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Wolswinkel, Johan; van Ommeren, Frank; den Ouden, Willemien

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# Limited Authorisations Between EU and Domestic Law: Comparative Remarks from Dutch Law

Johan WOLSWINKEL<sup>\*</sup>, Frank VAN OMMEREN<sup>\*\*</sup> & Willemien DEN OUDEN<sup>\*\*\*</sup>

*Where the number of authorizations available for grant is limited in advance to a maximum number, public authorities have to make a choice between qualified applicants through a selection procedure. EU law has played a major role in developing legal rules on the issuing of these limited authorizations, through, amongst other methods, the development of the obligation of transparency. However, the allocation regime under EU law, in particular as it arises from the internal market freedoms, has some inherent restrictions, only applying to economic activities and sometimes requiring cross-border interest in addition. Thus, in order to develop a general legal regime that applies to any process for the issuing of limited authorizations, the development of an allocation regime rooted in domestic law is necessary. This article discusses recent developments in Dutch case law, where a domestic allocation regime has been derived from the (national) principle of equal treatment. It endorses the adoption of this principle as the central basis for an allocation regime, rooted either in domestic or in EU law, since this principle does not only include the key issues inherent to an allocation context, but also allows for the development of allocation rules at the level of both individual decision-making and general rule-making.*

**Keywords:** administrative law, authorisations, allocation of scarce resources, equal treatment, competition, transparency, general principles of administrative law, legal comparison, EU law, internal market.

## 1 INTRODUCTION

Undoubtedly, EU law has played a major role in developing legal rules on ‘limited-issued authorizations’<sup>1</sup> or – in a shortened form – ‘limited authorizations’. Although limited authorization schemes can be found in a wide range of policy areas, such as gambling, public transport and telecommunications, all of these schemes share similar characteristics: since the number of authorizations available for grant is limited to a

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<sup>\*</sup> Professor of Administrative Law, Market & Data, Tilburg University. Email: c.j.wolswinkel@uvt.nl.

<sup>\*\*</sup> Professor of Constitutional and Administrative Law, VU University Amsterdam.

<sup>\*\*\*</sup> Professor of Constitutional and Administrative Law, Leiden University.

<sup>1</sup> This terminology is not yet common vocabulary in EU law. See for a scarce example thereof: amendments 2 and 11 in the Opinion of the Committee of the Regions on the award of concessions contracts, OJ. 2012, C 391/49.

maximum number, public authorities need to make a selection between suitable candidates for these authorizations. These common characteristics of limited authorization schemes give rise to general rules applicable to such processes.

EU law has shaped legal rules that are tailor-made for this so-called ‘allocation context’, primarily under the umbrella of the internal market freedoms contained in the Treaty on the Functioning of the European Union (TFEU) through the case-law of the Court of Justice of the European Union (CJEU) and in secondary EU legislation (e.g. the Services Directive<sup>2</sup>). Examples of these allocation rules are the need for a separate justification of the applicable maximum number of authorizations, the obligation of transparency with its implication of a sufficient degree of advertising, and the prohibition of an unlimited duration for limited authorizations.<sup>3</sup>

However, while EU law has fostered the development of general rules on limited authorizations, the scope of this EU allocation regime is restricted. As far as the allocation regime is based on the TFEU market freedoms, the starting point is the existence of an economic activity with a (certain) cross-border interest. Admittedly, the requirement of cross-border interest has very recently been relaxed under the Services Directive,<sup>4</sup> but this directive is not all-encompassing when regulating limited authorizations. The TFEU market freedoms and their inherent restrictions therefore remain relevant. Similarly, some allocation issues that fall outside the domain of economic activities have not been evaluated under the TFEU market freedoms, but under the general prohibition of discrimination on grounds of nationality (Article 18 TFEU). The contours thereof, however, are still far from crystallized as compared to the allocation rules flowing from the TFEU market freedoms. Thus, in the process of identifying general rules applying to *any* limited authorization scheme, EU law does not provide for an all-encompassing framework. Consequently, there is a need for an approach complementary to an EU-oriented approach. Such a complementary approach should depart from the experiences in domestic jurisdictions with allocation issues falling outside the realm of EU law in order to answer the questions of which allocation regime applies under domestic law and whether this domestic allocation regime is, or should be, similar to that under EU law.<sup>5</sup>

<sup>2</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 Dec. 2006 on services in the internal market, O.J. 2006, L 376/36.

<sup>3</sup> See Johan Wolswinkel, *From Public Contracts to Limited Authorisations and Vice Versa: Exploring the EU Court's Corollary Approach on Award Procedures*, 24 *Pub. Procurement L. Rev.* 137, 145 (2015); Vassilis Hatzopoulos, *The Allocation of Limited Authorisations Under EU Internal Market Rules*, in *Scarcity and the State I: The Allocation of Limited Rights by the Administration* 163 (Paul Adriaanse, Frank van Ommeren, Willemien den Ouden and Johan Wolswinkel eds, Intersentia 2016); Ferdinand Wollenschläger, *EU Law Principles for Allocating Scarce Goods and the Emergence of an Allocation Procedure. Identifying Substantive and Procedural Standards and Developing a New Type of Administrative Procedure*, 8 *Rev. Eur. Admin. L.* 205, 216–230 (2015).

<sup>4</sup> Joined Cases C-360/15 and C-31/16, *Visser Vastgoed*, ECLI:EU:C:2018:44, para. 110.

<sup>5</sup> See Wollenschläger, *supra* n. 3, at 253–254; and Paul Adriaanse, Frank van Ommeren, Willemien den Ouden & Johan Wolswinkel, *The Allocation of Limited Rights by the Administration: A Quest for a General Legal Theory*, in Adriaanse et al., *supra* n. 3, at 3–25.

This article takes up this challenge and can be seen as a follow-up to the introductory chapter in the book *Scarcity and the State I: The Allocation of Limited Rights by the Administration*. That contribution ended with the following call:

It is clear that the lens provided by this scarcity perspective needs to be polished even further. To that end, the comparative exercises on the allocation of limited rights, both between areas of law and between Member States (as well as between Member States and the EU), are worth continuing within legal academia. What is more, however, both the legislature and the judiciary can play an important role in developing a general legal theory on the allocation of limited rights that takes into account the peculiar characteristics of these rights.<sup>6</sup>

When this paragraph was written at the end of 2015, it was unknown that the highest administrative court of the Netherlands would very soon give a boost to the development of such a domestic allocation regime. At the end of 2016, the Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrecht-spraak van de Raad van State*; hereinafter: Council of State) delivered a high-impact judgment on limited authorizations by sketching the general contours of an allocation regime that builds on the (national) principle of equal treatment instead of EU law, although this regime is clearly inspired by EU law.<sup>7</sup>

The central question in this article is how a bottom-up approach to limited authorizations, here defined as an approach where domestic law instead of EU law develops and shapes the relevant allocation rules, could contribute to a general theory on limited authorizations in administrative law.<sup>8</sup> In addressing this central question, this article adds to the existing literature in the following way. Many (international) legal publications on limited authorizations have adopted the EU-oriented top-down perspective, focussing on allocation rules deriving from EU law, primarily the TFEU market freedoms.<sup>9</sup> While attention for the applicable allocation regime outside the realm of EU law is certainly not absent in domestic public law scholarship,<sup>10</sup> fewer attempts have been made to

<sup>6</sup> Adriaanse et al., *supra* n. 5, at 25.

<sup>7</sup> Administrative Jurisdiction Division of the Council of State 2 Nov. 2016, ECLI:NL:RVS:2016:2927 (*Arcade Hall Vlaardingen*).

<sup>8</sup> For different modes of top-down and bottom-up approaches, see Adriaanse et al., *supra* n. 5, at 8, and Wollenschläger, *supra* n. 3, at 253–254.

<sup>9</sup> See amongst other contributions: C. J. Wolswinkel, *The Allocation of a Limited Number of Authorisations; Some General Requirements from European Law*, 2 Rev. Eur. Admin. L. 61–104 (2009); M. Szydło, *The Process of Granting Exclusive Rights in the Light of Treaty Rules on Free Movement*, 12 Ger. L.J. 1408 (2011); G. Skovgaard Ølykke, *Is the Granting of Special and Exclusive Rights Subject to the Principles Applicable to the Award of Concessions?*, 23 Pub. Procurement L. Rev. 1, 6–7 (2014); Wolswinkel, *supra* n. 3; Wollenschläger, *supra* n. 3; Johan Wolswinkel, *Concession Meets Authorisation: New Demarcations Lines Under the Concessions Directive?*, 12 Eur. Procurement & Priv. P'ship L. Rev. 396–407 (2017), and several contributions in *Scarcity and the State I* (Adriaanse et al., *supra* n. 3).

