Allocation procedure and its applicability to the allocation of the national total maximum emission amount of pollutant

*Mirjam Vili**

Abstract

The Estonian Atmospheric Air Protection Act (AAPA) states, that the granting of an air pollution permit and an integrated environmental permit should be refused, if the emission of a pollutant discharged from the emission source causes the total maximum emission limit set for specific pollutants to be exceeded in the territory and economic zone of Estonia. Thus, the total quantitative limit for the permit applicants regarding the discharge of specific pollutants has been set with this provision. Any quantitative limit to a certain benefit can lead to a situation where there is not enough of it for all interested parties. This, in turn, means that the state has to make a decision on who to prioritize as benefit recipients. When granting the permit, the state may be in a situation where, due to the total emission limit, it has to select operators who are allowed to use the ambient air as a public good to discharge the pollutant. Therefore, the question arises as to which requirements should be met by such a selection procedure. This article dwells upon the question whether, in the form of the regulation of the AAPA, it is an allocation procedure as one of the special types of administrative procedure. In doing so, the requirements of the allocation procedure developed in German legal literature have been taken as a benchmark in the absence of an appropriate approach in Estonia.

Key words: ambient air protection, (national) emission ceilings, NEC-Directive, environmental permits, principle of prevention, allocation procedure

Introduction**

Regardless of the time perspective in which the finite nature of environmental benefits is discussed, there seems to be a consensus today that environmental resources are not infinite, so economic growth cannot be infinite either. The world's base of natural wealth and resources is finite and is constantly being depleted because of exploitation and pollution. At the same time, the demand for resources is increasing due to population growth and related socioeconomic developments. Ambient air – as well as water – although, according to the prevailing opinion, a renewable natural resource is still not replaceable for humanity according to current knowledge. It is not possible to obtain or produce ambient air of a quality suitable for living on planet Earth, therefore it is not possible to draw an equal sign between the self-sustainability of renewable natural resources and the limitlessness of resources.[1]

The German philosopher C. F. Gethmann concludes that the environment as a whole is

* LL.M. Doctoral student, University of Tartu, Faculty of Law.

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[1] P. Reszat, "Gemeinsame Naturgüter im Völkerrecht. Eine Studie zur Knappheit natürlicher Ressourcen und den völkerrechtlichen Regeln zur Lösung von Nutzungskonflikten" München: C.H.Beck, 2004, p. 56.

therefore a good that is not infinitely available.[2] Koenig is also in the opinion that environmental protection in its essence is simply the sharing of rights to use the limited environmental resources.[3] Murswiek believes that all environmental problems are also problems of sharing, as these originate from the scarcity of man-made environmental benefits.[4] If one social group gains the right to emit a pollutant, another social group loses out in air quality at its expense.[5] Thus, today all natural resources can be treated as an absolutely finite resource and all environmental use can be reduced to resource sharing.

However, the allocation of the right to use a natural resource as a finite resource between the specific persons participating in the administrative procedure should be distinguished from the general public-law use of environmental resources created by the state in the public interest. In the field of atmospheric air protection, the activities of operators of stationary emission sources may be restricted by refusing to authorise the activities that would result in exceeding the total emission limit set for the pollutant. In principle such a total limit can be set for all stationary pollution sources, for sources in specific sectors or for sources at regional or national level. The latter solution is used in Estonian law. More specifically, according to Section 97 of the Atmospheric Air Protection Act[6] (hereinafter **AAPA**), an air pollution permit and an integrated environmental permit (hereinafter together referred to as **environmental permit**) should be refused if the emissions of pollutants released from the emission source cause an exceedance of the total maximum emission amounts of pollutants (hereinafter also as **total emission**) in the territory and economic zone of Estonia.

The allocation of the total emission within a specified limit is an allocation of the emissions as a limited resource by the state. The article examines, based on the regulation in force in Estonia, the question of whether limiting the granting of environmental permits with total emissions means that the administrative procedure in which the emissions are granted belongs systematically to the allocation procedure as a special type of administrative procedure. The comparative benchmark here is – in the absence of relevant approaches in Estonia – German legal literature about allocation procedure in the German administrative law. The adoption of German law as one of the benchmarks in this article is justified by the general tendency of Estonian law to use several solutions originating from the Germanic legal system in the creation of its legal system after the restoration of the independence of the Republic of Estonia. Estonian administrative law and environmental law also have very strong similarities with German law. This fact makes legal solutions easily comparable.

This regulatory measure stands out as unique within the context of Estonian law. When a permit is refused, it affects the fundamental rights of applicants. It is crucial to define the nature of the regulation, not only for the sake of systematising it in the theory of law, but also for ensuring its constitutional validity. For this purpose, a broad overview of the allocation procedure, its nature, function, and important features is provided. Then, the presence of important features of the allocation procedure in allocating the total emission is comparatively examined. Thereafter,

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[2] C.F. Gethmann, "Ethische Probleme der Verteilungsgerechtigkeit im Umweltstaat". in C.F. Gethman, M. Kloepfer, S. Reinert "Verteilungsgerechtigkeit im Umweltstaat", Bonn: Economica Verlag GmbH, 1995, p. 28.

[3] C. Koenig, "Die öffentlich-rechtliche Verteilungslenkung". Berlin: Duncker & Humblot, 1995, p. 944.

[4] D. Murswiek, "Privater Nutzen und Gemeinwohl im Umeltrecht". Deutsches Verwaltungsblatt, 1994, p. 77 ff.

[5] C. Calliess, "Rechtsstaat und Umweltstaat". Tübingen: Mohr Siebeck, 2001, p. 363.

[6] Atmospheric Air Protection Act. Available at https://www.riigiteataja.ee/en/eli/529092023001/consolide (most recently accessed on 01.04.2024).

the main constitutional prerequisites for the procedure due to the important features of the allocation procedure are examined and the general important structural elements characteristic of the allocation procedure resulting from these assumptions are pointed out. Finally, it is analysed whether the important structural elements characteristic of the allocation procedure have been provided for in the current regulation of Estonia and the conclusions are made on the basis of this about the nature of the total emission allocation procedure. Prior to the above discussions, the author provides an overview of the context in which the regulation under consideration in the article is located, taking into account the European Union and national air quality regulations.

