principle.³⁹ The principle of equality has also been connected by the EUCJ with the rule of law.⁴⁰

When setting up the content and scope of the principle of equality, the EUCJ has relied primarily on Member States law,⁴¹ and this circumstance explains why the general content of the principle tends to be homogeneous in these jurisdictions. Such content results in a mandate pursuant to which similar situations are treated in a similar manner, as well as the corresponding prohibitions of treating differently such situations which are analogous,⁴² and of treating similarly situations which are different,⁴³ unless exceptions are grounded on objective criteria. The absence of an objective and rational justification of different treatment leads to arbitrariness and thus to an infringement of the principle of equality. This is a wide spread understanding of equality,⁴⁴ which in some jurisdictions is nevertheless being

³⁹ See G. DE BÚRCA, 'The Role of Equality in European Community Law', and C. BARNARD 'P v. S: Kite Flying or a New Constitutional Approach?', both in A. DASHWOOD and S. O'LEARY (eds.), *The Principle of Equal Treatment in EC Law*, Sweet & Maxwell, London 1997, pp. 13 ff., 59 ff.; and G. MORE, 'The Principle of Equal Treatment: From Market Unifier to Fundamental Right?' in P. CRAIG and G. DE BÚRCA (eds.), *The Evolution of EU Law*, OUP, Oxford 1999, pp. 517 ff.

⁴⁰ T. TRIDIMAS, *The General Principles of EU Law*, OUP, Oxford 2006, pp. 4 ff.

⁴¹ TRIDIMAS 2006, p. 6.

⁴² Joined Cases 117/76 & 16/77 *Albert Ruckdeschel & Co. and Others v. Hauptzollamt Hamburg St. Annen* [1977] ECR I-1753, para. 7.

⁴³ Case 106/83 *Sernid v. Cassa Conguaglio Zucchero* [1984] ECR 4209, para. 28.

⁴⁴ See, e. g., T.R.S. ALLAN, *Constitutional justice. A liberal theory of the rule of law*, OUP, Oxford 2001, p. 21; L. FAVOREU, *Droit constitutionnel*, Dalloz, Paris 2004, pp. 860 ff.; G. DE VERGOTTINI, *Diritto Costituzionale*, Cedam,

transformed as to additionally including a proportionality test, so that the measure does not only have to rest in objective reasons but also provide for a proportional difference of treatment.⁴⁵ Equality has its negative counterpart in the prohibition of discrimination.⁴⁶ This negative dimension is particularly apparent in EU law, especially within the rules on free movement –which are particular manifestations not only of the principle of non-discrimination based on nationality, but also of the general principle of equality, and thus they do not only prohibit direct discrimination on grounds of nationality, but also any other form of discrimination–⁴⁷ and in the context of the rules on competition –where the lack of equality is expressed in distortions of competition–.⁴⁸ It is important to note that both sets of rules are specifically qualified in Article 106(1) TFUE as amenable to being infringed in the process of granting special or exclusive rights.

The creation of a limited rights allocation scheme necessarily implies a different treatment of cases falling inside and outside its scope of application and, therefore, it has to

Milano 2008, p. 288; J.J. GOMES CANOTILHO, *Direito Constitucional e Teoria da Constituição*, Almedina, Coimbra 2003, pp. 1295 ff.

⁴⁵ On the differences between the ‘old’ and the ‘new test’ in Germany, see L. ORTERLOH, ‘Art. 3’ in M. SACHS (ed.), *Grundgesetz, Kommentar* (n 37), pp. 8 ff.

⁴⁶ SCHWARZE 2003, p. 562.

⁴⁷ See Case 152/73 *Giovanni Maria Sotgiu v. Deutsche Bundespost* [1974] ECR 153, para. 11; Case C-279/93 *Finazamt Köln-Alstadt v. Roland Schumacker* [1995] ECR I-225, para. 26; Case C-381/93 *Commission v. French Republic* [1994] ECR I-5145, para. 17; Case C-55/94 *Reinhard Gebhard v. Consiglio dell’Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, para. 37; Case C-367/98 *Commission v. Portugal* [2002] ECR I-4731, para. 45; Case C-110/05 *Commission v. Italy* [2009] ECR I-519, para. 37; Case C-383/05 *Raffaele Talotta v. État belge* [2007] ECR I-2555, para. 17.

