

The Allocation of a Limited Number of Authorisations

Some General Requirements from European Law

Johan Wolswinkel, LL.M., M.Sc.¹

*PhD researcher at the Department of Constitutional and Administrative Law,
Faculty of Law, VU University Amsterdam*

Abstract

'Limited authorisation schemes' differ from other authorisation schemes in that the designated limited number of available authorisations necessitates some kind of selection procedure among applicants. Consequently, questions rise regarding the lawfulness of such limitations together with challenges to the temporal and territorial scope of these authorisations. To an increasing extent, European law offers some general requirements for these schemes. This article explores these requirements by starting with the provisions in the new Services Directive and extending the results to a more general European framework.

I Introduction

Occasionally, the number of authorisations that is available for a certain activity is limited beforehand by the administrative authorities. These so-called 'limited authorisation schemes' differ from other authorisation schemes in that some kind of *selection* procedure among applicants is necessary whenever granting a limited number of authorisations.

Several policy areas in EU law show increasing attention to these kinds of authorisation schemes. For example, a system of emission allowance trading with national emission ceilings has been introduced at a European level.² The Authorisation Directive contains several provisions on the grant of a limited number of rights of use for radio frequencies and numbers.³ The European Court of Justice (ECJ) has also dealt with several questions on

¹ The author gratefully acknowledges the Netherlands Organisation for Scientific Research (NWO) for financial support (Toptalent) to his PhD research. A related Dutch article was published as: C.J. Wolswinkel, 'Diensten tussen frequenties en kansspelen. Contouren van een Europees kader voor het verlenen van een beperkt aantal vergunningen' [2009] *SEW* p. 287-299.

² See Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ 2003, L 275/32.

³ Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services, OJ 2002, L 108/21.

limited authorisation schemes, for example in the area of gambling activities.⁴

The adoption of the Services Directive⁵ marks a new era since this directive contains some *general* provisions on limited authorisation schemes. These provisions, concerning the selection procedure and the duration of the authorisation, build on a new distinction between authorisations that are limited in number ‘because of the scarcity of available natural resources or technical capacity’⁶ and authorisations that are limited in number ‘by an overriding reason relating to the public interest’.

This article aims at answering the following question: which general requirements on the allocation⁷ of a limited number of authorisations can be derived from European law? By ‘general requirements’, we mean requirements that can be applied in principle to all limited authorisation schemes or to a generalised category of these authorisation schemes. In answering this question as to general requirements, we restrict ourselves to some key questions which are characteristic for limited authorisation schemes.

The starting point of the analysis is the Services Directive, which only applies to *authorisation* schemes on *service* activities. Even with regard to these authorisation schemes, the Services Directive does not contain a complete set of general requirements. It is assumed, however, that the relevant provisions of the Services Directive reflect general rules that underlie *any* allocation of a limited number of authorisations. Since these general rules might already be visible in particular service areas, relevant provisions in these areas can support and complete the findings of the Services Directive. This article is restricted to considering two specific service areas which are often confronted with limited authorisation schemes: radio frequencies (electronic communications services) and gambling activities (services on

⁴ See most recently: Case C-42/07 *Liga and Bwin* [2009] nyp. See for a recent survey of the ECJ case law on gambling activities the opinion of the Advocate General in this case, para. 59-88.

⁵ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ 2006, L 376/36. See for general discussions of the Service Directive, among others: G. Davies, ‘The Services Directive: extending the country of origin principle and reforming public administration’ [2007] *European Law Review* p. 232-245; C. Barnard, ‘Unravelling the Services Directive’ [2008] *Common Market Law Review* p. 323-394; A. Hatje, ‘Services Directive – A Legal Analysis’, in: F. Breuss, G. Fink & S. Griller (eds.), *Services liberalisation in the internal market* (Wien 2008) p. 1-20; N. Maydell, ‘The Services Directive and Existing Community Law’, in: Breuss, Fink & Griller (2008) p. 21-124, and several contributions in J.W. van de Gronden (ed.), *The EU and WTO Law on Services* (Alphen aan den Rijn 2009).

⁶ The condition ‘scarcity of available natural resources or technical capacity’ will be abbreviated to ‘natural or technical scarcity’.

⁷ When considering limited authorisation schemes, the term ‘allocation’ instead of the general term ‘grant’ will be used mainly. Cf. Article 10 Directive 2003/87/EC.

organizing games of chance). The award of service concessions is also examined: although these concessions do not classify as authorisations but as public contracts, a *selection* should take place as well. Therefore, it is possible that requirements on the award of service concessions apply also to the allocation of authorisations. Finally, once some general requirements have been identified on the allocation of a limited number of authorisations on service activities, this framework may be applied to authorisation schemes on goods as well.

The article starts with clarification of the term ‘limited authorisation schemes’ and with the identification of the key questions when granting a limited number of authorisations (§ 2). Next, the sources of European law relevant for answering these key questions are outlined (§ 3). § 4 analyses the conditions under which the number of authorisations may be limited. This limitation is a necessary precondition for the allocation of these authorisations. In particular, the question is addressed whether ‘natural or technical scarcity’ is itself an overriding reason to limit the number of authorisations. In § 5, general requirements on the selection procedure are considered, in the context of both the initial grant and the renewal. Questions on the temporal and territorial scope of authorisations in limited authorisation schemes are dealt with in § 6. In the conclusion, limited authorisation schemes are placed next to other, ‘unlimited’ authorisation schemes (§ 7).

2 Limited Authorisation Schemes

2.1 Terminology

Although a general definition of ‘authorisation’ is lacking in European law,⁸ some specific directives define an authorisation or an equivalent concept.⁹ The Services Directive describes an ‘authorisation’ as any formal or implied decision from a competent authority, concerning access to a service activity or the exercise thereof.¹⁰ For the purposes of this article, an authorisation will be defined as the permission of a public authority to exercise a certain (economic) activity.¹¹

⁸ Cf. P. Houweling, *Van vergunning naar algemene regel* (Den Haag 2006) p. 21.

⁹ For instance, Article 2(2a) of the Authorisation Directive defines a ‘general authorisation’ as ‘a legal framework established by the Member State ensuring rights for the provision of electronic communications networks or services and laying down sector specific obligations that may apply to all or to specific types of electronic communications networks and services’. This definition is too broad for the purposes of this article, since these ‘general authorisations’ can be opposed to ‘individual rights of use’.

¹⁰ See the definition of ‘authorisation scheme’ in Article 4(6) Services Directive.

¹¹ The assumption in this definition is that the exercise of an activity includes the access to it. Cf. B.J. Drijber & H.M. Stergiou, ‘Public Procurement Law and Internal Market Law’

Two elements of this definition merit attention. First, the public authority confers a *right* to a private party when granting an authorisation: it allows a certain activity to be exercised. Because of this favouring character, it can be assumed that there exists a certain *demand* for such authorisations, especially if we restrict ourselves to economic activities, representing an economic value.¹² Secondly, authorisations have a *unilateral* character as opposed to the bilateral character of a contract.¹³

An authorisation can occur under different names, such as authorisation, licence, approval, permission, permit or concession.¹⁴ Concessions deserve some separate discussion. In its interpretative communication on concessions under Community law, the Commission defined 'concessions' as 'acts attributable to the State whereby a public authority entrusts to a third party – by means of a contractual act or a unilateral act with the prior consent of the third party – the total or partial management of services [as far as they constitute economic activities, CJW] for which that authority would normally be responsible and for which the third party assumes the risk'. It distinguished these concessions clearly from 'acts whereby a public authority authorises the exercise of an economic activity, even if these acts would be regarded as concessions in certain Member States' (authorisations) and from 'acts concerning non-economic activities'.¹⁵ Hence, although concessions are distinguished from authorisations, some acts called 'concessions' might classify as authorisations.¹⁶

What is meant by saying that the number of available authorisations is *limited* in advance? Since a limitation to the *number* of authorisations is a *quantitative* limitation, it may be useful to consider the interpretation of the term *quantitative restrictions* in Articles 28 and 29 of the EC Treaty on the free movement of goods. In *Geddo*, the ECJ defined quantitative restrictions broadly as 'measures which amount to a total or partial restraint of, according to the circumstances, imports, exports or goods in transit'.¹⁷ Measures having equivalent effect need not take the form of such a restraint.

[2009/3] *Common Market Law Review* p. 823, describing an authorisation as 'a permission to engage in a certain (economic) activity'.

¹² In *Deliège*, the ECJ ruled that the pursuit of an activity as an employed person or the provision of services for *remuneration* must be regarded as *an economic activity*, provided that the work performed is genuine and effective and not such as to be regarded as purely marginal and ancillary. See Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, para. 53 and 54.

¹³ See also Drijber & Stergiou (2009) p. 823.

¹⁴ See recital 39 of the preamble of the Services Directive.

¹⁵ See the Commission interpretative communication on concessions under Community law, OJ 2000, C 121/5. In fact, a concession being a unilateral act *with prior consent*, has a bilateral character as well.

¹⁶ See for instance Case C-462/99 *Connect Austria* [2003] ECR I-5197, para. 17.

¹⁷ Case 2/73 *Geddo* [1973] ECR 865, para. 7.

In *Dassonville*, the ECJ gave a broad definition of these measures within the meaning of Article 28, ruling that ‘the prohibition of measures having equivalent effect to quantitative restrictions [...] covers all legislation of the Member States that is capable of hindering, directly or indirectly, actually or potentially, intra-Community trade.’¹⁸

Although these definitions of quantitative restrictions are useful when defining the phenomenon of a limited number of available authorisations, it should be emphasized that not every quantitative restriction implies a limitation to the number of authorisations. For example, if a licence allows importing a fixed maximum number of units of certain goods, then the number of available licences need not have to be limited beforehand. However, if only a limited number of licences are available for the import of those goods, then the quantitative restriction is a limitation to the number of licences.

We shall use the term ‘limited authorisation schemes’ only if the restriction itself is a limitation of the number of authorisations or if there is an immediate link between the restriction and a limitation of the number of authorisations. This definition fits with the distinction between quantitative restrictions and measures having equivalent effect in Articles 28 and 29 EC. Hence, ‘measures having equivalent effect’ to a limitation of the number of available authorisations – such as authorisation schemes with a granting condition that only a limited number of applicants can fulfil – fall outside the scope of this article.

Thus, a limitation to the number of available authorisations can first consist of an explicit quantitative restriction, like a legal monopoly or another legal maximum of available authorisations. In such cases, the legal provision stipulates explicitly how many authorisations may be granted at most. For example, Article 16(1) *Wet op de Kansspelen* (Dutch Gambling Act) restricts the number of authorisations for organizing bets on sporting events to one.

Secondly, the number of available authorisations can be limited in a more implicit manner. In those cases, the design of the authorisation scheme *amounts to* a limitation to the number of authorisations. This is the case when a limitation to the number of authorisations follows directly from another quantitative variable or from a territorial restriction. An example of the first is a requirement according to which no more than one newspaper shop or one driving school may be opened for a given number of people, say 2000 inhabitants. A requirement limiting the number of service providers according to a minimum geographical distance between providers, say at least 5 kilometres between two petrol stations, is an example of a territorial

¹⁸ Case 8/74 *Dassonville* [1974] ECR 837, para. 5, and Case C-141/07 *Commission v. Germany* [2008] ECR I-6935, para. 28. See with respect to Article 29: Case 15/79 *Groenewald* [1979] ECR 3409, para. 7.

restriction resulting in a quantitative restriction.¹⁹ Thus, the territorial scope of an authorisation may limit the number of available authorisations. Nevertheless, not every territorial restriction implies a quantitative restriction. For example, if a service provider may only provide services within a radius of 10 kilometres, there is no limitation in advance to the number of service providers within that area.

A territorial restriction might imply a restriction to the number of available authorisations if the authorisation concerns the use of a natural resource which is only available in limited quantity. Here, the territorial restriction is not a legal, but a natural restriction. A clear example is the storage licence in Article 25 *Mijnbouwwet* (Dutch Mining Act), on the basis of which minerals may be stored under the ground: since only a limited number of places are suitable for storage, only a limited number of licences can be granted.

We should make a final note on terminology. The term ‘scarce licences’ has been used in academic literature to describe the situation in which there are only a limited number of available authorisations. Under this definition, *all* authorisations that are limited in number are scarce, irrespective of the reason for this restriction.²⁰ However, the term ‘scarce licences’ has been used in a more restrictive meaning as well, referring only to authorisations that are limited in number ‘because of natural or technical *scarcity*’.²¹ In order to prevent misunderstanding, the term ‘scarce licences’ or ‘scarce authorisations’ will be avoided in this article. Instead, authorisation schemes in which the number of available authorisations is limited beforehand will be referred to as ‘limited authorisation schemes’.²²

¹⁹ European Commission, *Handbook on implementation of the Services Directive* (Luxembourg 2007) p. 33.