<sup>10</sup> See e.g. in Germany, Ferdinand Wollenschläger, *Verteilungsverfahren. Die staatliche Verteilung knapper Güter: Verfassungs- und unionsrechtlicher Rahmen, Verfahren im Fachrecht, bereichsspezifische*

facilitate a comparison between these domestic allocation regimes (and the overarching EU allocation regime). Only the legal comparison of allocation regimes between different EU Member States and different sectors in *Scarcity & the State II*<sup>11</sup> reflects this bottom-up approach, but the topics covered in that volume (emission allowances, radio frequencies, gambling licences) are all covered to a greater or lesser extent by EU law.<sup>12</sup> By discussing the recent developments in Dutch administrative law, in particular the landmark judgment *Arcade Hall Vlaardingen* (and its subsequent case law) for a non-domestic audience, we facilitate an international comparison of allocation regimes with the aims of gaining knowledge, enriching and extending the ‘supply of solutions’ and of enabling the finding of a ‘better solution’ to a concrete allocation problem in a certain jurisdiction.<sup>13</sup> What is more, this contribution can also feed the discussion on the relationship between domestic law and EU law in allocation issues and thereby contribute to a further unification of allocation rules and principles to be implemented by national legislatures.

This article is structured as follows. First, we show the need for a complementary bottom-up or domestic law perspective to limited authorization schemes by pointing out the achievements and restrictions of EU law (section 2). Next, we describe the developments in Dutch administrative case-law with regard to limited authorizations, culminating in the landmark judgment *Arcade Hall Vlaardingen*, and sketch the impact of this judgment in subsequent domestic case-law (section 3). On the basis thereof, we reflect on the blurring distinction between allocation regimes based on either EU law or domestic law. At the same time, the rise of allocation regimes in administrative law gives cause for differentiation between the allocative task and other tasks of the administration and the consequences thereof for administrative law (section 4). We conclude this article with some observations on the next steps to be made (section 5).

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*verwaltungsrechtliche Typen- und Systembildung* (Mohr Siebeck 2010); in the Netherlands Johan Wolswinkel, *De verdeling van schaarse publiekrechtelijke rechten. Op zoek naar algemene regels van verdelingsrecht* (Boom 2013); in Spain *La administración de la escasez. Fundamentos de la actividad administrativa de adjudicación de derechos limitados en número* (L. Arroyo & D. Utrilla eds, Marcial Pons 2015), and in France J. V. Maublanc, *Le marché des autorisations administratives à objet économique* (Université de Pau et des Pays de l'Adour 2016).

<sup>11</sup> *Scarcity and the State II. Member State Reports on Gambling Licences, Radio Frequencies and CO<sub>2</sub> Emission Permits* (Paul Adriaanse, Frank van Ommeren, Willemien den Ouden & Johan Wolswinkel eds, Intersentia 2016).

<sup>12</sup> The reason for selecting these three sectors has been the varying ‘degree of Europeanisation’ applicable to these sectors. See Adriaanse et al., *supra* n. 11, at 5–6.

<sup>13</sup> See on the merits of legal comparison in general, J. Schwarze, *European Administrative Law* 78–80 (Sweet & Maxwell 2006).

## 2 TOP-DOWN AND BOTTOM-UP

### 2.1 THE HARVEST OF EU LAW: COMPETITION AND TRANSPARENCY

EU law has played a vital role in developing legal rules that are typically tailor-made for the issuing of a limited number of authorizations. This is unsurprising, since all efforts to realize a common market without internal frontiers have resulted in an increased openness of national markets, including authorization schemes, to economic operators from other Member States. Thus, while Member States have always imposed restrictions to the number of authorizations available for grant, the increased interest in acquiring limited authorizations by non-domestic operators is relatively new.<sup>14</sup> Once the number of interested economic operators exceeds the number of authorizations available for grant, Member States have to make choices between qualified applicants to award these limited authorizations.

An important achievement of EU law has been the development of the obligation of transparency as an immediate corollary of the principle of equal treatment.<sup>15</sup> The Court introduced this obligation in 1996 in *Commission v Belgium* with regard to the award of public contracts. In particular, it held that the procedure for comparing tenders has to comply, at every stage, with both the principle of equal treatment of tenderers and the principle of transparency so as to afford equality of opportunity to all tenderers when formulating their tenders. When a contracting entity takes into account an amendment to the initial tenders of only one tenderer, it is clear that that tenderer enjoys an advantage over his competitors, which breaches the principle of equal treatment of tenderers and impairs the transparency of the procedure.<sup>16</sup> In 2000, in *Telaustria*, the Court extended the scope of this obligation to the award of (service) concessions, even though these concession contracts were not subject to any EU secondary legislation at that time. It also further shaped the obligation of transparency by considering that this obligation consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed.<sup>17</sup> In 2010, the Court ruled in *Sporting Exchange* that this obligation of transparency also applied to the grant of exclusive authorizations, since this obligation is a mandatory prior condition of the right of a Member State to award to an

<sup>14</sup> For example, the Dutch monopoly on organizing sports-related games of chances had already existed from 1961 onwards, but was not contested in court before 2004, when Betfair, a betting company established in the United Kingdom, tried to obtain access to the Dutch gambling market (Case C-203/08, *Sporting Exchange*, ECLI:EU:C:2010:307, paras 12 and 15).

<sup>15</sup> Into more detail on this principle, see A Buijze, *The Principle of Transparency in EU Law* (Boxpress 2013).

<sup>16</sup> Case C-87/94, *Commission v. Belgium*, ECLI:EU:C:1996:161, paras 54 and 56.

<sup>17</sup> Case C-324/98, *Telaustria*, ECLI:EU:C:2000:669, paras 60–62.

operator the exclusive right to carry on an economic activity.<sup>18</sup> In the context of exclusive authorization schemes, compliance with the principle of equal treatment and with the consequent obligation of transparency means specifically that the objective criteria enabling the Member States' competent authorities' discretion to be circumscribed must be sufficiently advertised.<sup>19</sup>

It would be incorrect, however, to restrict the impact of EU law only to the obligation of transparency. Instead, where the obligation of transparency is ultimately a corollary of the TFEU market freedoms, these freedoms, in particular, the freedom of establishment (Article 49 TFEU) and the free movement of services (Article 56 TFEU), have given rise to other allocation rules. For example, the Court has made it clear that a limitation of the number of authorizations and the award of such limited authorizations for unlimited duration constitute prohibited restrictions to free movement, unless such restrictions are objectively justified and proportionate, i.e. unless such restrictions are justified by an overriding reason relating to the public interest and are both suitable and necessary with regard to that reason.<sup>20</sup>

Whereas sector-specific EU legislation had already addressed the issuing of limited authorizations from the 1990s onwards,<sup>21</sup> the adoption of the Services Directive in 2006 marked a new chapter in the development of allocation rules. Because of its trans-sectoral scope, the Services Directive provides for some *general* rules on limited authorizations. In particular, Article 12 deals with selection from among several candidates in cases where the number of service authorizations is limited because of the scarcity of available natural resources or technical capacity.<sup>22</sup> In those cases of limited authorization schemes arising as a result of natural or technical limitations of capacity (hereafter referred to as 'naturally' occurring limitations), public authorities must apply a selection procedure to potential candidates which provides full guarantees of impartiality and transparency,

<sup>18</sup> *Sporting Exchange*, *supra* n. 14, paras 46–47.

<sup>19</sup> *Sporting Exchange*, *supra* n. 14, para. 51.

<sup>20</sup> See e.g. Case C-64/08, *Engelmann*, ECLI:EU:C:2010:506, para. 43, distinguishing three different restrictions. Into more detail, see Wolswinkel (2009), *supra* n. 9; Wolswinkel, *supra* n. 3; and Wollenschläger, *supra* n. 3, distinguishing between substantive and procedural aspects.

<sup>21</sup> Examples include the Hydrocarbons directive (Directive 94/22/EC of the European Parliament and of the Council of 30 May 1994 on the conditions for granting and using authorisations for the prospecting, exploration and production of hydrocarbons, O.J. 1994, L 164/3), the Authorisation Directive (Directive 2002/20/EC of the European Parliament and of the Council of 7 Mar. 2002 on the authorisation of electronic communications networks and services, O.J. 2002, L 108/21 and its predecessor Directive 97/13/EC of the European Parliament and of the Council of 10 Apr. 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services, O.J. 1997, L 117/15). Into more detail on this sector-specific EU legislation, see Johan Wolswinkel, *The Need for Optimal Choice. Exploring a Hierarchy Between Allocation Procedures for Limited Authorisations Under EU Law*, in Adriaanse et al. (2016), *supra* n. 3, at 195–205.