⁴⁸ TRIDIMAS 2006, pp. 75 ff.

comply with the said constitutional and EU law requirements.⁴⁹ Furthermore, with respect to the allocation (in its strict sense) of limited public rights, scarcity drives to the need of selecting amongst applicants and therefore of treating them differently. Such differentiation is not in itself inconsistent with the principle of equality, but this constitutional requirement sets some conditions on the definition of the selection criteria. On the one hand, allocation cannot give rise to discrimination and consequently it must be based on reasonable and objective criteria and shall eventually comply with the principle of proportionality. On the other hand, the definition of such criteria must drive to equal or at least comparable conditions of applying for such resources for all operators concerned. In order to meet the requirements deriving from the principle of equality, allocation criteria must be feasible –i.e. giving all undertakings the real opportunity to comply with them–, verifiable –i.e. enabling the reliable verification of whether in a given instance they are in fact fulfilled–, mostly linked to the subject of the resource that is being awarded –since the farther and more loosely the criteria are connected with the subject-matter of the resource in question, the greater the risk that they would be set arbitrarily–, sufficiently clear and precise, and applied in accordance with uniform legal standards.⁵⁰ According to the case-law of the EUCJ, when national authorities have to base their allocation decisions on objective and non-discriminatory criteria, their discretion is subsequently circumscribed in such a way that it cannot be regarded as arbitrary.⁵¹

⁴⁹ Case 127/07 *Société Arcelor Atlantique et Lorraine* [2008] ECR I-9895.

⁵⁰ M. SZYDLO, 'The Process of Granting Exclusive Rights in the Light of Treaty Rules on Free Movement' (2011) 12-7 *German Law Journal* 1429, 1048. See also WOLLENSCHLÄGER 2010, pp. 35 ff.

⁵¹ See among others Case C-205/99 *Asociación Profesional de Empresas Navieras de Líneas Regulares (Anafir) and Others v. Administración General del Estado* [2001] ECR I-1271, para. 38; Case C-389/05 *Commission v French Republic* [2008] ECR I-5337, para. 94; Case 203/08 *Betfair* [2010] ECR I-4695, para. 50; Case C-64/08 *Ernst Engelmann* [2010] ECR I-8219, para. 55.

Alongside these constraints related to the creation of the allocation scheme and to the definition of allocation criteria, from the principle of equality certain consequences with respect to the configuration and the execution of allocation procedures can also be derived.⁵² Given that allocation procedures are a sort of multi-polar legal relations, where inasmuch as what benefits one, burdens the other, equality in the sense of equal outcomes for all applicants is hardly feasible. However, in some jurisdictions equality is guaranteed at an earlier stage as equality of opportunities for all the potentially interested subjects.⁵³ From this perspective, the principle of equality requires the granting authority to treat all the interested operators on an equal basis regarding the factual and legal conditions and circumstances tied to the very participation in the allocation procedure. This interpretation of the principle of equality as equality of opportunities underlies the requirement of transparency, which comprises a specific dimension in the sphere of selection procedures, amounting to the need to ensure a degree of *ex ante* advertising sufficient to allow for all the potential applicants to participate in the procedure on an equal footing. As has been pointed out, the EUCJ has adopted this view regarding service concessions.⁵⁴ As for limited entitlement administrative decisions, the Court has also clearly stated that ‘compliance with the principle of equal treatment and with the consequent obligation of transparency necessarily means that the objective criteria enabling the Member States’ competent authorities’ discretion to be circumscribed must be sufficiently advertised’.⁵⁵

⁵² Judgment of the German Federal Constitutional Court in the *Gleichheit im Vergaberecht* case (BVerfG 116, 135 [153]). See WOLLENSCHLÄGER 2010, pp. 34 ff.

⁵³ WOLSWINKEL 2009, pp. 38 ff.

⁵⁴ Case C-231/03 *Coname* [2005] ECR I-7287, paras. 17 ff.

⁵⁵ Case 203/08 *Betfair* [2010] ECR I-4695, para. 50. See also Case C-64/08, *Ernst Engelmann* [2010] ECR I-8219, paras. 55-57.

It is thus apparent that the transparency requirement and the resulting obligation of prior advertising have in EU law a strong connection with the principle of equality which lies in the understanding of the latter as equality of opportunities. In accordance with these grounds, certain conclusions can be drawn as to the scope of the obligation: on the one hand, the information must be appropriate, adequate, and adapted to the characteristics of the right to grant;⁵⁶ and on the other hand, it must include a reference to the future allocation procedure, the features of the rights that are to be allocated, the terms and forms of participation in the procedure, and the allocation criteria.⁵⁷ An obligation of transparency with such a minimum content can be rationally regarded as a condition of the existence of truly equal opportunities and therefore as a duty arising from the principle of equality in its condition as an EU law principle. The same can be said as for German public law: article 3(1) of the Constitution has been interpreted both by the academic literature and the courts as enshrining a subjective right to participate in an allocation procedure ruled by the principle of equal opportunities (*Recht auf chancengleiche Teilnahme*),⁵⁸ which comprises an obligation of *ex ante* transparency.⁵⁹

Such a wide interpretation of the equality principle is grounded on particular reasons in both legal systems: the role of equality as a market integration clause in EU law and the scope of the right to effective judicial protection (*Schutznorm* doctrine) in the German Constitution (article 19 IV). This is the reason why in other national legal orders the principle of equality is interpreted in a narrower manner, as a plain prohibition of different treatment

⁵⁶ See Case C-231/03 *Coname* [2005] ECR I-7287, para. 21; Case C-507/03, *Commission v. Ireland* [2007] ECR I-9777, para. 32; Case C-458/03 *Parking Brixen GmbH* [2005] ECR I-8585, para. 50.