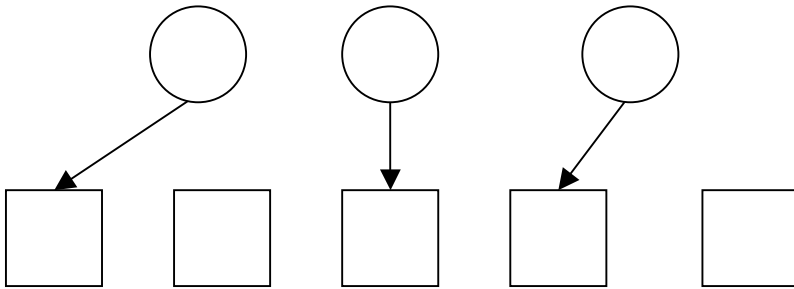
²⁰ See the Dutch Ministry of Economic Affairs, *Radio Spectrum Policy Memorandum 2005* (The Hague 2006) p. 18, and M. Cave & F. Minervini, ‘Economics of spectrum: implications for the Netherlands’ [2006/2] *Mediaforum* p. 32. See in the Dutch literature for example: F.J. van Ommeren, *Schaarse vergunningen. De verdeling van schaarse vergunningen als onderdeel van het algemene bestuursrecht* (Deventer 2004) p. 2.

²¹ See in Dutch literature on the Services Directive: E. Belhadj, S.J.H. Evans & J.W. van de Gronden, ‘De Dienstenrichtlijn: de gebreken van de deugden? Een eerste verkenning van de Dienstenrichtlijn’ [2007/4] *SEW* p. 146; R.J.G.M. Widdershoven & A.P.W. Duijkersloot, ‘De Dienstenrichtlijn en het algemeen bestuursrecht’ [2007/5] *RegelMaat* p. 191, and E. Steyger, ‘De implementatie van de Dienstenrichtlijn en het algemeen bestuursrecht’ [2008/1] *Nederlands Tijdschrift voor Bestuursrecht* p. 4 and 6.

²² Cf. Case C-124/97 *Läärä* [1999] ECR I-6067, para. 37; Case C-67/98 *Zenatti* [1999] ECR I-7289, para. 35; Case C-42/07 *Liga and Bwin* [2009] nyp, para. 64 (‘limited authorisation’).

2.2 Key Questions

Whenever the number of available authorisations is limited, several questions arise, uncommon to ‘traditional’ authorisation schemes. To put it somewhat simplistically: in traditional authorisation schemes, an authorisation is granted if the applicant satisfies the conditions for granting.²³ However, if the number of available authorisations for a certain activity has been limited *a priori*, then the single circumstance that all granting conditions have been met is insufficient to ensure granting of the authorisation. The possibility exists that the number of applicants satisfying these granting conditions exceeds the number of available authorisations. In such a situation, the administrative authorities have to make a *choice* by applying a *selection procedure* among (qualified) applicants.²⁴ This can be illustrated by the following figure:²⁵



Several selection (allocation) procedures may be applied: an auction, a beauty contest,²⁶ a lottery or allocation in order of receipt of the applications (‘first come first served’). In all these selection procedures, there is a different selection criterion, like highest price, quality, waiting time or lot. It is worth mentioning that all these selection procedures apply to a ‘market’ setting where the administrative authorities create the ‘supply’, *i.e.* the number of authorisations, and the applicants create the ‘demand’. This demand is to be expected in particular if the authorisation represents a certain economic value.

To a certain extent, a *procurement* setting reflects the reversed market setting: an administrative authority demands certain goods or services, which can be supplied by several parties. In such a setting, the administra-

²³ Cf. Article 10(5) Services Directive: ‘The authorisation shall be granted as soon as it is established [...] that the conditions for authorisation have been met.’

²⁴ Of course, traditional authorisation schemes contain a more implicit element of choice in that several interests must be weighed against each other.

²⁵ The circles and squares represent the authorisations and the applicants respectively.

²⁶ A beauty contest is sometimes called a comparative test or a tendering procedure. This last term should not be confused with the use of this term in procurement settings.

tive authority is not interested in the question of which party is willing to pay most, but rather which party demands the lowest price. Therefore, in procurement settings, the structure of selection procedures should sometimes be reversed. Despite these differences between limited authorisation schemes and procurement settings, they share the common need for selection: an equal outcome for every applicant is impossible.

When considering the design of the selection procedure, we should distinguish between the initial allocation and subsequent allocations. An extra question in subsequent allocations is whether or not (automatic) renewal of the authorisation of the incumbent is allowed.

If renewal is at stake, then the temporal scope of the authorisation has been limited. Besides the temporal scope, the territorial scope of authorisations can be limited. Although these scope questions do not arise exclusively in the context of *limited* authorisation schemes, they get their own meaning in this context. For example, if only one authorisation is granted for an unlimited time period, then other potential candidates will not have any opportunity to obtain that authorisation in the future, except for withdrawal of an authorisation. However, if the authorisation is granted for a limited time period, then a losing participant in the selection procedure will have a new opportunity to compete for the same authorisation in the future. The same holds for the territorial scope of an authorisation. If this scope is limited to a certain area, then candidates can compete for similar authorisations in other areas. In sum, a restricted temporal or territorial scope of an authorisation in a limited authorisation scheme implies that more than one selection procedure is necessary, such that there are more opportunities to obtain an authorisation.

When identifying general requirements in European law on the allocation of a limited number of authorisations, we restrict ourselves to the following three issues: (i) the lawfulness of a limitation to the number of available authorisations, (ii) the selection procedure and (iii) the temporal and geographical scope of the authorisation. Of course, several other issues can be considered as well. An example is the tradability of authorisations: if the number of authorisations is limited, then the possibility of trading creates the opportunity for a losing participant in the selection procedure to obtain an authorisation in the end.²⁷ However, the Services Directive does not provide us with any guidelines on this issue.

²⁷ The scheme for greenhouse gases emission allowance trading is based on this trading possibility. A proposed amendment of the Authorisation Directive aims at ensuring a smooth transition to the introduction of spectrum trading. See the Proposal for a Directive of the European Parliament and of the Council amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and services, and 2002/20/EC on the authorisation of electronic communications networks and services, COM (2007) 697 final, p. 6.

3 Relevant Sources of European Law

3.1 Fundamental Freedoms: Goods and Services

In general, an authorisation scheme is considered to be a restriction to one of the fundamental freedoms of the EC Treaty.²⁸ These freedoms are related to each other, since they are all elements of the internal market which is described as ‘an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty’ (Article 14(2) EC). In this article, we restrict ourselves to limited authorisation schemes with respect to goods and services (including establishment).

With respect to *goods*, quantitative restrictions on imports and exports and all measures having equivalent effect shall be prohibited between Member States (Articles 28 and 29 EC). However, the provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on certain grounds, like public policy (Article 30 EC). Besides, there can be ‘mandatory requirements’, like consumer protection and public health, that justify non-discriminatory rules restricting the free movement of goods.²⁹

When considering the free movement of *services* and the freedom of *establishment*, there is no clear link with quantitative restrictions. According to Article 43 EC, ‘restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited’, whereas Article 49 EC states that ‘restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended’. Again, restrictions to these freedoms can be justified by ‘imperative requirements in the general interest’ or ‘objective justifications’,³⁰ besides exceptions on grounds of public policy, public security and public health (Articles 46 ad 55 EC).

Although all these freedoms relate to each other via the internal market, they have their own legal framework and should therefore be distinguished.³¹ According to Article 50 EC, services within the meaning of the EC Treaty

²⁸ See in the context of goods: C-249/07 *Commission v. the Netherlands* [2008] nyp, para. 24.

See in the context of establishment: C-55/94 *Gebhard* [1995] ECR I-4165, para. 37. See also S.J.H. Evans, ‘The Services Directive: (Too) Great Expectations? An initial overview of the rights and obligations under the Services Directive’, in: Van de Gronden (2009) p. 18.

²⁹ See Case 120/78 *Cassis de Dijon* [1979] ECR 649, para. 8. See more extensively on this topic: P. Craig & G. de Búrca, *EU Law. Text, Cases and Materials* (Oxford 2007) p. 705-714.

³⁰ See for instance Case 33/74 *Van Binsbergen* [1974] ECR 1299, para. 14, and Case C-55/94 *Gebhard* [1995] ECR I-4165, para. 37.

³¹ See in more detail: C. Barnard, *The Substantive Law of the EU: the four freedoms* (Oxford 2007).

are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.³² Hence, services are defined complementary to goods, which are in turn defined as ‘products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions.’³³ One characteristic of services, in comparison with goods, is that the persons of service provider and service recipient are relatively important.³⁴ The difference between services and establishment is a relative one: the freedom of establishment has to do with service provision ‘on a stable and continuous basis’, whereas the free movement of services relates to temporary service provision.³⁵

Despite these mutually exclusive definitions, the general legal frameworks on the free movement of goods and services (including the freedom of establishment) show similarities: a restriction to one of these freedoms is prohibited, unless it is justified by some imperative or mandatory requirement.³⁶ These frameworks are sometimes even said to be converging.³⁷ This should be kept in mind when considering legal frameworks on limited authorisation schemes: general requirements on the allocation of a limited number of authorisations with respect to services might apply to goods as well. Nevertheless, such an extension should always be carried out carefully.

Another restriction to an immediate wide application of general requirements on limited authorisation schemes is the cross-border element in the definition of the several freedoms in the EC Treaty. Traditionally, the ECJ has refused to apply the rules on free movement to cases without any cross-border element.³⁸ However, the weight of this cross-border requirement seems to have been relaxed.³⁹ Nowadays, the nature and the substance of the national measure – instead of the circumstances of the case – seem

³² See on this definition for instance: Barnard (2008) p. 331-334.

³³ Case 7/68 *Commission v. Italian Republic* [1968] ECR 423, para 1.

³⁴ J.W. van de Gronden, *Hervormingen in een dienstbaar Europa. Over diensten, uitdagingen en Europees recht* (Deventer 2008) p. 2.

³⁵ The temporary nature of service provision should not only be determined in the light of the duration of the provision of the service, but also of its regularity, periodicity or continuity. See Case C-55/94, *Gebhard* [1995] ECR I-4165, para. 25-27.

³⁶ It is important to note that the legal framework developed in *Gebhard*, was intended to apply to all restrictions of one of the freedoms. See Case C-55/94, *Gebhard* [1995] ECR I-4165, para. 37.

³⁷ See for example: K.J.M. Mortelmans, ‘De interne markt: is er nog ruimte voor binnen-grenzen?’, in: E.R. Manunza & L.A.J. Senden (eds.), *De EU: de interstatelijkheid voorbij?* (Nijmegen 2006) p. 20-21.

³⁸ See for instance: Case 20/87 *Gauchard* [1987] ECR 4879, para 12-13. This lack of any cross-border element is called the ‘affaire interne’. See Drijber & Stergiou (2009) p. 816.

³⁹ See Case C-448/98 *Guimont* [2000] ECR I-10663, para. 21-24 (free movement of goods) and Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch a.o.* [2002]

to determine whether the measure may have external effect and might therefore, actually or potentially, obstruct free movement. Therefore, if an authorisation scheme potentially influences intra-Community trade, then it falls within the scope of the fundamental freedoms.⁴⁰

3.2 Services Directive

In the absence of any secondary legislation, the consequences of an authorisation scheme should be judged within the legal framework of the fundamental freedoms of the EC Treaty. On the contrary, if harmonization has taken place, then the consequences should be judged primarily within the context of the harmonising directive. As a consequence, (exhaustive) harmonization excludes the possibility of invoking an overriding reason outside the framework of the directive to justify a restriction to one of the freedoms.⁴¹

The Services Directive distinguishes itself from other directives because of its wide scope: it applies to all services, unless they are excluded from its scope in the Service Directive itself (Article 2). With reference to Article 50 of the EC Treaty, Article 4(1) Services Directive defines a *service* as ‘any self-employed economic activity, normally provided for remuneration’.

There is some debate whether the Services Directive applies only to cross-border situations or to (completely) internal situations as well. Most authors seem to argue that, since harmonization has taken place through the Services Directive, the requirement of a cross-border element no longer applies.⁴² Even authors who argue that the Services Directive only covers cross-border situations, admit that the Services Directive will indirectly apply to internal situations because of voluntary harmonization.⁴³ Therefore, either for principal or for pragmatic reasons, the Services Directive is considered to cover internal situations as well. This holds for limited authorisation schemes, in particular.

Next, there is some debate on the relation between the Services Directive and the free movement of goods. The Services Directive does not concern the application of Articles 28 to 30 EC,⁴⁴ such that the *manufacturing* of

ECR I-2157, para. 24-25. See with respect to gambling activities: Case C-6/01 *Anomar* [2003] ECR I-8621, para. 39-42.

⁴⁰ See more extensively: Mortelmans (2006) p. 21-28.

⁴¹ Cf. Case C-5/77 *Tedeschi* [1977] ECR 1555, para. 35. See also Belhadj, Evans & Van de Gronden (2007) p. 142.

⁴² See for instance: Davies (2007) p. 241-243; Barnard (2008) p. 351-352; Evans (2009) p. 18; Drijber & Stergiou (2009) p. 816.

⁴³ Cf. B. Hessel, ‘The Effects of the Services Directive for Local and Regional Authorities’, in: Van de Gronden (2009) p. 84-85.

