

# EU Law Principles for Allocating Scarce Goods and the Emergence of an Allocation Procedure

Identifying Substantive and Procedural Standards  
and Developing a New Type of Administrative Procedure

Ferdinand Wollenschläger\*

*Holder of a Chair in European Law and Public Economic Law at the Faculty of Law,  
University of Augsburg*

## Abstract

*Allocating scarce goods constitutes an important task of the administration, as the examples of awarding public contracts, places at university, subsidies, posts in the civil service, concessions for public transport and gambling or licences for the use of telecommunication frequencies demonstrate. The legal framework is increasingly determined by EU law under which a trans-sectoral allocation regime has been emerging, requiring objective, transparent, non-discriminatory and proportionate allocation criteria, a transparent and objective allocation procedure as well as adequate judicial protection. The article elaborates these material and procedural standards as well as their relevance for modelling a new and distinct type of administrative procedure aiming at distributing scarce goods ('Verteilungsverfahren'), a topic the science of administrative law has just begun to explore in a pan-European debate. Such type formation does not only pursue a systematic interest, but also allows critically evaluating and developing sector-specific procedures and thus plays an important role within the science of administrative law.*

## I Introduction: Allocating Scarce Goods as a Task of the Administration

In a very wide range of fields, it is a task for the administration to allocate scarce goods in competition situations. The causes of scarcity can be multifarious.<sup>1</sup> The fact that the availability of a natural resource is restricted

---

\* DOI 10.7590/187479815X14313382198539

The text is based on, but also further develops ideas presented in the author's book 'Verteilungsverfahren. Die staatliche Verteilung knapper Güter: Verfassungs- und unionsrechtlicher Rahmen, Verfahren im Fachrecht, bereichsspezifische verwaltungsrechtliche Typen- und Systembildung' (Tübingen 2010) ['Distributing Scarce Goods as a Task of the Administration: Parameters of Constitutional and European Union Law, Administrative Procedures in Specific Areas and the Emergence of a New Type of Administrative Procedure'] which also contains further references. All German sources have been translated.

<sup>1</sup> The three categories put forward below, namely of natural and deliberate scarcity, as well as of a limited range of services offered by the State (moreover, for such a categorisation cf.

frequently causes the State to remove the resolution of the allocation conflict from the societal domain and assign it to a regime operating under public law: The State has hence subjected conflicts with regard to the utilisation of the scarce good ‘frequency’ to a Frequency Regulation scheme (*Frequenzordnung*)<sup>2</sup> in order to guarantee efficient frequency utilisation in accordance with the further regulatory goals of the law on telecommunications, e.g. securing adequate and appropriate telecommunication services throughout Germany<sup>3</sup>. The example of imposing contingents on taxi concessions, intended to prevent a threat to livelihoods in the local taxi trade being caused by excess capacities, in the interest of maintaining its functionality,<sup>4</sup> shows that the State also takes on allocation tasks beyond scarcity problems that occur with natural resources if, for reasons attributed to the common good, it permits specific activities to be carried out to a restricted degree only; a further example is the distribution of gambling concessions if limited in number. Scarcity is ultimately prevalent when the public sector itself demands or supplies goods, but only does so in a limited quantity because of limited demand or of finite availability: Places at university, subsidies, public contracts or posts in the civil service are appropriate examples.

Whilst *Peter M. Huber* was obliged to observe in his 1991 study on allocation procedures that EU law has ‘so far hardly played any part in German administrative law’,<sup>5</sup> a finding that presumably applied to all Member States, the picture has now fundamentally changed. As can be universally observed in the course of the Europeanisation of national administrative law, the framework in which allocation procedures operate is increasingly being defined by European Union law. This is due not only to the fact that many allocation procedures are either based on EU directives that have been transposed into national law, as is the case with public procurement above the EU thresholds,<sup>6</sup> or, as for instance the

---

D. Kupfer, *Die Verteilung knapper Ressourcen im Wirtschaftsverwaltungsrecht* [Baden-Baden 2005], 103 ff.) are admittedly not sharply separated. The latter can for instance also result from a natural scarcity; cf. also C. Fuchs, ‘Instrumente und Verfahren staatlicher Verteilungsverwaltung’, in: E.V. Towfigh et al. (ed.), *Recht und Markt* (Baden-Baden 2009), 205 (206 f.); Kupfer, *ibid.*, 103; M. Martini, *Der Markt als Instrument hoheitlicher Verteilungslenkung* (Tübingen 2008), 18 f. Cf. as regards scarcity as a legal problem – next to the EU law sources in N. 9 – only: W. Berg, ‘Die Verwaltung des Mangels’ [1976/15] *Der Staat* 1; C. Tomuschat, ‘Güterverteilung als rechtliches Problem’ [1973/12] *Der Staat* 433; A. Voßkuhle, “Wer zuerst kommt, mahlt zuerst!” – Das Prioritätsprinzip als antiquierter Verteilungsmodus einer modernen Rechtsordnung’ [1999/3] *DV* 21.

<sup>2</sup> Cf. sections 52 ff. of the German Telecommunications Act (TKG).

<sup>3</sup> Cf. section 2 subsection (2) TKG.

<sup>4</sup> Cf. section 13 subsection (4) of the German Passenger Transport Act (PBefG).

<sup>5</sup> P.M. Huber, ‘Gemeinschaftsrechtlicher Schutz vor einer Verteilungslenkung durch deutsche Behörden’ [1991] *EuR* 31 (61).

<sup>6</sup> Cf. for the recently reformed framework (to be transposed until 18 April 2016) Dir. 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement, *OJ L* 94, 65; Dir. 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors, *OJ L* 94, 243; Dir. 2014/23/EU of the European Parliament and of the Council of 26

allocation of slots,<sup>7</sup> have been directly regulated in Union law by EU regulations. Rather, primary law makes trans-sectoral requirements of the State's allocation activity which also impact areas which are not normed under secondary law. According to a further observer, it is now 'unmistakeable that, under the influence of European Union law in particular, an increasing dynamic is developing towards open, transparent and economic efficiency-orientated tendering procedures' not only, as should be added, 'for the sale of public assets'.<sup>8</sup>

Against this background, the article develops EU law standards governing the allocation of scarce goods by the administration.<sup>9</sup> These standards are rooted in EU primary law (2.), but have also been incorporated into various sector-specific as well as trans-sectoral acts of EU secondary law (3.). Moreover, to complete the picture, but without being able to develop this any further in this article, it has to be noted that similar substantive and procedural standards have developed under national constitutional law.<sup>10</sup> After summarising the EU law standards for allocating scarce goods (4.), a final part (5.) will reflect on the importance of these standards for modelling a distinct type of administrative procedure aiming at distributing scarce goods. Such type formation constitutes

---

February 2014 on the award of concession contracts, *OJ L* 94, 1. The standards for judicial review are notably set by Council Dir. 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, *OJ L* 395, 33, lastly amended by Dir. 2007/66/EC, *OJ L* 335, 31.

<sup>7</sup> Council Reg. (EEC) 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports, *OJ L* 14, 1, lastly amended by Reg. (EC) 545/2009, *OJ L* 167, 24.

<sup>8</sup> J. Dietlein, 'Anteils- und Grundstücksveräußerungen als Herausforderung für das Vergaberecht' [2004] *NZBau* 472 (479). Cf. further Martini (N. 1) 90 f.; J. Wolswinkel, 'The Allocation of a Limited Number of Authorisations' [2009/2] *REALaw* 61.

<sup>9</sup> Cf. for analyses in the literature the contributions in P. Adriaanse & F. van Ommeren & W. den Ouden & J. Wolswinkel (ed.), *Scarcity and the State* (Cambridge 2016), forthcoming, notably V. Hatzopoulos, 'Authorisations under EU internal market rules', chapter 8, and W. den Ouden, 'Requirements under European fundamental rights', chapter 12; R. Caranta, 'General Report', in: U. Neergaard & C. Jacqueson & G. Skovgaard Ølykke (ed.), *The XXVI FIDE Congress in Copenhagen*, vol. 3: *Public Procurement Law: Limitations, Opportunities and Paradoxes* (Copenhagen 2014), 79 (120 ff.); D. Dragos & R. Caranta (ed.), *Outside the EU Procurement Directives – Inside the Treaty?* (Copenhagen 2012), notably R. Caranta, 'The Borders of EU Public Procurement Law', 25 (31 ff.); G. Skovgaard Ølykke, 'Is the Granting of Special and Exclusive Rights Subject to the Principles Applicable to the Award of Concession?' [2014/23] *P.P.L.R.* 1; M. Szydło, 'The Process of Granting Exclusive Rights in the Light of Treaty Rules on Free Movement' [2011/12] *German Law Journal* 1408; F. Wollenschläger, *Verteilungsverfahren. Die staatliche Verteilung knapper Güter: Verfassungs- und unionsrechtlicher Rahmen, Verfahren im Fachrecht, bereichsspezifische verwaltungsrechtliche Typen- und Systembildung* (Tübingen 2010), 102 ff.; J. Wolswinkel, 'Las autorizaciones limitadas en número en el Derecho de la Unión Europea', in: L. Arroyo & D. Utrilla (ed.), *La administración de la escasez* (Madrid 2015), 109; idem (N. 8) 61; idem, 'An Allocation Perspective to Public Law: Limited Public Rights and Beyond' [2014] *ReM* 2014-05.

<sup>10</sup> Cf. for a detailed outline Wollenschläger (N. 9) 31 ff. Cf. for a Spanish Perspective L. Arroyo, 'Las bases constitucionales de la actividad administrativa de adjudicación de derechos limitados en número', in: idem & Utrilla (N. 9) 47.

an important task within the science of administrative law; insofar, the emergence of a new type of administrative procedure ('Verteilungsverfahren') may be observed. This topic, originating in German administrative legal science,<sup>11</sup> has recently drawn considerable attention in further EU Member States and triggered a promising pan-European debate which is, however, only in its infancy<sup>12</sup>. Where appropriate, the article refers to German administrative law to illustrate implications of the emerging EU allocation regime.

A final conceptual remark: The article understands an allocation procedure to be an administrative procedure which aims at selecting, by using specific criteria, from among a number of individuals, one or more individuals for a specific purpose, the consideration of all applicants being ruled out because the object that is to be allocated is scarce, for whatever reason. This means in particular that – although selection or distribution criteria apply – simple grant procedures, which especially can be found in benefit administration (e.g. grant of social assistance), simple licensing and approval procedures (e.g. construction permits or restaurant licences) as well as selection procedures implemented by private individuals – including against the background of a responsibility incumbent on the State to guarantee a correct allocation – are not covered by the analysis because a scarcity situation to be overcome by the administration proves not to be constitutive for them.<sup>13</sup> Moreover, allocation procedures are not limited to the economic sphere – although this constitutes the main focus of EU law – as the examples of distributing human organs or places at university demonstrate. Hence, the concept goes beyond granting exclusive rights within the meaning of Article 106 § 1 TFEU.<sup>14</sup>

<sup>11</sup> The term 'Verteilungsverfahren' to designate a specific type of administrative procedure was introduced by Andreas Voßkuhle ('Strukturen und Bauformen neuer Verwaltungsverfahren', in: W. Hoffmann-Riem & E. Schmidt-Aßmann [ed.], *Verwaltungsverfahren und Verwaltungsverfahrensgesetz* [Baden-Baden 2002], 277); cf. for a general use even before Berg (N. 1) 3, who, however, has stressed the openness of this term. Cf. further Wollenschläger 'Verteilungsverfahren' (N. 9) – as well as the Spanish excerpt 'El procedimiento administrativo de adjudicación de derechos limitados en número en el Derecho administrativo general' (in: Arroyo & Utrilla [N. 9] 139) – and H.C. Röhl, 'Ausgewählte Verwaltungsverfahren', in: W. Hoffmann-Riem & E. Schmidt-Aßmann & A. Voßkuhle (ed.), *Grundlagen des Verwaltungsrechts*, vol. 2 (2nd edition Munich 2012), § 30/10 ff.; N. Malaviya, *Verteilungsentscheidungen und Verteilungsverfahren* (Tübingen 2009), 250 ff.; E. Schmidt-Aßmann, 'Der Verfahrensgedanke im deutschen und europäischen Verwaltungsrecht', in: Hoffmann-Riem & idem & Voßkuhle, *ibid.*, § 27/78; W. Hoffmann-Riem, 'Verwaltungsverfahren und Verwaltungsverfahrensgesetz – Einleitende Problemskizze', in: idem & Schmidt-Aßmann, *ibid.*, 9 (36); J.-P. Schneider, 'Strukturen und Typen von Verwaltungsverfahren', in: Hoffmann-Riem & Schmidt-Aßmann & Voßkuhle, *ibid.*, § 28/169. Cf. further for concepts going beyond procedural issues M. Schmidt-Preuß, *Kollidierende Privatinteressen im Verwaltungsrecht* (2nd edition Berlin 2005), 11; Fuchs (N. 1) 206.

<sup>12</sup> Cf. only Adriaanse & Van Ommere & Den Ouden & Wolswinkel (N. 9); Arroyo & Utrilla (N. 9); J. Wolswinkel, *De verdeling van schaarse publiekrechtelijke rechten* (The Hague 2013).

<sup>13</sup> Cf. in more detail, with further references and for a discussion of similar and diverging definitions Wollenschläger (N. 9) 2 ff.

<sup>14</sup> Cf. on the notion of 'exclusive rights' (Art. 106 § 1 TFEU) Szydło (N. 9) 1412 ff.

## 2 EU Law Standards for Allocating Scarce Goods

EU primary law formulates general requirements for the State's allocation activity. These follow first and foremost from the law relating to the internal market, notably the fundamental freedoms as the ECJ's recent case-law on contract awards that are not covered by the EU's public procurement directives (which can be generalised) demonstrates (2.1). Furthermore, the Union's set of fundamental rights (2.2), whose development is only in its infancy, and the law on state aid as well as competition and anti-trust law (2.3), are relevant.

### 2.1 The Allocation Regime of the Fundamental Freedoms

The market freedoms, constitutive for realising the internal market (cf. Art. 26 § 2 TFEU), guarantee that all EU citizens can take up and exercise self-employed and dependent gainful employment within the Union. Consequently, administrative procedures which allot market access opportunities must be shaped in accordance with the freedoms of movement of persons, services and goods, as well as of capital transactions. The fact that this results in far-reaching stipulations for the State's allocation activity is emphasised not lastly by the establishment of a public procurement regime for contract awards that are not covered by the EU's public procurement directives, namely emerging in the case-law of the ECJ.<sup>15</sup> The standards that have been developed there are amenable to generalisation, as is shown not only by rulings in other fields, but also by secondary legislation serving the purpose of market opening (cf. section 3).<sup>16</sup> The framework of the market freedom-based allocation regime (2.1.1) is outlined below regarding its material scope (2.1.1.1), its restriction to cross-border situations (2.1.1.2) and its stipulations in detail (2.1.1.3). A closing digression underlines that EU law also determines allocation procedures beyond market integration, notably as a consequence of the expansion of the integration programme of the fundamental freedoms through the introduction of Union citizenship (2.1.2).