⁵⁷ WOLSWINKEL 2009, pp. 88 ff.; SZYDLO 2011, pp. 1433 ff.

⁵⁸ Judgment of the German Federal Constitutional Court in the *Gleichheit im Vergaberecht* case (BVerfG 116, 135 [153]).

⁵⁹ WOLLENSCHLÄGER 2010, pp. 34 ff.

and not enshrining an obligation of *ex ante* transparency. An example is Spanish law, where this obligation can be connected with other constitutional mandates (objectivity, efficacy and transparency itself) but it has not been regarded yet as a consequence of the principle of equality in non-EU law cases.

On the contrary, it is not at all evident that the principle of equality demands a specific type of allocation procedure, neither in EU nor in national law. Provided that the selection rests on objective criteria, equality does not require that the allocation procedure has a comparative nature based on material criteria. Granting limited public rights according to the rule ‘first come, first served’ does not entail a comparison of the applications, projects, or subjective features of the interested individuals or firms, but it undoubtedly rests on an objective criterion –*prior in tempore*– which excludes the shadow of arbitrariness and discrimination. To sum up, while the obligation of transparency can be rationally regarded, at least in EU law and some Member States, as connected with principle of equality – understood as equality of opportunities–, the need of a competitive procedure shall necessarily be founded on a different constitutional principle.

3.2.3 Impartiality and objectivity

When it comes to the allocation of limited public rights, preclusion of favouritism and nepotism plays an important role. Taking into account that in such contexts public authorities decide on the distribution of a scarce resource and thus benefit some subjects with respect to others, the risk of being partial on the part of public bodies and public officials and agents is apparent. This explains the relevance of the analysis of the requirements deriving from the idea of impartiality in this context.

The requirement for impartiality in administrative action falls into the main principles of administrative law. In fact, in some Member States it enjoys constitutional status. For example, article 103 of the Spanish Constitution recognizes both objectivity and impartiality as constitutional mandates with the same content and different addressees: while objectivity imposes structural requirements on administrative organization, regarding

impartiality certain constraints related to individual officials are derived thereto. As for the contents of those requirements, which in Spain are usually connected with the principle of democracy,⁶⁰ objectivity and impartiality have two dimensions which have been subsequently specified under the general Administrative Procedure Act.⁶¹ On the one hand, impartiality forbids administrative decisions which unduly favour or work against private interests, and consequently sets conditions on the administrative decision-making and prevents the intervention in the procedure of civil servants and other administrative agents when a conflict of interests is apparent (articles 28 and 29 of the Administrative Procedure Act). On the other hand, the principles of objectivity and impartiality also require that administrative decisions are taken after a due and fair balance of the different interests at issue [article 4(1)c of the Administrative Procedure Act], thus entailing certain obligations in terms of administrative organization and procedure, particularly concerning advertising, participation and transparency [articles 3 and 35 *et seq.* of the Administrative Procedure Act].

Although it is not expressly enshrined in the German Constitution, impartiality is a well-established principle of German public law, the main contents of which are included in the German Federal Act on Administrative Procedure:⁶² articles 20 and 21 forbid the action of certain public officials acting on behalf of the Administration by reason of their connection with the parties or with the subject-matter of the procedure. A general principle has been inferred from these provisions, according to which the State must act with neutrality in administrative procedures.⁶³ It has been particularly highlighted that the goal of articles 20

⁶⁰ See J.A. SANTAMARÍA PASTOR, *Principios de Derecho Administrativo General I*, Iustel, Madrid 2009, pp. 82 ff.

⁶¹ *Ley 30/1992, de 30 de septiembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común.*

⁶² *Verwaltungsverfahrensgesetz* of 25.05.1976 (last amendment of 11.12.2008).

⁶³ V. NESSLER, 'Der Neutralitätsgrundsatz im Vergaberecht' (1999) *Neue Zeitschrift für Verwaltungsrecht* (NVwZ), 1081.

and 21 of the Federal Act on Administrative Procedure is to prevent the influence in administrative procedures of private interests which are unconnected with its subject-matter, and consequently to enable that the procedure and its outcome are fair, objective, and impartial.⁶⁴ These requirements have sometimes been traced back to the constitutional principle of democracy,⁶⁵ whilst other authors connect them primarily with the rule of law and, specifically, with the general principle of equality.⁶⁶ On the contrary, the need for a due and fair balance of the different interests affected by an administrative decision has not been understood in Germany as a consequence of the principle of impartiality. Nevertheless, it has been regarded as a general requirement of rational administrative action materially linked to the rule of law.⁶⁷

Regarding EU law, both the EUCJ and the General Court (hereinafter referred to as EUGC) have laid down the existence of the principle of impartiality as an element of the principle of good administration.⁶⁸ According to the EUGC in the *max.mobil* case, the principle of impartiality derives from the principle of good administration, which is itself traceable to the rule of law.⁶⁹ As for its content, the principle presumes both the removal of

⁶⁴ F.O. KOPP, *Verwaltungsverfahrensgesetz*, CH Beck, München 1996, pp. 334 ff.