<sup>22</sup> Into more detail, see Wolswinkel, *supra* n. 11, at 90–94. An example of such naturally limited authorizations is the authorization to store mineral resources in emptied gas fields.

including, in particular, adequate publicity about the launch, conduct and completion of the procedure.<sup>23</sup> Since Article 12 provides for exhaustive harmonization,<sup>24</sup> this provision has replaced Article 49 TFEU as the relevant legal framework for ‘naturally’ limited authorization schemes, at least as far as establishment of service providers is concerned.<sup>25</sup> The resulting allocation rule contained in Article 12 Services Directive is stricter than the rule flowing from Article 49 TFEU: the wording of Article 12 Services Directive does not allow for any exception to the obligation of adequate publicity,<sup>26</sup> while exhaustive harmonization no longer permits a claim to this exception being based on Article 49 TFEU.<sup>27</sup> For other ‘artificially’ limited authorization schemes, a provision similar to Article 12 is lacking in the Services Directive. Therefore, as confirmed by the Court in *Promoimpresa*, the award of such artificially limited authorizations is still subject to the obligation of transparency flowing from Article 49 TFEU, which – at least theoretically – still allows for objective justification in case of a lack of prior advertising.<sup>28</sup>

In addition to the requirement of an impartial and transparent selection procedure, the Services Directive contains relevant provisions on the duration of limited authorizations. As far as naturally limited authorizations are concerned, such an authorization must be granted for an appropriate limited period and may not be open to automatic renewal, nor confer any other advantage on the service provider whose authorization has just expired or on any person having any particular links with that service provider.<sup>29</sup> With regard to artificially limited authorizations, Article 11 stipulates that the authorization granted to a service provider shall not be for a limited period, except where the number of available authorizations is limited by an overriding reason relating to the public interest. In *Trijber and Hamnsen*, the Court has interpreted this provision such as to exclude authorization for unlimited duration: no discretion may be conceded to the competent national authorities, without undermining the objective pursued by Article 11 of securing service providers’ access to the market in question.<sup>30</sup> Thus, irrespective of whether the number of authorizations is limited for natural or artificial reasons, the duration of these authorizations should be limited.

<sup>23</sup> Art. 12(1) Services Directive. The same link between transparency and impartiality had already been emphasized by the Court in *Telaustria*, *supra* n. 17, para. 61.

<sup>24</sup> Joined Cases C-458/14 and C-67/15, *Promoimpresa*, ECLI:EU:C:2016:558, para. 61.

<sup>25</sup> Art. 12 Services Directive is part of Ch. III on the establishment of services providers, thereby leaving free movement of services (Art. 56 TFEU) untouched.

<sup>26</sup> *Promoimpresa*, *supra* n. 24, paras 54–55.

<sup>27</sup> *Promoimpresa*, *supra* n. 24, para. 62.

<sup>28</sup> *Promoimpresa*, *supra* n. 24, paras 70–71. See also *Wolswinkel*, *supra* n. 9, at 9–10.

<sup>29</sup> Art. 12(2) Services Directive.

<sup>30</sup> Joined Cases C-340/14 and C-341/14, *Trijber and Hamnsen*, ECLI:EU:C:2015:641, paras 62–63.

## 2.2 RESTRICTIONS TO THE EU ALLOCATION REGIME

It is fair to conclude that a market-freedom based allocation regime<sup>31</sup> has emerged under EU law, even though not all allocation rules have yet been crystallized. Nonetheless, the scope of this allocation regime is traditionally limited by two important restrictions: the need for an economic activity and the existence of (certain) cross-border interest.

Firstly, the TFEU market freedoms presuppose the exercise of an *economic activity*. Although the wording of the market freedoms in the TFEU does not refer to 'economic activity' as such, this overarching concept underlies all market freedoms. This is clear from Article 4 Services Directive, which defines a 'service' as any self-employed *economic activity*, normally provided for remuneration, as referred to in Article 57 TFEU.<sup>32</sup> Although the concept of an economic activity has been interpreted as any activity consisting in offering goods and services on a given market,<sup>33</sup> this broad interpretation does not cover every activity that is subject to an authorization scheme. To some extent, this has been confirmed recently in *Visser Vastgoed*, where the Court held that the Service Directive does not apply to State requirements that do not regulate or do not specifically affect the taking up or the pursuit of a service activity, but have to be respected by providers in the course of carrying out their economic activity in the same way as by individuals acting in their private capacity.<sup>34</sup> In the words of Advocate General Szpunar, not every requirement that might have the most incidental effect on the freedom of establishment is a market freedom restriction that needs to be justified.<sup>35</sup> Consequently, such 'general' requirements, applying both to service providers and other citizens, do not come within the scope of the Services Directive. Considering (limited) authorization schemes in particular, this may hold, e.g. for mooring authorization schemes or parking permit schemes: the activity of mooring a vessel or parking a car can be exercised equally both by service providers and by (other) individuals.

<sup>31</sup> For this terminology, see Wollenschläger, *supra* n. 3, at 210.

<sup>32</sup> See also Opinion of Advocate General Szpunar of 18 May 2017 in Joined Cases C-360/15 and C-31/16, *Visser Vastgoed*, ECLI:EU:C:2017:397, para. 68.

<sup>33</sup> See among other judgments: Case 118/85, *Commission v. Italy*, ECLI:EU:C:1987:283, para. 7; Case C-35/96, *Commission v. Italy*, ECLI:EU:C:1998:303, para. 36; Case C-237/04, *Enirisorse*, ECLI:EU:C:2006:197, para. 29.

<sup>34</sup> *Visser Vastgoed*, *supra* n. 4, para. 123.

<sup>35</sup> Opinion Advocate General Szpunar, *supra* n. 32, para. 136. See also recital 9 of the Services Directive: 'This Directive applies only to requirements which affect the access to, or the exercise of, a service activity. Therefore, it does not apply to requirements, [...] which do not specifically regulate or specifically affect the service activity but have to be respected by providers in the course of carrying out their economic activity in the same way as by individuals acting in their private capacity'.

Secondly, the TFEU market freedoms, which are rooted in the principle of non-discrimination on grounds of nationality (Article 18 TFEU),<sup>36</sup> presuppose cross-border interest. According to settled case law, the provisions of the TFEU on the freedom of establishment, the freedom to provide services and the free movement of capital do not apply to a situation which is confined in all respects within the borders of a single Member State.<sup>37</sup> In *Ullens de Schooten*, the Court clarified that it is nonetheless willing to interpret provisions of the Treaties relating to the fundamental freedoms, on the ground that it is not inconceivable that nationals established in other Member States had been or were interested in making use of those freedoms for carrying on activities in the territory of the home Member State, and, consequently, that the legislation, applicable without distinction to nationals of that State and those of other Member States, was capable of producing effects which were not confined to that home Member State.<sup>38</sup> Yet, though the Court has expressed its willingness to interpret the TFEU market freedoms in those circumstances, this does not imply that a domestic service provider can rely on these freedoms (and the resulting allocation regime) before its national court.<sup>39</sup> Whether a domestic service provider can invoke the TFEU market freedoms successfully, is an issue to be determined by domestic law.

### 2.3 GRADUAL EXPANSION OF THE EU ALLOCATION REGIME?

Notwithstanding the two important restrictions of economic activity and cross-border interest, the EU allocation regime is gradually gaining ground. First, the Court has also evaluated the granting of 'limited rights' that do not come within the scope of the market freedoms.<sup>40</sup> In *Bressol*, for example, the Court considered capacity restrictions for foreign students to higher education in Belgium. It considered that students have the right, enshrined in Articles 18 and 21 TFEU, to move and reside freely within the territory of a Member State, without being subject to direct or indirect discrimination on ground of their nationality. One particular consequence of this prohibition of discrimination is that Articles 18 and 21 TFEU preclude national legislation which limits the number of non-resident students in Belgium who may enrol for the first time in medical and paramedical

<sup>36</sup> Case C-458/03, *Parking Brixen*, ECLI:EU:C:2005:605, para. 47; Case C-91/08, *Wall*, ECLI:EU:C:2010:182, para. 32.

<sup>37</sup> See Case C-268/15, *Ullens de Schooten*, ECLI:EU:C:2016:874, para. 47, with reference to previous case-law.

<sup>38</sup> *Ullens de Schooten*, *supra* n. 37, para. 50, with reference to Joined Cases C-570/07 and C-571/07, *Blanco Pérez and Chao Gómez*, ECLI:EU:C:2010:300, para. 40.

<sup>39</sup> Wollenschläger, *supra* n. 3, at 211–215.