<sup>15</sup> W. Frenz, 'Allgemeine Grundsätze des Vergaberechts. Das EuGH-Urteil ANAV/Comune di Bari' [2006] *EWS* 347 (350), speaks of 'primary European public procurement law'.

<sup>16</sup> Cf. only C. Braun, 'Ausschreibungspflichtigkeit des Verkaufs von Gesellschaftsanteilen' [2006] *VergabeR* 657 (665); M. Gabriel, 'Die Kommissionsmitteilung zur öffentlichen Auftragsvergabe außerhalb der EG-Vergaberichtlinien' [2006] *NVwZ* 1262 (1263); further ECJ, Case C-431/07 *Bouygues et al.* [2009] ECR I-2665, para. 124; EC, Communication on the application of Community law on Public Procurement and Concessions to Institutionalised Public-Private Partnerships (IPPP) of 5 February 2008, C (2007) 6661, 6; Skovgaard Ølykke (N. 9) 6 ff.

## 2.1.1 Contouring a Market Freedom-Based Allocation Regime

### 2.1.1.1 On the Scope of the Market Freedom-Based Allocation

#### Regime

All allocation procedures which open up the possibility of economic activity are subject to the requirements of the market freedom-based allocation regime.<sup>17</sup> The fundamental freedom which is relevant in an individual case is determined by the subject-matter of the procedure. In view of the tendencies towards the convergence of market freedoms, the question of delimitation must however not be overestimated.<sup>18</sup>

The freedoms of establishment (Art. 49 ff. TFEU) and to provide services (Art. 56 ff. TFEU) are likely to have the greatest practical significance since most economically-relevant allocation procedures relate to the permanent or temporary exercise of self-employed activities protected by both freedoms,<sup>19</sup> such as the allocation of stand places at trade fairs and markets (sections 70 and 64 ff. of the German Trade Regulation Code [*GewO*]) or of concessions in taxi transportation (sections 13 and 47 of the German Passenger Transport Act [*PBefG*])<sup>20</sup>. By contrast, the free movement of goods (Art. 28 ff. TFEU), which covers supply contracts and which is relevant for instance for supplying statutory insurances with aids and appliances (sections 124 ff. of Book V of the German Social Code [*SGB V*]), proves to be of only marginal significance. The same applies to the free movement of workers that is entrenched in Article 45 ff. TFEU, which only extends to dependent employment, and hence to the public service. However, the derogation for activities which are connected with the exercise of official authority (Art. 45 § 4, Art. 51 and 62 TFEU), which removes employment in the core area of the executive and the judiciary from the market freedom allocation regime, is to be taken into consideration here, as it is moreover also with regard to freedom of establishment and freedom to provide services.<sup>21</sup> The free movement of capital (Art. 63 ff. TFEU), finally, protects

<sup>17</sup> Cf. also Szydło (N. 9) 1419 ff.

<sup>18</sup> In this sense also F. Wollenschläger, 'Das EU-Vergaberegime für Aufträge unterhalb der Schwellenwerte' [2007] *NVwZ* 388 (390).

<sup>19</sup> Cf. on the delimitation only ECJ, joined Cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 *Markus Stoß et al.* [2010] ECR I-8069, para. 55 ff.; joined Cases C-357/10 to C-359/10 *Duomo Gpa Srl et al.*, ECLI:EU:C:2012:283, para. 30 ff.

<sup>20</sup> On the applicability of the freedom to provide services in the transport sector Art. 58 § 1 TFEU and P. Schäfer, in: R. Streinz (ed.), *AEUV-EUV* (2nd edition Munich 2012) Art. 90 AEUV, para. 5 ff.

<sup>21</sup> On the scope of the derogation ECJ, Case 149/79 *EC v. Belgium I* [1980] ECR 3881; Case 149/79 *EC v. Belgium II* [1982] ECR 1845; Case 307/84 *EC v. France* [1986] ECR 1725; Case C-405/01 *Colegio de Oficiales* [2003] ECR I-10391; Case C-47/02 *Anker* [2003] ECR I-10477. From the literature only J.E. Beenen, *Citizenship, Nationality and Access to Public Service Employment* (Groningen 2001); M. Henssler & M. Kilian, 'Die Ausübung hoheitlicher Gewalt i.S.d. Art. 45 EG' [2005] *EuR* 192; F. Wollenschläger, *Grundfreiheit ohne Markt. Die Herausbildung der Unionsbürgerschaft im unionsrechtlichen Freizügigkeitsregime* (Tübingen 2007), 62 f.

cross-border investment, and hence plays a particular role in asset privatisation measures, such as the sale of shareholdings and real estate.<sup>22</sup>

In some subject-matters, allocation procedures have now been regulated by the EU legislator, such as economically important procurement procedures in the EU's public procurement directives<sup>23</sup>. There are however two ways in which this secondary legislation must not be understood as a final codification of the respective area: Firstly, because of their higher ranking the market freedoms also apply within the normed sphere, namely as a yardstick of lawfulness and a directive for interpretation and for filling gaps.<sup>24</sup> Secondly, the existence of secondary legislation does not preclude invoking market freedoms for allocation procedures which it does not cover, at least as long as such an exclusion is not explicitly ordered (and in a manner that is in conformity with primary law); the emergence of an allocation regime for procurement not covered by the EU directives illustrates this.<sup>25</sup>

### 2.1.1.2 The Requirement of a Cross-Border Element

As guarantees obligated to the internal market goal of the Union, i.e. to the integration of the national sub-markets to form one common market, the market freedoms only apply to allocation procedures with a cross-border element.<sup>26</sup> In what cases such an element is present must be regarded in a differ-

<sup>22</sup> Depending on the orientation of the investment, questions of delimitation to the other market freedoms, namely the freedom of establishment, arise here which cannot be explored in greater detail, cf. on this only W. Frenz, *Handbuch Europarecht*, vol. 1. *Europäische Grundfreiheiten Europäische Grundfreiheiten* (Berlin 2004) para. 2760 ff., 2770 and 2774 ff.; G. Ress & J. Ukrow, in: E. Grabitz & M. Hilf & M. Nettesheim (ed.), *Das Recht der Europäischen Union: EUV/AEUV* (Munich 2015), Art. 63 AEUV para. 286 ff. (52nd update January 2014); F. Wollenschläger, 'Unionsrechtliche Grundlagen des Öffentlichen Wirtschaftsrechts', in: R. Schmidt & idem (ed.), *Kompendium Öffentliches Wirtschaftsrecht* (4th edition Heidelberg 2015), § 1/80.

<sup>23</sup> Cf. N. 6 and for further examples below, 3.

<sup>24</sup> ECJ, Case C-92/00 *Hospital Ingenieure* [2002] ECR I-5553, para. 42 ff.; K. Bitterich, 'Das grenzüberschreitende Interesse am Auftrag im primären Gemeinschaftsvergaberecht' [2008] *EuZW* 14 (15 f.); P. Braun, 'A Matter of Principle(s). The Treatment of Contracts Falling Outside the Scope of the European Public Procurement Directives' [2000/9] *P.P.L.R.* 39 (41 f. and 48); W. Frenz, *Handbuch Europarecht*, vol. 1. *Europäische Grundfreiheiten Europäische Grundfreiheiten* (Berlin 2004) para. 1724; Wollenschläger (N. 18) 389. More narrowly, namely understanding the secondary legislation lending concrete form to the fundamental freedoms as a *lex specialis*, Huber (N. 5) 56.

<sup>25</sup> For EU public procurement law cf. only ECJ, Case C-59/00 *Vestergaard* [2001] ECR I-9505, para. 19; Case C-324/98 *Telaustria* [2000] ECR I-10745, para. 60; Case C-376/08 *Serrantoni* [2009] ECR I-12169, para. 20 ff.; Case C-221/12 *Belgacom*, ECLI:EU:C:2013:736, para. 28; Case C-42/13 *Cartiera dell'Adda*, ECLI:EU:C:2014:2345, para. 47. Cf. further recitals 10 f. and 20 of Reg. (EC) 1370/2007. In the literature: Bitterich (N. 24) 15 f.; B.J. Drijber & H. Stergiou, 'Public Procurement and Internal Market Law' [2009/46] *CML Rev.* 805 (843 ff.); Wollenschläger (N. 18) 389. Cf. for the procurement of Annex II B-services, however, Case C-95/10 *Strong Segurança* [2011] ECR I-865, para. 24 ff.; Drijber & Stergiou, *ibid.*, 844 f.

<sup>26</sup> The requirement of a cross-border reference is to be retained regardless of it being placed in question in the literature, which particularly arises from the resulting discrimination against residents and its alleged incompatibility with the status as a Union citizen which all citizens of the Member States have in common (cf. only N. Reich & S. Harbacevica, 'Citizenship and family on trial: A fairly optimistic overview of recent court practice with regard to free movement

entiated manner, particularly in order to prevent misinterpretations of the case-law of the ECJ: A strict distinction should be made between the question of the applicability of the market freedoms to an allocation procedure and the question whether a person has standing to challenge violations of these EU law guarantees. This can be illustrated using the case-law of the ECJ on the public procurement regime for contracts not covered by the EU's public procurement directives. Of course, this distinction is only of relevance to jurisdictions which, like the German administrative law system, distinguish between the objective lawfulness of administrative action and a violation of subjective rights required to have standing before the courts (cf. section 42 § 2 as well as section 113 § 1 sentence 1 and § 5 of the German Code of Administrative Court Procedure [VwGO]).<sup>27</sup>

When the Court of Justice had to adjudicate in 1999 in the *RI.SAN* case on the conformity of the award of a service concession with the fundamental freedoms, it rightly stated that they were not relevant where the initial case had no cross-border connection: The plaintiff, who complained of the public procurement decision of an Italian agency 'has its seat in Italy and does not operate on the Italian market in reliance on freedom of establishment or freedom to provide services ...'.<sup>28</sup> One must not however misinterpret this ruling, which relates to the standing of resident tenderers before courts, as meaning that the market freedoms are not relevant in the allocation procedure even if only resident parties participate in it. In a later case that was comparable to the *RI.SAN* case,

---

of persons' [2003/40] *CML Rev.* 615 [633 ff.]). The opposing opinion neglects the scope of the TFEU, which is materially restricted in this regard: cf. e.g. ECJ, joined Cases C-64/96 and C-65/96 *Uecker and Jacquet* [1997] ECR I-3171, para. 22; Case C-148/02 *Garcia Avello* [2003] ECR I-11613, para. 26; Case C-403/03 *Schempp* [2005] ECR I-6421, para. 20; Case C-212/06 *Gouvernement de la Communauté française et Gouvernement wallon* [2008] ECR I-1683, para. 39; S. Bode, 'Von der Freizügigkeit zur sozialen Gleichstellung aller Unionsbürger' [2003] *EuZW* 552 (556); Szydło (N. 9) 1423 f.; Wollenschläger (N. 21) 222 f.

<sup>27</sup> Section 42 § 2 reads: 'Unless otherwise provided by law, the action shall only be admissible if the plaintiff claims that his/her rights have been violated by the administrative act or its refusal or omission' ('Soweit gesetzlich nichts anderes bestimmt ist, ist die Klage nur zulässig, wenn der Kläger geltend macht, durch den Verwaltungsakt oder seine Ablehnung oder Unterlassung in seinen Rechten verletzt zu sein'). Section 113 § 1 sentence 1 reads: 'Insofar as the administrative act is unlawful *and* the plaintiff's rights have been violated, the court shall rescind the administrative act and any ruling on an objection' ('Soweit der Verwaltungsakt rechtswidrig *und* der Kläger dadurch in seinen Rechten verletzt ist, hebt das Gericht den Verwaltungsakt und den etwaigen Widerspruchsbescheid auf' – emphasis added). Section 113 § 5 reads: 'Insofar as the rejection or omission of the administrative act is unlawful *and* the plaintiff's rights are violated thereby, the court shall announce the obligation incumbent on the administrative authority to effect the requested official act if the case is mature for adjudication. Otherwise, it shall hand down the obligation to notify the plaintiff, taking the legal view of the court into consideration' ('Soweit die Ablehnung oder Unterlassung des Verwaltungsakts rechtswidrig *und* der Kläger dadurch in seinen Rechten verletzt ist, spricht das Gericht die Verpflichtung der Verwaltungsbehörde aus, die beantragte Amtshandlung vorzunehmen, wenn die Sache spruchreif ist. Andernfalls spricht es die Verpflichtung aus, den Kläger unter Beachtung der Rechtsauffassung des Gerichts zu bescheiden' – emphasis added).

<sup>28</sup> ECJ, Case C-108/98 *RI.SAN* [1999] ECR I-5219, para. 21 ff.



namely the Coname case, Advocate General Stix-Hackl opposed a 'dogmatisation' of the previous ruling, and pointed out that

'[i]n the specific context of procurement law, which is aimed at opening up national markets, whether or not all the parties in a given award procedure and/or in the subsequent national review procedure come from the same Member State as the contracting authority must not be the decisive factor. That approach could even be construed as an indication that the requisite announcement of the award procedure had not in fact taken place ... Thus, protection must be afforded not only to the undertakings actually participating in an award procedure but also to potential tenderers. Therefore, undertakings from other Member States need only be potentially concerned for there to be a cross-border situation and, thus, for a criterion for the application of the fundamental freedoms to be met.'<sup>29</sup>

The ECJ concurred with this in this ruling, as well as in others.<sup>30</sup> It is admittedly important to see that, as was stressed at the beginning, the judgments relate to two levels: the applicability of the fundamental freedoms to allocation procedures on the one hand and the question whether resident tenderers' individual rights are affected on the other. This is neglected by authors and courts which, with regard to the case-law of the ECJ that has been discussed, opine that a procedure that is in breach of Union law, because it violated *foreign* tenderers' interest in market access, automatically constitutes a violation of the rights of *resident* tenderers.<sup>31</sup> This is certainly not the case: Such procurement is objectively unlawful because of a breach of Union law; resident participants cannot however invoke the fundamental freedoms if they are not themselves engaged in a cross-border economic activity. This follows from the scope of the market freedoms which are materially restricted in this regard. This result must also not be overruled by claiming a special nature of violations of the principle of transparency,<sup>32</sup> particularly since these do not differ in qualitative terms from other obstacles to market access.<sup>33</sup> Lastly, this does not contradict the different outcome in the context of the EU's public procurement directives. For the latter

<sup>29</sup> AG Stix-Hackl, in: ECJ, Case C-231/03 *Coname* [2005] ECR I-7287, para. 27.