⁶⁵ E. SCHMIDT-ASSMANN, 'Verwaltungsverfahren und Verwaltungsverfahrensgesetz: Perspektiven der Systembildung', in W. HOFFMANN-RIEM and E. SCHMIDT-ASSMANN (eds.), *Verwaltungsverfahren und Verwaltungsverfahrensgesetz*, Nomos, Baden-Baden 2002, p. 454.

⁶⁶ NESSLER 1999, p. 1082. See also KOPP 1996, pp. 334 ff.

⁶⁷ SCHMIDT-ASSMANN 2004, pp. 84 ff.

⁶⁸ See, among others, Case C-255/90 *Jean-Louis Burban v. European Parliament* [1992] ECR I-02253; Case T-167/94 *Detlef Nölle v. Council and Commission* [1995] ECR II-02589. Regarding this case law see J. SCHWARZE, 'The Principle of Proportionality and the Principle of Impartiality in European Administrative Law' (2003) 1 *Rivista Trimestrale di Diritto Pubblico* 53.

⁶⁹ See Case T-54/99 *max.mobil Telekommunikation Service GmbH v. Commission* [2002] ECR II-00313, para. 48. This judgment was later set aside by the ECJ, which did not however put into question the argumentation concerning

those officials who have a personal interest in the outcome of the administrative procedure, and the duty of administrative bodies to carefully and impartially examine the relevant facts, interests and questions of law before adopting a decision.⁷⁰ Therefore, the two dimensions of impartiality and objectivity which have been identified with respect to the (in this respect somewhat different) national legal orders can be also noticed in EU law and particularly in the right to good administration.

These requirements have been expressly recognised as a part of the right to good administration enshrined in Article 41(1) CFREU, according to which ‘every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union’. This right to good administration does not only bind the EU authorities but also the authorities of the Member States in so far as they implement EU law [Article 51(1) CFREU]. The content of the principle of good administration was nevertheless stipulated even before the incorporation of the Charter to EU law. Therefore, its meaning had been specified in various soft law instruments, such as the Ombudsman’s Code of Good Administrative Behaviour, which was adopted by the European Parliament through Resolution of 6 September 2001. The Code remarks, on the one hand, the notion of impartiality, according to which the official ‘shall be impartial and independent’, ‘shall abstain from any arbitrary action adversely affecting members of the public, as well as from any preferential treatment on any grounds whatsoever’, his conduct ‘shall never be guided by personal, familiar or national interest or by political pressure’, and he ‘shall not take part in a decision in which he or she, or any close member of his or her family, has a financial interest’ (Article 8); and on the other hand, the notion of objectivity, according to

the character and the ground of the principle of impartiality (Case C-141/02 *Commission v. T-Mobile Austria GmbH* [2005] ECR I-01283).

⁷⁰ See Case C-269/90, *Technische Universität München v. Hauptzollamt München-Mitte* [1991] ECR I- 5469; see also Case T-71/93, *Langnese v. Iglo GmbH* [1995] ECR II-1533, and Case T- 14/96, *Bretagne Angleterre Irlande (BAI) v. Commission* [1999] ECR II-139.

which ‘when taking decisions, the official shall take into consideration the relevant factors and give each of them its proper weight in the decision, whilst excluding any irrelevant element from consideration’ (Article 9).

With respect to the allocation of limited public rights, the requirements of impartiality and objectivity purport a prohibition of adopting allocation decisions based on private interests of the public agents who are competent to take the allocation decision, as well as an obligation of carefully and impartially taking into consideration the relevant facts and interests at stake. Indeed, two kinds of interrelated requirements can be inferred from objectivity, the ultimate aim of which is to limit the margin of discretion of public authorities and to allow for controlling its exercise. On the one hand, it calls for a clear wording of the standards and criteria governing the allocation, which shall be accurate and unambiguous. In addition, such standards and criteria shall also be interpreted and applied in a homogeneous and consistent manner throughout the entire allocation procedure. On the other hand, out of the principle of objectivity arises a requirement for transparency in order to make possible that the granting authority takes due care of the relevant interests affected by the decision and to enable the review of the exercise of administrative discretion. This connection between objectivity and transparency is especially apparent in view of Article 12(1) of the Services Directive and the EU CJ’s case-law on the allocation of public contracts falling outside the scope of the secondary legislation on public procurement.⁷¹

Therefore, the obligations of advertisement and *ex ante* transparency deriving from the general principle of equality are also a means to achieve the guarantees of impartiality and –especially– objectivity of administrative action. From this perspective it has indeed been stated that transparency, ‘both in the design and in the conduct of the selection procedure, contributes to reviewing the impartiality of the selection procedure’, and that the ‘impartiality requirement is closely related or even part of the principle of equal treatment: impartiality is

⁷¹ Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, para 62. See also Case C- 458/09 *Parking Brixen* [2005] ECR I-8585, para. 49.

necessary to guarantee equal treatment'.⁷² In turn, some authors have argued that the fact that transparency is intended to protect impartiality proves that 'it can be separated from equal treatment' and that they have '–partly– independent nature'.⁷³ In our view, the requirements of equality, transparency, objectivity and impartiality overlap only to a certain extent. The relationship between equality and impartiality within allocation procedures becomes particularly apparent in EU law due to the case-law of the EUCJ, where freedoms of movement and non-discrimination are of central importance. Notwithstanding, some of the national experiences we have dealt with show a weaker connection between these constitutional mandates. Furthermore, the Charter provides a framework which will probably facilitate an autonomous role of impartiality, objectivity and good administration in this respect.