<sup>40</sup> See also Wolswinkel, *supra* n. 3, at 158, and Wollenschläger 2015, *supra* n. 3, at 230–231, on 'allocation beyond the market'.

courses, unless that legislation is justified in light of the objective of protection of public health. In particular, according to the Court, a selection process for non-resident students by the drawing of lots, which is based not on the aptitude of the candidates concerned but on chance, should be necessary to attain the objectives pursued.<sup>41</sup> Although the obligation of transparency has not played a vital role under Article 18 TFEU until now, it cannot be excluded that this EU ‘allocation beyond the market’ regime will also encompass that obligation, since the Articles 49 and 56 TFEU are considered specific expressions of the prohibition of discrimination on grounds of nationality (Article 18 TFEU).<sup>42</sup>

When it comes to the other requirement of cross-border interest, the scope of the EU allocation regime has not always been limited to cross-border situations. As noted above, the Court has recently confirmed in *Ullens de Schooten* that the TFEU market freedoms do not apply to a situation which is confined in all respects within a single Member State. Nonetheless, when applying the obligation of transparency, the Court seems a little more generous to domestic undertakings which invoke the TFEU market freedoms. In *Belgacom*, the Court held that once it has been established that there is a certain cross-border interest, the obligation of transparency to be complied with by the concession-granting authority benefits *any* potential tenderer, *even where* it is established in the same Member State as that authority.<sup>43</sup> Consequently, an economic operator in a Member State may allege an infringement of the obligation of transparency under Articles 49 and 56 TFEU occurring at the time of conclusion of an agreement whereby one or more public entities of that Member State have either granted to an economic operator of that same Member State a licence for services of certain cross-border interest or granted an economic operator the exclusive right to engage in an economic activity of cross-border interest.<sup>44</sup> Although this judgment seems hard to reconcile with the cross-border requirement that is inherent to the TFEU market freedoms (and may even be outdated after *Ullens de Schooten*),<sup>45</sup> its immediate effect is the exclusion of reverse discrimination: given the existence of certain cross-border interest, the TFEU market freedoms also confer rights to domestic service providers in as far as the obligation of transparency is concerned. By contrast, where a limited authorization lacks (sufficient) cross-border interest, the TFEU market-based allocation

<sup>41</sup> Case C-73/08, *Bressol et al.*, ECLI:EU:C:2010:181, paras 81–82.

<sup>42</sup> *Wall*, *supra* n. 36, para. 32.

<sup>43</sup> Case C-221/12, *Belgacom*, ECLI:EU:C:2013:736, para. 32. *See also Parking Brixen*, *supra* n. 36, para. 48: ‘the principle of equal treatment of tenderers is to be applied to public service concessions even in the absence of discrimination on grounds of nationality’. In *Parking Brixen*, the Court did not consider the case as purely internal, since undertakings established in other Member States might have been interested in providing the services concerned (*Parking Brixen*, *supra* n. 36, para. 55).

<sup>44</sup> *See Belgacom*, *supra* n. 43, para. 34.

<sup>45</sup> *See with further references for criticism to this approach: Wollenschläger*, *supra* n. 3, at 214.

regime does not apply, unless national legislation has made applicable the provisions of EU law to purely internal situations.<sup>46</sup>

When considering the EU allocation regime resulting from the Services Directive, the need for a cross-border interest is completely absent. In its recent judgment in *Visser Vastgoed*, the Court finally put beyond doubt that the provisions of Chapter III of the Services Directive on establishment of service providers (Articles 9 to 15) apply also to purely internal situations without requiring any cross-border interest.<sup>47</sup> As an immediate consequence of this judgment, the allocation regime flowing from Articles 11 and 12 Services Directive does also apply to purely domestic allocations.

The foregoing shows that although EU allocation regimes are definitely gaining ground, some allocations are still not (fully) within the scope of EU law. For these 'residual' allocations, it is a matter of domestic law which allocation regime applies: an allocation regime inspired by EU law or another allocation regime.

### 3 CASE-STUDY: LIMITED AUTHORIZATIONS IN THE NETHERLANDS

#### 3.1 A TRADITION OF LIMITED AUTHORIZATIONS

For several reasons, Dutch law is an interesting candidate for exploring the contours of an allocation regime for limited authorizations from a domestic law perspective, independent of the EU market-based allocation regime.

First of all, Dutch law has a long-standing tradition whereby the issuing of authorizations belongs to the domain of public law, whereas the conclusion of concession contracts is situated within the domain of private law.<sup>48</sup> In *Sporting Exchange*, the Dutch government therefore argued that the obligation of transparency cannot be extended to a licensing system which starts with an administrative authorization instead of a contract.<sup>49</sup> In response, the Court did not deny the difference between authorizations and concession contracts, but ruled that this difference does not, in itself, justify any failure to have regard to the requirements arising from Article 56 TFEU, in particular the principle of equal treatment and the obligation of transparency, when granting an administrative authorization.<sup>50</sup> In

<sup>46</sup> *Ullens de Schooten*, *supra* n. 37, para. 53.

<sup>47</sup> *Visser Vastgoed*, *supra* n. 4, para. 110.

<sup>48</sup> Gerdy Jurgens & Frank van Ommeren, *The Public-Private Divide in English and Dutch Law: A Multifunctional and Context-Dependent Divide*, 71 *Cambridge L.J.* 172, 183 (2012).

<sup>49</sup> Opinion of Advocate General Bot of 17 Dec. 2009 in Cases C-203/08 and C-258/08, *Ladbrokes and Sporting Exchange*, ECLI:EU:C:2009:791, para. 149.

<sup>50</sup> *Sporting Exchange*, *supra* n. 14, para. 46.

other words, the obligation of transparency does also apply to the granting of exclusive authorizations. In *Promoimpresa*, an Italian case on so-called *concessioni* for tourist beach activities, the Dutch government pointed out that the term ‘concession’ is often used to refer to an exclusive right or an authorization, but that does not mean that every ‘concession’ is a concession as defined by EU public procurement law.<sup>51</sup> In response to the Commission’s draft for a Concessions Directive, the Dutch government adopted a similar position, arguing that a separate Concessions Directive was not necessary, as such concession contracts hardly occur in the Netherlands, and that authorization schemes, which are more common in the Netherlands, should remain outside the scope of the Concessions Directive.<sup>52</sup> Interestingly, the Committee of the Regions adopted a similar opinion, which – surprisingly or not – had been prepared by a Dutch rapporteur.<sup>53</sup> This opinion on the Concessions Directive did not only emphasize that licences, including operating licences issued in limited quantities (referred to as ‘limited-issued licences’), must remain outside the scope of the directive, but even proposed an amendment to put beyond doubt that these ‘limited-issued licences’ should not qualify as concessions.<sup>54</sup> These examples illustrate that the Dutch government has always been hesitant to apply the EU allocation regime to limited authorizations.

In addition, when implementing the Services Directive with its allocation-oriented provisions, the Dutch government circumvented the issue of whether this directive, at least the chapter about the freedom of establishment and authorization schemes, also applied to purely internal situations.<sup>55</sup> Thus, in the absence of an explicit obligation in national legislation to apply the Services Directive voluntarily to purely internal situations, it waited for the Court’s interpretation of the Services Directive on the question of whether its provisions should also be applied to purely internal situations, an issue that was not settled before early 2018.<sup>56</sup> This uncertainty about the exact scope of the EU allocation regime might have been an additional reason for Dutch administrative courts to further develop an allocation regime rooted in domestic law.

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<sup>51</sup> See the Opinion of Advocate General Szpunar of 25 Feb. 2016 in Joined Cases C-458/14 and C-67/15, *Promoimpresa*, ECLI:EU:C:2016:122, para. 61.

<sup>52</sup> See *Kamerstukken II [Parliamentary Papers II]* 2011/12, file number 22 112, nr. 1344.

<sup>53</sup> Opinion of the Committee of the Regions on the award of concessions contracts, O.J. 2012, C 391/49.

<sup>54</sup> See policy recommendation 10 and amendment 2 of this opinion (*supra* n. 52). See also *Promoimpresa*, *supra* n. 24, paras 44–45.

<sup>55</sup> S. Prechal, S. de Vries & F. van Doorn, *The Implementation of the Services Directive in The Netherlands*, in *The Implementation of the EU Services Directive, Transposition, Problems and Strategies* 441 (U. Stelkens, W. Weiß & M. Mirschberger eds, T.M.C. Asser Press 2012).

<sup>56</sup> See the cases *Trijber and Harmsen*, *supra* n. 30, and *Visser Vastgoed*, *supra* n. 4.

## 3.2 CONTOURS OF A NATIONAL ALLOCATION REGIME

Although the award of limited authorizations has been contested before Dutch courts for many decades,<sup>57</sup> Dutch legal doctrine has addressed the issue of the legal regime applicable to those awards of limited authorizations mainly in the last decade.<sup>58</sup> Some of these limited authorizations are clearly shaped by EU law, e.g. radio spectrum licences, but other limited authorizations have less common ground with EU law. One example of those licences that have less common ground with EU law, is the municipal licence to operate an arcade hall offering games of chance (hereinafter: arcade hall licence): although the economic activity of offering games of chance is within the scope of the EU fundamental freedoms, which is also confirmed by Dutch case-law,<sup>59</sup> such gambling licences may lack cross-border interest, as might be the case with municipal arcade hall licences. In those circumstances, the EU market freedoms cannot be invoked. In addition, domestic legislation on these limited authorizations is more than once rather 'silent': national or municipal legislation sets a limitation to the number of authorizations available for grant, but detailed rules on the award of these limited authorizations are usually lacking. Thus, in the absence of a sector-specific allocation regime, administrative courts need to adopt a more deductive approach on the allocation regime, deriving concrete allocation rules from general principles of administrative law.