<sup>30</sup> ECJ, Case C-231/03 *Coname* [2005] ECR I-7287, para. 17 f.; Case C-458/03 *Parking Brixen* [2005] ECR I-8612, para. 54 f.; ECJ, Case C-221/12 *Belgacom*, ECLI:EU:C:2013:736, para. 31.

<sup>31</sup> Cf. for this view e.g. VG Münster (Administrative Court of Münster), *VergabeR* 2007, 350 (353 f.); C. Braun & C. Hauswaldt, 'Vergaberechtliche Wirkung der Grundfreiheiten und das Ende der Inländerdiskriminierung?' [2006] *EuZW* 176 (177); D. Kallerhoff, 'Zur Begründetheit von Rechtsschutzbegehren unterhalb der vergaberechtlichen Schwellenwerte' [2008] *NZBau* 97 (102).

<sup>32</sup> Cf., however, VG Münster (Administrative Court of Münster), *VergabeR* 2007, 350 (353 f.).

<sup>33</sup> Wollenschläger (N. 18) 396. Cf. also F. Bayreuther 'Inländerdiskriminierung bei Tariftreuerklärungen im Vergaberecht' [2009] *EuZW* 102 (104); A. Egger, *Europäisches Vergaberecht* (Baden-Baden 2008) para. 161; F. Huerkamp, *Gleichbehandlung und Transparenz als gemeinschaftsrechtliche Prinzipien der staatlichen Auftragsvergabe* (Tübingen 2010), 84 f.

create uniform law, apply irrespective of the establishment of a cross-border element and thus comprise an entitlement for resident tenderers.<sup>34</sup>

In a recent and potentially far-reaching ruling, the *Belgacom* case handed down on 14 November 2013, the ECJ, however, explicitly blurred this distinction. The court stressed that ‘the obligation of transparency to be complied with by the concession-granting authority benefits any potential tenderer ..., *even where it is established in the same Member State as those authorities.*’<sup>35</sup> Hence, ‘Articles 49 TFEU and 56 TFEU must be interpreted as meaning that an economic operator in a Member State may, before the courts of that Member State, allege an infringement of the obligation of transparency under those articles occurring at the time of conclusion of an agreement whereby one or more public entities of that Member State have either granted to an economic operator of that same Member State a licence for services of certain cross-border interest or granted an economic operator the exclusive right to engage in an economic activity of cross-border interest.’<sup>36</sup> Generalising this judgement would mean a turning point in the interpretation of the fundamental freedoms and in particular abolish reverse discrimination, but also raise new questions which cannot be discussed here (notably need for limitations *ratione personae* and *materiae*); it may, however, be questioned whether this problematic ruling, handed down only by a chamber of five judges and without an opinion of an Advocate General, is amenable to generalisation, in particular since it relates to a particular subject-matter and does neither overrule nor discuss the former (and contrary) case-law of the court.<sup>37</sup> Nonetheless, the ball might have been set rolling.

Irrespective of this, the question remains of when an interest in market access of foreign economic subjects, and hence a cross-border element activating the fundamental freedoms, can be affirmed.<sup>38</sup> In its case-law on the principle of transparency, the ECJ formulated a reservation in this regard according to which a notice of invitation to tender was not required if ‘because of special circumstances, such as a very modest economic interest at stake, it could reasonably be maintained that an undertaking located in a Member State other than that of [the contracting authority] would have no interest in the concession

<sup>34</sup> On this ECJ, Case C-87/94 *EC v. Belgium* [1996] ECR I-2043, para. 33.

<sup>35</sup> ECJ, Case C-221/12 *Belgacom*, ECLI:EU:C:2013:736, para. 32 (emphasis added).

<sup>36</sup> ECJ, Case C-221/12 *Belgacom*, ECLI:EU:C:2013:736, para. 34. Cf. for a critical view F. Wollenschläger, ‘Binnenmarktrelevanz statt grenzüberschreitender Aktivität – eine Neujustierung in der Dogmatik der Grundfreiheiten?’, in: C. Baldus & F. Kainer & C. Stumpf (ed.), *Privatrecht, Wirtschaftsrecht, Verfassungsrecht: Privatinitiative und Gemeinwohlhorizonte in der europäischen Integration, Festschrift für Peter-Christian Müller-Graff* (Baden-Baden 2015), forthcoming; cf. further M. Gabriel & M. Voll, ‘Das Ende der Inländerdiskriminierung im Vergabe(primär)recht’ [2014/3] *NZBau* 155.

<sup>37</sup> Cf. Wollenschläger (N. 36) IV.

<sup>38</sup> Cf. for the relationship between the concepts ‘purely internal measure’ and ‘cross-border-interest’ Drijber & Stergiou (N. 25) 815 ff.

at issue and that the effects on the fundamental freedoms concerned should therefore be regarded as too uncertain and indirect to warrant the conclusion that they may have been infringed<sup>39</sup>. In infringement proceedings as to the *de facto* public procurement of a non-priority service, relating to a contract which nonetheless reached one of the threshold values of the EU's public procurement directives (2004), but was only restrictedly subject to the transparency requirements of the latter, the Court of Justice qualified the reference by the Commission to the complaint of a foreign interested party – much more restrictively – as not being amenable to the presumption of a cross-border interest, and hence found that foreign tenderers had been indirectly discriminated against.<sup>40</sup> The Commission had, rather, to prove that the contract was 'of certain interest to ... [a foreign undertaking] ... and that that undertaking was unable to express its interest in that contract because it did not have access to adequate information before the contract was awarded'.<sup>41</sup> This restrictive line reflects judicial restraint in view of the decision of the EU legislator to subject non-priority services only to ex-post transparency, i.e. the requirement of a subsequent advertisement (cf. Art. 21 of the Public Procurement Directive 2004/18/EC). This places limits on the generalisation of the ruling from the outset – regardless of its justification<sup>42</sup>.<sup>43</sup> Moreover, in order not to endanger a coherent conceptualisation of the fundamental freedoms, developing an area-specific applicability threshold seems questionable.<sup>44</sup> Accordingly, it will not be possible to demand more than a minimum threshold for activating the market freedom-based public procurement regime.<sup>45</sup>

<sup>39</sup> ECJ, Case C-231/03 *Coname* [2005] ECR I-7287, para. 20; on the requirement of a 'cross-border significance' for the obligation to put out a notice of invitation to tender further Case C-412/04 *EC v. Italy* [2008] ECR I-619, para. 66, 81. Cf. for greater detail on this reservation for public procurement law the Commission Interpretative Communication of 24 July 2006 on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, *OJ C* 179, 2; the CFI held this Communication (Case T-258/06 *Germany v. EC* [2010] ECR II-2027) a correct implementation of primary EU law; cf. further Wollenschläger (N. 18) 391.

<sup>40</sup> ECJ, Case C-507/03 *EC v. Ireland* [2007] ECR I-9777, para. 29 ff.; further Case C-119/06 *EC v. Italy* [2007] ECR I-168, para. 63 ff.

<sup>41</sup> ECJ, Case C-507/03 *EC v. Ireland* [2007] ECR I-9777, para. 32; further Case C-119/06 *EC v. Italy* [2007] ECR I-168, para. 65; joined Cases C-147/06 and C-148/06 *SECAP et al.* [2008] ECR I-3565, para. 21: 'certain cross-border interest'; Case C-95/10 *Strong Segurança* [2011] ECR I-1865, para. 24 ff.

<sup>42</sup> Concurring M. Diehr, "'Vergabeprimärrecht" nach der An-Post-Rechtsprechung des EuGH' [2009] *VergabeR* 719 (729); A. Hübner, 'Anmerkung zu EuGH, Urt. v. 13.11.2007 – Rs. C-507/03' [2008] *VergabeR* 2008, 58 (59 ff.). Disagreeing Bitterich (N. 24) 18; Huerkamp (N. 33) 79 ff.

<sup>43</sup> Similarly T. Siegel, 'Die Grundfreiheiten als Auffangordnung im europäischen und nationalen Vergaberecht' [2008] *EWS* 66 (67 f.). Disagreeing Diehr (N. 42) 726 f.

<sup>44</sup> Cf. also Bitterich (N. 24) 18; Huerkamp (N. 33) 81 f.

<sup>45</sup> Similarly e.g. M. Dreher, 'Vergaberechtsschutz unterhalb der Schwellenwerte' [2002] *NZBau* 419 (423); Egger (N. 33) para. 157 ff.; Wollenschläger (N. 18) 391; cf. further Huerkamp (N. 33) 78 ff. A wider approach is favoured by e.g. M. Burgi, 'Die Zukunft des Vergaberechts' [2009] *NZBau* 609 (613); Drijber & Stergiou (N. 25) 813 f.; cf. also Szydło (N. 9) 1424 f.: rebuttable

The more recent case-law of the ECJ is also in this vein. According to these judgments, the ‘certain cross-border interest’ required in a construction contract may pertain ‘because of its estimated value in conjunction with its technical complexity or the fact that the works are to be located in a place which is likely to attract the interest of foreign operators’.<sup>46</sup> The Court of Justice summed it up as follows:

‘It is in principle for the contracting authority concerned to assess whether there may be cross-border interest in a contract whose estimated value is below the threshold laid down by the Community rules, it being understood that that assessment may be subject to judicial review. It is permissible, however, for legislation to lay down objective criteria, at national or local level, indicating that there is certain cross-border interest. Such criteria could be, inter alia, the fact that the contract in question is for a significant amount, in conjunction with the place where the work is to be carried out. The possibility of such an interest may also be excluded in a case, for example, where the economic interest at stake in the contract in question is very modest ... However, in certain cases, account must be taken of the fact that the borders straddle conurbations which are situated in the territory of different Member States and that, in those circumstances, even low-value contracts may be of certain cross-border interest.’<sup>47</sup>

### 2.1.1.3 The Requirements of the Market Freedom-Based Allocation Regime

The requirements of the market freedom-based allocation regime will be developed on in the following section. Two levels are to be separated here: Firstly, scarcity as such can prove to be in need of justification under Union law, if, as in the case of quotas, it is based on a state decision to permit conduct protected by market freedoms to a limited degree only (2.1.1.3.1). Independently of this, the market freedoms encompass not only substantive requirements for all state allocation activities that are relevant to opportunities for market access (2.1.1.3.2), but also procedural ones (2.1.1.3.3). Finally, a right to an effective remedy constitutes an integral part of the market freedoms (2.1.1.3.4).

---

presumption of lacking cross-border interest in case of adequate assessment by the public authority.

<sup>46</sup> ECJ, joined Cases C-147/06 and C-148/06 *SECAP et al.* [2008] ECR I-3565, para. 24. Cf. also Case C-347/06 *ASM Brescia SpA* [2008] ECR I-5641, para. 59 and 62; Case C-221/12 *Belgacom*, ECLI:EU:C:2013:736, para. 29; Case C-42/13 *Cartiera dell’Adda*, ECLI:EU:C:2014:2345, para. 47; cf. also CFI, Case T-258/06 *Germany v. EC* [2010] ECR II-2027, para. 82 ff.

<sup>47</sup> ECJ, joined Cases C-147/06 and C-148/06 *SECAP et al.* [2008] ECR I-3565, para. 30 f. Confirmed in Case C-347/06 *ASM Brescia SpA* [2008] ECR I-5641, para. 59 and 62; further AG Bot, in: Case C-203/08 *Sporting Exchange Ltd* [2010] ECR I-4695 and Case C-258/08 *Ladbroke’s* [2010] ECR I-4757, para. 166 f. Cf. further, also from a comparative perspective, S. Treumer, ‘Cross-border Interest and Application of EU Law Principles in the Public Procurement Context at National Level’, in: Dragos & Caranta (N. 9) 335.

### 2.1.1.3.1 *The Need to Justify State-Created Scarcity*

State-imposed restrictions of the possibility to engage in gainful employment (which refers to the first two categories of scarcity distinguished above, 1.) are in need of justification vis-à-vis the market freedoms. For, they constitute an obstacle to market access encompassed by the latter, even if they affect foreign and domestic market participants without distinction<sup>48</sup>.<sup>49</sup> Consequently, the application of contingents (like the creation of state monopolies or the direct award to one or more private operators) must be justified by goals which are in the interest of the general public and suited to achieve the objective pursued therewith, and must not go beyond what is needed to achieve the goal.<sup>50</sup> A prominent line of case-law in this respect deals with restricting gambling which has been deemed justified in principle in order to protect consumers, prevent fraud and squandering money on gambling as well as to combat criminality related to gambling.<sup>51</sup> (Proportionate) restrictions might also be justified to secure

<sup>48</sup> Cf. for an understanding of the market freedoms not only as prohibitions of discrimination, but also of restrictions to market access ECJ, Case C-415/93 *Bosman* [1995] ECR I-4921, para. 94 f.; Case 8/74 *Dassonville* [1974] ECR I-837, para. 5; Case C-190/98 *Graf* [2000] ECR I-493, para. 18; Case C-134/03 *Viacom* [2005] ECR I-1167, para. 35; joined Cases C-544/03 and C-545/03 *Mobistar et al* [2005] ECR I-7723, para. 29; Case C-370/05 *Festersen* [2007] ECR I-1135, para. 24 f.; Case C-169/07 *Hartlauer* [2009] ECR I-1721, para. 33; Case C-358/12 *Conorzio Stabile Libor Lavori Pubblici*, ECLI:EU:C:2014:2063, para. 28; and with further references S. Weatherill, 'After Keck: Some thoughts on how to clarify the clarification' [1996/33] *CML Rev.* 885 (901); R.C.A. White, *Workers, establishment, and services in the European Union* (Oxford 2004), 261 ff.; F. Wollenschläger, 'A new Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for shifting the Economic Paradigm of European Integration' [2011/17] *ELJ* 1 (7 f.); idem (N. 21) 54 f. Disagreeing – i.e. understanding the market freedoms uniquely as prohibitions of discriminations between internal and cross-border situations, though not limited to discriminations on grounds of nationality – e.g. G. Davies, *Nationality Discrimination in the European Internal Market* (Den Haag 2003).

<sup>49</sup> Cf. only ECJ, Case C-323/03 *EC v. Spain* [2006] ECR I-2161, para. 43 ff.; joined Cases C-338/04, C-359/04 and C-360/04 *Placanica et al.* [2007] ECR I-1891, para. 51; Case C-380/05 *Centro Europa 7 Srl* [2008] ECR I-349, para. 95 ff.; Case C-169/07 *Hartlauer* [2009] ECR I-1721, para. 33 ff.; Case C-64/08 *Engelmann* [2010] ECR I-8219, para. 44 f.; Case C-463/13 *Stanley International Betting Ltd*, ECLI:EU:C:2015:25, para. 46; Hatzopoulos (N. 9); Szydło (N. 9) 1419 ff.; Wolswinkel (N. 8) 78 f.