In order to delimit the scope of the article, it should be pointed out that it does not deal with the case when the state has separately set a limit for the total pollutant emissions of stationary emission sources and the emissions are allocated within this quantity. Here, one of the main ways of allocating emissions is the emissions trading system. It is generally confirmed in case of emissions trading that it is a procedure that is part of the allocation procedure.[7] In addition, although this is also a topical issue in Estonia and considering the ongoing preparation of the draft climate law, the article does not discuss the question of how to allocate the total national emissions by the economic sectors covered by the emissions.

1. Total emission and its distinction from environmental quality and emission limit values

1.1 Three-pillar approach to ensure air quality in the European Union

The total emissions referred to in Section 97 of AAPA derive from Directive (EU) 2016/2284 of the European Parliament and of the Council (hereinafter **NEC Directive**), which deals with the reduction of national emissions of certain air pollutants.[8] Sulphur dioxide (SO_2), nitrogen oxides (NOx), ammonia (NH_3), non-methane volatile organic compounds (VOCs) and fine particulate matter ($PM_{2.5}$) are covered by the NEC Directive.[9] It is one of the pieces of legislation that supports the goal of the European Green Deal to achieve a toxic-free environment[10] and it also supports the achievement of the zero pollution goals set in the zero pollution action plan by 2030.[11]

The NEC Directive entered into force on 31 December 2016 and replaced the previously valid Directive 2001/81/EC.[12] The pollutant emission ceilings established by Directive 2001/81/EC

[7] A. Voßkuhle, "Strukturen und Bauformen neuer Verwaltungsverfahren" in: Hoffmann-Riem/Schmidt-Aßmann, Verwaltungsverfahren. Baden-Baden: Nomos, 2015, DOI: doi.org/10.5771/9783845258669, p. 308.

[8] Directive (EU) 2016/2284 of the European Parliament and of the Council on the reduction of national emissions of certain air pollutants, amending Directive 2003/35/EC and repealing Directive 2001/81/EC, OJ L 344 17.12.2016, p. 1.

[9] The NEC Directive also regulates other pollutants (listed in Annex I of the Directive). There is no obligation to reduce emissions for these pollutants. Member States have an obligation to monitor and report on the impact of pollutant emissions specified in Annex I.

[10] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Green Deal, COM(2019) 640 final.

[11] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Pathway to a Healthy Planet for All EU Action Plan: 'Towards Zero Pollution for Air, Water and Soil', COM(2021) 400 final.

[12] Directive 2001/81/EC of the European Parliament and of the Council of 23 October 2001 on national emission

were valid until 2020, when the national emission reduction obligations set out in the NEC Directive started to be applied. In their essence the directives are similar. The more important difference is that while Directive 2001/81/EC set annual emission ceilings for each pollutant in units of mass (tonnes) for member states, the NEC Directive sets emission reduction obligations expressed as a percentage of the emissions of each pollutant in the reference year 2005. In addition, the NEC Directive sets stricter obligations to reduce pollutant emissions. Compared to Directive 2001/81/EC, the list of pollutants has been supplemented with obligations to reduce fine particulate matter ($PM_{2.5}$). Although according to the NEC Directive, the country has a pollutant emission reduction target in percentage terms, it is possible to express it as an absolute number, i.e. as a total emission, based on the actual emissions of the base year (2005).

The NEC Directive forms part of the European Union's legal framework for ambient air protection, which also includes directives on ambient air quality and European Union legislation regulating the reduction of air pollution at source.[13] Thus, in a broader sense the modern air quality regulation of the European Union is based on three pillars.[14] First, the ambient air quality standards, which derive from Directive 2008/50/EC of the European Parliament and Council on ambient air quality and cleaner European air[15] (hereinafter **AAQD**) and Directive 2004/107/EC of the European Parliament and the Council relating to arsenic, cadmium, mercury, nickel and polycyclic aromatic hydrocarbons in ambient air.[16] AAQD regulates environmental quality including sulphur dioxide, nitrogen oxides and fine particulate matter. The second pillar concerns emissions related to specific sources of pollution as well as (newly)[17] eco-design requirements for boilers and stoves. Two directives are important for stationary emission sources: Directive 2010/75/EU of the European Parliament and of the Council on industrial emissions (integrated prevention and control of pollution)[18] (hereinafter **IED**) and Directive (EU) 2015/2193 of the European Parliament and of the Council on the limitation of emissions of certain pollutants into the air from medium combustion plants.[19] IED regulation covers sulphur dioxide, nitrogen oxides, volatile organic compounds and fine particulate matter, among others. The objective of the Directive on Medium Combustion Plants is to limit emissions of sulphur dioxide, nitrogen oxides and dust from medium capacity combustion plants.

The air quality regulation of the European Union has traditionally relied on these two pillars. With the predecessor of the NEC Directive – Directive 2001/81/EC – the so-called third pillar

ceilings for certain atmospheric pollutants, OJ L 309, 27.11.2001, p. 22–30.

[13] Such systematization is guided, for example, by the Commission's report to the European Parliament and the Council on the progress made in the implementation of Directive (EU) 2016/2284, which deals with the reduction of national emissions of certain air pollutants. COM (2020) 266.

[14] Commission report to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. The Third Clean Air Outlook. COM/2022/673 final.

[15] Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe, OJ L 152, 11.6.2008, p. 1–44.

[16] Directive 2004/107/EC of the European Parliament and of the Council of 15 December 2004 relating to arsenic, cadmium, mercury, nickel and polycyclic aromatic hydrocarbons in ambient air, OJ L 23, 26.1.2005, p. 3–16.

[17] Stated in the Third Clean Air Outlook (Note 14).

[18] Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), OJ L 334, 17.12.2010, p. 17–119.

[19] Directive (EU) 2015/2193 of the European Parliament and of the Council of 25 November 2015 on the limitation of emissions of certain pollutants into the air from medium combustion plants, OJ L 313, 28.11.2015, p. 1–19.

was created at the level of the European Union, which regulates pollutant emissions, but does not do so based on the emission source. With Directive 2001/81, the European Union's emissions regulation moved for the first time beyond regulation based only on the emission source.[20] Setting a total limit for pollutant emissions at the level of a member state can therefore be considered as a separate regulatory mechanism in the field of ambient air protection in the European Union.