Regarding the type of allocation procedure, the distinction between the two dimensions of impartiality and objectivity seems to be of importance. The need for impartial behaviour of public authorities does not require that the allocation procedure has a comparative or competitive nature, because it can be satisfied through lottery or a 'first come, first served' procedure. On the contrary, the duty of administrative bodies to carefully examine the relevant facts and interests at stake can eventually require that the type of procedure enables some kind of comparison or competition among the individuals and firms interested in accessing the relevant market or in the exercise of a right. Depending on the features of the activity or right concerned, this second dimension of impartiality –objectivity, in the wording of the Code of Good Administrative Behaviour– may call for some kind of comparative allocation procedure.

⁷² WOLSWINKEL 2009, p. 91.

⁷³ PRECHAL and DE LEEUW 2008, p. 231.

3.2.4 Efficacy

EU law imposes a general requirement of effectiveness on the Member States according to which national authorities have to give to the former adequate effect. Nonetheless, EU law does not contain a general principle of efficacy of administrative action in itself. Moreover, efficacy does not operate as a directive of administrative allocation decisions. EU law on public procurement is clear proof of this. On the one hand, the EUCJ has historically focused on the consequences of public procurement over the internal market and competition, paying almost no attention to the way in which administrative procedures and decisions in the area of public procurement favour the public interest. On the other hand, EU secondary legislation has dealt with the specification of those requirements which are necessary to prevent public procurement from having a negative effect on the fundamental freedoms and the rules on competition, the obligation of effectiveness being of great importance within this context. In contrast, the understanding of public procurement law as an instrument to improve the efficacy of other public policies as well as of public procurement decisions is rather new. The recent Directive 2014/24/EU on public procurement seeks to complement the traditional rationale of public procurement regulation with two supplementary objectives: increasing ‘the efficiency of public spending to ensure the best possible procurement outcomes in terms of value for money’ and to allow ‘procurers to make better use of public procurement in support of common societal goals such as protection of the environment, higher resource and energy efficiency, combating climate change, promoting innovation, employment and social inclusion and ensuring the best possible conditions for the provision of high quality social services’.⁷⁴ In short, the manner and the extent to which public procurement satisfies the public interest is increasingly important, although efficacy of administrative action is not a general principle of EU law, but

⁷⁴ Recitals (2) and (47).

a requirement having a governing role which remains circumscribed to those legal frameworks where it has already been incorporated.

On the contrary, in some national legal orders efficacy operates as a general principle of public law. In Germany efficacy had deserved little attention outside well defined areas of administrative law, such as the execution of administrative acts. However, academic literature has recently noticed its important contribution to the development of general administrative law as a general principle stemming from the rule of law [article 20(1) of the German Constitution]: administrative law and administrative action are instruments of social direction, the efficacy of which matters from a constitutional standpoint.⁷⁵ The Spanish Constitution expressly proclaims that the public Administration is obliged to protect and pursue with efficacy [article 103(1)] and efficiency [article 31(2)] those interests which have been qualified as public interests by the law. Hence, optimization of scarce public resources becomes a constitutional requirement, while efficacy turns into a source of legitimacy of a public Administration which, as the bureaucratic organisation of a social State (article 1 of the Spanish Constitution), is called to shape the social order subject to the public interest.⁷⁶ Moreover, as has been pointed out, these constitutional mandates do not only bind the public Administration in the exercise of its discretionary powers, but also directly bind the Parliament in-so-far as it is primarily concerned with the development of administrative law.⁷⁷

According to this understanding, the principle of efficacy has an effect on the whole range of administrative activities since they are devoted to the fulfilment of public interest requirements. It also has an impact on the allocation of limited public rights, as long as the

⁷⁵ See SCHMIDT-ASSMANN 2004, pp. 56 ff.

⁷⁶ See L. PAREJO ALFONSO, *Eficacia y Administración. Tres estudios*, Instituto Nacional de Administración Pública, Madrid 1995.