Initially, the highest Dutch administrative court with regard to economic affairs, the Administrative High Court for Trade and Industry (*College van Beroep voor het bedrijfsleven*), was the leading actor in the development of rules on limited authorizations based on general principles of administrative law. An illustrative example is a judgment from 2009, where it derived an obligation to offer competition opportunities for limited authorizations from the principle of diligence (due care), which requires administrative decisions to be prepared and taken carefully. The scope of this case law derived allocation rule was initially limited to the

<sup>57</sup> For example, in the 1980s, case-law indicated already that in the event of mutually exclusive applications, a (very global) comparison between applicants was necessary (Wolswinkel (2013), *supra* n. 10, at 62).

<sup>58</sup> See inter alia F. J. van Ommeren, *Schaarse vergunningen. De verdeling van schaarse vergunningen als onderdeel van het algemeen bestuursrecht* (Kluwer 2004); *Schaarse publieke rechten* (F. J. van Ommeren, W. den Ouden & C. J. Wolswinkel eds, Boom Juridische uitgevers 2011); Wolswinkel (2013), *supra* n. 10; A. Drahmman, *Transparante en eerlijke verdeling van schaarse besluiten* (Kluwer 2015); J. van Rijn van Alkemade, *Effectieve rechtsbescherming bij de verdeling van schaarse publieke rechten* (Boom 2016).

<sup>59</sup> Apart from the *Betfair* case, which resulted in the *Sporting Exchange* judgment of the Court, reference can be made to the case of *Schindler*, a gambling operator from Germany, where the Council of State held that against the background of the case law of the Court of Justice regarding the free provision of services, the proportionality requirement of suitability and necessity was not satisfied as 'no procurement had occurred at all' (Administrative Jurisdiction Division of the Council of State 18 July 2007, ECLI:NL:RVS:2007:BA9831).

particular circumstance where there is no possibility for a new licence to be granted without an existing licence expiring or being revoked. In that particular circumstance, where all available licences have already been granted, other market parties should in principle be given the chance to compete for a new licence that becomes available.<sup>60</sup> Since then, this specific obligation to create opportunities for competition has been gradually extended, initially to other candidates who had already expressed their interest in obtaining a limited authorization,<sup>61</sup> and then to any potential candidate for limited authorizations.<sup>62</sup> In particular, case law clarified that this requirement to create competition opportunities implies that it should be clear to potential applicants whether the licence is, or will be, available and which allocation procedure will be followed.<sup>63</sup>

In addition to the principle of diligence, the Administrative High Court for Trade and Industry also relied on the (unwritten) principle of legal certainty and the principle of proportionality. According to this court, 'high standards' should be imposed on the allocation procedure from the perspective of legal certainty.<sup>64</sup> To some extent, this reference to legal certainty ran the risk of becoming an empty phrase, since legal certainty did not often return in the judgments of the Administrative High Court for Trade and Industry when concrete allocation rules were formulated. One exception was the prohibition derived from the principle of legal certainty to switch to another allocation mechanism, once a specific allocation mechanism has been chosen and potential candidates have acted on the basis thereof.<sup>65</sup> With respect to the duration of limited authorizations, the Administrative High Court for Trade and Industry ruled that a prohibition to grant limited authorizations for an indefinite period could be disproportionate to new entrants who had expressed their interest in obtaining the authorization.<sup>66</sup> Although this case law of the Administrative High Court for

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<sup>60</sup> Administrative High Court for Trade and Industry 3 June 2009, ECLI:NL:CBB:2009:BI6466 (*Arcade Hall The Hague*).

<sup>61</sup> Administrative High Court for Trade and Industry 15 May 2012, ECLI:NL:CBB:2012:BW6630 (*Sunday evening shop Wassenaar*).

<sup>62</sup> Administrative High Court for Trade and Industry 24 Augustus 2012, ECLI:NL:CBB:2012:BX6540 (*Sunday evening shop Castricum*).

<sup>63</sup> Administrative High Court for Trade and Industry 28 Apr. 2010, ECLI:NL:CBB:2010:BM4375 (*Arcade Hall Zwolle*).

<sup>64</sup> See e.g. Administrative High Court for Trade and Industry 8 Jan. 2010, ECLI:NL:CBB:2010:BL3125 (*Sunday evening shop Heemstede*) and Administrative High Court for Trade and Industry 24 Augustus 2012, ECLI:NL:CBB:2012:BX6540 (*Sunday evening shop Castricum*).

<sup>65</sup> Administrative High Court for Trade and Industry 8 Jan. 2010, ECLI:NL:CBB:2010:BL3125 (*Sunday evening shop Heemstede*).

<sup>66</sup> See e.g. Administrative High Court for Trade and Industry 15 May 2012, ECLI:NL:CBB:2012:BW6630 (*Sunday evening shop Wassenaar*) and Administrative High Court for Trade and Industry 24 Augustus 2012, ECLI:NL:CBB:2012:BX6540 (*Sunday evening shop Castricum*).

Trade and Industry, in cases outside the scope of EU law, shows some resemblance to EU allocation regimes, no explicit reference was made to Union law.

### 3.3 A TURNING POINT? *ARCADE HALL VLAARDINGEN*

Early 2016, the president of the highest *general* administrative court in the Netherlands, the Administrative Jurisdiction Division of the Council of State, requested its Advocate General to submit an opinion on the question of whether there is any legal norm under domestic law requiring administrative authorities to offer competition opportunities to potential applicants for limited authorizations. According to the Dutch General Administrative Law Act (*Algemene wet bestuursrecht*), such an opinion can be requested for the sake of legal uniformity and legal development.<sup>67</sup> Legal uniformity was at stake here, since both the Council of State and the Administrative High Court for Trade and Industry were confronted with cases on limited authorizations, but hardly cross-referenced each other's judgments. What is more, specific allocation rules had been developed ad hoc on a case-by-case basis with different underlying general principles of administrative law, thereby underlining the need for a coherent allocation regime from the perspective of legal development. The circumstance that such an opinion of an Advocate General is requested only a few times a year, underlines the importance of this issue in administrative law.

In his opinion,<sup>68</sup> Advocate General Widdershoven gave a detailed overview of both EU and domestic legislation, case law and literature. On that basis, he concluded that Dutch law contains a legal norm requiring administrative authorities to create opportunity for potential applicants to compete for the available licences. In its subsequent judgment, the Council of State<sup>69</sup> agreed with the Advocate General and derived a general allocation regime from the principle of equality. This principle, according to the Council of State, should be interpreted in this allocation context as requiring equal opportunities to be offered.<sup>70</sup> It formulated three specific allocation rules within this allocation regime. First, there is a legal obligation for public authorities to create competition opportunities for potential applicants. Secondly, limited authorizations can, in principle, only be granted temporarily to avoid giving licensees a disproportionate advantage and

<sup>67</sup> Art. 8:12a General Administrative Law Act.

<sup>68</sup> Opinion Advocate-General Widdershoven 25 May 2016, ECLI:NL:RVS:2016:1421 (*Arcade Hall Vlaardingen*).

<sup>69</sup> One of the five judges in the grand chamber of the Council of State was the president of the Administrative High Court for Trade and Industry. This indicates that the judgment intended to contribute to consistency between case law of the Council of State and the Administrative High Court for Trade and Industry.

<sup>70</sup> *Arcade Hall Vlaardingen*, *supra* n. 7.

depriving newcomers of the possibility of entering the market. Finally, in order to ensure equal opportunities, public authorities should ensure a sufficient degree of advertising regarding the availability of the licence, the allocation procedure, the application period and the applicable criteria. Timely before the start of the application procedure, the authorities should provide clarity on this procedure by disclosing information on these aspects through a medium which enables potential applicants to take notice thereof. The lack of a sufficient degree of advertising amounts to a breach of the principle of equal treatment and the consequent obligation of transparency.<sup>71</sup>

The Council of State did not only put beyond doubt the existence of an obligation to create opportunities for competition, but also made clear that this obligation is not absolute. According to the Council of State, a legitimate restriction of this obligation can result from either legislation with respect to the limited authorization scheme itself or other legislation that applies to the exercise of the activity at stake. An example of the latter restriction could be spatial planning legislation: the limited possibility to grant an operating licence that is required to commence an economic activity can be restricted by the requirement that this exploitation should be in conformity with a zoning plan. The Council of State added that such a restriction cannot go as far as to entirely exclude any competition opportunities. In any case, legislation itself or its legislative history should make clear that the interest of creating competition has been weighed against other interests.

Three years later, this judgment *Arcade Hall Vlaardingen* has become the new legal standard to evaluate allocations of limited authorizations, especially in the case law of the Council of State. Moreover, subsequent case law shows that the new allocation regime of the Council of State is not a completed construction, but is still 'work in progress', both in substance and in scope.