However, all three pillars are aimed at reducing the amount of pollutants in the ambient air. The purpose of setting the ambient air quality limit values of the European Union is to directly ensure a certain air quality in a certain area.[21] These are quality requirements for a specific environmental element. A reliable air quality should be ensured regardless of the sources that may affect the quality. Also, the total emission of a pollutant does not regulate emissions from specific emission sources but includes all possible sources in the territory of the member state and the economic zone. The result of the reduction of the total emission is, similarly to compliance with air quality limit values, a reduction of the concentration of pollutants in the ambient air, which in turn leads to improved air quality. However, the NEC Directive does not regulate ambient air quality in a specific area, but stipulates a general obligation to reduce emissions of specific pollutants.[22] Advocate General Juliane Kokott finds that although national emission ceilings are related to the discharge of emissions, these can be considered a special form of limit values, "limit values for the whole economy".[23] The NEC Directive makes references both to directives on ambient air quality and to European Union legislation regulating the reduction of air pollution at the point of source. According to Article 1(2)(a) of the NEC Directive, one of the objectives of the directive is to help achieve air quality levels consistent with the World Health Organization's air quality guidelines. According to Recital 18 of the NEC Directive, the provisions of the Directive should effectively contribute to the achievement of air quality objectives. Related to the source-based emission rules, the NEC Directive implies that Union legislation on source-based air pollution control should effectively ensure expected emission reductions.[24] In turn, Recital 29 of the IED indicates that the fulfilment of the goals for achieving national emissions of pollutants should be ensured through the requirements set for the source-based emission limit value. Thus, by determining the emission limit values resulting from the IED, the objectives of the NEC Directive are also fulfilled. However, the IED does not contain a specific obligation to follow the NEC Directive, similar to Article 18, which obliges to comply with environmental quality limit values when granting a permit.[25]

[20] A. Epiney, Umweltrecht der Europäischen Union. Baden-Baden: Nomos, 2019, p. 488.

[21] H. D. Jarass, Luftqualitätsrichtlinien der EU und die novellierung des Immissionsschutzrechts. – Neue Zeitschrift für Verwaltungsrecht, 2003/3, p. 258.

[22] A. Epiney (Note 20), p. 490.

[23] The proposal of 16 December 2010 of Advocate General J. Kokott in ECJ joined cases C-165/09–C-167/09, p. 59.

[24] Recital 12 of the NEC Directive.

[25] According to IED art 18, if the environmental quality standard stipulates stricter conditions than those that can be met by using the best available techniques, the permit should contain additional measures, without limiting the taking of other possible measures to meet the environmental quality standards.

1.2 Differentiation in Estonian law in the procedure for granting an air pollution permit and integrated environmental permit for stationary emission sources

The requirements of the integrated environmental permit, which result from the Industrial Emissions Act, record the obligations regarding emissions stipulated in the IED. In addition, all environmental permits regulating air pollutants should consider the environmental quality requirements arising from the AAQD. These regulations are interrelated, as air quality limit values cannot be applied directly to emission sources, but only by setting requirements for emissions from a specific source. In order to regulate the ambient air quality in a way that does not exceed the limit value of the environmental quality, it is necessary to have the concept of emission limit values.[26] If we compare air quality values and source-based emission regulation, in the absence of special regulation limiting emissions, we can basically conclude that emissions can be added to the region as long as the limit value of environmental quality is not exceeded.

In Estonian law, this conclusion is also supported by the General Part of the Environmental Code Act[27] (hereinafter **GPECA**), which applies to both the air pollution permit and an integrated environmental permit. According to GPECA Section 52 (1) 8), the issuer of the environmental permit refuses to grant an environmental permit if upon addition of emissions arising from the activity proposed based on the environmental permit, the limit value of the quality of the environment would be exceeded. Ambient air protection with only source-based pollutant emission limits without air quality values does not ensure that ambient air is safe for human health and the environment, even if all installations use best available techniques. The purpose of regulation based on emission and air quality limit values is to ensure air quality in a specific area that meets the established requirements. This purpose is also carried out by the grounds for refusal to grant a permit provided for in Section 52 (1) 8) of GPECA.

However, by setting the total emission, it is ensured that the emission of the pollutant remains within certain limits throughout the country. Refusal of a permit due to total emission exceedances is not related to the air quality of a particular stationary source area or to the best available techniques used at the facility. Based on Section 97 of AAPA the permit issuer should refuse to grant a permit even if the introduction of a stationary emission source would not lead to the emission limit values and air quality limit values being exceeded. The legislator would be able to direct the ambient air quality of a specific region by setting the total limit of pollutant emissions. This is, for example, in the case that within the framework of the total limit quantity, the total limit quantities of pollutant emissions have been established regionally, as was pursued to be done with the first Ambient Air Protection Act established immediately after the restoration of Estonia's independence.[28] In Principle, it

[26] I. Appel, Staatliche Zukunfts- und Entwicklungsvorsorge. Tübingen: Mohr Siebeck, 2005, lk 193.

[27] General Part of the Environmental Code Act. Available at https://www.riigiteataja.ee/en/eli/529122023002/consolide (most recently accessed on 01.04.2024).

[28] Pursuant to Section 6 (1) of Ambient Air Protection Act, in force 1998–2004, if the release of pollutants into the ambient air is regulated by international agreements, the total emissions permitted for these pollutants from stationary emission sources of the county shall be established by the regulation of the Government of the Republic. Although Estonia was not yet a member of the European Union at the time of the entry into force of this Act, the explanatory memorandum explains that the need for regulation arises from the Europe Council Decisions 81/462/ EEC on the conclusion of the Convention on Long-Range Transboundary Air Pollution and 94/69/ EC concerning the conclusion of the United Nations Framework Convention on Climate Change.

is also possible to contribute to the reduction of emissions in a specific sector based on the total limit quantity – by setting the total emission limit for the stationary emission sources of a specific sector. However, in Estonian law, the basis for refusing to grant a permit due to exceeding the total limit quantity of pollutant emissions is limited to the fact that the total emissions of the pollutant should be considered when issuing air pollution permits and integrated environmental permits.