⁴⁴ See recital 76 of the preamble of the Services Directive.

goods is considered to fall outside its scope.⁴⁵ Rules on the *sale* of a product concern the free movement of goods as well.⁴⁶ However, it has been suggested that the *distribution* of goods can sometimes be considered as a service.⁴⁷ In any event, if one authorisation scheme deals with both goods and services, then it should satisfy the conditions of the Service Directive.⁴⁸ Therefore, it is to be expected that the Services Directive will have a wider scope than only ‘pure’ service provisions.⁴⁹

The relevant provisions on the allocation of a limited number of authorisations are part of chapter III of the Services Directive.⁵⁰ This chapter, dealing with the freedom of establishment, contains provisions on authorisations (Articles 9 to 13) and on requirements prohibited or subjected to evaluation (Articles 14 and 15).⁵¹ According to Article 15, quantitative restrictions should satisfy the conditions of non-discrimination, necessity (‘justified by an overriding reason relating to the public interest’) and proportionality. Article 11 concerns the duration of an authorisation. It allows for an exception to the obligation of an unlimited duration of an authorisation ‘where the number of available authorisations is limited by an overriding reason relating to the public interest’. Article 12 contains provisions on the duration, selection procedure and renewal of authorisations in cases ‘where the number of authorisations available for a given activity is limited because of the scarcity of available natural resources or technical capacity’. Since both articles deal with the duration of an authorisation, ‘overriding reasons relating to the public interest’ and ‘natural or technical scarcity’ seem to be complementary.

⁴⁵ Cf. Barnard (2008) p. 334-335.

⁴⁶ See for instance: Case C-239/90 *Boscher a.o.* [1991] ECR I-2023, para. 8; Case C-20/03 *Burmanjer a.o.* [2005] ECR I-4133, para. 21-22 and 33-35.

⁴⁷ Hessel (2009) p. 89. See also: European Commission (2007) p. 13: ‘When implementing the Directive, Member States need to bear in mind that whereas the manufacturing of goods is not a service activity, there are many activities ancillary to them (for example retail, installation and maintenance, after-sale services) that do constitute a service activity and should therefore be covered by the implementing measures.’

⁴⁸ For example, if services are provided at a physical market and one authorisation scheme is applied for assigning market stands, then this authorisation scheme should satisfy the conditions of the Services Directive, even if most of the market stands deal exclusively with the selling of goods.

⁴⁹ Barnard (2008) p. 335.

⁵⁰ The free movement of services is the subject of chapter IV of the Services Directive. Whenever authorisation schemes make no distinction between establishment and temporary service provision, the provisions of chapter III of the Services Directive are relevant to temporary service provision as well (cf. *Kamerstukken II* 2007/08, 31579, no. 3, p. 42-43).

⁵¹ A *requirement* is, among other things, any obligation, prohibition, condition or limit provided for in the laws, regulations or administrative provisions of the Member States (Article 4(7)).

3.3 Specific Service Areas: Radio Frequencies and Gambling Activities

We mentioned already that requirements on the allocation of a limited number of authorisations have been developed in specific service areas. These specific provisions may be helpful in completing and interpreting the provisions of the Services Directive. Given the distinction between ‘overriding reasons relating to the public interest’ and ‘natural or technical scarcity’ in the Services Directive, it is useful to consider a specific instance of both categories. As for natural or technical scarcity, we consider electronic communications services. The number of available authorisations for these service activities is sometimes limited as far as they concern the use of radio frequencies. This limitation has to do with the scarcity of the radio spectrum.⁵² In fact, the radio spectrum as a natural resource is not scarce in itself, but the possibilities to use radio frequencies simultaneously and without interference, are limited, given the current technological possibilities.⁵³ With respect to overriding reasons relating to the public interest, we consider gambling activities. A limitation to the number of authorisations for these activities has not to do with scarcity of available natural resources or technical capacity,⁵⁴ but with ‘reasons of overriding general interest’, like ‘the objectives of consumer protection and the prevention of both fraud and incitement to squander on gaming, as well as the general need to preserve public order’.⁵⁵

Both service areas have been excluded from the scope of the Services Directive.⁵⁶ Spectrum policy has been harmonized at Community level to a considerable extent, *inter alia* by the above-mentioned Authorisation Directive containing a specific legal framework for the assignment of radio frequencies. By contrast, the area of gambling activities has not been confronted with any form of harmonization. In its absence, the ECJ case law on gambling activities is based on general rules derived from the EC Treaty and the fundamental freedoms.⁵⁷

⁵² See also recital 22 of the preamble the Authorisation Directive, characterizing radio frequencies as *scarce resources*.

⁵³ See more extensively: G. Staple & K. Werbach, ‘The End of Spectrum Scarcity’ [2004/3] *IEEE Spectrum* p. 48-52.

⁵⁴ See also the note by J.H. Jans under *Raad van State* 18 July 2007, *AB* 2007, 302.

⁵⁵ See for instance: Joined Cases C-338/04, 359/04 and 360/04 *Placanica and Others* [2007] ECR I-1891, para. 46.

⁵⁶ See Article 2(c) and (h) for electronic communications services and networks and certain gambling activities respectively.

⁵⁷ See explicitly the Advocate General in his opinion on Case C-42/07, *Liga and Bwin* [2009] nyp, arguing that games of chance and gambling have not so far been the subject of any regulation or harmonisation within the Union (para. 46), that the regulations of the Member States concerning games of chance and gambling must not interfere with the

In both areas, the dividing line between goods and services is not always clear. With respect to lottery activities, the ECJ held that where a national measure restricts both the free movement of goods and the freedom to provide services, this measure, in principle, will be examined in relation to only one of those two fundamental freedoms where it is shown that one of them is entirely secondary in relation to the other and may be considered together with it.⁵⁸ However, in the field of telecommunications, it is sometimes difficult to determine which freedom should take priority, since the two aspects are often intimately linked.⁵⁹ Accordingly, the question whether a certain restriction is justified must be examined simultaneously in the light of both Article 28 and Article 49 of the Treaty.⁶⁰ Although the Authorisation Directive on electronic communications services deals by definition with services, and gambling activities have been judged to relate primarily to services as well,⁶¹ these delineation questions suggest that general requirements on limited authorisation schemes with respect to services might also apply to goods.

3.4 Authorisations and Service Concessions

It has already been mentioned that the allocation of a limited number of authorisations is to some extent the reverse of public procurement of public *contracts*. However, both market settings are confronted with selection problems. Since general requirements on public procurement may be relevant for the allocation of a limited number of authorisations as well, it is worth considering public procurement law. According to settled case law, ‘the purpose of coordinating at Community level the procedures for the award of public contracts is to eliminate barriers to the freedom to provide *services and goods* [italics, CJW]’.⁶² Hence, public procurement rules are in

obligations of the Member States in the context of the EC Treaty, particularly in relation to the freedoms of movement (para. 56) and that limiting the powers of the Member States in the field of games of chance and gambling does not have the aim of establishing a common market and the liberalisation of that area of activity (para. 249).

⁵⁸ Case C-275/92 *Schindler* [1994] ECR I-1039, para. 22.

⁵⁹ For instance, in *Sacchi*, the ECJ ruled that ‘the transmission of television signals [...] comes, as such, within the rules of the Treaty relating to services’, whereas ‘on the other hand, trade in [...] products used for the diffusion of television signals, are subject to the rules relating to freedom of movement for goods’ (See Case 155/73 *Sacchi* [1974] ECR 409, para. 6-7).

⁶⁰ Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, para. 31-33.

⁶¹ See for lottery activities: C-275/92 *Schindler* [1994] ECR I-1039, para. 24 and 25. See for other gambling activities for example Case C-6/01 *Anomar* [2003] ECR I-8621, para. 56.

⁶² See for example Case C-380/98 *University of Cambridge* [2000] ECR I-8035, para. 16; Case C-507/03 *Commission v. Ireland* [2007] ECR I-9777, para. 27.

essence a concrete expression of several fundamental freedoms relating to the internal market.⁶³

The most important directive in this respect is the Public Sector Directive.⁶⁴ This directive deals with the coordination of procedures for the award of public contracts and contains a lot of (detailed) provisions on, *inter alia*, advertising, transparency and the conduct of the award procedure. A *public contract* is defined as a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities (Article 1(2a)). It can have as its object the execution of works, the supply of products or the provision of services. In principle, the Public Sector Directive does apply to all public contracts above a certain threshold amount (Article 7).⁶⁵

If the consideration does not solely consist of payment, the public contract is called a concession. A service concession is defined as 'a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment'.⁶⁶ These service concessions are excluded from the scope of the Public Sector Directive (Article 17). Nonetheless, the ECJ ruled that in the absence of any (secondary) legislation, the consequences in Community law of the award of such concessions must be examined in the light of primary law and, in particular, of the fundamental freedoms provided for by the EC Treaty. Therefore, the award of such concessions should comply with the fundamental rules of the EC Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular.⁶⁷ Again, these rules only apply if there is a cross-

⁶³ See more extensively on this relationship between procurement law and internal market law: Drijber & Stergiou (2009) p. 805-846.

⁶⁴ Directive 2004/18/EC of the European Parliament and the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ 2004, L 134/114. Besides, there is Directive 2004/17/EC on the coordination of the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ 2004, L 134/1 ('Utilities Directive').

⁶⁵ An exception is the non-priority category of services (the so-called 'II B'-services). These public service contracts are solely subject to the obligations to define the technical specifications (Article 23) and to send a notice of the results of the award procedure (Article 35(4)). The reason for this restricted regime is the assumption that contracts for such services are not, in the light of their specific nature, of cross-border interest such as to justify the other provisions of the directive being applicable. See Case C-507/03 *Commission v. Ireland* [2007] ECR I-9777, para. 24 and 25.

⁶⁶ Article 1(4). The Public Sector Directive defines public works concessions as well.

⁶⁷ Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, para. 60. See also: Case C-231/03 *Coname* [2005] ECR I-7287, para. 16; Case C-458/03 *Parking Brixen* [2005] ECR I-8585, para. 49 and 50.

border element in the award of service concessions,⁶⁸ whereas the Public Sector Directive harmonizes internal situations on the award of public contracts as well.⁶⁹

In so far as the consideration for a service concession consists solely of the right to exploit the service, the service concession bears great resemblance to an authorisation to provide a service. The remaining difference is that where an authorisation is a (unilateral) permission from an administrative authority, a service concession is characterized by its bilateral nature.⁷⁰ We saw already that this distinction between service concessions and authorisations seems to be important in EC law. This is confirmed by the Services Directive, which states explicitly that it does not deal with rules on public procurement.⁷¹

In sum, distinctions should be made between goods and services and between authorisations and concessions. The Services Directive is located in the middle of these distinctions, since it deals with *authorisation* schemes on *service* activities. Due to this position, we are mainly interested in service areas involving radio frequencies and gambling activities as far as they are concerned with authorisation schemes. However, we should realise that service concessions can occur in these areas as well.⁷² Within the Services Directive, a distinction seems to be made between natural and technical scarcity and overriding reasons relating to the public interest. Whereas services involving radio frequencies belong to the first category, gambling activities are part of the second category. This distinction can be applied to

⁶⁸ Cf. Case C-231/03 *Coname* [2005] ECR I-7287, para. 20. Most, if not all procurement procedures seem to contain this interstate element. See E.R. Manunza 'Alle aanbestedingen zijn interstatelijk', in: Manunza & Senden (2006) p. 71-89. The above-mentioned non-priority category of services is in general assumed *not* to be of cross-border interest. Only if it is established that these services are nonetheless of 'certain cross-border interest', then the fundamental rules of the EC Treaty apply, in particular the principles resulting from the Articles 43 and 49 EC (Case C-507/03 *Commission v. Ireland* [2007] ECR I-9777, para. 29). See more extensively on the relation between 'certain cross-border interest' and 'affaire interne': Drijber & Stergiou (2009) p. 815-817.

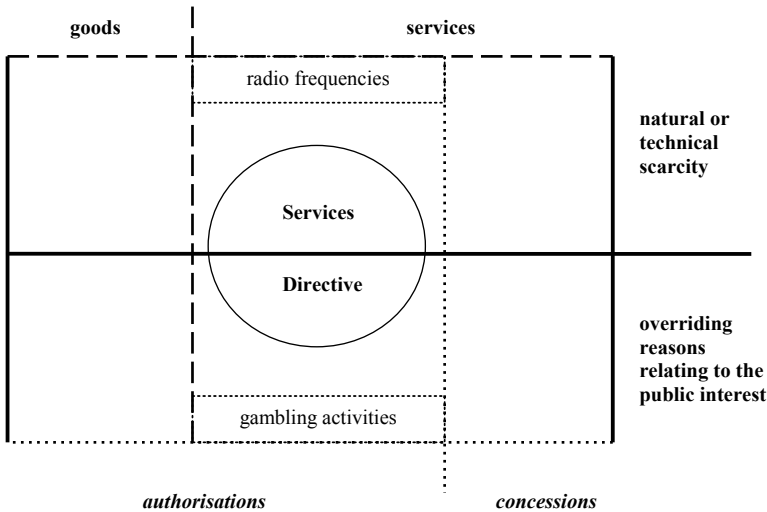
⁶⁹ Cf. Steyger (2008) p. 4-5.

⁷⁰ Cf. Drijber & Stergiou (2009) p. 823-824.

⁷¹ See recital 57 of the preamble of the Services Directive. Nevertheless, some authorisations may be called 'concessions' in national legislation. Recital 39 of the Services Directive speaks about *administrative* procedures for granting these 'concessions'.

⁷² For gambling activities, see for an explicit example: Case C-260/04 *Commission v. Italian Republic* [2007] ECR I-7083, para. 20. For electronic communications services, this can be derived from Article 13 of the Public Sector Directive, which (in addition to the exclusion of service concessions in Article 17) excludes public contracts from the scope of the Directive insofar as they are intended primarily to allow the contracting authorities to exercise certain activities in the *telecommunications sector*. Otherwise, the Public Sector Directive would have applied to public contracts and service concessions in this sector.

goods and to service concessions as well. These remarks can be summarized in the following figure:



Despite all these distinctions, there might be good reason for extending some results on the award of service concessions to the allocation of service authorisations; after all, both areas are confronted with a selection problem. Moreover, general requirements on the selection procedure are derived from the fundamental rules of the EC Treaty, which do not distinguish between concessions and authorisations. As far as these rules are derived from the fundamental freedoms together, the distinction between goods and services should not be made too absolute.