<sup>50</sup> ECJ, joined Cases C-338/04, C-359/04 and C-360/04 *Placanica et al.* [2007] ECR I-1891, para. 52 ff.; Case C-380/05 *Centro Europa 7 Srl* [2008] ECR I-349, para. 100; Case C-169/07 *Hartlauer* [2009] ECR I-1721, para. 40 ff.; Case C-156/13 *Digibet Ltd*, ECLI:EU:C:2014:1756, para. 22; Case C-463/13 *Stanley International Betting Ltd*, ECLI:EU:C:2015:25, para. 47 ff. Cf. in the literature and in great detail Hatzopoulos (N. 9) I.; further Drijber & Stergiou (N. 25) 825 ff.; Szydło (N. 9) 1439 ff.

<sup>51</sup> Cf. ECJ, joined Cases C-338/04, C-359/04 and C-360/04 *Placanica et al.* [2007] ECR I-1891, para. 52 ff.; joined Cases C-660/11 and C-8/12 *Biasci et al.*, ECLI:EU:C:2013:550, para. 21 ff.; Case C-156/13 *Digibet Ltd*, ECLI:EU:C:2014:1756, para. 21 ff.; Case C-463/13 *Stanley International Betting Ltd*, ECLI:EU:C:2015:25, para. 45 ff.; Case C-64/08 *Engelmann* [2010] ECR I-8219, para. 28 ff.; joined Cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 *Markus Stoß et al* [2010] ECR I-8069, para. 68 ff.; Case C-212/08 *Zeturf Ltd* [2011] ECR I-5633, para. 36 ff., 73 ff.; Case C-347/09 *Dickinger and Ömer* [2011] ECR I-8185, para. 39 ff.; joined Cases C-186/11 and C-209/11 *Stanleybet International et al.*, ECLI:EU:C:2013:33, para. 20 ff.; Case C-203/08 *Sporting Exchange Ltd* [2010] ECR I-4695 and Case C-258/08 *Ladbrokes* [2010] ECR I-4757, para. 22 ff. For an overview S. van den Bogaert & A. Cuyvers, 'The allocation of gambling licenses', in: Adriaanse & Van Ommeren & Den Ouden & Wolswinkel (N. 9) chapter 13.

the performance of services of general economic interest (cf. Art. 106 § 2 TFEU).<sup>52</sup> In a recent ruling the Court has held that '[a]rticles 49 TFEU and 56 TFEU must be interpreted as meaning that they do not preclude national legislation ... which provides that the provision of urgent and emergency ambulance services must be entrusted on a preferential basis and awarded directly, without any advertising, to the voluntary associations covered by the agreements, in so far as the legal and contractual framework in which the activity of those associations is carried out actually contributes to the social purpose and the pursuit of the objectives of the good of the community and budgetary efficiency on which that legislation is based.'<sup>53</sup> Such a direct award does not only restrict the principle of transparency (cf. below, 2.1.1.3.3.1); rather the legislator has limited market access from the outset.

The distribution of the goods which are permissibly made scarce is then orientated towards the substantive and procedural stipulations discussed below (cf. 2.1.1.3.2 and 2.1.1.3.3). The fact that the shortage already results from a state decision may lead to more strict standards in this respect.

Finally, it has to be noted that scarcity resulting from the state's demanding or supplying goods only in a limited quantity (which refers to the third category of scarcity distinguished above, 1.) is, generally speaking, not in need of justification, unless there would be a legal obligation of the state to the contrary; this may only be assumed in very exceptional cases.<sup>54</sup>

#### *2.1.1.3.2 The Material Component of the Market Freedom Allocation Regime: the Requirement of Objective, Transparent, Non-discriminatory and Proportionate Allocation Criteria*

The material standards following from the market freedoms only require a brief note, given that, because of the multiplicity of the subject-matters concerned, only an abstract framework can be drawn up.<sup>55</sup> At the outset, it shall be noted that the requirements outlined below, in order to secure market access, do not only refer to criteria used for a comparative assessment of the applications (i.e. the allocation criteria *sensu strictu*), but to all criteria relevant for the award including minimum conditions for participation in the procedure or general requirements all applicants have to fulfill. Moreover, the standards extend to

<sup>52</sup> Cf. for a general discussion Caranta 'Report' (N. 9) 143 ff.; N. Fiedziuk, 'Putting Services of General Economic Interest up for Tender: Reflections on Applicable Rules' [2013/50] *CML Rev.* 87. Restrictive ECJ, Case C-160/08 *EC/Germany* [2010] ECR I-3713, para. 125 ff.

<sup>53</sup> ECJ, Case C-113/13 *Spezzino*, ECLI:EU:C:2014:2440, para. 65.

<sup>54</sup> Cf. Wollenschläger (N. 9) 78 ff. for the discussion on respective (positive) obligations following from fundamental rights of the German constitution ('Leistungsrechte').

<sup>55</sup> Cf. also Hatzopoulos (N. 9) II.b.; Wollenschläger (N. 9) 125 f.; further Drijber & Stergiou (N. 25) 818 ff.; Skovgaard Ølykke (N. 9) 6 ff.

the terms of the allocation (like the duration of the award).<sup>56</sup> With regard to the comparative allocation criteria the award may be based on substantive and/or formal criteria. The former imply a comparison of the applications based on material aspects (e.g. the most economically advantageous tender in public procurement, auctions, preference for well-established applicants), the latter comprise criteria like first come, first serve, seniority and distribution per capita, pro rata, by lot or in rotation.<sup>57</sup>

EU Public Procurement law constitutes a good example to illustrate these different types of criteria: First, the general Procurement Directive 2014/24/EU<sup>58</sup> provides for ‘technical specifications’ defining ‘the characteristics required of a works, service or supply’ (Art. 42). Regarding the award, it then distinguishes notably between exclusion grounds (Art. 57) and selection criteria (Art. 58), both regarding the issue of participation in the procurement procedure, on the one hand, and, on the other hand, contract award criteria applied in a second step and determining the choice between all tenders not disqualified because of exclusion grounds and fulfilling the selection criteria (Art. 67).<sup>59</sup> Furthermore, the contracting authority is entitled to ‘lay down special conditions relating to the performance of a contract’ including inter alia ‘economic, innovation-related, environmental, social or employment-related considerations’ (Art. 70); according to recital 104 of this directive, ‘[u]nlike contract award criteria which are the basis for a comparative assessment of the quality of tenders, contract performance conditions constitute fixed objective requirements that have no impact on the assessment of tenders.’

Coming back to the substantive requirements of EU law, firstly, stipulations are not permissible under Union law which openly or indirectly discriminate against foreign workers, investors or products without the difference in treatment being justified. Public procurement law has a rich case-law here; differentiation linked to the characteristic of being a foreigner is rare in formal terms, whilst indirect discrimination is more widespread.<sup>60</sup> For instance, one could complain that, when granting contracts, only tenderers were considered which

<sup>56</sup> Cf. for a distinction between (comparative) allocation and (further) granting criteria Wolswinkel ‘Allocation Perspective’ (N. 9) 2.

<sup>57</sup> Cf. in more detail including an assessment Wollenschläger (N. 9) 554 ff.

<sup>58</sup> Cf. N. 6.

<sup>59</sup> Exclusion grounds refer to the breach of certain legal obligations (e.g. conviction by final judgment for participation in a criminal organisation or corruption; cf. Art. 57 Dir. 2014/24/EU), selection criteria ‘may relate to: (a) suitability to pursue the professional activity; (b) economic and financial standing; (c) technical and professional ability’ (Art. 58 Dir. 2014/24/EU) and the award is based ‘on the most economically advantageous tender’ (Art. 67 § 1 Dir. 2014/24/EU).

<sup>60</sup> Cf. e.g. ECJ, Case C-225/98 *EC v. France* [2000] ECR I-7445, para. 85 ff.; Case C-234/03 *Contse et al.* [2005] ECR I-9315, para. 28 ff.; Case C-64/08 *Engelmann* [2010] ECR I-8219, para. 32 ff. More in detail Egger (N. 33) para. 267 ff.; Wollenschläger (N. 18) 391 f. Cf., in general, on the concept of indirect discrimination ECJ, Case C-237/94 *O’Flynn* [1996] ECR I-2617, para. 21; Wollenschläger (N. 21) 39 f.

had office premises at the place where the service was to be provided at the time the tender was submitted.<sup>61</sup> Also the automatic exclusion of tenders which are considered to be abnormally low may lead to the market being shored up to the disadvantage of foreign tenderers.<sup>62</sup> Moreover, as a consequence of the market freedoms being understood not only as prohibitions of discrimination, but also of restrictions on market access,<sup>63</sup> it is not permissible to apply criteria unjustifiably restricting intra-EU trade in this sense. Thus, the award criteria themselves, being decisive for market access, must not unduly restrict the latter: 'As regards public contracts, it is the concern of the European Union, in relation to the freedom of establishment and the freedom to provide services, to ensure the widest possible participation by tenderers in a call for tenders ... The application of a provision which excludes persons who have committed serious infringements of national rules governing social security contributions from participating in procedures for the award of public works contracts ... may compromise the widest possible participation by tenderers in a call for tenders.'<sup>64</sup> Yet, and rightly so, the mentioned criterion has been held to be justified in view of its aim 'to ensure the reliability, diligence and responsibility of the tenderer and its proper conduct in relation to its employees.'<sup>65</sup> Likewise, it has been held to be principally justified in the context of gambling to exclude operators who have been convicted of criminal offences.<sup>66</sup> To give an example to the contrary: The ECJ upheld the requirement to only use certain products when performing a contract infringing EU law.<sup>67</sup>

In a judgment on the distribution of scarce broadcasting frequencies handed down in the year 2008, the Court of Justice has introduced a general formula to assess the conformity of award criteria with the fundamental freedoms, requirements which also appear in various acts of secondary legislation<sup>68</sup>. The distribution has to be carried out 'on the basis of objective, transparent, non-discriminatory and proportionate criteria'.<sup>69</sup> The principles of objectiveness

<sup>61</sup> ECJ, Case C-234/03 *Contse et al.* [2005] ECR I-9315, para. 28 ff.; further Case C-264/03 *EC v. France* [2005] ECR I-8831, para. 64 ff.; Case C-64/08 *Engelmann* [2010] ECR I-8219, para. 32 ff.

<sup>62</sup> Cf. e.g. ECJ, joined Cases C-147/06 and C-148/06 *SECAP et al.* [2008] ECR I-3565, para. 23 ff.

<sup>63</sup> Cf. above, N. 48.

<sup>64</sup> ECJ, Case C-358/12 *Consorzio Stabile Libor Lavori Pubblici*, ECLI:EU:C:2014:2063, para. 29. Cf. further Case C-470/13 *Generali-Providencia Biztosító*, ECLI:EU:C:2014:2469, para. 34 ff.; joined Cases C-357/10 to C-359/10 *Duomo Gpa et al.*, ECLI:EU:C:2012:283, para. 37 ff.

<sup>65</sup> Case C-358/12 *Consorzio Stabile Libor Lavori Pubblici*, ECLI:EU:C:2014:2063, para. 31 ff. Cf. further Case C-470/13 *Generali-Providencia Biztosító*, ECLI:EU:C:2014:2469, para. 34 ff.

<sup>66</sup> ECJ, joined Cases C-72/10 and C-77/10 *Costa and Cifone*, ECLI:EU:C:2012:80, para. 76 ff.; Case C-463/13 *Stanley International Betting Ltd*, ECLI:EU:C:2015:25, para. 45 ff.

<sup>67</sup> ECJ, Case C-359/93 *EC v. Netherlands* [1995] ECR I-157, para. 27; Case C-59/00 *Vestergaard* [2001] ECR I-9505, para. 22.

<sup>68</sup> For details see below, 3.

<sup>69</sup> ECJ, Case C-380/05 *Centro Europa 7 Srl* [2008] ECR I-349, para. 103 f. On the principle of proportionality also Case C-538/07 *Assitur Srl* [2009] ECR I-4219, para. 24 ff. Cf. also the EC in its Communication on IPPP (N. 16) 8; M. Krüger, 'The Principles of Equal Treatment and



and non-discrimination prohibit criteria that aim to exclude specific tenderers; the requirement of transparency demands the formulation of clear, meaningful award criteria in order, firstly, to counter barriers to access for interested parties, and secondly to rule out latitude in decision-making enabling the allocating authority to engage in arbitrary treatment, and thirdly, to make the award decision verifiable.<sup>70</sup> The criterion of proportionality, finally, requires an appropriate material connection between the asset to be distributed and the criteria that are relevant thereto.<sup>71</sup> This does not rule out the pursuance of secondary purposes, like environmental or social considerations (e.g. requirement to pay a certain minimum wage) in public procurement, if sufficiently justified.<sup>72</sup>

Finally, the chances of newcomers to gain market access must not be unduly restricted.<sup>73</sup> In this regard, the award of concessions may turn out to be disproportionate if their term exceeds the time needed to amortise the investment since the aspect of a fair allocation over time is not taken into account. An excessive duration of the contract would restrict the chances of new applicants to gain access to the market.<sup>74</sup> Moreover, the ECJ held ‘a Member State which, in breach of EU law, has excluded a category of operators from the award of licences to engage in a particular economic activity and which seeks to remedy that breach by putting out to tender a significant number of new licences, [precluded] from protecting the market positions acquired by the existing operators, by providing inter alia that a minimum distance must be observed between the establishments of new licence holders and those of existing operators.’<sup>75</sup>

---

Transparency and the Commission Interpretative Communication on Concessions’ [2003/12] P.P.L.R. 181 (2002); Szydło (N. 9) 1425 ff., 1439 ff.

<sup>70</sup> Cf. in this respect ECJ, Case C-199/07 *EC v. Greece* [2009] ECR I-10669, para. 35 ff.; further joined Cases C-72/10 and C-77/10 *Costa and Cifone*, ECLI:EU:C:2012:80, para. 56, 72 ff.; joined Cases C-660/11 and C-8/12 *Biasci et al.*, ECLI:EU:C:2013:550, para. 21 ff.; Case C-156/13 *Digibet Ltd*, ECLI:EU:C:2014:1756, para. 33 ff.; Case C-463/13 *Stanley International Betting Ltd*, ECLI:EU:C:2015:25, para. 38; Szydło (N. 9) 1429 ff.: criteria must be feasible, verifiable and linked to the subject-matter of the good allocated.