The NEC Directive itself does not directly contain an obligation directed at the member states to create a regulation that would allow them to refuse to grant an environmental permit if the total emission is exceeded. At the same time, it is of course important to emphasize that the member states are still obliged to implement the directive in a way that effectively contributes to the achievement of the Union's long-term air quality goal.[29] Therefore, in case of the restriction on the granting of environmental permits in question (AAPA Section 97), it is fully a national regulation. Given the limited accessibility of the resource in terms of specific pollutants, and the divergence from the approach in the NEC Directive and national regulation, which is traditionally based on emission limit values and air quality limit values, it is crucial, particularly for those with an interest in the resource, to ascertain what it fundamentally is.

2. Characteristics of the allocation procedure

2.1 Nature and function of the allocation procedure

A scarcity that occurs in a market economy usually regulates itself, as the scarcity is reflected in the market price of the good. The allocation procedure deals with the situations of scarcity of goods, when the state has not left the satisfaction of the demand for some limited good to market forces alone.[30] Public authorities manage such scarce goods through many of their decisions by distributing these among individuals. Traditional situations in which the state makes decisions on the distribution of scarce goods in the administrative procedure are, for example, the filling of student places at the university, granting of subsidies, granting of the right to use radio frequencies and the appointment of public servants. Although the decisions on the allocation of scarce resources are not unknown to the state, the allocation procedure as a general type of procedure is not regulated in Estonian law. There are also no systematic concepts to the allocation procedure as a separate type of procedure in Estonia. The problems of the allocation procedure and the legal organization of their resolution have been analyzed in more detail in German legal theoretical literature already since the 1970s.[31] The decisions on the distribution of benefits made in different areas allow to treat the allocation procedure as a cross-sectoral phenomenon and today, in Germany, the allocation procedure is considered as a separate type of administrative procedure.[32] According to the

[29] Recital 9 of the NEC Directive.

[30] D. Kupfer, "Die Verteilung knapper Ressourcen im Wirtschaftsverwaltungsrecht." Baden-Baden: Nomos, 2005, p. 102.

[31] C. Tomuschat, "Güterverteilung als rechtliches Problem", Der Staat, 1973, Vol. 12, No. 4 p. 433 ff. Available at: https://www.jstor.org/stable/43640522 (most recently accessed on 01.04.2024); W. Berg "Die Verwaltung des Mangels: Verfassungsrechtliche Determinanten für Zuteilungskriterien bei knappen Ressourcen", Der Staat, 1976, Vol. 15, No. 1 p. 1 ff. Available at: https://www.jstor.org/stable/43640778 (most recently accessed on 01.04.2024).

[32] See for example N. Malaviya, "Verteilungsentscheidungen und Verteilungsverfahren." Tübingen: Mohr Siebeck 2009, p. 250 ff; Voßkuhle (Note 7) p. 290; H.C.Röhl "Ausgewählte Verwaltungsverfahren" in: W. Hoffmann-Riem, E. Schmidt-Aßmann, A. Voßkuhle (Eds), Grundlagen des Verwaltungsrechts, Band II, München: C.H.Beck, 2012, 2. Aufl. § 30 Rn. 10 ff.; F. Wollenschläger,

prevailing opinion in Germany it is an allocation procedure both when a good administered by the state is shared, but also when the state acts as a purchaser on the market in a public procurement procedure.[33]

The executive authority selects the beneficiaries from a large number of applicants based on specific criteria through the allocation procedure. The allocation decision is adopted as a result of the allocation procedure. The decisions that are made in a competitive situation due to the scarcity of benefits can therefore be considered allocation decisions.[34] The necessity of the allocation procedure is thus determined by two mutually dependent situations – the scarcity of benefits and the multitude of those who require these. As a result of the above, the function of the allocation procedure is to allocate scarce resources – the allocation procedure becomes necessary when there are not enough goods offered by the state for all those who want it. Voßkuhle emphasizes that the function of the allocation procedure is the legally appropriate allocation of scarce goods in a competitive situation.[35] Even more precisely, it could be said that the allocation of scarce goods in a competitive situation should be ensured in accordance with fundamental rights. The constitutional framework also indicates how the allocation procedure can be structured.

2.2 Scarcity of goods

The need to carry out the allocation procedure and decide on allocation is because the specific good is not available in the required quantity. The scarcity of goods can be due to natural causes or created intentionally by the state for a specific purpose. Based on this fact, it is possible to distinguish two kinds of scarcity – natural scarcity and deliberate scarcity.[36]

In case of natural scarcity, the reason for the scarcity of a good is independent of the legal system. The scarcity of good here is due to factual circumstances.[37] It may be related to the physical characteristic of the resource, or it may be technically impossible to increase the amount of the available resource or possible only with excessive expenditure.[38] The cases of natural scarcity are not created by the state and therefore cannot be influenced by the state.

The deliberate scarcity is politically desired and created by the legal system.[39] The occurrence of a scarcity situation is therefore preceded by the decision that creates such a situation. Here, a distinction is made between artificially created scarcity and the situation where the goods to be allocated are made available by the public authority only to a limited extent.[40] In case of artificially created scarcity, the state sets limits in the public interest on the use of a good that would be freely available under normal market conditions.[41] By making a good available to a limited

"Verteilungsverfahren. Die staatliche Verteilung knapper Güter: verfassungs- und unionsrechtlicher Rahmen, Verfahren in Fachrecht, bereichsspezifische verwaltungsrechtliche Typen- und Systembildung", Tübingen: Mohr Siebeck, 2010, p. 531 ff; Kupfer (Note 30) p. 529 ff.

[33] E. Meiers, "Das kommunale Marktwesen." Peter Lang GmbH, Internationaler Verlag der Wissenschaften, 2015, p. 93, DOI: 10.3726/978-3-653-05698-3; Voßkuhle (Note 7) p. 295; Schoch "Einleitung" in Schoch/Schneider, Verwaltungsrecht Werkstand: 4. EL November 2023, Rn 690 Available at: https://beck-online.beck.de/Dokument?vpath=bibdata%2Fkomm%2Fschochkovwgo_4_bandvwvfg%2Fvwvfg%2Fcont%2Fschochkovwgo.vwvfg.vor1.gle.gli.gl2.glb.glcc.htm&pos=10&hlwords=on (most recently accessed on 01.04.2024); Röhl (Note 32) § 30 Rn 12 ff; The opposite view is held by Malaviya (see Note 32, p. 126 ff).

[34] Malaviya (Note 32) p. 4; Wollenschläger (Note 32) p. 2.

[35] Voßkuhle (Note 7) p. 290.