⁷⁷ L. ARROYO, 'Ponderación, proporcionalidad y Derecho administrativo' (2009) 2 *InDret*.

limitation in itself of these legal positions as well as the selection among those private parties interested in obtaining them are measures designed to achieve different public interests. The scope and content of the principle of efficacy within this context shall be analysed on a separate basis. As for its scope, efficacy operates as a constitutional directive whenever the allocation decision is relevant to public interests. It is possible that, once the limitation of the number of rights to grant has been executed, the selection among those who aim at obtaining them lacks any potential impact on the relevant public interest, thus making it essentially neutral from this perspective. In these circumstances the regulation of the allocation procedure might be constitutionally conditioned by virtue of other mandates but not by the principle of efficacy. In contrast, when the selection does have those effects, efficacy gains importance. However, such importance might have various degrees, depending on the following criteria: first, the public interest can work as an external limitation in the exercise of the allocated right (e.g. an authorization for the provision of gambling services) and secondly, the exercise of such right can be directly aimed at the execution of the public interest (e.g. a public contract). Despite not being able to establish an absolute connection in this respect, it can be *prima facie* assumed that the former will normally be the case of authorisations, while the latter will better fit other kinds of limited public rights (e.g., rights to use public goods). Nonetheless, it seems reasonable that the requirements of the principle of efficacy regarding the regulation of the allocation procedure will be higher in the last of these two situations.

With respect to the substantive requirements, in the context of allocation procedures the principle of efficacy basically has two relevant dimensions: from a negative perspective, it forbids the administrative authority to grant the rights at stake to those individuals or firms who are not in an adequate condition to respect or to eventually comply with the requirements of public interests, and positively, it compels rights to be granted to those who could better comply, from an objective standpoint, with the demands of public interests, both in terms of the extent of their implementation (efficacy) and of the optimization of scarce resources (efficiency). Administrative law must therefore shape not only the selection criteria, but also the allocation procedures in a way that makes it possible to evaluate the capacities, strengths and limitations of the potential applicants and their projects, according to the particular

features of the limited public rights at issue.⁷⁸ Two consequences can be deduced in this respect: first, when efficacy matters *ex ante* transparency should always be obligatory because of its decisive contribution to the selection of potential candidates; and secondly, when efficacy matters genuine comparative or competitive procedures should enjoy *prima facie* priority over other selection mechanisms which do not allow a particular scrutiny of candidates. Indeed, allocation procedures such as lottery or ‘first come, first served’ can satisfy the requirements stemming from the principle of equality, but as it has also been said regarding objectivity, if the principle of efficacy comes into play the allocation procedure must foresee competitive, or at least comparative, selection mechanisms.⁷⁹

3.3 Specific requirements

The aforementioned constitutional principles affect the legal regime and the development of the administrative activity of allocation of limited public rights in a general way, i.e., regardless the object of such rights. However, EU law and domestic constitutional law impose some additional requirements on certain limited public rights schemes due to their content and/or the context in which their allocation takes place. In this regard two main scenarios should be separately mentioned: the administrative allocation of legal positions covered by a given constitutional freedom, and the administrative allocation of public benefits or services which have constitutional relevance.

⁷⁸ For other dimensions of the relationship between transparency and the quality of administrative decisions, see BUIJZE 2013, pp. 45 ff.

⁷⁹ SZYDLO 2011, p. 1445, with respect to the granting of exclusive rights. For additional references to Dutch law, see WOLSWINKEL 2009, p. 92.

The first group of cases refers to the creation and subsequent allocation of a limited number of entitlement administrative decisions which enable the exercise of a constitutional freedom, normally (but not always) the freedom to conduct a business (Articles 14 and 15 CFREU, article 38 of the Spanish Constitution, article 12 of the German Constitution). The decision to limit the number of entitlement administrative decisions and the definition of the allocation criteria entail a restriction of the content of the relevant freedoms. Therefore, they must meet the constitutional requirements applying to the limitation of such legal positions. These requirements include *inter alia* the intervention of the Parliament (*Gesetzesvorbehalt* or *reserva de ley*) and, more generally, the principle of prior normative programming (i.e., the requirement on regulatory authorities to predetermine to a certain extent the content and procedure for the adoption of singular administrative decisions before they are taken). The limitation of the number and the allocation criteria must also be justified in the pursuance of a legitimate purpose, satisfy the principle of proportionality and may not infringe the essential content or substance of the right [Article 52(1) CFREU, article 53.2 of the Spanish Constitution and article 19(2) of the German Constitution concerning the core content guarantee⁸⁰].

As for the limitation of the number of entitlement administrative decisions for the development of economic activities, the influence of EU primary law shall be highlighted, which in this context is quite sharp and derives from at least three set of rules. The first one is that of the freedoms recognized in the Charter, and in particular the freedom to conduct a business (Article 16 CFREU). Secondly, in this kind of scenarios some other specific requirements arise from the fundamental freedoms of the Treaty whenever the limited entitlement decisions scheme falls within their scope, essentially due to its cross-border

⁸⁰ On German law, see also, e. g., the Judgments of the German Federal Constitutional Court of 11.06.1958 (BVerfGE 7, 377) and of 28.03.2006 (1 BvR 1054/01).