<sup>71</sup> Extensively Huerkamp (N. 33) 226 ff. Cf. also ECJ, Case C-376/08 *Serrantoni* [2009] ECR I-12169, para. 31 ff.; joined Cases C-72/10 and C-77/10 *Costa and Cifone*, ECLI:EU:C:2012:80, para. 69 ff.; Case C-358/12 *Consortio Stabile Libor Lavori Pubblici*, ECLI:EU:C:2014:2063, para. 28 ff.; Szydło (N. 9) 1429 ff., 1439 ff.

<sup>72</sup> Cf. only ECJ, Case C-549/13 *Bundesdruckerei*, ECLI:EU:C:2014:2235, para. 30 ff. In the same vein also Krüger (N. 69) 203 f.

<sup>73</sup> Cf. joined Cases C-660/11 and C-8/12 *Biasci et al.*, ECLI:EU:C:2013:550, para. 21 ff.; Case C-156/13 *Digibet Ltd*, ECLI:EU:C:2014:1756, para. 32.

<sup>74</sup> ECJ, Case C-323/03 *EC v. Spain* [2006] ECR I-2161, para. 47 f.; further Case C-64/08 *Engelmann* [2010] ECR I-8219, para. 46 ff.; Case C-451/08 *Helmut Müller GmbH* [2010] ECR I-2673, para. 79; Frenz (N. 24) para. 1849; Wolswinkel (N. 8) 98 ff. In the field of the EU’s public procurement directives, the ECJ (Case C-454/06 *Presstext* [2008] ECR I-4401, para. 73 f.) however accepts open-ended contracts for lack of a corresponding ban and despite the simultaneously stressed contradiction of the system and goals of the Union’s procurement law.

<sup>75</sup> ECJ, joined Cases C-72/10 and C-77/10 *Costa and Cifone*, ECLI:EU:C:2012:80, para. 66. Cf. further Case C-463/13 *Stanley International Betting Ltd*, ECLI:EU:C:2015:25, para. 36 ff.

### 2.1.1.3.3 *The Procedural Component of the Market Freedom Allocation Regime: the Requirements of a Transparent and Objective Administrative Procedure*

The realisation of the market freedoms does not only require prohibiting the use of award criteria which are discriminatory or hinder market access, but also designing the administrative award procedure accordingly.<sup>76</sup> Support for such positive procedural stipulations is found not only in the market freedoms interpreted in the light of the effectiveness principle, but very generally in Article 4 § 3 sub-paragraph 2 TEU, in accordance with which the 'Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties ...'.<sup>77</sup> In this sense, the ECJ has stressed variously that access to judicial protection in order to verify whether national measures are in accord with the market freedoms is vital to their effectiveness.<sup>78</sup> Particularly in its more recent case-law on procurement not covered by the EU's directives, the ECJ further expanded the procedural dimension of the market freedoms and derived obligations from the latter in terms of transparency and advertisement (2.1.1.3.3.1), as well as the requirement of shaping the award procedure along the lines of equal opportunities (2.1.1.3.3.2).

#### 2.1.1.3.3.1 Obligations in Terms of Transparency and Advertisement

A major aspect of the procedural protection of market freedoms is constituted by the principles of transparent initiation and implementation of the allocation procedure. At first, the Court of Justice derived the principle of transparent procedures from the prohibition of discrimination under Union law, namely in the case of *Unitron Scandinavia*: Only if it were complied with would it be possible to ascertain whether the administrative procedure was implemented without discrimination.<sup>79</sup>

Although it did not specify any concrete consequences *in casu*, the ECJ hence acknowledged the existence of documentation obligations.<sup>80</sup> The Court of Justice

<sup>76</sup> Cf. also Hatzopoulos (N. 9) II.a.; Szydło (N. 9) 1433 ff.

<sup>77</sup> Cf. also AG *Stix-Hackl*, in: ECJ, Case C-231/03 *Coname* [2005] ECR I-7287, para. 42 ff.; H. Kaelble, *Vergabeentscheidung und Verfahrensgerechtigkeit* (Berlin 2008), 228; F. Neumayr, 'Value for Money v. Equal Treatment' [2002/11] *P.P.L.R.* 215 (231). Denying positive obligations, i.e. duties to act, following from EU primary law Braun (N. 24) 45.

<sup>78</sup> ECJ, Case 222/86 *Heylens* [1987] ECR 4097, para. 14 ff.; Case C-340/89 *Vlassopoulou* [1991] ECR I-2357, para. 22. Cf. now also Art. 47 CFREU.

<sup>79</sup> ECJ, Case C-275/98 *Unitron Scandinavia* [1999] ECR I-8291, para. 31; Case C-324/98 *Telaustria* [2000] ECR I-10745, para. 61; Case C-458/03 *Parking Brixen* [2005] ECR I-8612, para. 49; Case C-410/04 *ANAV* [2006] ECR I-3303, para. 21; Case C-260/04 *EC v. Italy* [2007] ECR I-7083, para. 24; Case C-196/08 *Acoset SpA* [2009] ECR I-9913, para. 49. A transparency principle derived from the market freedoms further resounded in Case C-108/98 *RI.SAN* [1999] ECR I-5219, para. 20.

<sup>80</sup> Cf. also Frenz (N. 24) para. 1845; idem (N. 15) 349; M. Knauff, 'Dokumentations- und Informationspflichten', in: M. Müller-Wrede (ed.), *Kompendium des Vergaberechts* (Köln 2013), chapter 22, para. 7. Disagreeing Egger (N. 33) para. 147.

had already derived a duty to state reasons from the guarantee of an effective remedy.<sup>81</sup>

In its later judgment in the *Telaustria* case, the Court of Justice moreover considered the obligation of transparency to consist in the contracting authority ‘ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition’.<sup>82</sup> This thought anticipates the principle, subsequently and rightly derived from the market freedoms in the case of *Parking Brixen*, to make the award of public contracts sufficiently public.<sup>83</sup> In fact, the possibility opened up by the market freedoms, namely to engage in commerce in other EU Member States, would be lost were foreign tenderers not to be able to learn of such economic opportunities.<sup>84</sup> The form and scope of the obligation to advertise an award depend

<sup>81</sup> ECJ, Case 222/86 *Heylens* [1987] ECR 4097, para. 15; further Case C-75/08 *Mellor* [2009] ECR I-3799, para. 59.

<sup>82</sup> ECJ, Case C-324/98 *Telaustria* [2000] ECR I-10745, para. 62; equally Case C-458/03 *Parking Brixen* [2005] ECR I-8612, para. 49; Case C-260/04 *EC v. Italy* [2007] ECR I-7083, para. 24; Case C-220/06 *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia* [2007] ECR I-12175, para. 75.

<sup>83</sup> ECJ, Case C-458/03 *Parking Brixen* [2005] ECR I-8612, para. 49 ff.; further Case C-231/03 *Coname* [2005] ECR I-7287, para. 17 ff.; Case C-410/04 *ANAV* [2006] ECR I-3303, para. 21; Case C-260/04 *EC v. Italy* [2007] ECR I-7083, para. 24; Case C-507/03 *EC v. Ireland* [2007] ECR I-9777, para. 29 ff.; Case C-220/06 *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia* [2007] ECR I-12175, para. 75; Case C-412/04 *EC v. Italy* [2008] ECR I-619, para. 66 and 81; Case C-347/06 *ASM Brescia SpA* [2008] ECR I-5641, para. 58 ff.; Case C-324/07 *Coditel Brabant* [2008] ECR I-8457, para. 25; joined Cases C-72/10 and C-77/10 *Costa and Cifone*, ECLI:EU:C:2012:80, para. 54 f., 72 f.; BGH (German Federal Court of Justice), NJW-RR 2006, 836 (843); AG Bot, in: ECJ, Case C-203/08 *Sporting Exchange Ltd* [2010] ECR I-4695 and Case C-258/08 *Ladbroke's* [2010] ECR I-4757, para. 152 ff.; VG Köln (Cologne Administrative Court), K 4507/08 – juris, para. 20 ff.; CFI, Case T-258/06 *Germany v. EC* [2010] ECR II-2027, para. 68 ff. It is however questionable whether the obligation to issue a notice of invitation to tender can be derived in concurrence with the Court of Justice from the fundamental freedoms prohibition of discrimination (particularly clearly in this instance Case C-231/03 *Coname* [2005] ECR I-7287, para. 17 ff.; Case C-507/03 *EC v. Ireland* [2007] ECR I-9777, para. 30 f.; Case C-412/04 *EC v. Italy* [2008] ECR I-619, para. 66; Case C-347/06 *ASM Brescia SpA* [2008] ECR I-5641, para. 58 ff.; Case C-221/12 *Belgacom*, ECLI:EU:C:2013:736, para. 37; concurring Huerkamp [N. 33] 159 f. and 315 ff.). This supposes not issuing a notice of invitation to tender being qualified as latent discrimination, i.e. a *de facto* preferential treatment of resident tenderers. At any rate, a lack of transparency constitutes an obstacle to market access and can hence at least be qualified as a restriction of the market freedoms – cf. in more detail Szydło (N. 9) 1433 ff.; Wollenschläger (N. 18) 393; disagreeing Huerkamp (N. 33) 317 ff. (cf. in contrast however ECJ, Case C-376/08 *Serrantoni* [2009] ECR I-12169, para. 41). As also with the EU’s fundamental right of equality (on this below, 2.2.2.), the Member States are however not necessarily bound by an isolated principle of transparency (on this also Krüger [N. 69] 193 ff.). Cf. further on the relationship Drijber & Stergiou (N. 25) 817 ff.

<sup>84</sup> The EC hence also presumes an obligation to issue a notice of invitation to tender in its Communication on IPPP (N. 16) 7; C. Braun, ‘Europarechtlicher Vergaberechtsschutz unterhalb der Schwellenwerte’ [2007] *VergabeR* 17 (21 f.); M. Bungenberg, *Vergaberecht im Wettbewerb der Systeme* (Tübingen 2007), 210; M. Burgi, ‘Die Vergabe von Dienstleistungskonzessionen: Verfahren, Vergabekriterien, Rechtsschutz’ [2005] *NZBau* 610 (612 and 615); Frenz (N. 24) para. 1837 ff.; Kaelble (N. 77) 237 ff.; Krüger (N. 69) 197 ff.; Neumayr (N. 77) 222 and 227; R. Ortner, *Vergabe von Dienstleistungskonzessionen* (Köln 2007), 174 ff.; Szydło (N. 9) 1433 ff.; Wollenschläger (N. 18) 392 f.; Wolswinkel (N. 8) 90 ff. Dissenting Braun (N. 24) 44 ff.;

on the circumstances of the individual case,<sup>85</sup> a formal call for tenders not being absolutely necessary, but allowing a suitable degree of publicity to be ensured by other means<sup>86</sup>. The administrative effort which this entails can also be taken into account.<sup>87</sup> The lack of any advertisement is in breach of Union law<sup>88</sup> unless it can be exceptionally justified, for instance in cases of particular urgency<sup>89</sup>. Moreover, the advertisement must provide sufficient information on the subject of the award as well as on criteria that are material to allocation and to the procedures.<sup>90</sup>

### 2.1.1.3.3.2 Equal Treatment and Equal Opportunities in Award Procedures

The equal treatment of tenderers in the administrative procedure proves to be of considerable significance for the production of an expedient, equitable decision on allocations. In the context of its case-law on the requirements of

---

N. Meyer, *Die Einbeziehung politischer Zielsetzungen bei der öffentlichen Beschaffung* (Berlin 2002), 182; critical with regard to the lack of legal certainty also AG Sharpston, in: ECJ, Case C-195/04 *EC v. Finland* [2007] ECR I-3351, para. 84 ff.

<sup>85</sup> ECJ, Case C-458/03 *Parking Brixen* [2005] ECR I-8612, para. 50; Case C-231/03 *Coname* [2005] ECR I-7287, para. 21; Case C-324/07 *Coditel Brabant* [2008] ECR I-8457, para. 25. Cf. for a further concretisation AG Stix-Hackl, in: ECJ, Case C-231/03 *Coname* [2005] ECR I-7287, para. 91 ff.; joined Cases C-72/10 and C-77/10 *Costa and Cifone*, ECLI:EU:C:2012:80, para. 55; the Commission Interpretative Communication (N. 39) 3 ff., and the Commission Communication on IPPP (N. 16) 8, as well as in the literature: A. Brown, 'EU Primary Law Requirements in Practice: Advertising, Procedures and Remedies for Public Contracts Outside the Procurement Directives' [2010/19] *P.P.L.R.* 169 (173 ff.); Burgi (N. 84) 615; Egger (N. 33) para. 253 f.; Frenz (N. 24) para. 1838 ff.; idem (N. 15) 350; Huerkamp (N. 33) 322 ff.; Ortner (N. 84) 178 ff.; Wollenschläger (N. 18) 393.

<sup>86</sup> ECJ, Case C-324/07 *Coditel Brabant* [2008] ECR I-8457, para. 25; Case C-64/08 *Engelmann* [2010] ECR I-8219, para. 50; joined Cases C-72/10 and C-77/10 *Costa and Cifone*, ECLI:EU:C:2012:80, para. 55; Drijber & Stergiou (N. 25) 810 f.

<sup>87</sup> Cf. joined Cases C-147/06 and C-148/06 *SECAP et al.* [2008] ECR I-3565, para. 32; Huerkamp (N. 33) 181 ff.

<sup>88</sup> ECJ, Case C-458/03 *Parking Brixen* [2005] ECR I-8612, para. 50; Case C-231/03 *Coname* [2005] ECR I-7287, para. 17; Case C-410/04 *ANAV* [2006] ECR I-3303, para. 22; Case C-260/04 *EC v. Italy* [2007] ECR I-7083, para. 25; Case C-220/06 *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia* [2007] ECR I-12175, para. 76; Case C-412/04 *EC v. Italy* [2008] ECR I-619, para. 66; Case C-347/06 *ASM Brescia SpA* [2008] ECR I-5641, para. 59; BGH (German Federal Court of Justice) NJW-RR 2006, 836 (843).

<sup>89</sup> On this ECJ, Case C-231/03 *Coname* [2005] ECR I-7287, para. 19 f.; Case C-260/04 *EC v. Italy* [2007] ECR I-7083, para. 26 ff.; Case C-507/03 *EC v. Ireland* [2007] ECR I-9777, para. 31; Case C-412/04 *EC v. Italy* [2008] ECR I-619, para. 66; Case C-347/06 *ASM Brescia SpA* [2008] ECR I-5641, para. 60 and 64 ff.; Case C-64/08 *Engelmann* [2010] ECR I-8219, para. 51 ff.; CFI, Case T-258/06 *Germany v. EC* [2010] ECR II-2027, para. 138 ff.; ECJ, Case C-221/12 *Belgacom*, ECLI:EU:C:2013:736, para. 38; Case C-113/13 *Spezzino*, ECLI:EU:C:2014:2440, para. 56 ff.; Drijber & Stergiou (N. 25) 832 ff.; J. Kühling & F. Huerkamp, 'Ausschreibungsverzicht und Europäische Grundfreiheiten – Das Vergaberecht in der (Wirtschafts-)Krise' [2009] *NVwZ* 557 (560); Ortner (N. 84) 176 ff.; Szydło (N. 9) 1435 f.; Wolswinkel (N. 8) 96.