In the following analysis the lawfulness of a limitation in advance of the number of available authorisations will be considered. Next, the selection procedure and the temporal and geographical scope of the authorisation will be examined. Whereas the provisions on the Services Directive will be the central starting point, results on the award of service concessions are discussed as far as they contribute to the development of general requirements on the selection procedure. Moreover, recourse will be made to the specific service areas of electronic communications services (radio frequencies) and gambling activities whenever this is useful for completing, confirming or interpreting the results of the Services Directive.

4 Lawfulness of Limiting the Number of Authorisations

4.1 Lawfulness of Authorisation Schemes

Although an authorisation scheme itself constitutes a restriction to one of the fundamental freedoms, an authorisation scheme is not prohibited *per se*. According to Article 9(1) of the Service Directive, an authorisation scheme is justified if (a) the authorisation scheme does not discriminate against the provider in question, (b) the need for an authorisation scheme is justified by an overriding reason relating to the public interest and (c) the objective pursued cannot be attained by means of a less restrictive measure, in particular because an *a posteriori* inspection would take place too late to be genuinely effective. When considering less restrictive measures, we can also think of general rules instead of individual authorisations. For example, Article 5(1) Authorisation Directive requires that Member States, where possible, in particular where the risk of harmful interference is negligible, shall not make the use of radio frequencies subject to the grant of individual rights of use but shall include the conditions for usage of such radio frequencies in the general authorisation.⁷³

These requirements in the Services Directive on the lawfulness of authorisation schemes seem to be mainly a codification of existing case law.⁷⁴ In *Gebhard*, the ECJ ruled already that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: (i) they must be applied in a non-discriminatory manner, (ii) they must be justified by imperative requirements in the general interest, (iii) they must be suitable for securing the attainment of the objective which they pursue and (iv) they must not go beyond what is necessary in order to attain it.⁷⁵ This legal framework remains relevant for service activities excluded from the scope of the Services Directive, like gambling activities.⁷⁶ The same holds for authorisation schemes with respect to goods.⁷⁷

4.2 Lawfulness of Limited Authorisation Schemes

If an authorisation scheme itself amounts to a restriction of the free movement of goods or services or the freedom of establish-

⁷³ It should be stressed that the Authorisation Directive distinguishes general authorisations from individual rights of use. See above note 9.

⁷⁴ See Davies (2007) p. 234. Evans (2009) p. 19, argues that this is not entirely true.

⁷⁵ Case C-55/94 *Gebhard* [1995] ECR I-4165, para. 37.

⁷⁶ See for example for gambling activities: Case C-234/01 *Gambelli* [2003] ECR I-13031, para. 64 and 65, referring to *Gebhard* as well.

⁷⁷ See recently: Case C-249/07 *Commission v. Netherlands* [2008] nyp, para. 44.

ment, then a limitation of the number of available authorisations is an even stronger restriction: even if the granting conditions have been met, then the authorisation is not guaranteed. It follows from the Services Directive that a restriction on the number of available authorisations is not prohibited *per se*: quantitative restrictions, like limited authorisation schemes,⁷⁸ are not listed under Article 14 ('prohibited requirements'), but under Article 15 ('requirements to be evaluated').

The Services Directive gives the following framework for evaluating the lawfulness of a limitation to the number of available authorisations. According to Article 15(2) jo. 15(3), quantitative or territorial restrictions⁷⁹ are only allowed if they satisfy the conditions of non-discrimination, necessity and proportionality. The condition of non-discrimination implies that requirements must be neither directly nor indirectly discriminatory according to nationality (paragraph 3(a)). On the basis of the condition of necessity, requirements must be justified by an overriding reason relating to the public interest (paragraph 3(b)). Several reasons have been recognized in the case law of the European Court of Justice as overriding reasons relating to the public interest, like public policy, public health and protection of consumers.⁸⁰ In relation to quantitative restrictions, it is important to note that grounds of an *economic* nature have not been recognized as overriding reasons relating to the public interest.⁸¹ Finally, according to the condition of proportionality, (i) requirements must be suitable for securing the attainment of the objective pursued, (ii) they must not go beyond what is necessary to attain that objective and (iii) it must not be possible to replace those requirements with other, less restrictive measures which attain the same result (paragraph 3(c)). It is clear that this framework resembles the legal framework for the lawfulness of an authorisation scheme itself.

The application of these conditions is illustrated very well in the area of gambling activities. In *Gambelli*, the ECJ repeated that restrictions on the freedom of establishment must be justified by imperative requirements in the general interest, must be suitable for achieving the objective which they pursue, must not go beyond what is necessary in order to attain it and must in any event be applied without discrimination.⁸²

⁷⁸ Cf. European Commission (2007) p. 33.

⁷⁹ Given the relatedness between quantitative and territorial restrictions when limiting the number of available authorisations, Article 15(2) Services Directive is right in mentioning territorial restrictions next to quantitative restrictions.

⁸⁰ See for a non exhaustive account: Article 4(8) and recital 40 of the preamble of the Services Directive.

⁸¹ See Case C-260/04 *Commission v. Italian Republic* [2007] ECR I-7083, para. 35. See also: European Commission (2007) p. 32.

⁸² Case C-243/01 *Gambelli* [2003] ECR I-13031, para. 65. With regard to the condition of suitability, the ECJ added that the restrictions must serve to limit betting activities 'in a consistent and systematic manner' (para. 67).

The ECJ has recognized several reasons of overriding general interest justifying a restriction: consumer protection, the prevention of both fraud and incitement to squander on gaming, the general need to preserve public order, etc.⁸³ However, invoking these overriding reasons is not sufficient to justify a legal monopoly on gambling activities. Such a monopoly or any other limitation of the number of authorisations must also be *suitable* and *necessary* to achieve the invoked objectives.⁸⁴

In Dutch case law, legal monopolies on casinos and betting on sporting events and horse-racing have been judged to be suitable and proportionate. According to the *Raad van State* (Council of State), it is plausible that admitting only one licensee does not only simplify the monitoring of the licensee, but also prevents competition between licensees with the risk of increasing gambling addiction.⁸⁵ However, the European Commission is of the opinion that the Dutch legal monopoly on betting on sporting events infringes Article 49 of the EC Treaty.⁸⁶

This current discussion between the European Commission and the Dutch government makes clear that the justification of an authorisation scheme differs from the justification of a limitation to the number of authorisations. For example, the need for monitoring might justify an authorisation scheme, but not necessarily a limitation to the number of authorisations.⁸⁷

⁸³ See for example: Case C-275/92 *Schindler* [1994] ECR I-1039, para. 57-60; Case C-124/97 *Läärä* [1999] ECR I-6067, para. 32 and 33; Case C-67/98 *Zenatti* [1999] ECR I-7289, para. 31; Case C-243/01 *Gambelli* [2003] ECR I-13031, para. 67; Joined Cases C-338/04, 359/04 and 360/04 *Placanica and Others* [2007] ECR I-1891, para. 46; Case C-260/04 *Commission v. Italian Republic* [2007] ECR I-7083, para. 27, and Case C-42/07 *Liga and Bwin* [2009] nyp, para. 56.

⁸⁴ See more extensively on the principle of proportionality and the review of restrictions on free movement, in particular with regard to gambling activities: J.H. Jans, R. de Lange, S. Prechal & R.J.G.M. Widdershoven, *Europeanisation of Public Law* (Groningen 2007) p. 151-160.

⁸⁵ *Raad van State* 14 May 2008, *LJN* BD1483, para. 2.15.7 (betting on sporting events and horse-racing) and *Raad van State* 14 March 2007, *AB* 2007, 212, note by J.H. Jans, para. 2.6.2.4 (casinos).

⁸⁶ See the reasoned opinion of the Commission, 2002/5443, C (2008) 638, annex to *Kamerstukken II* 2008/09, 24557, no. 98. According to the Commission, the objectives of combating criminality and reducing gambling activities might justify an authorisation scheme. However, whereas combating criminality is not an overriding reason justifying a *limited* authorisation scheme in the form of a legal monopoly, the objective of reducing gambling activities is, although an overriding reason for a legal monopoly, not being pursued in a consistent and systematic manner (para. 35 and 78). See also on this discussion: *Kamerstukken II* 2006/07, 24557, no. 77, and *Kamerstukken II* 2008/09, 24557, no. 93.

⁸⁷ Cf. *Raad van State* 18 July 2007, *AB* 2007, 302, note by J.H. Jans, para. 2.5.8, where the monitoring argument was insufficient to justify automatic renewal of certain gambling authorisations.

This requirement of subsidiarity ('less restrictive measures') can be seen in the area of electronic communications services as well: the reason justifying an authorisation scheme for the use of radio frequencies, *i.e.* the risk of harmful interference, differs from the reason for justifying a restriction of the number of authorisations, which is the need to ensure the efficient use of radio frequencies.⁸⁸

In conclusion, when considering the lawfulness of a restriction to the number of authorisations, it should be first verified whether the overriding reasons relating to the public interest in fact justify an authorisation scheme as such or whether they also justify a limitation to the number of available. Next, even if overriding reasons relating to the public interest do justify a limitation to the number of authorisations, it should be verified whether the conditions of non-discrimination and proportionality are satisfied as well.

4.3 Natural or Technical Scarcity

The Services Directive seems to distinguish between authorisations which are limited in number 'because of scarcity of available natural resources or technical capacity' (Article 12) and authorisations which are limited in number 'by an overriding reason relating to the public interest' (Article 11). In order to determine the exact relation between these two 'reasons', the question should be addressed what is meant by 'scarcity of available natural resources or technical capacity'. Next, it should be observed whether natural or technical scarcity can be seen as an 'overriding reason'.

The first draft of the Services Directive gave two examples of authorisation schemes falling under the scope of Article 12: the award of analogue radio frequencies and the exploitation of a hydro-electric plant.⁸⁹ The first example has been left out of the final version because electronic communications services are excluded from the scope of the Services Directive. Although it is not entirely clear why the other example has been deleted,⁹⁰ a reason might be that the generation of electricity by water force is considered to fall under the free movement of goods, hence falling outside the scope of the Directive.⁹¹

⁸⁸ See Article 5(1) and Article 5(5) Authorisation Directive respectively.

⁸⁹ See recital 28 of the preamble of the Proposal for a Directive of the European Parliament and of the Council on services in the internal market, COM (2004) 2 final.

⁹⁰ Nonetheless, it is clear that this example has been deleted for some explicit reason: in some intermediate version of the Services Directive, this example had already been left out, whereas the award of radio frequencies was still mentioned. See Council of the European Union, Proposal for a Directive of the European Parliament and of the Council on services in the internal market, no. 5161/05, p. 27.

⁹¹ Cf. Barnard (2008), p. 355. See also: P. Sablière, 'La mise en concurrence des concessions de force hydraulique' [2007] *AJDA* p. 2015.

The final version of the Services Directive does not only lack examples, but also a definition of ‘scarcity’. Although its meaning might seem clear at first sight, it should be realised that there is no univocal definition of scarcity. A common economic definition says that goods are scarce when their quantity is limited in relation to their capacity to satisfy needs.⁹² Given this definition, almost all goods are scarce. Since scarcity of goods is defined in relation to other goods, this notion of scarcity is called *relative scarcity*.⁹³

An opposite notion of scarcity is that of *absolute scarcity*. According to this definition, goods are scarce if their quantity has a finite physical limit (and cannot be extended by human intervention). Therefore, whereas relative scarcity presupposes the possibility of choice, this possibility is absent in the case of absolute scarcity.⁹⁴

A related distinction is that between natural and artificial scarcity.⁹⁵ Natural scarcity can be related to absolute scarcity: there is no possibility of increasing the quantity of certain goods. This holds in particular for natural resources, like soil, water or minerals.⁹⁶ Sometimes, resources themselves are available in unlimited quantity, but simultaneous use of this resource might be technically impossible. A good example is the radio spectrum with its radio frequencies. In that case, there is no *natural* scarcity, but *technical* scarcity. Both kinds of scarcity differ from *artificial* scarcity in the sense that the possibility to increase the supply exists only in the case of artificial scarcity.

When considering scarcity of available natural resources within the meaning of Article 12, the notion of absolute scarcity seems most relevant. Authorisation schemes in the Mining Act illustrate this concept of absolute scarcity. However, the mining licence to extract minerals (Article 6 Mining Act) concerns the free movement of goods, so it is considered to fall outside the scope of the Services Directive.⁹⁷ On the contrary, the licence in Article 25 Mining Act for the storage of minerals, like gas or greenhouse gases, is considered to fall within the scope of the Services Directive.⁹⁸ There is

⁹² See G. Montani, ‘Scarcity’, in: J. Eatwell, M. Milgate & P. Newman (eds.), *The New Palgrave. A Dictionary of Economics* (Basingstoke 2003) p. 253.

⁹³ S. Baumgärtner, C. Becker, M. Faber & R. Manstetten, ‘Relative and absolute scarcity of nature. Assessing the roles of economics and ecology for biodiversity conservation’ [2006] *Ecological Economics* p. 489.