As for substance, for example, the Council of State has added to the previously mentioned allocation rules the requirement that the criteria should be formulated clearly, precisely and unambiguously.<sup>72</sup> This means that the criteria should provide for sufficient guidance to potential candidates when submitting their application. Alongside the introduction of new allocation rules, existing allocation rules have been refined. For example, with regard to exceptions to the allocation rule of requiring that limited authorizations should be of a limited duration, the Council of State has held that these exceptions are difficult to conceive of in the case of

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<sup>71</sup> *Arcade Hall Vlaardingen*, *supra* n. 7, para. 12.

<sup>72</sup> Administrative Jurisdiction Division of the Council of State 27 Sept. 2017, ECLI:NL:RVS:2017:2611 (*Arcade Hall Helmond*).

authorizations for economic activities,<sup>73</sup> whereas in the case of limited authorizations for non-economic activities, such exceptions can be justified in particular circumstances by the principle of legal certainty.<sup>74</sup> Another example of refinement is the relaxation of the requirement of limited duration if the limited authorisation concerns the activity of constructing a building: because of the temporary nature of this activity, there is no need to artificially limit the duration of this authorisation.<sup>75</sup>

The scope of the domestic allocation regime has been gradually expanded. Even though the Council of State merely referred to limited authorizations in *Arcade Hall Vlaardingen*, it has also applied its allocation regime to the funding of secondary school education, because the applicable legislation provides for a system of regulated competition between secondary schools,<sup>76</sup> and to financial subsidies that are available in limited amount.<sup>77</sup> Early 2018, Advocate General Widdershoven was asked to submit an opinion on limited rights in spatial planning law. He concluded that a zoning plan that assigns different functions to different locations does not involve the allocation of limited rights. In addition, an individual permit to deviate from such a zoning plan (a so-called ‘zoning permit’) is, as a rule, not a decision involving the allocation of limited rights, since, as a rule, there is only one possible applicant for such a permit, namely the person who disposes of the location for which the permit is applied. In particular circumstances, however, such a zoning permit is a limited authorization, such that its issuing is subject to the domestic allocation regime. This occurs, for example, if there is a ‘close connection’ between the zoning permit and an operating licence that is available in limited quantity: if the operating licence can only be granted in conformity with the zoning plan, whereas the zoning plan does only allow for the grant of *one* zoning permit for the establishment of an arcade hall, both authorization procedures need to be coordinated, such that the principle of equal treatment and the obligation of transparency are complied with in both procedures.<sup>78</sup> In its subsequent judgment in *Wind Farm Zeewolde*, however, the Council of State did not make clear whether it underlined this opinion or not. Instead, it merely ruled that

<sup>73</sup> Cf. para. 182 of the opinion of Advocate General Bot of 17 Dec. 2009 in Cases C-203/08 and C-258/08, *Ladbrokes and Sporting Exchange*, ECLI:EU:C:2009:791.

<sup>74</sup> Administrative Jurisdiction Division of the Council of State 12 Apr. 2017, ECLI:NL:RVS:2017:994 (*Authorisation Doom*).

<sup>75</sup> Administrative Jurisdiction Division of the Council of State 30 Aug. 2017, ECLI:NL:RVS:2017:2331 (*Wind Farm Noord-Holland*).

<sup>76</sup> Administrative Jurisdiction Division of the Council of State 18 Jan. 2017, ECLI:NL:RVS:2017:86.

<sup>77</sup> Administrative Jurisdiction Division of the Council of State 11 July 2018, ECLI:NL:RVS:2018:2310.

<sup>78</sup> Opinion Advocate General Widdershoven 6 June 2018, ECLI:NL:RVS:2018:1847 (*Wind Farm Zeewolde*). See already in the case-law of the Council of State: *Arcade Hall Helmond*, *supra* n. 72. On this issue, see also C. J. Wolswinkel, *Economic Law Meets Environmental Law. New Expansion of the Services Directive?*, in *Upgrading Trade and Services in EU and International Economic Law* 41–61 (S. Tans et al. eds, Wolf Legal Publishers 2019).

limited rights were not at stake in this particular case.<sup>79</sup> Thus, it is still an open question to what extent the domestic allocation regime also applies to decisions in spatial planning law.

#### 3.4 COMPARATIVE REMARKS: EXPLORING THE SCOPE OF THE NATIONAL ALLOCATION REGIME

From a comparative point of view, these recent developments in Dutch law with regard to limited authorizations give rise to several observations.

First, the (new) Dutch allocation regime is principle-based: allocation rules are not derived by analogy from sector-specific legislation in fields where the allocation of limited rights is regulated more intensely, e.g. telecommunications law or public procurement law. Although the resulting allocation rules are similar to the rules in these densely regulated fields, this case law regime does not refer explicitly to the general prevalence of these allocation rules in other fields.

Secondly, the Council of State has adopted the principle of equal treatment as the central legal basis for its allocation regime, in both its substantial and its procedural manifestation. This is a discontinuity with existing case law of the High Administrative Court on Trade and Industry, which adopted other general principles of administrative law, such as the principles of diligence (due care), legal certainty and proportionality, as legal basis for its allocation regime.

Thirdly, when adopting the principle of equal treatment as legal basis, the Council of State did not refer to the Dutch Constitution, which starts with the recognition of the principle of equal treatment as a fundamental right.<sup>80</sup> Instead, the allocation regime is based on the *unwritten* principle of equal treatment as a general principle of administrative law. Thus, the inductive approach adopted by the Council of State does not coincide with a constitutional approach, deriving allocation rules directly from the Constitution.<sup>81</sup> The explanation, therefore, might be a lack of constitutionalization in Dutch administrative law.<sup>82</sup>

Fourthly, the Council of State acknowledges the idiosyncrasies of limited authorizations by concretizing the general principle of equal treatment into a context-dependent principle of 'equal opportunities'. Since equal outcomes cannot be achieved because of the limitation to the number of available authorizations,

<sup>79</sup> Administrative Jurisdiction Division of the Council of State 19 Dec. 2018, ECLI:NL:RVS:2018:4198 (*Wind Farm Zeewolde*).

<sup>80</sup> Art. 1 of the Dutch Constitution.

<sup>81</sup> See L. A. Jiménez & D. Utrilla, *The Allocation of Limited Public Rights: An Analytical and Constitutional Approach*, in Adriaanse et al., *supra* n. 3, at 35.

<sup>82</sup> E. A. Alkema, *Constitutional Law*, in *Introduction to Dutch Law* 333–334 (4th ed., J. Chorus, P.-H. Gerver & E. Hondius eds, Kluwer Law International 2006).

equal treatment can only be realized in the form of equal opportunities to compete for those limited authorizations.

An immediate consequence of the choice for a general principle of administrative law that applies across all areas of administrative law, is that there is no reason in advance to restrict the scope of the allocation regime to limited authorizations only. Thus, it is not surprising that the scope of the allocation regime has been gradually expanded to limited rights in general (including financial grants), irrespective of whether economic or non-economic activities are at stake. This triggers the question of the relationship between this domestic allocation regime and the EU allocation regime with its inherent restrictions to economic activities with cross-border interest.

In comparison with EU law, three additional observations are to be made. First, although the Council of State did not refer to EU law in *Arcade Hall Vlaardingen*, a subsequent judgment clarified that the third allocation rule, requiring a sufficient degree of advertising, was based on the obligation of transparency in the Court's case law. By this explicit reference, the Council of State tried to bridge the gap between domestic and EU allocation regimes, but still left some unclarity: does the Council of State adopt the EU obligation of transparency voluntarily in areas or cases where EU law does not apply or does the Council of State use this obligation of transparency merely as a source of inspiration?

Secondly, the Council of State did not frame the domestic allocation regime as a *residual* regime in the sense that it should only apply if the EU allocation regime does not apply. Instead, the Council of State seemed to introduce an allocation regime that applies irrespective of whether or not the limited authorization at stake has (certain) cross-border interest. Thus, the issue whether there is cross-border interest or whether secondary EU legislation, such as the Services Directive, applies to purely internal situations, can be circumvented by applying this domestic allocation regime. In the particular case of *Arcade Hall Vlaardingen*, the Council of State therefore concluded that there was no need to discuss the appeal grounds relating to a breach of Union law after observing that the award at stake did not comply with the principles of equal treatment and the obligation of transparency as interpreted in the domestic allocation regime. However, in as far as it is clear that the EU allocation regime applies, the Council of State is still willing to apply this regime, either the Services Directive<sup>83</sup> or the TFEU provisions.<sup>84</sup> What is more, after the Court's judgment in *Visser Vastgoed*, the Council of State has already applied its EU allocation regime in purely internal situations without having

<sup>83</sup> See e.g. Administrative Jurisdiction Division of the Council of State 7 June 2017, ECLI:NL:RVS:2017:1520 (*canal tour operating licence Amsterdam*).