<sup>90</sup> Cf. joined Cases C-72/10 and C-77/10 *Costa and Cifone*, ECLI:EU:C:2012:80, para. 56; the EC in its Communication on IPPP (N. 16) 8 f.; Kaelble (N. 77) 239 ff.; Szydło (N. 9) 1436 f.; Wolswinkel (N. 8) 90. Reserved on such concept obligations Huerkamp (N. 33) 324 f. and 335 ff.

the award of contracts beyond the coordinated public procurement law, the Court of Justice has repeatedly complained of the absence of a corresponding procedure. Given that the Member States are only restrictedly bound by the EU's fundamental rights (Art. 51 § 1 sentence 1 CFR), the requirement of equal treatment and equal opportunities in award procedures cannot be understood as a generally applicable principle based on the procedural dimension of the fundamental right to equality before the law (Art. 20 CFR).<sup>91</sup> Nonetheless, the fundamental freedoms protecting foreign applicants who wish to gain access to the market require the procedure to be structured in such a way that opportunities for market access are guaranteed.<sup>92</sup> Completely in line with this, the ECJ stressed the significance of 'open, transparent and non-discriminatory procedures' for market access in a judgment on the allocation of broadcasting frequencies,<sup>93</sup> and the Commission referred in its Communication on the non-coordinated public procurement regime to the 'guarantee of a fair and impartial procedure'.<sup>94</sup>

The Court of Justice has so far hardly drawn any conclusions from this postulate in its case-law on the market freedom-based allocation regime beyond the obligations of transparency and to advertise an award discussed above.<sup>95</sup> Also the abovementioned Commission communication only contains a small number of requirements which do not already follow from the prohibition of discrimination against foreign tenderers and goods, such as the application of appropriate periods for application<sup>96, 97</sup>

The ECJ has nonetheless recognised the principle, which to a certain extent emerges as the consequence of the obligation to advertise the award, to apply the material and procedural criteria advertised at the beginning of the award procedure. The contracting authority is hence prohibited 'from rejecting a tender which satisfies the requirements of the invitation to tender on grounds which are not set out in the tender specifications and which are relied on subsequent

<sup>91</sup> Cf. below, 2.2.1.

<sup>92</sup> In the same vein also ECJ, Case C-108/98 *RI.SAN* [1999] ECR I-5219, para. 20; cf. further Szydło (N. 9) 1425 ff.; Wollenschläger (N. 18) 394. By contrast, Braun (N. 24) 44 ff., considers that the principle of equal treatment cannot be derived from EU primary law. Dissenting F. Huerkamp, 'Die grundfreiheitlichen Beschränkungsverbote und die Beschaffungstätigkeit des Staates' [2009] *EuR* 563 (566 ff.), as well as idem (N. 33) 65 ff., who calls for the prohibitions on restrictions of fundamental freedoms in public procurement to be understood as principles relating to the equal treatment of tenderers.

<sup>93</sup> ECJ, Case C-380/05 *Centro Europa 7 Srl* [2008] ECR I-349, para. 99 ff., in particular 105.

<sup>94</sup> Commission Interpretative Communication (N. 39) 5. Cf. also ECJ, Case C-324/07 *Coditel Brabant* [2008] ECR I-8457, para. 25.

<sup>95</sup> Cf. only ECJ, Case C-458/03 *Parking Brixen* [2005] ECR I-8612, para. 49 ff.; Case C-410/04 *ANAV* [2006] ECR I-3303, para. 20 ff.; Case C-6/05 *Medipac-Kazantzidis* [2007] ECR I-4557, para. 33; Case C-260/04 *EC v. Italy* [2007] ECR I-7083, para. 23 ff.; Case C-220/06 *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia* [2007] ECR I-12175, para. 74 ff.

<sup>96</sup> With regard to this principle W. Frenz, 'Unterschwelvenvergaben' [2007] *VergabeR* 1 (8).

<sup>97</sup> Commission Interpretative Communication (N. 39) 5 f.

to the submission of the tender.’ The danger would otherwise exist of an arbitrary procedure that would impair tenderers’ equal opportunities.<sup>98</sup> The ‘transparent and objective approach’ also called for by the Commission in its communication points in this direction, in accordance with which ‘[a]ll participants must be able to know the applicable rules in advance and must have the certainty that these rules apply to everybody in the same way ... It is important that the final decision awarding the contract complies with the procedural rules laid down at the outset’.<sup>99</sup> Turned on its head, this also means that tenders which do not satisfy the requirements must not be considered.<sup>100</sup> Yet, this requirement to apply the criteria and procedure set out in advance does not mean that every deviation constitutes a breach of the market freedoms; rather, a distinction should be made between requirements relevant for market access and other regulatory provisions.<sup>101</sup>

Finally, equal opportunities in terms of market access, in particular in negotiation procedures, imply the maintenance of neutrality vis-à-vis tenderers, for instance with regard to negotiations and to access to information<sup>102</sup> or by excluding biased officials<sup>103, 104</sup>.

#### 2.1.1.3.4 Legal Protection

Being able to verify alleged violations of the market freedoms is vital to their effectiveness.<sup>105</sup> Accordingly, a corresponding guarantee of legal protection is

<sup>98</sup> ECJ, Case C-6/05 *Medipac-Kazantzidis* [2007] ECR I-4557, para. 53 f.; cf. further joined Cases C-72/10 and C-77/10 *Costa and Cifone*, ECLI:EU:C:2012:80, para. 56 f.; Case C-42/13 *Cartiera dell'Adda*, ECLI:EU:C:2014:2345, para. 48; Burgi (N. 84) 615; Egger (N. 33) para. 274; Krügener (N. 69) 201 and 204 ff.; Neumayr (N. 77) 230 and 233 f. Cf. also in the context of the public procurement directives Case C-532/06 *Lianakis* [2008] ECR I-251, para. 33 ff.; further – not ruling out a power to make alterations – Case C-431/07 *Bouygues et al.* [2009] ECR I-2665, para. 124.

<sup>99</sup> Commission Interpretative Communication (N. 39) 6; confirmed in CFI, Case T-258/06 *Germany v. EC* [2010] ECR II-2027, para. 129 f. In the same vein the EC in its Communication on IPPP (N. 16) 7; further Wolswinkel (N. 8) 90. On the question of possible alterations Krügener (N. 69) 204 ff.; Wolswinkel, ‘Allocation Perspective’ (N. 9) 5.

<sup>100</sup> Neumayr (N. 77) 233 f.

<sup>101</sup> In this vein already Wollenschläger (N. 18) 394 f.

<sup>102</sup> Cf. on this also the Commission Interpretative Communication (N. 39) 6, and, illustrandi causa, Art. 30 § 2 sentence 2 of the Concession Directive 2014/23/EU (N. 6): ‘In particular during the concession award procedure, the contracting authority or contracting entity shall not provide information in a discriminatory manner which may give some candidates or tenderers an advantage over others.’

<sup>103</sup> Burgi (N. 84) 615; Frenz (N. 24) para. 1846. Cf., illustrandi causa, Art. 35 of the Concession Directive 2014/23/EU (N. 6).

<sup>104</sup> Cf. also Wolswinkel, ‘Allocation Perspective’ (N. 9) 5.

<sup>105</sup> Cf. for a comprehensive analysis of issues related to legal protection in allocation procedures F. Wollenschläger, ‘Challenges of legal protection’, in: Adriaanse & Van Ommeren & Den Ouden & Wolswinkel (N. 9) chapter 5. Cf. further S. Díez Sastre, ‘La tutela de los competidores en los procedimientos administrativos de adjudicación’, in: Arroyo & Utrilla (N. 9) 205.

regarded as constituting an integral component of these guarantees.<sup>106</sup> With the Court of Justice, this is fundamentally orientated towards primary legal protection, i.e. towards the possibility to challenge an administrative decision with the goal of quashing it. Not only individual legal protection interests, but also the internal market goal of the Union is satisfied to a greater degree by reducing obstacles to mobility than by providing financial compensation for violations of the law (damages as secondary form of legal protection).<sup>107</sup> That the priority of primary legal protection however is also not a dogma in Union law is made clear by the case of *Unibet*. In this case, the ECJ did not consider national legislatures and the judiciary to be obliged to create new legal remedies providing primary legal protection if the compatibility of national measures with Union law could be effectively reviewed within compensation actions.<sup>108</sup>

<sup>106</sup> ECJ, Case 222/86 *Heylens* [1987] ECR 4097, para. 14 ff.; Case C-340/89 *Vlassopoulou* [1991] ECR I-2357, para. 22; Case C-64/08 *Engelmann* [2010] ECR I-8219, para. 55; Case C-91/08 *Wall AG* [2010] ECR I-2815, para. 61 ff.; AG Bot, ebd., para. 124 ff.; Commission Interpretative Communication (N. 39) 6 f. Cf. now also Art. 47 CFREU. In the literature: J. Englisch, 'Effektiver Primärrechtsschutz bei Vergabe öffentlicher Aufträge' [2007/98] *VerwArch* 410 (431); Hatzopoulos (N. 9) II.c.

<sup>107</sup> In this vein ECJ, Case C-265/95 *EC v. France* [1997] ECR I-6959, para. 59 f.: 'As regards the fact that the French Republic has assumed responsibility for the losses caused to the victims, this cannot be put forward as an argument by the French Government in order to escape its obligations under Community law. Even though compensation can provide reparation for at least part of the loss or damage sustained by the economic operators concerned, the provision of such compensation does not mean that the Member State has fulfilled its obligations.'; further – for public procurement – Case C-81/98 *Alcatel Austria AG et al.* [1999] ECR I-7671, para. 37 ff.; OLG Düsseldorf (Appellate Court Düsseldorf) [2010] *NZBau* 328 (330). Cf. also – in the context of an assessment of environmental effects of projects – ECJ, Case C-201/02 *Wells* [2004] ECR I-723, para. 69: 'In that regard, it is for the national court to determine whether it is possible under domestic law for a consent already granted to be revoked or suspended in order to subject the project in question to an assessment of its environmental effects, in accordance with the requirements of Directive 85/337, or alternatively, if the individual so agrees, whether it is possible for the latter to claim compensation for the harm suffered' (emphasis added; confirmed in Case C-420/11 *Leth*, ECLI:EU:C:2013:166, para. 37). In the same vein K. Bitterich, 'Rechtsschutz bei Verletzung aus dem EG-Vertrag abgeleiteter "Grundanforderungen" an die Vergabe öffentlicher Aufträge' [2007] *NVwZ* 890 (893 f.); Braun (N. 84) 19; idem, 'Zivilrechtlicher Rechtsschutz bei Vergaben unterhalb der Schwellenwerte' [2008] *NZBau* 160 (161); M. Burgi, 'Von der Zweistufenlehre zur Dreiteilung des Rechtsschutzes im Vergaberecht' [2007] *NVwZ* 737 (742); Frenz (N. 96) 9 f. and 13; S. Gers-Grapperhaus, *Das Auswahlrechtsverhältnis bei Auftragsvergaben unterhalb der Schwellenwerte* (Baden-Baden 2009) 246 ff.; Wollenschläger (N. 18) 395. With regard to the party seeking legal protection: R. Streinz, 'Primär- und Sekundärrechtsschutz im Öffentlichen Recht' [2002/61] *VVDStRL* 300 (351 f.).

<sup>108</sup> ECJ, Case C-432/05 *Unibet* [2007] ECR I-2271, para. 36 ff., in particular 53 ff.; cf. further Case C-91/08 *Wall AG* [2010] ECR I-2815, para. 61 ff.; CFI, joined Cases T-172/98 and T-175/98 to T-177/98 *Salamander et al.* [2000] ECR II-2487, para. 77 f.; joined Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01 *Philip Morris International et al.* [2003] ECR II-1, para. 123; AG Bot, in: ECJ, Case C-91/08 *Wall AG* [2010] ECR I-2815, para. 136 ff. Cf. also Bitterich (N. 107) 893 f.; O. Dörr, 'Die Gewährleistung von Gerichtsschutz als menschenrechtliche Verpflichtung Gerichtsschutz', in: E. Klein (ed.), *Gewaltenteilung und Menschenrechte* (Berlin 2006), 129 (139 f.); J. Gundel, 'Rechtsschutz und Rechtsweg bei der Vergabe öffentlicher Aufträge unterhalb der "Schwellenwerte"' [2008] *Jura* 288 (293 f.); Huerkamp (N. 33) 338 f. Dissenting Braun (N. 84) 19 and 22 ff.; Englisch (N. 106) 433 f.

Additionally, in the context of the multipolar conflict situation of access to employment with a recruitment practice in violation of Anti-Discrimination Directive 76/207/EEC, the European legislator did not consider primary legal protection to be absolutely necessary, but considered effective compensation to be sufficient (Art. 6 of Directive 76/207/EEC). The ECJ has not objected to this.<sup>109</sup> It remains to be seen how far-reaching consequences can be drawn from this.<sup>110</sup> It can however be observed that restrictions in the guarantee of legal protection are permissible in multipolar legal relationships if important reasons justify them.

In a procurement-related case, the General Court – unlike the German Constitutional Court ('Bundesverfassungsgericht') in the national context<sup>111</sup> – has strengthened the primacy of primary legal protection by obliging the contracting authority to inform unsuccessful bidders about the decision to award the contract in order to enable them to lodge an appeal:

'As regards, first of all, the purported infringement of the principle of the right to an effective remedy, it should be borne in mind that access to the courts is one of the essential elements of a community based on the rule of law and is guaranteed in the legal order based on the EC Treaty, inasmuch as the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of acts of the Community administration ... Moreover, the Court of Justice bases the right to an effective remedy before a court of competent jurisdiction on the constitutional traditions common to the Member States and on Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ... Lastly, the right to an effective remedy for every person whose rights and freedoms guaranteed by the law of the European Union are infringed has also been reaffirmed by Article 47 of the Charter.

Moreover, in tendering procedures, tenderers must be protected against arbitrary decisions by the contracting authority by ensuring that unlawful decisions taken by that authority may be reviewed effectively and as rapidly as possible ...

Full legal protection against arbitrary decisions on the part of the contracting authority therefore presupposes, first, the obligation to inform all the tenderers of the decision to award the contract before the contract is concluded, so that

<sup>109</sup> ECJ, Case 14/83 *von Colson and Kamann* [1984] ECR 1891, para. 8 ff. and 22 ff.; Case 79/83 *Harz* [1984] ECR 1921, para. 16 ff.; Case C-380/01 *Schneider* [2004] ECR I-1389, para. 27 f.; Bitterich (N. 107) 894.