⁹⁴ See more extensively: Baumgärtner, Becker, Faber & Manstetten (2006) p. 488-491.

⁹⁵ See for further refinements: J. Elster, *Local Justice. How Institutions Allocate Scarce Goods and Necessary Burdens* (Cambridge 1992) p. 21, who distinguishes (weakly or strongly) natural, quasi-natural and artificial scarcity.

⁹⁶ The term ‘natural resources’ can be found in Article 174 of the EC Treaty: ‘a prudent and rational utilisation of natural resources’ is one of the objectives of environmental policy of the Community.

⁹⁷ *Kamerstukken II* 2007/08, 31479, no. 3, p. 10.

⁹⁸ *Kamerstukken II* 2007/08, 31579, no. 3, p. 112.

absolute scarcity, since only a limited number of underground sites – namely sites that have been ‘emptied’ before – can be filled with these substances.

Nevertheless, the notion of relative scarcity remains important for the application of Article 12 as well. If some natural resource can be used for several applications, administrative authorities should decide which quantity of the resource is *available* for which application: the greater the quantity of a natural resource given for a certain application, the smaller the quantity left for other applications. In this respect, Dutch radio spectrum policy makes a useful distinction between *allocation scarcity* and *assignment scarcity*. Allocation scarcity means that the administrative authorities have to choose between different kinds of applications before allocating frequencies: which bandwidths of the radio spectrum are available for which applications?⁹⁹ After this choice, there can be situations in which the number of licences for a certain application within a certain bandwidth is limited. If the number of interested parties exceeds the number of available licences or if there is more than one interested party for one specific licence, then there is *assignment scarcity*.¹⁰⁰ Therefore, the mere fact that a larger quantity of some natural resource could have been *available* for a certain application (even up to the level of satisfaction), does not take away the presence of scarcity if insufficient quantity of this resource had been left for other applications. In such a situation, it could be argued that the condition of scarcity in the meaning of Article 12 would be fulfilled as well.

On the contrary, the mere fact that an authorisation concerns the use of a natural resource is insufficient for satisfying the scarcity condition of Article 12; there can be situations in which a limited quantity of a natural resource has been made available for a certain application, *without* this limited quantity being the result of limited availability of that natural resource. For example, the service activity of organizing a market involves the use of public ground. However, the fact that only one authorisation is available for the organization of a market does not result from scarcity of the public ground; the limited availability of the public ground results from the fact that a market should not be too large in order to remain attractive for consumers.

In addition to the term ‘scarcity’ the relationship between ‘natural resources’ and ‘technical capacity’ deserves some attention. Scarcity of natural resources depends on temporal and geographical circumstances and on technical developments.¹⁰¹ Technological change can increase natural resource availability because more quantity can be made available or less quantity is needed for a certain application.¹⁰² Consequently, natural resource availability and technical developments go together. Therefore,

⁹⁹ *Radio Spectrum Policy Memorandum 2005* (2006) p. 15.

¹⁰⁰ *Radio Spectrum Policy Memorandum 2005* (2006) p. 18.

¹⁰¹ Baumgärtner, Becker, Faber & Manstetten (2006) p. 493.

¹⁰² S.P.A. Brown & D. Wolk, ‘Natural Resource Scarcity and Technological Change’ [2000/1] *Economic & Financial Review* p. 2-3.

it seems reasonable to consider both kinds of scarcity ('natural scarcity' and 'technical scarcity') in relation to each other. Nevertheless, the wording of Article 12 of the Services Directive ('scarcity of the available natural resources *or* technical capacity') seems to keep open the possibility that there is no connection between natural and technical scarcity.

If available technical capacity is an autonomous reason for scarcity, then the scope of Article 12 is broadened. One can think especially of network industries or 'natural monopolies', like drinking water, energy and transport. In these industries, there is no scarcity of available natural resources.¹⁰³ However, simultaneous use of a network is sometimes limited because of technical impossibilities ('scarcity of available technical capacity'). Nonetheless, even under a broad interpretation of this concept of 'natural or technical scarcity', the conclusion seems justified that only a few authorisation schemes fall within the scope of Article 12 of the Services Directive.¹⁰⁴

4.4 Natural or Technical Scarcity: An Overriding Reason?

The next question is whether natural or technical scarcity can be considered as an overriding reason relating to the public interest. It follows from Article 15(3) of the Services Directive that every quantitative restriction must be justified by an overriding reason relating to the public interest. Therefore, 'natural or technical scarcity' should classify as such a reason as well. However, at the same time, the Services Directive seems to assume a distinction between 'natural and technical scarcity' (Article 12) and 'overriding reasons relating to the public interest' (Article 11).¹⁰⁵ The preamble of the Services Directive seems to confirm this distinction by stating that the number of authorisations can be limited 'for *reasons other than*

¹⁰³ The fact that only one network is available (for authorisation) follows from economic reasons only: it is not profitable for more than one party to be active at a certain market, although there are physical possibilities to build a second network. In its original meaning, the concept of 'natural monopoly' did apply to natural resources in limited supply. See M. Mosca, 'On the origins of the concept of natural monopoly: Economies of scale and competition' [2008] *The European Journal of the History of Economic Thought* p. 322-324.

¹⁰⁴ In many cases, network industries fall outside the scope of the Services Directive, because they concern the free movement of goods or are excluded from its scope, like transport (Article 2(d) Services Directive). Because of the limited scope of Article 12, the Dutch government did not implement this article in the general Services Act (see *Kamerstukken II* 2007/08, 31579, no. 3, p. 19 and 112).

¹⁰⁵ The phrase 'by an overriding reason relating to the public interest' in Article 11(1b) was not included in the first draft of the Services Directive, but has been added in a later stage for reasons of clarification only. See Amended proposal for a Directive of the European Parliament and of the Council on services in the internal market, COM (2006) 160 final.

scarcity of natural resources or technical capacity'.¹⁰⁶ Obviously, these other reasons should be overriding reasons relating to the public interest.¹⁰⁷ This would suggest that 'natural or technical scarcity' is not an overriding reason in itself.¹⁰⁸

A parallel with the allocation of radio frequencies can solve this apparent contradiction.¹⁰⁹ According to recital 11 of the preamble of the Authorisation Directive, individual rights of use should not be restricted except where this is unavoidable in view of *the scarcity of radio frequencies and the need to ensure the efficient use thereof*. In connection with this recital, Article 5(5) of the Authorisation Directive states that Member States shall not limit the number of rights of use to be granted except where this is *necessary to ensure the efficient use of radio frequencies*. In other words: although scarcity of the natural resource (radio spectrum) is a necessary condition, it is in itself not a sufficient reason to limit the number of authorisations. The only sufficient reason is the need to ensure the efficient use of radio frequencies. Hence, *efficient use of a natural resource* may be considered as an overriding reason relating to the public interest, but not the scarcity of the natural resource itself.

Furthermore, it should be emphasized that there is no direct link between scarcity of a natural resource and limiting the number of available authorisations. Admittedly, physical properties of a natural resource, e.g. the radio spectrum, in relation to the state of technology can limit the extent to which this resource can be shared. But even if nature and technology place an upper limit to the number of authorisations available for granting, this upper limit is not always reached, since the determination of the number of available authorisations does not depend only on technical considerations, but on economic considerations as well.¹¹⁰ In other words, the size of scarcity of a natural resource does not in itself imply the size of the number of authorisations.¹¹¹

¹⁰⁶ The relevant part of recital 62 of the preamble reads as follows: 'This provision [Article 12, CJW] should not prevent Member States from limiting the number of authorisations for reasons other than scarcity of natural resources or technical capacity. These authorisations should remain in any case subject to the other provisions of this Directive relating to authorisation schemes.'

¹⁰⁷ See also European Commission (2007) p. 27.

¹⁰⁸ It should be emphasized that scarcity as such is neither mentioned as an overriding reason in the list of Article 4(8) nor in the list of recital 40 of the preamble of the Services Directive.

¹⁰⁹ This apparent contradiction might be simply due to some poor drafting of (the final version of) the Services Directive. See for instance: Barnard (2008) p. 323-324.

¹¹⁰ For example, whereas a bandwidth of 25 MHz was the *technical* minimum to provide UMTS services in the Netherlands, a bandwidth of 35 MHz was necessary to provide these services on a *cost-effective* basis (*Kamerstukken II 1999/2000, 24095, no. 55, p. 17*).

¹¹¹ The abovementioned storage licence in the Mining Act illustrates these observations. On the basis of the proposed Articles 32b and 32c Mining Act, the area for which a storage

It is therefore contended that natural or technical scarcity is not a *reason* justifying a restriction to the number of authorisations, but a *fact* that ‘activates’ certain overriding reasons relating to the public interest. These overriding reasons might be linked closely with that natural resource, like the need of ensuring an efficient use of a scarce natural resource or the need of preventing harmful interference. However, ‘general’ overriding reasons, like public order or public safety, can be activated by natural or technical scarcity as well. It is also possible that *other* overriding reasons do justify a limitation to the number of authorisations, whereas the reasons activated by natural or technical scarcity do not.¹¹² Finally, whenever several overriding reasons are invoked to justify a quantitative restriction, these reasons should be weighed against each other. In so far as the overriding reasons activated by natural or technical scarcity are decisive for the limitation to the number of authorisations, this authorisation scheme should fall within the scope of Article 12 of the Services Directive.

There might be some support in the Services Directive for this reading, holding that natural or technical scarcity is not a reason complementary to overriding reasons relating to the public interest. Article 12 speaks about ‘limited because of’, whereas Article 11 speaks about ‘limited by’. This wording indicates that overriding reasons and scarcity are incomparable quantities.¹¹³ The European Commission suggests the same incomparability: ‘Limitations on the number of available authorisations are only permissible if they are *motivated by* the scarcity of available natural resources or technical capacity or if they are *justified by* an overriding reason relating to the public interest [italics, CJW].’¹¹⁴ In any event, this interpretation of overriding reasons activated by natural or technical scarcity fits with Article 15: every

licence has been granted, can be reduced, provided that both remaining areas are demarcated in such a way that in both areas the exercise of storage activities can take place in the best possible manner, both *technically* and *economically* (*Kamerstukken II 2007/08, 31479, no. 2*).

¹¹² For example, there might be possibilities for sharing: a frequency band might be used by several parties. See *Radio Spectrum Policy Memorandum 2005* (2006) p. 24. Another example is an allocation plan for the (scarce) ground, indicating which ground may be used for which application without introducing an authorisation scheme. See also Van Ommeren (2004) p. 70-71, and the Taskforce Vereenvoudiging Vergunningen, *Eenvoudig vergunnen* (The Hague 2005) p. 52, considering the allocation of scarcity as a valid motive that might urge to public regulation by either general rules or an authorisation scheme.

¹¹³ It should be admitted directly that the wording of Article 12 (‘because of’) points more into the direction of a *reason* than the wording of Article 11 (‘by’). Furthermore, recital 62 states that the number of authorisations can be limited ‘for reasons other than scarcity of natural resources or technical capacity’. Hence, this recital suggests that scarcity of natural resources or technical capacity is a *reason* itself.

¹¹⁴ European Commission (2007) p. 27.

quantitative restriction must be justified by an overriding reason relating to the public interest.

Whenever reference is made below to ‘limited authorisation schemes because of natural or technical scarcity’, this is meant to infer limited authorisation schemes, justified by overriding reasons which are activated by natural or technical scarcity. Limited authorisation schemes, justified by other overriding reasons relating to the public interest, are sometimes referred to as ‘other limited authorisation schemes’.

5 Selection Procedure: Grant and Renewal

5.1 Equal Treatment and Transparency: Service Concessions

Once we have established a general legal framework on limiting the number of authorisations, we are interested in general requirements on the selection procedure. Here, we start with the award of service concessions instead of the allocation of a limited number of authorisations, since the legal framework on the award of these service concessions has been developed further.

When considering the award of service concessions – and more generally: public contracts – the principles of equal treatment, non-discrimination and transparency are the leading principles.¹¹⁵ These principles are closely related to each other and can all – to some extent – be reduced to the principle of equality. The prohibition of discrimination can be considered as an expression of the general principle of equality (equal treatment).¹¹⁶ This holds in particular for the prohibition of discrimination on grounds of nationality, as laid down in Article 12 EC.¹¹⁷ Articles 43 and 49 EC (freedom of establishment and free movement of services), which are more specific expressions of the general prohibition of discrimination on grounds of nationality, are sometimes considered to be particular expressions of the principle of equal treatment as well.¹¹⁸ The principle of transparency has been referred to as the corollary of the principle of equal treatment.¹¹⁹ Moreover, the principle of non-discrimination on grounds of nationality has been said to imply, in particular, an obligation of transparency in order to enable the contracting authority to be satisfied that this principle has been complied with.¹²⁰

¹¹⁵ See recital 2 of the preamble and Article 2 of the Public Sector Directive.

¹¹⁶ See Jans, De Lange, Prechal & Widdershoven (2007) p. 130.

¹¹⁷ Case 810/79 *Überschär* [1980] ECR 2747, para. 16.

¹¹⁸ Case C-3/88 *Commission v. Italian Republic* [1989] ECR 4035, para. 8. See also: Case C-458/03 *Parking Brixen* [2005] ECR I-8585, para. 48.

¹¹⁹ Case C-496/99 P *Succhi di Frutta* [2004] ECR I-3801, para. III.