[36] For more information on the different categories of the scarcity of goods, see e.g. Berg (Note 31).

[37] Meiers (Note 33), p. 94; Kupfer (Note 30) p. 103.

[38] Kupfer (Note 30) p. 105 ff.

[39] Kupfer (Note 30) p. 105 ff.

[40] Meiers (Note 33) p. 95.

[41] Kupfer (Note 30) p. 108.

extent, the state participates in the commodity market as a provider of a good that is in demand, making it available only to a limited extent.[42]

2.3 The competitive situation and the resulting structure of multipolar procedure

In addition to the fact that the resource is available to a limited extent, the allocation decision also assumes that a situation has arisen that requires the good to be allocated – the good is not sufficiently available for all persons who want to have a share in it.[43] Due to the competitive situation one person can receive a benefit only at the expense of other persons who requested the same benefit in the procedure. The competitive situation leads to the fact that the allocation procedure does not involve the bilateral relationship between the administrative authority and the addressee of the administrative act, which is characteristic of the usual administrative procedure. This creates a multilateral relationship between the administrative authority and the benefit applicants.[44] The executive authority has to make a selection decision in the allocation procedure.

There may be several parties involved in the proceedings even in the traditional administrative procedure and the state should deal with the issues of allocation of scarce goods. For example, in case of legal relations arising in environmental law, it is often not possible to talk only about two parties. If one person requests a permit from the state for an activity that pollutes the environment, often a person (for example, a person living on a neighbouring property) who wants the state not to grant a permit for the activity also participates in this procedure. In these situations, which are typical of environmental law, as well as planning law, the public authority has to decide between conflicting interests. In the allocation procedure the administrative authority is required to decide between parallel interests, i.e. between competitors.[45] At the same time, it should be pointed out here that the administrative authority should also decide between the interests that are parallel in nature when granting traditional environmental permits to operators, as when an environmental permit is granted to one person, the possibilities of future similar operators to carry out polluting activities are reduced. Compared to the allocation procedure the difference though lies in the fact that in the allocation procedure the bilateral relationship in the granting of advantages by the state has been replaced by a procedure in which persons who wish to receive a benefit participate and among whom the recipients of the separately defined benefit are selected.[46] The selection of the recipients of the concrete advantage among the participants of the procedure is what differentiates allocation decisions from other administrative decisions, which may ultimately have an effect similar to allocation, but which do not involve the selection procedure between the persons with parallel interests.

[42] Kupfer (Note 30) p. 114.

[43] Meiers (Note 33), p. 93.

[44] Meiers (Note 33), p. 77; Schoch (Note 33) Rn 690; Röhl (Note 32) § 30, Rn. 22; Voßkuhle (Note 7), p. 294; Wollenschläger, on the other hand, believes that the procedure can be carried out both in a multipolar manner, where all applicants are involved, as well as in bipolar procedures running side-by-side in parallel, although he himself admits that due to the divisional conflict, a multipolar procedure structure is more appropriate (Wollenschläger (Note 32) p. 598).

[45] M. Hamdorf, "Die Verteilungsentscheidung: Transparenz und Diskriminierungsfreiheit bei der Zuteilung knapper Güter." Peter Lang GmbH, Internationaler Verlag der Wissenschaften: 2012, DOI: 10.3726/978-3-653-01539-3, p. 14; Malaviya (Note 31), p. 254.

[46] Voßkuhle (Note 7), p. 291.

3. Scarcity and competitive situation in case of total emissions

3.1 Total emission as artificially created scarcity

Atmospheric air, the mixture of gases making up the earth's atmosphere, is the earth's largest natural resource used by all mankind. In principle, the use of atmospheric air for the discharge of pollutants is possible on an unlimited scale. The fact that only air of a certain quality is suitable for human living makes the ambient air a natural scarcity. Air oxygen, which comes from the process of photosynthesis in the atmosphere, is necessary for both humans and animals to breathe.[47] Therefore, atmospheric air of appropriate quality is vital for the survival of mankind, as well as for the existence of any life on earth. However, within such an absolute limit, the state can in turn set a limit on the use of atmospheric air. In this case, the limit set by the state is the emission of certain pollutants emitted into the ambient air. With the total emissions, the state has set a limit on the total emissions of the pollutant in the country. Thus, an artificial scarcity has been created. Without this limit, it would be possible to release the pollutant into the ambient air to an unlimited extent, taking into account the possible valid local environmental quality and emission limit values.

As the NEC Directive indicates, the limit covers all anthropogenic emissions of pollutants into the atmosphere within the territory and economic zone of Estonia and the emissions of pollutants from practically all sources, i.e. both point and diffuse sources are covered. Such a general quantitative environmental limit established at the national level does not directly affect the fundamental rights of individuals. In order to stay within the set emission limit, the state should develop its own regulation and corresponding measures should be planned with the national air pollution control program stipulated in article 6 of the NEC Directive. Recital 19 of the directive emphasizes that national air pollution control programs should include measures applicable to all sectors concerned.

However, in case of operators of stationary sources, the Estonian legislator has given a different meaning to the total emissions, as the granting of an environmental permit should be refused, if the emission of a pollutant discharged from the emission source causes the total emission to be exceeded. Since the compliance with the limit is made mandatory when granting an environmental permit, it directly affects the rights of those interested in obtaining the permit. The total emission should be taken into account in the administrative procedure for granting an environmental permit and therefore this is an artificially created scarcity characteristic of the allocation procedure as a special type of administrative procedure.

3.2 Competitive situation in the allocation of total emissions

In addition to the scarcity of goods, the allocation procedure is also characterized by the resulting competitive situation. The total emission is not divided by legal act among the sectors. Emissions of pollutants listed in the NEC can originate from energy, transport, industrial processes, solvents, agriculture and waste, which may also include activities for which an environmental permit is not required.[48] Thus,

[47] K. Juurikas et al, Keskkonnaökonoomika. Tallinn: OÜ Infotrükk 2004, p. 21.