<sup>110</sup> Far-reaching Gundel (N. 108) 293 f. More restrictive C. Weißenberger, 'Die Zweistufentheorie im Wirtschaftsverwaltungsrecht' [2009] *GewArch* 417 (426). Cf. further F. Huerkamp & J. Kühling, 'Primärrechtsschutz für Unterschwellenvergaben aus Luxemburg?' [2001] *NVwZ* 1409 (1410 ff.).

<sup>111</sup> Cf. BVerfG (German Federal Constitutional Court), BVerfGE (reports) 116, 135 (155 f.). Cf. in more detail and with further references Wollenschläger (N. 9) 89 f.



they may have a real possibility of initiating proceedings for annulment of that decision, where the requisite conditions are met.

Such full legal protection requires, next, that the unsuccessful tenderer should have the opportunity to examine in sufficient time the validity of the award decision, which means that there must be a reasonable period of time between communication of the award decision to the unsuccessful tenderers and the signature of the contract, in order inter alia to enable the latter to lodge an application for interim measures, under Articles 242 EC and 243 EC in conjunction with Article 225(1) EC, so that the judge hearing the application for interim measures may order suspension of the operation of the contested decision until the court adjudicating on the substance rules on the main action for annulment of that decision ... The right to full and effective judicial protection means that individuals must be granted interim protection if this is necessary to ensure the full effectiveness of the judgment to be given in the main proceedings, in order to prevent a lacuna in the legal protection afforded by the courts having jurisdiction ...<sup>112</sup>

The case-law on gambling demonstrates, however, that it may be sufficient in terms of effective legal protection not to repeat an unlawful allocation procedure, but to grant chances in a new procedure: 'both the revocation and redistribution of the old licences and the award by public tender of an adequate number of new licences could be appropriate courses of action. In principle, those courses of action are both capable of remedying, at least as regards the future, the unlawful exclusion of certain operators, by allowing them to engage in their activity on the market under the same conditions as existing operators.'<sup>113</sup> The newcomers must, however, not be unduly disadvantaged vis-à-vis existing operators, by e.g. requiring a minimum distance between the establishment of new applicants and those of the former.<sup>114</sup>

Finally, the guarantee of legal protection produces advance effects for the administrative procedure. As has already been stressed in the context of the principle of transparency, the procedure must be sufficiently documented and the allocation decision must be motivated in order to guarantee effective legal protection<sup>115</sup>. In this context, the General Court has stressed:

<sup>112</sup> EGC, Case T-461/08 *Evropaïki Dynamiki v. EIB* [2011] ECR II-6367, para. 118 ff. Cf. further Case T-199/14 *R Vanbreda*, ECLI:EU:T:2014:1024, para. 162, 172.

<sup>113</sup> ECJ, Case C-463/13 *Stanley International Betting Ltd*, ECLI:EU:C:2015:25, para. 34 f.; further joined Cases C-72/10 and C-77/10 *Costa and Cifone*, ECLI:EU:C:2012:80, para. 52.

<sup>114</sup> ECJ, joined Cases C-72/10 and C-77/10 *Costa and Cifone*, ECLI:EU:C:2012:80, para. 53 ff.; further Case C-463/13 *Stanley International Betting Ltd*, ECLI:EU:C:2015:25, para. 36 ff.

<sup>115</sup> ECJ, Case 222/86 *Heylens* [1987] ECR 4097, para. 15; Case C-340/89 *Vlassopoulou* [1991] ECR I-2357, para. 22; Case C-75/08 *Mellor* [2009] ECR I-3799, para. 59; further the Commission Interpretative Communication (N. 39) 7; Frenz (N. 24) para. 1824 and 1844; Ortner (N. 84) 181 f.

[I]n order to ensure that the requirement of effective judicial protection is satisfied, the contracting authority must comply with its duty to give reasons ... by providing an adequate statement of reasons to any unsuccessful tenderer who so requests, in order to ensure that the latter may rely on that right under the best possible conditions and have the possibility of deciding, with full knowledge of the facts, if there is any point in his applying to the court having jurisdiction. The duty to state reasons for a contested decision is an essential procedural requirement, intended inter alia to ensure that the person adversely affected by the measure in question has the right to an effective remedy.<sup>116</sup>

### 2.1.2 Digression: Allocation Beyond the Market

With introduction of Union citizenship in the course of the Maastricht Treaty reform process and its dynamic development by the ECJ<sup>117</sup>, the fundamental freedoms' integration programme has undergone a paradigm shift that has been described in detail elsewhere<sup>118</sup>: Neither the fact of being a market participant, nor cross-border market participation, are any longer a prerequisite for benefiting from its integration guarantees – a right of residence including a far-reaching claim to be treated like nationals in the host Member State and a comprehensive protection against obstacles to mobility on the part of the Member States. This places allocation constellations beyond the opening of market access opportunities in the focus of Union law.

The most prominent example of this is likely to be access to higher education, for which substantive allocation directives have developed in the case-law of the ECJ: As long ago as in the cases of *Forcheri*, *Gravier* and *Blaizot*, which the Court of Justice addressed in the 1980s, the latter declared the general prohibition of discrimination contained in today's Article 18 TFEU to cover access to educational facilities, hence precluding the Member States from placing EU foreigners in a less advantageous position in this regard unless it may be justified by overriding reasons of public interest (e.g. safeguarding the national education system or the national health system in view of shortage of graduates)<sup>119</sup>.<sup>120</sup>

<sup>116</sup> EGC, Case T-461/08 *Evropaïki Dynamiki v. EIB* [2011] ECR II-6367, para. 122.

<sup>117</sup> Cf. only ECJ, Case C-85/96 *Martínez Sala* [1998] ECR I-2691; Case C-184/99 *Grzelczyk* [2001] ECR I-6193; Case C-413/99 *Baumbast and R* [2002] ECR I-7091; Case C-138/02 *Collins* [2004] ECR I-2703; Case C-456/02 *Trojani* [2004] ECR I-7573; Case C-209/03 *Bidar* [2005] ECR I-2119; joined Cases C-11/06 and C-12/06 *Morgan and Bucher* [2007] ECR I-9161; Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177; Case C-333/13 *Dano*, ECLI:EU:C:2014:2358.

<sup>118</sup> Wollenschläger (N. 21); further idem (N. 48) 1; idem, 'Grundrechtsschutz und Unionsbürgerschaft', in: A. Hatje & P.-C. Müller-Graff (ed.), *Enzyklopädie Europarecht*, vol. 1: *Europäisches Organisations- und Verfassungsrecht* (Baden-Baden 2014), 116 ff.

<sup>119</sup> Cf. on limitations ECJ, Case C-147/03 *EC v. Austria* [2005] ECR I-5969, para. 50 and 62 ff.; Case C-73/08 *Bressol et al.* [2010] ECR I-2735, para. 62 ff.

<sup>120</sup> ECJ, Case 152/82 *Forcheri* [1983] ECR 2323, para. 13 ff.; Case 293/83 *Gravier* [1985] ECR 593, para. 19 ff.; Case 24/86 *Blaizot* [1988] ECR 379, para. 16 ff. More recently: Case C-65/03 *EC v. Belgium* [2004] ECR I-6427; Case C-147/03 *EC v. Austria* [2005] ECR I-5969; Case C-73/08 *Bressol et al.* [2010] ECR I-2735. Further details on the development of students' right to freedom

Corresponding obligations follow today from the prohibition of discriminating against Union citizens based on Articles 21 in conjunction with 18 TFEU.<sup>121</sup> It is worth noting that in its ruling in the Bressol case, the ECJ has not only discussed the possible justification of restricting access of EU foreigners to higher medical education as such, but also addressed the appropriateness of the allocation criteria applied to select among foreign students: 'In that regard, it is apparent from the documents before the Court that non-resident students who are interested in higher education are selected, with a view to their registration, by drawing lots which, as such, does not take into account their knowledge or experience. In those circumstances, it is for the referring court to ascertain whether the selection process for non-resident students is limited to the drawing of lots and, if that is the case, whether that means of selection based not on the aptitude of the candidates concerned but on chance is necessary to attain the objectives pursued.'<sup>122</sup>

A procedural dimension of the higher education admittance system over and above this has so far not come up the case-law or been the subject of academic studies. Admittedly, here too the admission procedure must be structured in such a manner as to guarantee discrimination-free access. A case ruled on by the High Administrative Court of Bavaria ('Bayerischer Verwaltungsgerichtshof') in 2007 concerning admission deadlines however points in this direction: The deadline set by the defendant University for the submission of the *Abitur* school-leaving certificate was such that candidates who took their 'A' levels in the United Kingdom could not be admitted to the winter semester immediately after obtaining their school-leaving qualification since the UK school authorities do not issue the certificate in question until a later date. The High Administrative Court of Bavaria considered this to constitute a discrimination against persons who have acquired their higher education admission entitlement in the United Kingdom that was in need of justification in the light of Article 21 TFEU – but also justifiable in view of the interest of other candidates in being admitted in time.<sup>123</sup>

---

of movement Wollenschläger (N. 21) 80 ff.; further P.M. Huber, *Konkurrenzschtutz im Verwaltungsrecht* (Tübingen 1991), 459 ff.

<sup>121</sup> On this Wollenschläger (N. 21) 197 ff.; on its relationship with the earlier case-law of the ECJ on discrimination-free access to higher education *ibid.*, 210 f.

<sup>122</sup> ECJ, Case C-73/08 *Bressol et al.* [2010] ECR I-2735, para. 80 f.

<sup>123</sup> VGH München (High Administrative Court of Bavaria), Decision of 4 December 2007, 7 CE 07.2872, juris. For a further activation of Art. 21 TFEU in the context of access to higher education: OVG Münster (High Administrative Court of North Rhine-Westphalia) [2010] NVwZ-RR 229 (229 f.).

## 2.2 The Union's Fundamental Rights Framework for the State's Allocation Activity

As a consequence of the advancing Europeanisation of numerous allocation procedures, the framework in which the State's allocation activity operates is also increasingly determined by the fundamental rights of the Union, in addition to the fundamental rights guaranteed in national constitutional law. EU fundamental rights have been initially acknowledged as general principles of primary law in the case-law of the ECJ<sup>124</sup> and were derived from the common constitutional traditions of the Member States as well as from the international agreements on the protection of human rights, namely the ECHR (cf. Art. 6 § 3 TEU). In addition to this, however, a codification of the Union's set of fundamental rights has now been added in the shape of the EU Charter of Fundamental Rights, which was declared binding by the Treaty of Lisbon (Art. 6 § 1 TEU).<sup>125</sup> The juxtaposition of Union and national fundamental rights regimes that can be observed in the European judicial area gives rise, first of all, to the question of the applicability of the former to Member State action (2.2.1). After this has been clarified, the Union's fundamental right stipulations for allocation procedures will be discussed in detail (2.2.2). Finally, the significance of the ECHR for state allocation activities is to be looked at (2.2.3).

### 2.2.1 The Applicability of EU Fundamental Rights to the Member States

Whilst the institutions, bodies, offices and agencies belonging to the European Union are certainly bound by EU fundamental rights (Art. 51 § 1 sentence 1 CFR), a relationship of competition between Union and national fundamental rights protection can be observed at the national level, which is entrusted with the implementation of most of the allocation procedures. The fact that national fundamental rights cannot be uncritically declared to be (exclusively) material here – analogous to the supranational level, and as also could be suggested by Article 1 § 3 of the German Basic Law (GG)<sup>126</sup> – is a result of the Europeanisation of national administrative law and of the corresponding involvement of national authorities in the implementation of Union law. In

<sup>124</sup> Cf. from the initial period only ECJ, Case 29/69 *Stauder* [1969] ECR 419, para. 7; Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, para. 4; Case 4/73 *Nold* [1974] ECR 491, para. 13.

<sup>125</sup> Cf. on the development of EU fundamental rights Wollenschläger, Grundrechtsschutz (N. 118) § 8/4 ff., and on the juxtaposition of EU fundamental rights as Charter rights and general principles of primary law *ibid.*, para. 100.

<sup>126</sup> Art. 1 § 3 GG reads: 'The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law' ('Die nachfolgenden Grundrechte binden Gesetzgebung, vollziehende Gewalt und Rechtsprechung als unmittelbar geltendes Recht').

order to ensure that Union law is applied in a uniform way in all parts of the Union, it is not permissible to apply and/or implement the latter only to the extent for which the respective national fundamental rights standard allows. Rather, the principles of precedence and of uniform application of EU law require applying EU fundamental rights to Member State action determined by EU law. Hence, it has been established in the Court's jurisprudence that Member States are bound by EU fundamental rights where the former act '*within the scope of Community law*'.<sup>127</sup> Similarly, Article 51 § 1 sentence 1 CFR, though somewhat more reserved in its formulation, orders an obligation of Member States to EU fundamental rights 'only when they are implementing Union law'. This extends not only to constellations in which EU secondary law explicitly obliges the Member States to act in a certain way. Moreover, and this is controversial,<sup>128</sup> even in cases where Member States enjoy discretion, the question arises as to the extent to which EU fundamental rights limit the scope of discretion awarded.

In addition, it has to be noted that the question of whether Member States implement EU law and are therefore bound by EU fundamental rights does not only arise with regard to obligations clearly defined by EU law, such as the requirement in an EU directive that data from telecommunications connections be retained for a certain period of time. There is a diffuse group of cases in which Member States act in a context somehow determined by EU law, and thus it has to be established under which conditions one might assume the implementation of EU law. Here – without being able to develop this any further, the discussion of this issue being only in its infancy<sup>129</sup> – the rather wide reading in the *Fransson* case may be contrasted with more restrictive approaches in the *Siragusa* case of 6 March 2014<sup>130</sup> or in the *Hernández* case of 10 July 2014<sup>131</sup>, as well as in the jurisprudence of the German Constitutional Court ('*Bundesverfassungsgericht*')<sup>132</sup>.

Finally, EU fundamental rights also apply in the context of Member States restricting the EU fundamental freedoms. Against the criticism to which this category was subjected, in particular just after the Charter came into force, it has to be noted that there is no doubt that EU law (including EU fundamental rights) determines autonomously the admissibility and extent of limitations to

<sup>127</sup> ECJ, Case C-260/89 *ERT* [1991] ECR I-2925, para. 42 ff.; Case C-368/95 *Familiapress* [1997] ECR I-3689, para. 24; Case C-71/02 *Karner* [2004] ECR I-3025, para. 48 ff.