¹²⁰ Case C-275/98 *Unitron Scandinavia* [1999] ECR I-8291, para. 31; Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, para. 61.

In general, the principle of equality precludes comparable situations from being treated differently, unless the difference in treatment is objectively justified. It also precludes different situations from being treated in the same way, unless such treatment is objectively justified.¹²¹ It has been argued that this principle of equality acquires particular importance in the field of economic law. In this field, equality is not only a ‘constitutional necessity’, but also a ‘keystone to integration’: it prevents distortions of competition in the internal market.¹²² This is clear with respect to procurement law: the ECJ held that the principle of equality lies at the very heart of the directives on procurement law and that the purpose of such directives is to ensure in particular the development of *effective competition* in the field of public contracts.¹²³

It is inherent to any selection problem that equal treatment in the sense of an equal outcome is impossible. Therefore, equal treatment should be found in equal opportunities. The ECJ held that the procedure for comparing tenders has to comply at every stage with both the principle of the equal treatment of tenderers and the principle of transparency so as to afford *equality of opportunity* to all tenderers when formulating their tenders.¹²⁴ It follows from this judgment that, when providing for equal opportunities, an important role is reserved for transparency.

This principle or requirement of transparency¹²⁵ has a specific dimension when it comes to selection procedures, just like the general principle of equal treatment amounts to affording equality of opportunities when awarding public contracts.¹²⁶ It is especially in the field of service concessions falling outside the scope of the Public Sector Directive, that this dimension of transparency has been developed by the ECJ.¹²⁷ In *Telaustria*, the ECJ held

¹²¹ T. Tridimas, *The General Principles of EU Law* (Oxford 2006) p. 61-62. See also Jans, De Lange, Prechal & Widdershoven (2007) p. 126 and 130.

¹²² Tridimas (2006) p. 75-76.

¹²³ Case C-243/89 *Commission v. Denmark* [1993] ECR I-3353, para. 33.

¹²⁴ Case C-87/94 *Commission v. Belgium* [1996] ECR I-2043, para. 54.

¹²⁵ We will not discuss whether transparency is an obligation or a principle. See for this discussion: S. Prechal & M. de Leeuw, ‘Dimensions of Transparency: The Building Blocks for a New Legal Principle?’ [2007/1] *Review of European Administrative Law* p. 61-62, and K. Wauters & J. Ghysels, ‘De transparantieplicht bij de gunning van overheidsovereenkomsten in de rechtspraak van het Hof van Justitie, met rechtsvergelijkende annotaties’ [2008] *Rechtskundig Weekblad* p. 387. In this article, we refer to transparency both as an obligation and as a principle.

¹²⁶ See for the various dimensions of the principle of transparency, for example: Prechal & De Leeuw (2007) p. 51-62, and R.J.G.M. Widdershoven a.o., *De Europese agenda van de Awb* (The Hague 2007) p. 85-93. E.g. Article 10(2g) Services Directive requires that the criteria for the granting of an authorisation shall be *transparent*.

¹²⁷ Other public contracts are subjected to the detailed provisions on transparency in the Public Sector Directive. See more extensively on the principle of transparency in the context of

that the obligation of transparency 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.¹²⁸ In *Coname*, the ECJ further specified that this transparency requirement, *without necessarily implying an obligation to hold an invitation to tender*, is, in particular, such as to ensure that an undertaking located in the territory of another Member State can have access to *appropriate* information regarding that concession *before* it is awarded, so that, if that undertaking had so wished, it would have been in a position to express its interest in obtaining that concession. The award of a concession in the absence of any transparency amounts to a difference in treatment to the detriment of the undertaking located in the other Member State. Unless such a difference in treatment is justified by objective circumstances or its effects on the fundamental freedoms should be regarded as too uncertain and indirect to warrant the conclusion that they may have been infringed, this amounts to indirect discrimination on the basis of nationality, prohibited under Articles 43 EC and 49 EC.¹²⁹ Furthermore, the ECJ ruled in *Parking Brixen* that, although the appropriateness of the detailed arrangements of the call for competition depends on the particularities of the public service concession in question, ‘a complete lack of any call for competition in the case of the award of a public service concession [...] does not comply with the requirements of Articles 43 EC and 49 EC any more than with the principles of equal treatment, non-discrimination and transparency.’ Furthermore, the ECJ held that the principle of equal treatment of tenderers, including the duty of transparency, is to be applied to public service concessions even in the absence of discrimination on grounds of nationality.¹³⁰ Finally, in *Commission v. Italian Republic*, the ECJ observed that the automatic renewal of licences for horse-race betting operations without a call for tenders did not accord with Articles 43 and 49 EC, and, in particular, infringed the general principle of transparency and the obligation to ensure a sufficient degree of advertising. The ECJ added that such an infringement might be justified for reasons of overriding general interest, provided that this renewal was suitable for achieving the objective pursued, did not go beyond what was necessary in order to achieve that objective and was applied without discrimination.¹³¹

service concessions for instance: I.J. van den Berge, ‘De reikwijdte van het transparantiebeginsel bij de verlening van dienstenconcessies’ [2005] *Nederlands tijdschrift voor Europees recht* p. 241-245; Wauters & Ghysels (2008) p. 386-401, and Drijber & Stergiou (2009) p. 809-811.

¹²⁸ Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, para. 62; Case C-458/03 *Parking Brixen* [2005] ECR I-8585, para. 49.

¹²⁹ Case C-231/03 *Coname* [2005] ECR I-7287, para. 17-21.

¹³⁰ Case C-458/03 *Parking Brixen* [2005] ECR I-8585, para. 48-50.

¹³¹ Case C-260/04 *Commission v. Italian Republic* [2007] ECR I-7083, para. 25-29. In this case, the qualification of the particular *licence* as a public service concession was beyond dispute

It follows from this case law that with regard to selection procedures, the principle of transparency deals, above all, with *ex ante* publicity: there should be a sufficient degree of prior advertising.¹³² This transparency requirement does not imply an obligation to hold an invitation to tender according to the detailed provisions of the Public Sector Directive, but prohibits a complete lack of any call for competition as well. Secondly, the principle of transparency turns out to serve two goals in the context of the award of service concessions: the creation of competition and the review of impartiality. Thirdly, the principle or requirement of transparency is not absolute; infringements on this principle are allowed, provided that they are justified for reasons of overriding general interest.¹³³

Once the principle of transparency requires prior advertising, other elements of the transparency requirement become important as well. These elements can be derived from general case-law on the award of public contracts.¹³⁴ The selection and award criteria must be clearly defined in advance and made known to the persons concerned.¹³⁵ Furthermore, these selection and award criteria must be formulated in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way, must be interpreted by the adjudicating authority in the same way throughout the entire procedure and must be applied objectively and uniformly to all tenderers.¹³⁶ Hence, transparency in the context of selection procedures implies consistency, which can be seen as an element of equal treatment as well.¹³⁷

5.2 Limited Authorisation Schemes Because of Natural or Technical Scarcity

Now we turn back to limited authorisation schemes. Article 12 of the Services Directive contains some requirements on the selection procedure:

(see para. 20).

¹³² This is in contrast with the requirement of *ex post* publicity for the non-priority category of services (see above note 65): ‘The other procedural rules provided for by that directive, including those relating to the obligations to invite competing bids by means of *prior* advertising, are, by contrast, not applicable to those contracts [italics, CJW].’ See Case C-507/03, *Commission v. Ireland* [2007] ECR I-9777, para. 24.

¹³³ See also Wauters & Ghysels (2008) p. 399-400, and Drijber & Stergiou (2009) p. 837.

¹³⁴ See more extensively for instance: W. Timmermans & T. Bruyninckx, ‘Gunningscriteria en transparantie bij overheidsopdrachten’ [2009] *Nieuw Juridisch Weekblad* p. 338-351.

¹³⁵ See for instance Case C-470/99 *Universale Bau* [2002] ECR I-11617, para. 99, and Joined Cases C-226/04 and C-228/04 *La Cascina* [2006] ECR I-1347, para. 32.

¹³⁶ See for instance Case C-19/00 *SIAC* [2001] ECR I-7725, para. 42-44.

¹³⁷ Cf. Tridimas (2006) p. 76.

‘1. Where the number of authorisations available for a given activity is limited because of the scarcity of available natural resources or technical capacity, Member States shall apply a selection procedure to potential candidates which provides full guarantees of impartiality and transparency, including, in particular, adequate publicity about the launch, conduct and completion of the procedure.

2. In the cases referred to in paragraph 1, authorisation shall be granted for an appropriate limited period and may not be open to automatic renewal nor confer any other advantage on the provider whose authorisation has just expired or on any person having any particular links with that provider.

3. Subject to paragraph 1 and to Articles 9 and 10, Member States may take into account, in establishing the rules for the selection procedure, considerations of public health, social policy objectives, the health and safety of employees or self-employed persons, the protection of the environment, the preservation of cultural heritage and other overriding reasons relating to the public interest, in conformity with Community law.’

The key obligation in this provision is that of an impartial and transparent selection procedure. The impartiality requirement is closely related to or even part of the principle of equal treatment: impartiality is necessary to guarantee equal treatment.¹³⁸ Transparency, both in the design and in the conduct of the selection procedure, contributes to reviewing the impartiality of the selection procedure. Although we focus in this article on the transparency requirement only, it should nevertheless be stressed that transparency is necessary, but not sufficient for guaranteeing impartiality and equal treatment.

It has been remarked in the literature that the transparency requirement in Article 12 of the Services Directive appears to spring from the case law in *Coname* on service concessions.¹³⁹ Indeed, the transparency requirement of ‘adequate publicity about the launch, conduct and completion of the selection procedure’¹⁴⁰ seems to correspond to some extent with the transparency requirement of ‘a sufficient degree of prior advertising’ in the award of service concessions. Moreover, the term ‘adequate’, like ‘sufficient’, leaves room for several ways of publicity, depending on the characteristics of the authorisation.¹⁴¹ Nonetheless, it might be asked whether the requirement of

¹³⁸ Cf. Van Ommeren (2004) p. 47-48.

¹³⁹ See Belhadj, Evans & Van de Gronden (2007) p. 148; Evans (2009) p. 20-21.

¹⁴⁰ The recently proposed amendment of Article 26a Mining Act, aiming at introducing a transparent selection procedure with the possibility of concurring applications for the storage licence, seems to be an example of implementing this requirement of adequate publicity. See *Kamerstukken II 2007/08*, 31479, no. 3, p. 10-11 and 15.

¹⁴¹ Cf. Case C-458/03 *Parking Brixen* [2005] ECR I-8585, para. 50, referring to ‘the particularities of the public service concession in question’.

transparency has exactly the same *contents* in the grant of authorisations as in the award of concessions.

Although the requirement of an impartial and transparent selection procedure seems to imply prior advertising ('adequate publicity about the launch of the selection procedure'), it should be realised that the goal of prior advertising in the award of service concessions is, according to *Telaustria*, to enable the services market to be opened up to *competition* and the *impartiality* of procurement procedures to be reviewed. The first goal is related to equality as 'keystone to integration'. This goal of competition may be less relevant or even irrelevant when granting authorisations.¹⁴² However, the second goal of impartiality, contributing to equality as 'constitutional necessity', preserves its full importance. This is confirmed by the separate mentioning of the impartiality requirement in Article 12(1).¹⁴³ Therefore, it can be argued that transparency still includes prior advertising in the allocation of a limited number of authorisations.

Another question is which selection procedure should be used. Transparency implies that the prior advertising should not only announce *that* a selection procedure will be applied, but also specify *which* selection procedure will be applied ('adequate publicity about the conduct of the procedure'). However, Article 12 Services Directive does seem to neither prescribe which selection procedure should be applied, nor to exclude any possible selection procedure (auction, beauty contest, drawing of lots or 'first come, first served') *a priori*.¹⁴⁴

It should be recalled that the transparency requirement in the award of service concessions does not imply an obligation to apply a tendering procedure according to the provisions of the Public Sector Directive, but prohibits a complete lack of any call for competition as well. With regard to the reversed setting of granting authorisations, an auction and a beauty contest are assumed to be a *competitive or comparative selection procedure*.¹⁴⁵ Article 5(4) Authorisation Directive requires such procedures for the grant of a limited number of radio frequencies.¹⁴⁶ Since Article 12 of the Services Directive does not prescribe competitive or comparative selection procedures

¹⁴² Cf. Van Ommeren (2004) p. 46, arguing that the creation of competition is not a general principle of administrative law.

¹⁴³ The need for impartiality is already clear from Article 10(1) Services Directive: 'Authorisation schemes shall be based on criteria which preclude the competent authorities from exercising their power of assessment in an arbitrary manner.'

¹⁴⁴ Cf. *Kamerstukken II* 2007/08, 31579, no. 4, p. 6-7.

¹⁴⁵ Cf. *Kamerstukken II* 2002/03, 28851, no. 3, p. 17 and 98. See also *College van Beroep voor het bedrijfsleven* 26 April 2007, LJN BA3858, para. 5.4, arguing that a procedure of 'first come first served' was not transparent enough to guarantee efficiency.