[48] Minister of Climate Order No. 1-2/23/144 of 30.03.2023 Approval of the updated "National Programme for the Reduction of Emissions of Certain Atmospheric Pollutants for the Period 2020–2030". Available at (only in Estonian): https://kliimaministeerium.ee/energeetika-maavarad/valisohk/ohusaasteainete-vahendamise-programm (most recently accessed on 01.04.2024).

competition first arises between the owners of stationary emission sources and other persons engaged in the activities emitting the same pollutant. Although all sectors are included by total emissions and therefore compete with the operators of stationary sources, this is not a competition characteristic of the allocation procedure, as other sources do not need to have an environmental permit and therefore do not participate in the administrative procedure. Therefore, if, in addition to those persons who can participate in the administrative procedure, other persons also compete for the finite resource, these other persons are still not parties to the procedure in the allocation procedure.

Since the total emission is the basis for refusing permission to stationary sources, permit applicants also compete for the benefit. The situation is not problematic if the pollutant emissions covered by the applications are below the total emissions. In such a case, each applicant has the right to request the granting of an environmental permit if other conditions for the granting of the permit are met. In this case, it is important to note that the grounds for refusal to grant an environmental permit have not been applied yet in Estonia. The total emissions for certain pollutants have been established in Estonia since 2004, but such a situation that would cause the total emissions to be exceeded has not occurred. Thus, there is no competition for this good. However, as a quantitative limit on emissions has been set, it is not in principle excluded that competition for the benefit will arise. Given, inter alia, the fact that the total emissions resulting from the NEC directive will decrease over time. Therefore, the competition between applicants may arise due to the set emission limit – operators are the persons with parallel interests who all want to use the same benefit of emitting the same pollutant into the ambient air. According to the AAPA the total emission should be considered in the normal environmental permit procedure. The authorising authority should refuse to grant an environmental permit, if the emissions of a pollutant discharged from the emission source cause the total emission to be exceeded. Although competition may arise, it is therefore not a multipolar selection procedure (which is a characteristic feature of the allocation procedure) between the persons who would also like to benefit from the use of the allowance.

4. Constitutional frameworks in the allocation procedure and the general structural elements of the allocation procedure relying on them

The public authority should make a choice among the participants in the benefit allocation procedure to whom to distribute the benefit. Competitive situations therefore bring the question of equal treatment to the fore. By distributing a limited good, the state creates a basis for different treatment of persons, the legality of which should be assessed according to the fundamental right of equality.[49] The issue of equal treatment arises in all allocation procedures, including when environmental benefits are distributed. Wherever, due to limited resources, it is not possible to satisfy the requests of all persons interested in the benefit, equal treatment of the persons interested in the benefit should be ensured. However, the content of equal treatment may differ depending on the specific procedure for allocating environmental benefits.

Equality rights protect the individual against unjustified unequal treatment by the state compared to other individuals. Section 12 (1) of the

[49] Wollenschläger (Note 32) p. 36; Kahl/Ludwigs (Eds), "Handbuch des Verwaltungsrechts." Band IV, Köln: C.F. Müller Verlag: 2022, p. 1175.

Constitution of the Republic of Estonia[50] guarantees legal equality, which is guaranteed when the law treats people in similar situations equally.[51] The differentiation of participants in the procedure is possible, but it should be based on relevant criteria. In the allocation procedure this means that everyone who wants to receive a share of the benefit should have the opportunity to participate on an equal basis.[52] This requires the development of a specific procedure that ensures the neutrality of the administrative authority and equal treatment of the participants. It serves the interests of the parties interested in the proceedings as well as the public. On the one hand, it is important to ensure clarity about the procedure for individuals, but a solid concept also reduces the arbitrariness of the public authority and helps to ensure the plurality of suitable participants in the procedure.[53]

The requirement arising from the general principle of equal treatment to ensure an equal procedure includes the development of both procedural rules and substantive legal bases.[54] However, the state first needs to decide that it is necessary to manage the benefit by the state through allocation and establish the purpose of the allocation. The goal also dictates the appropriate way of allocating the benefit.[55] This includes the need to decide to what extent the benefit will be distributed, what the selection procedure will be and what the criteria for the procedure will be.[56]

At the start of the procedure, it is important to inform interested parties about the procedure to ensure equal treatment.[57] If a person does not find out about the allocation procedure, it cannot participate in it on a fair and equal basis. If the allocation procedure and criteria have not been provided for in the legislative act, these should be made public already at the time of notification.[58] The Estonian Supreme Court has also emphasized that the assessment criteria should be known to the participants in advance, because as a result, all participants will be put on an equal footing.[59]

In addition to procedural rules, an allocation procedure in line with the principle of equal treatment requires the existence of allocation criteria. The criteria for allocation can be formal and material.[60] Here, the material selection criteria have a separate and important place alongside the procedure, as these are the basis for the selection. The formal allocation criteria are neutral to the participants. This includes, in addition to the randomness achieved by drawing lots, e.g. priority-based allocation, which provides for allocation in chronological order.[61] The allocation procedure can also take place through a combination of formal and material criteria. Which specific criterion is appropriate for deciding on the allocation of a certain benefit is measured by the constitution – what matters is how the

[50] The Constitution of the Republic of Estonia, Available at: https://www.riigiteataja.ee/en/eli/530122020003/consolide (most recently accessed on 06.04.2024).
[51] A. Kivioja, K. Muller, L. Oja, in Constitution of the Republic of Estonia. Annotated edition, 2020. Avaliable at (only in Estonian): https://pohiseadus.ee/sisu/3483, § 12, para 14 (most recently accessed on: 06.04.2024).
[52] Malaviya (Note 32), p. 247; Kupfer (Note 30) p. 537.
[53] Wollenschläger (Note 32), p. 539.
[54] Schoch/Schneider (Note 33); Voßkuhle (Note 7), p. 306; Malaviya (Note 32), p. 132; Wollenschläger (Note 32), p. 534.
[55] Kahl/Ludwigs (Eds) (Note 49), p. 1168.
[56] Malaviya (Note 32), p. 252.
[57] Voßkuhle (Note 7), p. 306.
[58] Malaviya (Note 32), p. 252; Voßkuhle (Note 7), p. 306.
[59] Judgement of the Administrative Law Chamber of Estonian Supreme Court 3-3-1-87-04, of 28 February 2005, p. 14.
[60] Kahl/Ludwigs (Eds) (Note 49), p. 1167; Malaviya (Note 32), p. 252; Hamdorf (Note 454), p. 15. Berg further distinguishes between formal and overwhelmingly formal criteria (Berg (Note 31), p. 17).
[61] Berg (Note 31), p. 17.