character.⁸¹ Indeed, the quantitative limitation of the entitlement administrative decisions to grant involves a restriction of the fundamental freedoms which is additional to that resulting from the very requirement of an authorization. Such a restriction can be justified if it aims at protecting certain interests or objectives (mandatory requirements, overriding reasons of public interest, etc.) and if, in doing so, it passes a proportionality test (Articles 49 and 56 TFEU).⁸² The scope and structure of such requirements depend on whether or not the concerned sector is governed by secondary legislation (as is the case of services, hydrocarbons, electronic communications, or transport sectors): if there is some harmonization of the relevant area, the national measure will be primarily confronted with the relevant piece of secondary legislation.⁸³ Thirdly, the TFUE rules on special and exclusive rights also have an impact on public decisions limiting the number of entitlement administrative decisions to grant, since the allocation of the later results in the attribution of special or exclusive rights to their holders. As a consequence, the decision concerning the limitation of the number of this kind of public rights may be brought under any of the prohibitions built by the EUCJ when interpreting Article 106(1) TFEU, which would make necessary a justification through the general exception of Article 106(2) TFEU.⁸⁴

Secondary EU legislation is also of importance with respect to the definition of a scheme of limited entitlement administrative decisions. On the one hand, there are Directives which face the regulation of limited entitlement administrative decisions from a sector-based

⁸¹ See, e. g., Joined Cases C-570/07 and C-571/07 *Blanco Pérez and Chao Gómez* [2010] ECR I-4629, para. 55 ff.; Case C-169/07 *Hartlauer* [2009] Rec I-7633, para. 36.

⁸² See on this point, e.g., Case C-42/07, *Liga Portuguesa de Futebol Profissional and Bwin International Ltd. v. Departamento de Jogos da Casa da Misericórdia de Lisboa* [2009] ECR I-7633, para. 56; Case C-64/08, *Ernst Engelmann* [2010] ECR I-8219, para. 45.

⁸³ See C. BARNARD, *The Substantive Law of the EU: The Four Freedoms*, OUP, Oxford 2010, pp. 149 ff., 479 ff.

⁸⁴ Arroyo 2004, pp. 467 ff.

perspective and some of them are studied in depth in this collective work, namely those regulating greenhouse gas emission permits⁸⁵ and radio frequencies.⁸⁶ On the other hand, the Services Directive establishes a general legal framework for limited authorisations schemes which applies to entitlement administrative decisions, irrespective of them being technically administrative authorisations, concessions, or waivers, whenever they refer to services (and not goods) of any kind, except those that are excluded from its scope in Article 2. Firstly, Article 15(2) requires Member States to examine whether their legal system makes access to a service activity or the exercise of it subject to ‘quantitative or territorial restrictions, in particular in the form of limits fixed according to population or of a minimum geographical distance between providers’. Secondly, Article 15(3) states that those restrictions shall comply with some conditions: (i) they must be neither directly nor indirectly discriminatory on the basis of nationality nor on the basis of the registered office location; (ii) they must be necessary in terms of being justified by an overriding reason relating to the public interest; and (iii) they must be proportional, in the sense that the restrictions are suitable for securing the attainment of the objective pursued, that they do not go beyond what is necessary to attain that objective and that it is not possible to replace those requirements with other, less restrictive measures which attain the same result. Thirdly, Article 11 forbids those authorisations to be granted for a limited period, except where ‘the number of available authorisations is limited by an overriding reason relating to the public interest’. Finally, Article 12 contains rules on the allocation procedure, duration and renewal of authorisations whose number ‘is limited because of the scarcity of available natural resources or technical capacity’.

With regard to the allocation of the entitlement administrative decisions, once their number has been validly limited the concerned constitutional freedom turns into a right to

⁸⁵ European Parliament and Council Directive 2003/87/EC of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC [2003] OJ L275/32.

⁸⁶ European Parliament and Council Directive 2002/20/EC of 7 March 2002 on the authorisation of electronic communications networks and services [2002] OJ L108/21.

participate in the allocation procedure, and to do so with certain guarantees: the requirement of Parliamentary legislation spreads to the regulation of the administrative procedure of allocation, the Administration is required to give adequate publicity to the call and, if necessary, to complete and to concrete the allocation program (so-called *Konzeptpflicht* within the German academic literature).⁸⁷ Finally, the constitutional freedom held by all applicants does not ensure that they will all obtain the entitlement administrative decision, but it does include the guarantee that the administrative decision results from a proper and accurate implementation of the allocation program. In general terms, the obligation of correctness of administrative action stems from the rules governing such action, but in cases like these such an obligation finds a specific constitutional basis, which vanishes when the subject-matter of the allocation is not a legal position protected by the Constitution.