¹⁴⁶ In addition, these rights of use shall be granted on the basis of objective, transparent, non-discriminatory and proportionate selection criteria (Article 7(3) Authorisation Directive).

explicitly,¹⁴⁷ it can be argued that the requirement of an impartial and transparent selection procedure is less far-reaching than that of a competitive or comparative selection procedure. Hence, other selection procedures than an auction or a beauty contest, like the drawing of lots or 'first come, first served', can be applied as well, provided that the launch of this procedure has been made public adequately.¹⁴⁸

It has been suggested that Article 12(3)¹⁴⁹ might leave some room for deviating from this transparency requirement, since it contains the possibility of taking into account overriding reasons relating to the public interest in establishing the rules for the selection procedure.¹⁵⁰ However, this possibility is 'subject to paragraph 1', which contains the transparency requirement. Therefore, an infringement on the general transparency requirement in the first paragraph does not seem to be allowed. Maybe, exceptions to the requirements of Article 12(2) are possible, as far as they concern the selection procedure.

This second paragraph of Article 12 gives a more detailed interpretation to the principles of equal treatment, impartiality and transparency. An authorisation within the meaning of Article 12 Services Directive may not be open to automatic renewal nor confer any other advantage on the provider whose authorisation has just expired. Hence, a policy guaranteeing the incumbent licensees a yearly renewal of their licences¹⁵¹ will be contrary to the Services Directive. However, Article 12(2) does not preclude renewal as such. This is also the case in the specific area of electronic communications services.¹⁵²

However, even the formal equal treatment of all potential candidates might benefit the incumbent licensee. Therefore, there might be good reasons to confer an advantage to a new entrant, for example by putting aside some authorisations for new entrants or even by excluding the incumbent. The Authorisation Directive allows this policy in the grant of authorisations for radio frequencies: the preamble states that it would not be contrary to the Authorisation Directive if the application of objective, non-

¹⁴⁷ Only recital 62 of the preamble of the Services Directive emphasizes the element of 'open competition' in the selection procedure.

¹⁴⁸ The grant of authorisations in order of receipt of the applications ('first come first served') can sometimes be considered as a competitive selection procedure, since there is an incentive to apply for an authorisation as soon as possible. However, this competitive element is absent if the start of this selection procedure is unknown.

¹⁴⁹ This third paragraph was not part of the original version of the Services Directive (COM (2004) 2 final).

¹⁵⁰ See Belhadj, Evans & Van de Gronden (2007) p. 148; Evans (2009) p. 21.

¹⁵¹ See for example: *Raad van State* 24 January 2000, *JB* 2000, 69.

¹⁵² For instance, the renewal of two GSM licences in the Netherlands did only occur after the interests of the incumbents had been weighed against those of possible new entrants and the incumbents had been charged with a fee for their rights of use. See the Decision of 29 March 2007 on the renewal of GSM licences, *Staatscourant* 2007, no. 64.

discriminatory and proportionate selection criteria to promote the development of *competition* would have the effect of excluding certain undertakings from a competitive or comparative selection procedure for a particular radio frequency.¹⁵³ The same might be argued for other limited authorisation schemes because of natural or technical scarcity.

5.3 Other Limited Authorisation Schemes

It should not be surprising that the Services Directive requires a transparent selection procedure for limited authorisation schemes. The ECJ has derived the principles of equal treatment and transparency from the fundamental freedoms of the EC Treaty, which do not distinguish between authorisations and concessions. Also the European Commission emphasized that:

'[...] like any act of State laying down the terms governing economic activities, concessions are subject to the provisions of Articles 28 to 30 [...] and 43 to 55 [...] of the Treaty, and to the principles emerging from the Court's case law – notably the principles of non-discrimination, equality of treatment, transparency, mutual recognition and proportionality.'¹⁵⁴

However, the requirements of Article 12 of the Services Directive apply to limited authorisation schemes because of natural or technical scarcity only. The question therefore arises whether the selection procedure for other limited authorisation schemes should satisfy a transparency requirement as well, although a similar provision is lacking in the Services Directive. Again, we take a look at the award of service concessions. This time, we are not only interested in the *contents* of the transparency requirement, but also in the *legal basis* for this transparency requirement.

In its case law on the award of service concessions, the ECJ derived a transparency requirement from the fundamental rules of the EC Treaty. Hence, the exclusion from the scope of the Public Sector Directive did not mean that these service concessions were not subjected to any requirement of transparency. The same can be argued for limited authorisation schemes. Article 12 of the Services Directive introduces the requirement of a transparent selection procedure for a specific category of limited authorisation schemes. However, this does not imply that *other* limited authorisation schemes are not subjected to the requirements of impartiality and transparency. Since these limited authorisation schemes do not fall within the scope of the Directive as far as the selection procedure is concerned, the granting of such authorisations must be examined in the light of the fundamental freedoms of the EC Treaty. Hence, it can be argued that, analogous to public

¹⁵³ Recital 23 of the Authorisation Directive.

¹⁵⁴ Commission interpretative communication on concessions under Community law, OJ 2000, C 121/6.

service concessions, these authorisations are also subjected to a transparency requirement.

Another question concerns the *contents* of this transparency requirement: does the transparency requirement imply prior advertising, as in the case law on service concessions? Some authors have pointed out that there is no case law supporting the view that such a duty of analogous application exists and that such a step is certainly not to be welcomed when viewed from the fundamental principle of legality.¹⁵⁵ However, other authors argue that the allocation of a limited number of authorisations should be subjected to such a transparency requirement as well.¹⁵⁶ With regard to gambling activities, the *Raad van State* has asked the ECJ for a preliminary ruling on the question whether the interpretation on the freedom of establishment (Article 49 EC), the principle of equal treatment and the principle of transparency, given by the ECJ in the context of public service concessions, also applies to the procedure of granting an authorisation for organizing gambling activities in a 'one authorisation scheme' as laid down in the Gambling Act (*Wet op de Kansspelen*).¹⁵⁷

Although this analogous application therefore is an open question and the preliminary ruling of the ECJ should be waited for,¹⁵⁸ there might be good reasons for applying these contents of the transparency requirement to limited authorisation schemes on gambling activities and even to all limited authorisation schemes that are justified by an overriding reason relating to the public interest. Already mentioned with respect to Article 12 of the Services Directive is the fact that even if there is no need for competition when granting authorisations, the transparency requirement remains important to ensure that the principles of equal treatment and non-discrimination are complied with. Therefore, it can be argued that a transparency requirement consisting of a sufficient degree of prior advertising should hold for other limited authorisation schemes as well, without the resulting selection procedure necessarily being competitive.¹⁵⁹

¹⁵⁵ See Drijber & Stergiou (2009) p. 825. According to the Dutch Minister of Justice, a general obligation to apply a tendering procedure to Dutch authorisations on gambling activities cannot be derived from Case C-260/04 (*Commission v. Italian Republic*): the Dutch authorisations do not classify as public service concessions. Nevertheless, the Minister is planning to use 'objective and transparent selection procedures' for certain gambling authorisations in the future (*Kamerstukken II 2008/09, 24557, no. 93, p. 4 and 7*).

¹⁵⁶ See Van Ommeren (2004) p. 75-76; Widdershoven a.o. (2007) p. 91. See for Dutch case law on prior advertising, although derived from the requirement of due care: *College van Beroep voor het bedrijfsleven* 3 June 2009, *JB 2009/188*, para. 6.3.5.

¹⁵⁷ *Raad van State* 14 May 2008, *LJN BD1483*, r.o. 2.18.4.

¹⁵⁸ The preliminary ruling in this Case C-203/08 (*Betfair*) is not to be expected before 2010 (see *Kamerstukken II 2008/09, 24557, no. 93, p. 5*).

¹⁵⁹ On the contrary, the prevention of competition is sometimes even the reason for limiting the number of available authorisations to one. See *Raad van State* 14 March 2007, *AB 2007, 212*, para. 2.6.2.4.

A difference with limited authorisation schemes because of natural or technical scarcity is that the specific requirements of Article 12(2) do not fully apply. Next, the transparency requirement itself does not apply if the limited authorisation scheme does not contain any interstate element: in these exceptional circumstances, the fundamental freedoms of the EC Treaty are not infringed. Even more important is that a total lack of prior advertising and hence an infringement on the transparency requirement can, analogous to *Coname* and *Commission v. Italian Republic*, still be justified by an overriding reason relating to the public interest ('objective circumstance'), provided that this infringement is non-discriminatory, suitable and necessary as well.¹⁶⁰ By contrast, Article 12 Services Directive does not seem to allow for such an exception to the transparency requirement in limited authorisation schemes because of natural or technical scarcity.

The reasoning above leads to the implication that *all* limited authorisation schemes, even those justified by overriding reasons relating to the public interest, should – in principle – satisfy the requirement of transparency. With regard to the *renewal* of authorisations, it can be argued, analogous to *Commission v. Italian Republic*, that an automatic renewal of licences without a call for applications infringes the general principle of transparency. Nevertheless, such a renewal might be justified for overriding reasons relating to the public interest. Although the Dutch *Raad van State* ruled with regard to certain gambling authorisations that the argument of keeping grip on the market was insufficient to justify an automatic renewal without inviting any competing bids,¹⁶¹ it is unclear whether in other cases an automatic renewal without a tendering procedure might be justified as a suitable and necessary instrument to attain certain overriding reasons.¹⁶²

As for the legal basis for this transparency requirement, we can use the same reasoning as was applied to the initial grant. Hence, although the prohibition of automatic renewal or conferral of any other advantage to incumbents (Article 12(2) Services Directive) does not apply to limited authorisation schemes that are justified by other overriding reasons, it follows from the general transparency requirement that such an automatic renewal amounts to discrimination on grounds of nationality (or an unjustified difference in treatment), unless such a lack of transparency can be justified by an overriding reason relating to the public interest. By the way, this overriding reason does not have to coincide with the overriding reason justifying the limitation of the number of authorisations.¹⁶³

¹⁶⁰ An overriding reason might be the need to prevent competition. If there is a total lack of prior advertising, then the authorisation scheme should contain other guarantees for transparency and impartiality in order to satisfy the condition of proportionality when infringing the principle of transparency.

¹⁶¹ *Raad van State* 18 July 2007, AB 2007, 302, note by J.H. Jans, para. 2.5.8.

¹⁶² See for the preliminary question: *Raad van State* 14 May 2008, LJN BD1483, para. 2.20.2.

¹⁶³ Cf. Drijber & Stergiou (2009) p. 837.

Once we argue that other limited authorisation schemes on service activities are subjected to a requirement of transparency as well, this reasoning can also be applied to limited authorisation schemes falling within the scope of the free movement of goods.¹⁶⁴ This holds all the more if we take into account that the person providing services is more important than the person providing goods, such that a departure from the requirement of transparency might be justified sooner in the context of services. On the contrary, when this transparency requirement is derived from primary law, it might have a somewhat more restricted scope: it does only apply to limited authorisation schemes with an interstate element, whereas the requirements of Article 12 Services Directive apply to *all* limited authorisation schemes because of natural or technical scarcity.

6 Scope of the Authorisation

6.1 General

Whereas the question on the selection procedure arises only in the context of *limited* authorisation schemes, this is not the case for questions on the temporal and territorial scope of an authorisation. Nevertheless, such questions of scope get their own meaning within limited authorisation schemes: a restriction on the scope of an authorisation creates the possibility for other service providers to obtain an authorisation at another time or at another place.

Although this analysis is restricted to the temporal and territorial scope of an authorisation, it is important to note that other questions of scope can arise as well. For example, the right to use radio frequencies is specified by time, area and spectrum. The last parameter specifies the available bandwidth of radio frequencies in the radio spectrum. If this last parameter had not been specified, a right of use would contain all radio frequencies in a certain area at a certain time. Sometimes, these scope questions are absorbed into the question on the object of the authorisation. For example, there exists no ‘general’ authorisation for organizing gambling activities, but only ‘specific’ authorisations to organize specific gambling activities, like betting on horse-racing or a casino. It is clear that if a certain activity is specified more precisely in the authorisation, then more opportunities remain for other candidates to engage in related activities.

¹⁶⁴ See for instance Case C-195/04 *Commission v. Finland* [2007] ECR I-3351, para. 24, in which the transparency requirement was invoked with regard to the free movement of goods.

6.2 Temporal Scope

Article 11 of the Services Directive contains provisions on the duration of an authorisation. Its first paragraph reads as follows:

‘1. An authorisation granted to a provider shall not be for a limited period, except where:

(a) the authorisation is being automatically renewed or is subject only to the continued fulfilment of requirements;

(b) the number of available authorisations is limited by an overriding reason relating to the public interest; or

(c) a limited authorisation period can be justified by an overriding reason relating to the public interest.’

This provision should be read in conjunction with Article 12(2), stating that ‘authorisation shall be granted for an appropriate limited period’ in limited authorisation schemes because of natural or technical scarcity.¹⁶⁵ This ‘appropriate limited period’ should be fixed in such a way that it does not restrict or limit free competition beyond what is necessary in order to enable the provider to recoup the cost of investment and to make a fair return on the capital invested.¹⁶⁶

This relevant part of Article 12(2) seems to be the *complement* of Article 11(1b).¹⁶⁷ Article 11(1) states the general rule of unlimited duration of authorisations.¹⁶⁸ Moreover, it allows for some exceptions to this general rule, hence permitting a limited authorisation period. One of these exceptions is the fact that the number of available authorisations is limited by an overriding reason relating to the public interest. However, there is no general *obligation* to grant those authorisations for a limited period. On the contrary, in cases in which the number of authorisations is limited because of natural or technical scarcity, authorisations *must* be granted for a limited period (Article 12(2)).¹⁶⁹

Such a reading of Articles 11 and 12 of the Services Directive is in line with similar provisions in specific service areas. In the area of radio frequencies, being an example of natural or technical scarcity, the condition of a maximum duration *may* be attached to a right of use for radio frequencies. This condition must be objectively justified, non-discriminatory, propor-

¹⁶⁵ Because of this conjunction, the Dutch Services Act implements these two articles in one article. See *Kamerstukken II 2007/08*, 31579, no. 3, p. III-112.