constitutional objectives of the allocation are achieved.[62]

While the need to ensure equal treatment is at the forefront of the allocation procedure, in addition to the fundamental right of equality, rights of freedom may play a role in the development of the rules of the allocation procedure, depending on the type of benefit to be distributed. The rights of freedom primarily protect individuals from the creation of unjustified scarcity of goods.[63] In order to implement the freedom of choice in the field of activity, profession and workplace provided for in Section 29 of the Constitution of the Republic of Estonia, the legislator is obliged to take measures that eliminate unjustified unequal treatment of people in their choice.[64] The right enshrined in Section 29 of the Constitution is a fundamental right with a simple statutory reservation. The legislator can limit a person's right to choose in justified cases. The first sentence of Section 31 of the Constitution of the Republic of Estonia stipulates the right to conduct a business and considers any interference by the state in activities considered as entrepreneurship an infringement. The core of the freedom to conduct a business is the state's obligation not to make unreasonable obstacles to entrepreneurship, which should be dealt with broadly.[65] According to a broad approach, essentially every regulation established by a country is an interference with the freedom to conduct a business, for example, already when the previously valid legal framework is made stricter.[66] A restriction of the freedom to conduct a business is, for example, when a limit is set for the use of a benefit that previously could be used without restriction. When setting a limit, it is not possible to carry out economic activities in previously permitted way. However, according to the opinion of the Supreme Court, the freedom to conduct a business does not give a person the right to demand the use of national wealth or state property for the benefit of her or his own business.[67] According to Section 5 of the Constitution of the Republic of Estonia, the natural wealth and resources of Estonia are national riches (which must be used sustainably). In the same decision the Supreme Court also emphasized that, despite this, the freedom to conduct a business is affected by the situation where the public authority makes the conditions for doing business less favourable compared to the legal framework that has been in force until now.

5. Compliance of the total emission allocation procedure with the general structural elements of the allocation procedure

5.1 Overview of the procedure for allocating total emissions in the environmental permit procedure

According to Section 97 of the AAPA the distribution of pollutant emission is decided in the environmental permit granting procedure. The main purpose of granting an environmental permit is to ensure the legality of the activity and the permissibility of the activity based on environmental protection aspects, as well as to resolve possible conflicts of interests related to environmental use, especially regional ones. The

[62] Berg (Note 31), p. 17; Malaviya (Note 32), p. 136.
[63] Hamdorf (Note 454), p. 87.
[64] A. Henberg, K. Muller in Constitution of the Republic of Estonia. Annotated edition, 2020. Available at (only in Estonian): https://pohiseadus.ee/sisu/3500/paragrahv_29, § 29, para 8 (most recently accessed on: 06.04.2024).
[65] O. Kask, S. A. Ehrlich, A. Henberg in Constitution of the Republic of Estonia. Annotated edition, 2020. Available at (only in Estonian): https://pohiseadus.ee/sisu/3502,§ 31 para 7 (most recently accessed on 06.04.2024).
[66] Ibid, para 23.
[67] Judgement of the Constitutional Review Chamber of Estonian Supreme Court 3-4-1-27-13, of 16 December 2013, para 44.

environmental permit is not designed to resolve conflicts of interests of persons with parallel interests interested in the benefit.

At the same time, when creating the provision, the legislator has not redistributed all already allocated emissions, as is done when creating an emissions trading system.[68] Section 97 of AAPA applies only to new entrants or to changes in the activities of existing facilities. Here, the benefit is not distributed once, but every time when the request for granting a permit is satisfied, the administrative authority should consider whether it is possible to allocate the desired amount of pollutant emission. In case of a positive decision the chances of other participants to get a share of the benefit become smaller. This regulation is similar to the regulation of refusing to grant an environmental permit due to exceeding the limit value of environmental quality, where also those operating in the area on the basis of a permit take away the opportunity for new entrants. This is also a problem of allocation, which does not, however, require the application of allocation procedure.

Therefore, there is no separate division of the procedure when dividing the emission amount. At the same time, emissions are allocated without restrictions to all applicants until the total emissions limit is reached. Since there are no more precise allocation criteria, applications are granted according to the priority principle in the administrative procedure. The applicant, whose application reaches the limit of the total emissions, will not be able to receive the benefit to the desired extent and the permit will be refused.

[68] It is not possible to create an emissions trading system in such a way that so-called free emissions not yet covered by installations are distributed. To create a system, all emissions must be covered, including emissions issued to specific installations.

5.2 Determining the benefit to be allocated

Under chapter four it was explained that the benefit to be distributed between the participants by the legislator or the executive authority, the object of the allocation procedure, should first be determined in the allocation procedure. The allocation that guarantees fundamental rights means the full distribution of the scarce good determined for the sake of the allocation procedure among the participants. As can be seen from chapter two, the total maximum amount creates an artificial scarcity, which is one of the characteristic features of the allocation procedure. The same clause indicates, however, that the total emission is not limited to the operators of stationary emission sources, but the limit is the total emission in the territory and the economic zone of Estonia, regardless of the emission source. This limit should be considered when allocating emissions to stationary emission sources according to Section 97 AAPA. Therefore, it is not possible to determine the good to be allocated. To the extent that it is not possible to determine the benefit that is distributed among operators of stationary emission sources, the shareable benefit necessary for the application of the allocation procedure has not been determined. Also, the fact that the benefit to be allocated is an unused maximum amount that can be determined does not make this benefit the object of the allocation procedure, as this amount is also used by all other emission sources emitting the same pollutant in addition to stationary emission sources. In addition, to the extent that the nationally valid total emission limit should be considered when granting a permit, the state would treat other polluters included in the total emission unequally when distributing emissions only between the operators of stationary emission sources. This is because their ability to emit pollutants is reduced at the expense of stationary emission sources.

5.3 The purpose of the norm

Wollenschläger points out that the legislature or the executive authority, when creating the allocation procedure, first needs to understand that it is an allocation problem, which as a solution requires the allocation procedure to be carried out.[69] Therefore, one could ask whether the legislator has not understood that the situation created requires the allocation procedure. For this purpose, the goal of the legislator in creating the regulation should first be looked at. According to article 1 of the NEC Directive the aim of setting total emissions is to move towards achieving the level of air quality that does not cause significant adverse effects or risks to human health or the environment. This shows that exceeding the total emission can cause an environmental threat according to Section 5 of the GPECA. According to the provision an environmental threat means the sufficient likelihood of emergence of a significant environmental nuisance. Section 10 of the same act states that an environmental threat should be prevented. An environmental threat or a significant environmental nuisance should be tolerated where the activity is required due to overriding public reasons, there is no reasonable alternative and required measures have been taken to reduce the environmental threat or the significant environmental nuisance.