<sup>84</sup> See e.g. Administrative Jurisdiction Division of the Council of State 2 May 2018, ECLI:NL:RVS:2018:1466 (*lotto*).

recourse to its own domestic allocation regime.<sup>85</sup> Conversely, the Council of State has been willing to apply its domestic allocation regime if an applicant could not invoke the TFEU fundamental freedoms because of a lack of cross-border interest in the particular case.<sup>86</sup> Thus, both allocation regimes seem to be used interchangeably.

The third and final pressing issue is whether the application of both allocation regimes yields the same outcome. At first sight, the allocation rules that are part of the domestic allocation regime (obligation to create competition opportunities, limited duration, sufficient degree of advertising) seem to coincide with the EU allocation regime, if not exactly in wording, then at least in essence. However, the content and scope of exceptions to these general allocation rules might differ under EU and domestic law. In that regard, it is noteworthy that the exception clause formulated by the Council of State does not refer to concrete exceptions familiar in EU law, such as extreme urgency or the circumstance that only one specific operator is able to exercise the activity at stake. Instead, the Council of States prescribes in more abstract terms the need to balance in advance the interest of facilitating competition versus other interests, e.g. the obligation to respect legal certainty.

#### 4 TOWARDS A GENERAL ALLOCATION REGIME?

##### 4.1 ORIENTATION TOWARDS EU LAW?

The Dutch case-law discussed above gives rise to the more general question of how a bottom-up approach to limited authorizations or – more generally – limited rights, understood as an allocation regime rooted in domestic law, should develop and, in that context, should relate to the top-down perspective of EU law.

Insofar as economic activities are concerned, an explicit orientation in domestic law towards EU law seems not only useful, but even indispensable. This is self-evident for economic activities with a cross-border effect, since that effect determines the applicability of the market freedoms of the TFEU. However, the Services Directive turns out to be an EU allocation regime that is increasingly gaining ground, not only across services, but also in purely internal situations and with regard to activities concerning retail trade of goods. Given this tendency of ongoing expansion, existing exceptions, either in scope (e.g. gambling activities) or in substance (e.g. exceptions to transparency), might be captured by the Services Directive in the near future. Taking the allocation regime of the Services Directive, which

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<sup>85</sup> Administrative Jurisdiction Division of the Council of State 16 Mar. 2018, ECLI:NL:RVS:2018:902.

<sup>86</sup> *Wind Farm Noord-Holland*, *supra* n. 75.

builds on the Court's case law on the TFEU market freedoms, as the EU point of reference, such a coordinated approach can create consistency between purely internal and cross-border situations. In as far as limited authorizations with certain cross-border effect fall outside the scope of the Services Directive, applying the same EU allocation regime has the advantage of excluding reverse discrimination to the disadvantage of domestic economic operators, if this reverse discrimination has not already been excluded in advance by EU law.<sup>87</sup>

The orientation in the Dutch allocation regime towards EU law authorizations can be categorized as a very light version of voluntary adoption. In *Ullens de Schooten*, the Court referred to a situation where national law requires the national court to grant the same rights to a national of its own Member State as those which a national of another Member State *in the same situation* would derive from EU law.<sup>88</sup> In a specific allocation context, this would mean that if a limited authorization outside the scope of the Services Directive has certain cross-border effect, then domestic service providers could rely on the EU allocation regime of the TFEU market freedoms as well. Although the Council of State has not stated explicitly that it aims to grant the same rights to domestic service providers as to foreign service providers, this is the actual outcome of the judge-made allocation regime. That judicial law-making approach contrasts with the cautious approach adopted by the Dutch legislator, who has been hesitant to extend the scope of relevant allocation provisions of EU law, e.g. in the Services Directive, to situations confined in all respects within the Netherlands. What is more, the Dutch legislator has still been quite absent in this process of developing a domestic allocation regime with a minimum set of legal rules.<sup>89</sup>

In sum, as far as economic activities are concerned, pragmatic reasons such as the ongoing expansion of the Services Directive and the prevention of reverse discrimination of domestic service providers, justify an explicit orientation towards EU law in those cases where EU law does not apply directly. Outside the scope of economic activities, other, more fundamental considerations come to the fore.

In our view, before addressing the question of which allocation regime applies (domestic or EU law), it is necessary to identify those characteristics of limited authorizations that are shared across all sectors. Following this conceptual or analytical approach towards limited authorizations,<sup>90</sup> limited authorizations are characterized foremost by the existence of a limitation to the number of rights (authorizations) available for grant. Without such a maximum, limited

<sup>87</sup> See e.g. *Belgacom*, *supra* n. 43.

<sup>88</sup> Cf. *Ullens de Schooten*, *supra* n. 37, para. 52.

<sup>89</sup> See Frank van Ommeren (2016), *Challenges for the National Legislator: The Allocation of Limited Rights by the Administration*, in Adriaanse et al., *supra* n. 3, at 73–91.

<sup>90</sup> Adriaanse et al., *supra* n. 5, at 9–15.

authorizations do not occur. The existence of this maximum opens up the possibility that the number of available authorizations will not be sufficient to satisfy all (potential) applicants. In those circumstances of scarcity, public authorities have to choose, selecting which applicants obtain a right and which do not. In this selection procedure, applicants that qualify for the authorizations at stake equally, need to be treated differently. Because of the impossibility of realizing equal outcomes, the highest attainable value is ensuring equal opportunities in the selection procedure for applications competing for these limited authorizations.<sup>91</sup>

This conceptual characterization of issuing limited authorizations illustrates that equality is at stake here.<sup>92</sup> Thus, the principle of equal treatment appears to be the most natural candidate among the general principles of administrative law as a legal basis for allocation regimes. Even though other legal principles, such as the principle of legal certainty, could also be relevant for developing an allocation regime, the principle of equal treatment exhibits the peculiarities of allocation issues more distinctively. In fact, the general principle of equal treatment could even constitute the legal basis of some *ius commune* on allocation issues across Member States, provided this principle is given a context-dependent meaning.

Thus, in our view, any approach to allocation issues that puts central the principle of equal treatment, either in EU or in domestic law, should be welcomed.<sup>93</sup> In general, this principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way, unless such treatment is objectively justified.<sup>94</sup> In other words, such a difference in treatment should not be the result of discrimination on arbitrary grounds. From the perspective of EU law in general and EU internal market law in particular, discrimination on grounds of nationality is most problematic, as it favours domestic service providers at the expense of foreign service providers. However, from a more general perspective, any distinction that cannot be justified objectively, either on grounds of nationality or on other grounds, amounts to arbitrary discrimination.

To some extent, the EU allocation regime does already reflect a shift from the specific prohibition of non-discrimination on grounds of nationality to the general principle of equal treatment. Considering the principle of discrimination on

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<sup>91</sup> See Wolswinkel, *supra* n. 3, at 147.

<sup>92</sup> Some authors have even argued that equality or non-discrimination has relevance in cases of scarcity only. See B. P. Sloot, *Positieve discriminatie. Maatschappelijke ongelijkheid en rechtsontwikkeling in de Verenigde Staten en in Nederland* [Positive discrimination. Societal inequality and legal development in the United States and in the Netherlands] 26 (W.E.J. Tjeenk Willink 1986), and to some extent C. Perelman, *The Idea of Justice and the Problem of Argument* 36 (Humanities Press 1977).

<sup>93</sup> See e.g. the judgment of the German Bundesverfassungsgericht on university admissions (BVerfG, Judgment of the First Senate of 19 Dec. 2017, ECLI:DE:BVerfG:2017:ls20171219.1bvl000314).

<sup>94</sup> Case C-127/07, *Arcelor*, ECLI:EU:C:2008:728, para. 23.

grounds of nationality merely as a specific expression of the principle of equal treatment,<sup>95</sup> the Court proclaims equal opportunities for *any* service provider once a certain cross-border interest has been settled<sup>96</sup> or simply because some EU legislation, e.g. the Services Directive, applies to purely internal situations equally. Consequently, the obligation of transparency applies, even in the absence of discrimination on grounds of nationality. Equally, under the TFEU market freedoms, unlimited duration of limited authorizations is considered to be a restriction to free movement for foreign service providers. The Services Directive, however, also puts forward the distinction between incumbents and new entrants. Although this distinction might coincide initially with the distinction between domestic and foreign service providers, this one-to-one correspondence blurs over time once foreign service providers have succeeded in obtaining limited authorizations after an impartial and transparent selection procedure.