¹⁶⁶ Recital 62 of the preamble of the Services Directive.

¹⁶⁷ It could be argued as well that this provision is a *species* of Article 11(1b): Article 12(2) does not only allow, but does even oblige to a limited duration.

¹⁶⁸ Cf. European Commission (2007) p. 26.

¹⁶⁹ For example, Article 28 Mining Act requires that a storage licence shall be granted for a limited period.

tionate and transparent. If Member States grant rights of use for a limited period of time, the duration must be appropriate for the service concerned.¹⁷⁰ Admittedly, these provisions do not contain a general obligation to limit the duration of an authorisation. However, this follows from the fact that these provisions do not only apply to rights of use in *limited* schemes, but to *all* rights of use. In cases where the number of available rights of use has been limited, a limited period does indeed seem to be the general rule.¹⁷¹

As for gambling authorisations under the Dutch Gambling Act, which are limited in number because of overriding reasons, some authorisations, like that for organizing a casino, are granted for an unlimited time period, whereas other authorisations, like that for organizing bets on sporting events, have a limited duration. In any case, there is no general rule prescribing a limited or an unlimited duration. Whereas the ECJ has not ruled on the unlimited duration of gambling authorisations explicitly until now, the Dutch *Raad van State* held that granting only one authorisation for an unlimited period did not constitute an unjustified restriction of access to the Dutch casino market, since this grant did not exclude the possibility that this authorisation would be withdrawn and granted to another party in the future.¹⁷² Hence, an unlimited duration does not seem to be excluded in advance.

According to Article 11(1), an exception to an unlimited duration of an authorisation is possible if the number of authorisations is limited by an overriding reason or if it is justified by an overriding reason relating to the public interest. Hence, a limited number of authorisations seems to be an autonomous 'reason' for limiting the duration of an authorisation.

It might be even more systematic, given the connection with Article 12, to take a limited duration for *all* limited authorisation schemes as the starting point. Contrary to limited authorisation schemes within the scope of Article 12, exceptions to this general rule are still possible in case of limited authorisation schemes because of (other) overriding reasons. Such an unlimited authorisation period should be justified by an overriding reason relating to the public interest and be non-discriminatory and proportionate as well. Although this approach does not follow immediately from the struc-

¹⁷⁰ See Article 6(1) jo. annex B(4) and Article 5(2) Authorisation Directive.

¹⁷¹ In a recently proposed amendment of the Authorisation Directive, which preserves mainly the above wording of Article 5(2), the preamble states that an individual right of use has a restrictive impact on free access to radio frequencies. Therefore, the validity of a non-tradable individual right of use should be limited in time. See Recital 51 of the Proposal for a Directive of the European Parliament and of the Council amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and services, and 2002/20/EC on the authorisation of electronic communications networks and services, COM (2007) 697 final.

¹⁷² *Raad van State* 14 March 2007, AB 2007, 212, para. 2.6.2.3, with a critical note by J.H. Jans.

ture of the Services Directive itself, it should be emphasized that in cases in which the number of available authorisations is limited, a limitation of the temporal scope of the authorisation may be necessary in order to ensure that all service providers have access to the market on an equal basis.¹⁷³ Of course, a limited duration of an authorisation hinders the exercise of service activities by the incumbent service provider, but an unlimited duration would hinder other potential candidates.

With respect to the temporal scope, the distinction between natural or technical scarcity and overriding reasons relating to the public interest¹⁷⁴ creates a *complete* framework for the duration of an authorisation; the two provisions complement each other. This framework can be applied to limited authorisation schemes on goods as well. The basis for this framework would be the free movement of goods, as laid down in Articles 28 and 29 EC. This would imply that, for instance, authorisations for market stands, dealing exclusively with the sale of goods, may only have an unlimited duration if there is an overriding reason justifying this duration. Again, such a justification is only necessary if the authorisation scheme is expected to influence intra-Community trade.

6.3 Territorial Scope

A limited temporal scope implies that after this time period, a selection procedure should be applied again and renewal might be considered. On the contrary, if the territorial scope of an authorisation is limited, then several selection procedures can be held simultaneously, since the total territory is divided into several parts.

We mentioned already that a territorial restriction can, but does not necessarily, imply a quantitative restriction. Here, we focus only on the situation that, given the quantitative restriction, there is still the possibility of creating a territorial restriction. Hence, we do not consider 'natural' restrictions to the territorial scope of an authorisation: if a natural resource, like gas, is only available at certain places, then it is self-evident that the authorisation only concerns these places.¹⁷⁵

Compared with the temporal scope, the Services Directive contains few provisions on the territorial scope of an authorisation. Article 10(4) Services

¹⁷³ Cf. European Commission (2007) p. 26.

¹⁷⁴ In fact: overriding reasons activated by natural or technical scarcity and other overriding reasons.

¹⁷⁵ The same holds for the temporal scope of an authorisation: if there is a 'natural restriction' to the temporal scope of an authorisation, then a temporal restriction is self-evident. See paragraph 4a of Article 33 Services Act, stating that if the duration of an authorisation is limited by nature, then the general obligation of an unlimited time period does not hold (*Kamerstukken II 2008/09, 31579, no. A*). An example is the authorisation for organizing a specific event at a specific day (*Kamerstukken II 2007/08, 31579, no. 3, p. 112*).

Directive states that the territorial scope of an authorisation shall not be limited, except where an authorisation for each individual establishment or a limitation of the authorisation to a certain part of the territory is justified by an overriding reason relating to the public interest.¹⁷⁶ According to the European Commission, authorisations which are not granted for the whole territory of a Member State but for a specific part only are likely to hinder the exercise of service activities and to constitute an additional burden on service providers. The Commission adds to Article 10(4) that the restriction should not only be justified by an overriding reason but also be non-discriminatory and proportionate.¹⁷⁷ Again, it might be argued, analogous to the temporal scope of an authorisation, that if the number of available authorisations is limited, this limitation is *in itself* a sufficient ‘reason’ to limit the territorial scope of an authorisation. It might even be argued that if the number of authorisations is limited because of natural or technical scarcity, then the territorial scope of the authorisation should be limited. Only if the number of available authorisations is limited by an overriding reason, there might be an (other) overriding reason justifying an unlimited territorial scope of the authorisation.

Once the territorial scope of an authorisation is discussed, the principle of mutual recognition comes into play. This principle is also regarded as one of the general principles on the free movement of goods and services.¹⁷⁸ Article 10(3) of the Services Directive states that the conditions for granting authorisation for a new establishment shall not duplicate requirements and controls which are equivalent or essentially comparable as regards their purpose to which the provider is already subject in another Member State or in the same Member State. This provision, which is relevant for authorisations without a natural restriction to a certain territory, reflects some features of the principle of mutual recognition.¹⁷⁹ However, once mutual recognition is accepted, a limited authorisation scheme can be annulled: the limitation of the number of available authorisations in a certain Member State (or a certain part of a Member State) is useless if service providers

¹⁷⁶ The Commission states that individual authorisations for each establishment will normally be justified in cases where the authorisation is linked to a physical infrastructure (e.g. a shop) because an individual assessment of each installation in question may be necessary (European Commission (2007) p. 27).

¹⁷⁷ European Commission (2007) p. 27.

¹⁷⁸ See for the principle of mutual recognition in the ECJ case law: Joined Cases 110/78 and 111/78 *Van Wesemael* [1979] ECR 35, para. 28-30 and Case C-76/90 *Säger* [1991] ECR I-4221, para. 14-15. See more extensively on this principle of mutual recognition: J. Snell, ‘Free Movement of Services and the Services Directive: The Legitimacy of the Case Law’, in: Van de Gronden (2009) p. 35-40.

¹⁷⁹ Cf. Barnard (2008) p. 355. Article 16(2b) of the Services Directive reflects to some extent the principle of mutual recognition in relation to the free movement of services. See Barnard (2008) p. 364-365.

with an authorisation in another Member State (or another part of the same Member State) cannot be prevented from providing services.¹⁸⁰ Again, it might therefore be argued that a limitation to the number of available authorisations is an overriding reason itself to justify an infringement on the general principle of mutual recognition.

7 Concluding Remarks

All 'limited authorisation schemes', *i.e.* authorisation schemes where the number of available authorisations is limited beforehand, have some common characteristics. First, all these authorisation schemes have been faced with the question of whether the number of available authorisations may be limited. Secondly, these limited authorisation schemes are all confronted with a selection issue: whenever the number of available authorisations is limited and the number of candidates exceeds this number of authorisations, a selection procedure is necessary to make a choice. Thirdly, it might be necessary to restrict the temporal or geographical scope of such authorisations in order to create equal opportunities for all candidates.

Until recently, there seemed to be little attention in European law for a general approach towards these limited authorisation schemes. The new Services Directive gives an impetus to a more general approach and provides us with some general requirements on the allocation of a limited number of authorisations. However, this directive does not contain one uniform set of requirements applying to all limited authorisation schemes. Instead, it distinguishes according to the *reason* for limiting the number of available authorisations. If the number of available authorisations is limited because of 'natural or technical scarcity', then an impartial and transparent selection procedure should be applied. Moreover, such an authorisation *must* be granted for a limited period. On the contrary, if the number of available authorisations is limited by an overriding reason relating to the public interest, this authorisation *may* be granted for a limited period, but there is no obligation for such a restriction. Besides, the Services Directive makes clear that a limitation to the number of available authorisations is only allowed if it satisfies the conditions of non-discrimination, necessity ('justified by an overriding reason relating to the public interest') and proportionality.

These provisions of the Services Directive provide us with an incomplete framework of general requirements on limited authorisation schemes. Furthermore, only a few authorisation schemes satisfy the criterion of natural or technical scarcity. However, starting with the Services Direc-

¹⁸⁰ See for the preliminary question on this issue in the context of gambling activities: *Raad van State* 14 May 2008, LJN BD1483, para. 2.12.4.

tive, we can develop a consistent and coherent framework on the allocation of a limited number of authorisations. Therefore, we have considered two specific service areas with more advanced results on limited authorisation schemes: electronic communications services involving the use of radio frequencies and services on gambling activities. Furthermore, we have looked at developments in public procurement law on the award of service concessions, since selection procedures occur in that area as well. Of course, such an approach demands caution, since developments in European administrative law, either by Community legislature or by ECJ decisions, should be waited for on a number of issues. Nevertheless, several (preliminary) conclusions might be drawn from observations in these areas.

It has been argued that natural or technical scarcity should not be considered as an overriding *reason* relating to the public interest. Instead, this scarcity is a *fact* that activates (particular) overriding reasons relating to the public interest. Hence, a distinction should not be made between natural or technical scarcity on the one hand and overriding reasons relating to the public interest on the other, but between overriding reasons activated by natural or technical scarcity and other overriding reasons.

This amended distinction between natural or technical scarcity and (other) overriding reasons relating to the public interest is meaningful to some extent for the design of the selection procedure. In case of natural or technical scarcity, there is no reason to deviate from general requirements on transparency, since the administrative authorities – to put it simply – do not pursue any separate goal with the limitation of the number of authorisations; they simply had no (or at least: little) choice in limiting the number of authorisations. On the contrary, if the number of authorisations is limited because of an overriding reason, there might be good reason for deviating from the transparency requirement. This may be necessary to achieve the overriding reasons because of which the number of available authorisations has been limited.

Moreover, it has been argued that a transparency requirement for other limited authorisation schemes can be based on general principles derived from the fundamental freedoms of the EC Treaty. Although the Services Directive is silent on this issue, there is reason to argue that, analogous to service concessions, such limited authorisation schemes demand for an impartial and transparent selection procedure as well, unless an exception to this general obligation is justified by an overriding reason. The requirement of transparency seems to consist in ensuring, for the benefit of any potential candidate, a *sufficient degree of prior advertising* such that, at least, the *impartiality* of the selection procedure can be reviewed. Nonetheless, it is possible that an exception to this transparency requirement is accepted with respect to authorisations sooner than with respect to concessions.

With respect to the temporal and geographical scope of an authorisation, a 'limited, unless' approach has been suggested, comparable with the

‘transparent, unless’ approach for the selection procedure: if the number of authorisations is limited because of natural or technical scarcity, then the authorisation must be granted for a limited time period. In other limited authorisation schemes, the authorisation must be granted for a limited time period, unless an unlimited time period is justified by an overriding reason. We could apply this reasoning to the territorial scope of an authorisation as well.

It can be argued that these general requirements form a legal framework that holds for all kinds of authorisation schemes on services as well as goods. Moreover, this framework has much in common with the legal framework on public procurement law. This is not surprising since all these schemes demand some kind of selection procedure among potential candidates.

In the end, it seems that European law contributes to the development of a self designed legal framework for limited authorisation schemes next to that for traditional authorisation schemes. This framework does not only contain requirements which are not needed in traditional authorisation schemes. On the contrary, a limitation to the number of authorisations seems to be an overriding reason itself to deviate from general principles with regard to traditional authorisation schemes. It can even be argued that limited authorisation schemes turn the legal framework for traditional authorisation schemes upside-down.