As stated above, the second set of cases is that of the allocation of constitutionally relevant public benefits or services. Such relevance can derive from the fact that the benefit to allocate is the subject-matter of a constitutional right [e.g., the right to education in article 27(1) of the Spanish Constitution], or it may result from the circumstance that the affected benefit or service is the object of a constitutional directive, i.e. a mandate of optimization imposed on the public authorities by the Constitution without directly acknowledging a corresponding subjective public right to citizens [e.g. the mandates of protection of health, housing, disabled and elderly people in articles 43, 47, 49 and 50 in connection to article 53(3) of the Spanish Constitution]. The scarcity of public resources available for the satisfaction of these benefits or services can be managed either through the restrictive configuration of their scope and/or of the requirements for accessing them and the subsequent establishment of admission procedures, or by means of the limitation of the number of benefits and their further administrative allocation. When the latter alternative is chosen, the limitation on the number of benefits, the demarcation of their scope and the definition of the

⁸⁷ See WOLLENSCHLÄGER 2010, pp. 536 ff.

allocation criteria are constitutionally relevant,⁸⁸ to the extent that they will have to pass a proportionality test from the perspective of the prohibition of insufficient actions (*Untermassverbot*). Likewise, as a result of the quantitative limitation of resources to allocate, the right or interest in obtaining the benefit in question turns into a right to participate in a procedure with certain guarantees. Which ones these are depends largely, however, on whether the constitutional provision configures the service or benefit directly as a right [as happens with the right to education in article 27(1) of the Spanish Constitution] or as a mere mandate for public authorities in compliance of which the corresponding rights are set out [e.g., the rights to access health services or to a subsidized housing in articles 43 and 47 of the Spanish Constitution].⁸⁹

4. CLOSING REMARKS

The creation and the administrative allocation of limited public rights, although traditionally governed by heterogeneous legal regimes, raise certain common regulatory problems which make necessary to incorporate this kind of activity to the system of general administrative law. To that end, it is first necessary to conceptually demarcate it as well as to identify its main manifestations. The analytical tools resulting from this approach are the basis for the systematic construction of the administrative activity of allocation of limited public rights, which must be developed both deductively and inductively. The deductive perspective, which is the one on which this paper has focused, allows for identifying certain horizontal requirements on the administrative activity under examination, which stem both from EU law and national constitutional law. Academic literature has mainly focused on the scope and particularities of the limitations arising from the fundamental freedoms as well as

⁸⁸ See e.g. the ECHR Judgement of 2.04.2013 on Case *Tarantino and others v. Italy* regarding the right to education.

⁸⁹ Arroyo 2015.

from both general and sector-based secondary EU law. Nevertheless, the development of a doctrine on the allocation of limited public rights as a part of general administrative law demands widening the perspective in order to explore the requirements on this kind of administrative activity, which derives from a set of constitutional principles, such as impartiality, objectivity, efficacy, transparency and equality, the two latter being of special strength from the point of view of EU law. These principles go beyond the law of the internal market and operate as a bridge between the law of the Union and the constitutional orders of its Member States. From this perspective, it should be noticed that, as long as some of these principles ensure the application of certain legal requirements that are also enshrined in EU law even in the cases where the conditions for the application of the later are not met, they contribute to the prevention of asymmetries between EU and non-EU law cases.

EU and national constitutional law impinge on two main aspects of limited public rights schemes. The first one refers to the limitation on the number of rights to be allocated. When such rights are related to the exercise of a subjective legal position with a constitutional rank, the limitation of their number may involve a restriction of the corresponding constitutional right and must therefore fulfil the requirements that the CFREU and/or the relevant domestic Constitution imposes on such kind of restrictions. This particularly applies to limited entitlement administrative decisions as well as to limited public benefits with constitutional relevance. Moreover, the limitation on the number of entitlement administrative decisions for the development of economic activities raises concerns from the standpoint of the EU law rules on fundamental freedoms and on special and exclusive rights, and must therefore conform to the corresponding justifications provided for by EU law in this context.

The second element concerns the administrative allocation procedure and the allocation criteria. Apart from the specific requirements that may exist on this field depending on the content of the right to be allocated, both EU law and domestic constitutional law impose a general mandate that the allocation procedure and criteria meet certain requirements of transparency, equality and non-discrimination, objectivity, impartiality and efficacy. The scope of these requirements and the specific techniques through which they must be carried out, as well as their constitutional basis, vary depending on the kind of right to grant and the

context of its allocation, yet their acknowledgement is an indisputable trend in relation to almost all of them.

Finally, some closing remarks shall be made with respect to these procedural requirements. Firstly, they have been regarded as outcomes of certain legal principles, some of them being fundamental rights both at EU and national level (e.g. equality and good administration) while others are policies without a subjective nature, and even without constitutional status in some jurisdictions (e.g. efficacy and efficiency). Furthermore, it has been confirmed that these specific procedural requirements can be simultaneously connected with more than one of these principles, as is particularly true for *ex ante* transparency. Secondly, as long as they are legal principles their legal force has to be analysed from two different perspectives: on the one hand, these procedural regulations are *prima facie* required by the respective constitutional principles but on the other hand, they can eventually be displaced by other opposing principles under certain conditions. Finally, these procedural requirements enjoy the legal force which comes from the norm at stake (e.g. EU primary law, national constitutional law, etc.). However, they perform a genuine constitutional function which consists in providing structural criteria for the systematic construction of general administrative law, and, in particular, for the development of a general theory on the allocation of limited public rights.

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