It is submitted that every allocation regime rooted in the principle of equal treatment will be roughly similar because of the identical characteristics of allocation issues across sectors and jurisdictions. In particular, it should not be surprising that EU law and domestic law provide for a similar allocation regime. In this respect, it is noteworthy that, when implementing Article 12 of the Services Directive, some Member States chose for a one-to-one transposition of the wording of Article 12, whereas other Member States refrained from a separate implementation of this provision, since the allocation principles enshrined in this provision were considered to be already part of national law.<sup>97</sup>

At the same time, the recognition that the resulting allocation regime will be roughly similar, does not imply that the application of both principles will coincide completely. For example, the chosen medium to satisfy the requirement of a sufficient degree of advertising can differ for limited authorizations with and without a cross-border interest. Next, justified exceptions to general allocation rules on competition opportunities and limited durations can also differ between EU and domestic allocation regimes. However, the explanation for these differences should no longer be found in the particularities of an allocation context, since this context is conceptually identical irrespective of whether the domestic or the EU regime applies. Likewise, the justification for differences should no longer be found in a different understanding of the principle of equality, as this principle should be given the same meaning at

<sup>95</sup> *Parking Brixen*, *supra* n. 36, para. 48.

<sup>96</sup> *Belgacom*, *supra* n. 43, para. 32.

<sup>97</sup> *The Implementation of the EU Services Directive, Transposition, Problems and Strategies* 32–33 (U. Stelkens, W. Weiß & M. Mirschberger eds, T.M.C. Asser Press 2012).

both the EU and the domestic level, requiring equal opportunities to be ensured and implying concrete rules on limited duration and sufficient advertising. Instead, any difference in application should be explained by the different weight that is given to the principle of equality vis-à-vis other legitimate interests. Whereas in EU law the objective of protecting and promoting an internal market appears to be a weighty interest that cannot be easily outweighed by other interests,<sup>98</sup> the relative weight of this principle of equality vis-à-vis other interests can be different at the domestic level,<sup>99</sup> thereby allowing for more exceptions to an equality-based allocation regime in domestic law.

#### 4.2 ALLOCATION ISSUES AS CATALYST FOR GENERAL ADMINISTRATIVE LAW

The foregoing shows the advantages of developing a general legal regime on the allocation of limited rights on the basis of the principle of equal treatment. What is necessary, therefore, is an interpretation of this principle that takes into account the specific allocation context, shifting from equal outcomes to equal opportunities. This context-dependent interpretation of the principle of equal treatment can be considered a further emancipation of general administrative law, fostered by developments in sector-specific areas of administrative law.<sup>100</sup>

Instead of emphasizing the distinction between national and EU allocation regimes, the principle of equal treatment should be embraced as the underlying basis for some *ius commune* on allocation issues. A context-dependent interpretation of this principle encourages further analysis of the differences between the allocative task and other tasks of the administration, e.g. ensuring minimum levels of quality for citizens, and of the consequences of this distinction for the application of general principles of administrative law and for the design of administrative procedure.<sup>101</sup> Wollenschläger has described this context-dependent approach as the need for task-related ‘type formation’ in administrative law. Such type formation acts as an intermediary between the concretion of sector-specific legislation

<sup>98</sup> This difference in application of general principles of law is not unique, as the application of the EU principle of legitimate expectations is also stricter than the domestic principle of legitimate expectations. See J. E. van den Brink & W. den Ouden, *General Principles of Law*, in *Europeanisation of Public Law* 207–235 (J. H. Jans, S. Prechal & R. J. G. M. Widdershoven eds, Europa Law Publishing 2015).

<sup>99</sup> See also Takis Tridimas, *The General Principles of EU Law* 6 (Oxford University Press 2006).

<sup>100</sup> See on this ‘emancipation’ of general administrative law: F. Wollenschläger (2015), *Constitutionalisation and Deconstitutionalisation of Administrative Law in View of Europeanisation and Emancipation*, 10 *Rev. Eur. Admin. L.* 7, 65 (2017).

<sup>101</sup> See also C. J. Wolswinkel, *Limited Public Rights and Beyond. An Allocation Perspective to Public Law*, *Law & Method* (2015), and Adriaanse et al., *supra* n. 5, at 7.

and the abstraction of general administrative law, and hence takes place at a 'medium level of dogmatic system formation'. This approach permits sector-specific provisions to be reflected in an abstracting manner without running the risk, because of too high a level of abstraction, of losing sight of the structures and challenges that are characteristic of the specific field.<sup>102</sup>

The recent case law of the Dutch Council of State does not only show the need for, but also the merits of this exercise of type formation. In particular, the domestic allocation regime discussed in section 3 adopts a context-dependent interpretation of the principle of equal treatment, requiring equal opportunities to be ensured. The allocation rules that result from this subprinciple of equal opportunities, turn out to be stricter than general rules of administrative law on the grant of (non-limited) authorizations. For example, the requirement of a sufficient degree of advertising obliges administrative authorities to make sufficient information publicly available in advance, *i.e.* before the start of the application period. By contrast, in the absence of a limitation to the number of available authorizations, any applicant who satisfies the granting criteria could be granted an authorization. Consequently, the need for *ex ante* publication of information would be less urgent. What is more, the allocation rule on the duration of a limited authorization can even be considered an allocation rule deviating from general administrative law. Whereas unlimited duration is the starting point for non-limited authorizations because of the administrative burdens for the holder of the authorization to request for renewal, at least according to EU law,<sup>103</sup> the allocation rule that limited authorizations shall not be granted for unlimited duration, constitutes an exception to this starting point.

To some extent, the bottom-up approach towards limited authorizations that is rooted in domestic law opens up even more possibilities to develop a general legal theory on the allocation of limited rights than a top-down approach inspired by EU law. In particular, the Dutch allocation regime has already been applied to other limited rights than authorizations for economic activities, such as subsidies and certain permits in spatial planning law. Whereas these limited rights still share the characteristics of being granted at request, the recent debate on the issuing of limited rights assigned in a spatial zoning plan calls for considering the allocative

<sup>102</sup> Wollenschläger (2015), *supra* n. 3, at 252, with reference to R. Wahl, *Vereinheitlichung oder bereichsspezifisches Verwaltungsverfahrensrecht?*, in *Die Vereinheitlichung des Verwaltungsverfahrensrechts* 42–50 (W. Blümel ed., Duncker & Humblot 1984), and E. Schmidt-Aßmann, *Der Verfahrensgedanke im deutschen und europäischen Verwaltungsrecht*, in *Grundlagen des Verwaltungsrecht. Band II: Informationsordnung, Verwaltungsverfahren, Handlungsformen* 536 (W. Hoffmann-Riem & E. Schmidt-Aßmann & A. Voßkuhle eds, C.H. Beck 2012), referring to 'Verteilungsverfahren' (allocative administration) as one of these types of administrative action.

<sup>103</sup> Art. 11 Services Directive.

task of the administration at the level of general rule-making next to individual decision-making. This means that the consequences of a context-dependent interpretation of the principle of equal treatment and the corollary obligation of transparency need to be made explicit at the level of general rule-making as well. For example, is there an obligation to create equal opportunities for competition in the context of the general decision-making process of a zoning plan for some municipal area and, if so, how should these opportunities for competition be created effectively?

## 5 CONCLUDING REMARKS

The allocation of scarce resources is a task at the very heart of public administration. The awareness that this allocative task of the administration gives rise to a separate legal regime with distinct allocation rules has gradually gained ground, both in EU and in domestic law.

This article contributes to this process of maturation of allocation regimes by adopting a bottom-up approach towards limited authorizations, hence primarily focussing on the role of domestic law instead of EU law. Although EU law has undoubtedly played a significant role in recognizing and developing legal rules that are tailor-made for an allocation context, the resulting EU allocation regime has some inherent limitations as it mainly builds on the TFEU market freedoms. Thus, it applies to economic activities with a certain cross-border interest only, unless secondary legislation, such as the Services Directive, transposes this regime to purely internal situations as well.

Recent case law of the Dutch Council of State shows the merits of a context-dependent interpretation of the principle of equal treatment, shifting from equal outcomes to equal opportunities. The resulting allocation regime exhibits the mutual relationships between several allocation rules, e.g. on the duty to create opportunities for competition and the prohibition of unlimited duration, and strengthens the need for transparency *ex ante* without reducing the allocation regime to issues of transparency only. What is more, because of its explicit orientation towards EU law, it facilitates a comparison between allocation regimes under EU and domestic law. This does not mean that domestic allocation regimes should be considered subordinate to EU law, although in the light of *Ullens de Schooten*, the Court might be willing to interpret its EU market-based allocation regime for the purposes of applying this regime in a domestic context. Instead, irrespective of its orientation towards EU law and irrespective of whether economic activities are at stake, such a domestic allocation regime should be applied consistently and continuously in order to fulfil its guiding and unifying role. Conversely, since the

domestic allocation regime is derived from general principles of administrative law also embraced by EU law, developments in domestic case-law might also provide guidance for the Court in translating the general principle of equal treatment into a specific allocation context. Thus, this contribution should also be regarded as an invitation to other legal scholars to disclose the allocation regime applicable in their Member States, such that legal comparison between domestic allocation regimes can result in further identification of some *ius commune* in administrative law as far as the allocative task of the administration is concerned.