In its decision 3-20-771[70] dealing with the obligation to reduce greenhouse gas emissions, the Supreme Court finds that the general climate goals for controlling emissions do not set restrictions on facilities as a rigid numerical norm, as the achievement of such goals does not depend only on the planned facility, but on the combined effect of many activities. The determination of specific numerical norms by sector or facility is a matter of policy choices. However, the courts panel considers that if the planned activity would lead to consequences, due to which it is not possible to achieve the goals of reducing greenhouse gas emissions, this activity would have a significant environmental impact, and it should be determined whether such an impact can be sufficiently avoided or mitigated. If, as a result of the consideration, it turns out that the emission of greenhouse gases accompanying the planned activity cannot be tolerated according to the Section 10 of the GPECA, then it is an unacceptable environmental impact and the granting of the permit should be refused.

Based on decision 3-20-771 of the Supreme Court and the relevant regulation of the GPECA, it can be considered that according to Estonian law exceeding the total emission represents an environmental threat, which should be generally avoided in accordance with the principle of prevention provided for in Section 10 of the GPECA. Thus, it can be concluded that the purpose of the regulation of Section 97 of AAPA is to prevent environmental threat to ensure compliance with the NEC Directive, not to allocate benefits.

5.4 The necessity of applying the rules of the allocation procedure

However, due to the limit set by Section 97 of the AAPA, situations may arise where several environmental permit applications are pending simultaneously, and it is not possible to satisfy all of them due to exceeding the total emissions. In the absence of allocation criteria, the principle of priority applicable in the general administrative procedure must be applied. This means that the environmental permit is granted to whoever submitted the application first.

Nevertheless, the principle of priority does not necessarily guarantee that the best solution

[69] Wollenschläger (Note 32), p. 38.

[70] Judgement of the Administrative Law Chamber of Estonian Supreme Court 3-20-771, of 11 October 2023, para 22.

in the public interest is achieved, as the most efficient implementation of the purpose of the provision would require distribution to the person whose emissions are lower or whose field of activity meets the public interest to a greater extent. Such a conflict of interest has been taken into account in Estonian law in the event of the possibility of an environmental quality limit value being exceeded because of the additional emissions resulting from the proposed activity. According to Section 52 (1) p. 9 of GPECA the issuer of an environmental permit refuses to grant the environmental permit where the environmental nuisance emerging from emissions generated by the activity proposed on the basis of the environmental permit would bring about a situation where, for the purpose of adhering to the limit values of the quality of the environment, an environmental permit could not be granted to another person henceforth and the public interest in not granting the requested permit for the purpose of preventing the environmental nuisance overrides the interest in granting the requested environmental permit. However, this provision cannot be applied in cases where total emissions are exceeded.

Hence, the AAPA also contains a regulation in case the total emission does not allow to satisfy all pending environmental permit applications. According to Section 96 (1) of the AAPA, in such a case, the persons who generate energy for domestic or community use shall have a preferential right to obtain an environmental permit. However, if all the persons applying for an environmental permit generate energy for domestic or community use or if none of them does that, the persons with the lowest emissions of pollutants per unit of similar production shall have a preferential right to obtain an environmental permit (Section 96 (2) of AAPA). Proceeding from the regulation and pursuant to the explanations provided in chapter 4 it is about the material criteria for allocating the benefits. These criteria allow the public interest to be taken into account when granting a permit to discharge emissions.

The decision to grant a preferential right is made by a directive of the Minister of Climate upon the proposal of the Environmental Board (Section 96 (3) of AAPA). The provision thus provides for a separate selection procedure with a multipolar relationship, which is characteristic of the allocation procedure, involving the persons, who have applied for an environmental permit, on equal bases. Therefore, not all persons who might have an interest in emissions participate in the selection procedure, but only those who have applied for an environmental permit. The AAPA does not provide for the obligation to inform other persons that might also be interested in using the pollutant. What is questionable here is the principle of equal treatment, where the comparable groups are the persons who submitted the application and other persons who are interested in the emissions. The persons who submitted the application are included in the procedure, but the others are not. In case of the allocation procedure the obligation to notify interested parties should be affirmed. However, since the purpose of setting the limit provided for in Section 97 of AAPA is not to distribute the limited benefit but to prevent an environmental threat, the purpose of selection criteria provided in the law in this case is not to distribute a limited benefit but also to grant the preferential right to pollute. Therefore, the provisions of Section 96 of AAPA have correctly considered only those persons who apply for a permit.

6. Conclusions

The approach above indicates that the determination of the total emission is an artificially created scarcity, and due to the provisions of Section 97 of AAPA, according to which the granting of a permit should be refused if the emission of a pol-

lutant released from the emission source causes an exceedance of the total maximum emission in the territory and economic zone of Estonia, it may also be a competitive situation. However, it is not a procedure that can be systematically considered as part of the allocation procedure, which is an independent type of administrative procedure which theoretical foundations are clearly designed in German legal theoretical literature. The regulation in the AAPA is not structured considering the requirements of the allocation procedure. The allocation of a pollutant emission is decided in the normal administrative procedure for granting a permit. In essence, this is also not a situation that would require the use of structural elements specific to the allocation procedure. The scarcity of the good is intrinsically related to the procedure in the allocation procedure – the scarce good defined for the allocation procedure is distributed. However, in case of total emissions, the persons to whom Section 97 of AAPA does not apply also participate in the use of the limited benefit. The aim of the regulation is to prevent an environmental threat – to ensure that the total emissions are not exceeded by granting the permit. Nevertheless, due to the existence of the emission limit, there may be situations where several applications are pending which cannot be satisfied simultaneously due to the need to prevent exceeding the limit. The AAPA takes this into account and the criteria have been established based on public interests. However, since the purpose of setting the total emission limit is to prevent environmental threat, the selection procedure is also carried out for the purpose of preventing environmental threat, not with the main goal of distributing benefits.