<sup>128</sup> Cf. on this with further references Wollenschläger, *Grundrechtsschutz* (N. 118) para. 16 ff., and idem, 'The EU Charter of Fundamental Rights and its Applicability to the Member States – A Step towards Unitarisation or Federalisation?' [2015/13] *Ritsumeikan International Affairs* 1.

<sup>129</sup> For more details, see Wollenschläger, *Grundrechtsschutz* (N. 118) para. 29 ff. with further references.

<sup>130</sup> ECJ, Case C-206/13 *Siragusa*, ECLI:EU:C:2014:126.

<sup>131</sup> ECJ, Case C-198/13 *Hernández*, ECLI:EU:C:2014:2055, para. 32 ff.

<sup>132</sup> BVerfG (German Federal Constitutional Court), BVerfGE (reports) 133, 277 (316).

the fundamental freedoms.<sup>133</sup> The crucial issue in this context is to which extent EU fundamental rights apply when a restriction of the market freedoms has been established (cf. the discussion of the ECJ's case law at the end of this section).<sup>134</sup>

As far as the parallel application of national fundamental rights when Member States implement EU law is concerned, the ECJ has recently emphasised several times that national fundamental rights may be applied, but only 'provided that ... neither the level of protection of the Charter ... nor the priority, the unity and the effectiveness of EU law is affected'.<sup>135</sup>

With regard to whether the Union's set of fundamental rights constitutes the yardstick for the State's allocation activity (and leaving out the *Fransson* line of case-law), there is accordingly a need to distinguish between allocation procedures based on secondary legislation and other such procedures. The fundamental rights of the Union can be invoked directly in the first case. In view of the detailed norming of these procedures, the significance of the EU's fundamental rights however appears to be limited.<sup>136</sup> In other respect, EU fundamental rights may only be applied if the restriction of a market freedom can be established. Contrary to the *Parking Brixen* case, this precludes declaring a right to equal opportunities of tenderers based on the Union's general fundamental right to equality to be material across the board in allocation procedures:

According to the Court's case-law, Articles 43 EC and 49 EC [= Art. 49 and 56 TFEU] are specific expressions of the principle of equal treatment ... The prohibition on discrimination on grounds of nationality is also a specific expression of the general principle of equal treatment ... In its case-law relating to the Community directives on public procurement, the Court has stated that the principle of equal treatment of tenderers is intended to afford equality of oppor-

---

<sup>133</sup> Cf. the so-called *ERT* jurisprudence (Case C-260/89 *ERT* [1991] ECR I-2925, para. 42 ff.); also confirmed after the CFR had entered into force in ECJ, Case C-390/12 *Pfleger*, ECLI:EU:C:2014:281, para. 30 ff. Cf. for a detailed discussion Wollenschläger, Grundrechtsschutz (N. 118) para. 25 ff.; idem, 'Anwendbarkeit der EU-Grundrechte im Rahmen einer Beschränkung von Grundfreiheiten. Bestätigung der ERT-Rechtsprechung durch den EuGH auch unter der Grundrechtecharta' [2014] *EuZW* 577.

<sup>134</sup> Wollenschläger (N. 133) 580.

<sup>135</sup> Cf. ECJ, Case C-399/11 *Melloni*, ECLI:EU:C:2013:107, para. 60; further Case C-617/10 *Åkerberg Fransson*, ECLI:EU:C:2013:105, para. 29; Wollenschläger, Grundrechtsschutz (N. 118) para. 24 with further references.

<sup>136</sup> Cf. for the general principle of equality in the context of coordinated EU public procurement law for instance ECJ, Case C-243/89 *EC v. Denmark* [1993] ECR I-3353, para. 33 ff.; Case C-87/94 *EC v. Belgium* [1996] ECR I-2043, para. 51 ff. (The principle of equal treatment is however derived in a manner that is immanent to the directives in both of these judgments; Art. 2 of the new Directive 2004/18/EC on the award of public contracts now explicitly stipulates the principles of equal treatment, non-discrimination and transparency); further Case C-470/99 *Universale-Bau AG* [2002] ECR I-11617, para. 84 ff.; joined Cases C-21/03 and C-34/03 *Fabrimcom* [2005] ECR I-1559, para. 26 ff. Cf. furthermore on the protection of business secrets Case C-450/06 *Varec* [2008] ECR I-581, para. 44 ff.

tunity to all tenderers when formulating their tenders, regardless of their nationality ... As a result, the principle of equal treatment of tenderers is to be applied to public service concessions even in the absence of discrimination on grounds of nationality.<sup>137</sup>

This approach disregards the fact that the Member States are, as a matter of principle, not generally bound by the Union's fundamental right of general equality beyond the implementation of (the EU's public procurement) directives; insofar Member States are only bound by the specific prohibitions of non-discrimination on grounds of nationality encompassed by the market freedoms and Article 18 TFEU<sup>138</sup>. Yet, in accordance with the above, the fundamental rights of the Union moreover apply if a national provision is involved which restricts a market freedom. This is to be established in each individual case.<sup>139</sup> The significance of the EU's fundamental rights is therefore placed into perspective. The decisive question is whether a specific design of the allocation procedure constitutes an obstacle to market access. It is only when this can be affirmed that the Union's fundamental rights come to play and only at a secondary level, that is, as principles to be respected when restricting fundamental freedoms. Insofar, the requirement of a cautious application of EU fundamental rights to Member States' action calls for a sufficiently close link between the restriction in question and the fundamental rights standards applied in its context.<sup>140</sup> Coming back to the example of imposing quotas for the access of foreign students to universities (cf. above, 2.1.2): While the quota itself constitutes a discrimination vis-à-vis foreigners and is thus covered by the students' right to non-discrimination (Art. 18, 21 TFEU), criteria applied to distribute places within the quota for foreigners (e.g. qualification, social hardships etc.) may only be assessed with regard to a general (fundamental) right to equal treatment (Art. 20 CFR) which supposes that the latter is held applicable in view of the discrimination falling under EU law (Art. 51 § 1 sentence 1 CFR).

<sup>137</sup> ECJ, Case C-458/03 *Parking Brixen* [2005] ECR I-8612, para. 48; confirmed in Case C-410/04 *ANAV* [2006] ECR I-3303, para. 20; Case C-6/05 *Medipac-Kazantzidis* [2007] ECR I-4557, para. 33; Case C-260/04 *EC v. Italy* [2007] ECR I-7083, para. 22 ff.; Case C-220/06 *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia* [2007] ECR I-12175, para. 74; joined Cases C-72/10 and C-77/10 *Costa and Cifone*, ECLI:EU:C:2012:80, para. 54; Case C-463/13 *Stanley International Betting Ltd*, ECLI:EU:C:2015:25, para. 39. From the literature: Kaelble (N. 77) 233 f.; Wolswinkel (N. 8) 87. The ECJ however still derived the obligation of equal treatment from the market freedoms in Case C-108/98 *RI.SAN* [1999] ECR I-5219, para. 20.

<sup>138</sup> Correctly ECJ, Case C-412/04 *EC v. Italy* [2008] ECR I-619, para. 106; Egger (N. 33) para. 15; Krüger (N. 69) 186 ff. Cf. also Braun (N. 24) 44 ff.

<sup>139</sup> Similarly Wollenschläger (N. 18) 393 f. Admittedly, it appears easy to prove this with scarcity caused by state regulation since it always constitutes an obstacle to market access. Cf. for an understanding of the fundamental freedoms' prohibitions on restriction in public procurement as principles of equal treatment of tenderers, which ultimately ties the Member States to a general principle of equality under Union law: Huerkamp (N. 92) 566 ff.; further idem (N. 33) 65 ff.

<sup>140</sup> Wollenschläger (N. 133) 580.

### 2.2.2 The Framework for the State's Allocation Activity within the Union's Fundamental Rights

The restricted applicability of EU fundamental rights to Member States' action, both in the context of (transposed) secondary legislation and beyond, casts light on why this category, unlike notably the market freedoms that have been discussed above, has not played a prominent role in allocation procedures so far.<sup>141</sup> Nonetheless, there are topically relevant requirements here too: For instance, the Union's fundamental right to equality before the law (Art. 20 CFR) demands the establishment of proper and equitable allocation criteria<sup>142</sup>, and for the allocation procedure to be structured in such a way as to safeguard their implementation in the outcome of the procedure. Moreover, the freedom rights positions respectively competing in the individual allocation procedures – in the context of the economically-relevant interests in access such as freedom to choose an occupation (Art. 15 § 1 CFR) and freedom to conduct a business (Art. 16 CFR) as well as the right to property (Art. 17 § 1 CFR) – must be balanced out. Furthermore, general rule-of-law requirements of the administrative procedures follow from the right to good administration (Art. 41 CFR) – albeit limited to EU institutions<sup>143</sup>. Finally, the guarantee of an effective remedy enshrined in Article 47 CFR must be complied with.<sup>144</sup>

Apart from the recourse had to the EU's fundamental rights and other general legal principles in individual cases in order to interpret the public procurement directives,<sup>145</sup> the case of *CAS Succhi di Frutta* can be understood as one of the few application cases<sup>146</sup> of an allocation regime based on the Union's fundamental rights. This case discussed the lawfulness of an award decision of the European Commission within the framework of procurement of food for food aid to the Caucasus, to which the public procurement directives did not apply and for which the relevant EU regulations also only contained a small number of allocation rules. The CFI and the ECJ declared the equality principle and the principle of transparency to be applicable,<sup>147</sup> referring to the case-law

<sup>141</sup> The still underdeveloped role of the EU's fundamental rights is also noted by Frenz (N. 24) para. 1786.

<sup>142</sup> Comprehensively on the substantive stipulations of the principle of equal treatment Huerkamp (N. 33) 226 ff.

<sup>143</sup> Cf. W. Kahl, 'Die Europäisierung des Verwaltungsrechts als Herausforderung an Systembildung und Kodi-fikationsidee' [2010/supplement 10] *Die Verwaltung* 39 (60 f.), with further references. Left open by P. Craig, in: S. Peers & T. Hervey & J. Kenner & A. Ward (ed.), *The EU Charter of Fundamental Rights. A Commentary* (Oxford 2014), Art. 60 AEUV, para. 41.02 f.

<sup>144</sup> Cf. in more detail above, 2.1.1.3.4.

<sup>145</sup> Cf. N. 136.

<sup>146</sup> Cf. further for instance CFI, Case T-203/96 *Embassy Limousines* [1998] ECR II-4239, para. 85; Case T-145/98 *ADT* [2000] ECR II-387, para. 164.

<sup>147</sup> CFI, joined Cases T-191/96 and T-106/97 *CAS Succhi di Frutta* [1999] ECR II-3181, para. 72; ECJ, Case C-496/99 P *CAS Succhi di Frutta* [2004] ECR I-3801, para. 107 ff.



on the public procurement directives, and took inspiration from both stipulations for the allocation procedure.

This calls firstly for a sufficiently authoritative notice of invitation to tender: ‘all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract.’<sup>148</sup> It additionally falls to the contracting authority

‘strictly to comply with the criteria which it has itself laid down on that basis not only in the tendering procedure *per se*, which is concerned with assessing the tenders submitted and selecting the successful tenderer, but also, more generally, up to the end of the stage during which the relevant contract is performed ... Although, therefore, any tender which does not comply with the specified conditions must, obviously, be rejected, the contracting authority nevertheless may not alter the general scheme of the invitation to tender by subsequently proceeding unilaterally to amend one of the essential conditions for the award, in particular if it is a condition which, had it been included in the notice of invitation to tender, would have made it possible for tenderers to submit a substantially different tender.’<sup>149</sup>

This does not mean that the contracting authority could not reserve for itself any power to make alterations. It is however expressly required to provide for such powers ‘in the notice of invitation to tender which has been drawn up by the authority itself and defines the framework within which the procedure must be carried out, so that all the undertakings interested in taking part in the procurement procedure are aware of that possibility from the outset and are therefore on an equal footing when formulating their respective tenders.’<sup>150</sup> The only other lawful alternative would be the initiation of a new tendering procedure.<sup>151</sup>

In the case of Embassy Limousines, the CFI ultimately derived from the principles of equal treatment and transparency, in turn in the context of the

<sup>148</sup> ECJ, Case C-496/99 P *CAS Succhi di Frutta* [2004] ECR I-3801, para. 111; equally CFI, joined Cases T-191/96 and T-106/97 *CAS Succhi di Frutta* [1999] ECR II-3181, para. 73; further ECJ, Case C-470/99 *Universale-Bau AG* [2002] ECR I-11617, para. 84 ff.; Kaelble (N. 77) 239 ff.

<sup>149</sup> ECJ, Case C-496/99 P *CAS Succhi di Frutta* [2004] ECR I-3801, para. 115 f.; further CFI, joined Cases T-191/96 and T-106/97 *CAS Succhi di Frutta v. Commission* [1999] ECR II-3181, para. 73. Further Kaelble (N. 77) 234 f.

<sup>150</sup> ECJ, Case C-496/99 P *CAS Succhi di Frutta* [2004] ECR I-3801, para. 118; further CFI, joined Cases T-191/96 and T-106/97 *CAS Succhi di Frutta* [1999] ECR II-3181, para. 73. Cf. also Kaelble (N. 77) 234 f.

<sup>151</sup> ECJ, Case C-496/99 P *CAS Succhi di Frutta* [2004] ECR I-3801, para. 119 and 127; further CFI, joined Cases T-191/96 and T-106/97 *CAS Succhi di Frutta* [1999] ECR II-3181, para. 81; Kaelble (N. 77) 235.

award of contract by Community institutions, the obligation to notify about and the duty to state reasons for a negative public procurement decision;<sup>152</sup> furthermore, it recently referred in the case of *VIP Car Solutions* to the significance of the duty to provide adequate reasons for its decisions to enable the Court to review public procurement decisions, especially in view of the existing broad powers of appraisal enjoyed by the administration, and hence also made the concept of the compensatory function of the administrative procedure fruitful for Union law<sup>153</sup>.

Finally, in a further procurement case already discussed in detail in the context of the market freedoms, the General Court derived from the EU fundamental right to an effective remedy (Art. 47 CFR) certain procedural standards securing effective legal protection such as the duty of the contracting authority to give grounds for an award decision and to inform unsuccessful bidders about the decision to award the contract in order to enable them to lodge an appeal.<sup>154</sup>

### 2.2.3 Digression: The ECHR as a Further Fundamental Rights Layer in the European Legal Area

In addition to the Union's fundamental rights protection, the European Convention on Human Rights constitutes a further level of fundamental rights in the European legal area which is taking on increasing significance. In view of its restricted binding impact as an international treaty,<sup>155</sup> as well as of shortcomings in their protection content in terms of equality and freedom rights, it has however yet to attain a particular relevance for allocation procedures. Nonetheless, perspectives will be developed for the Convention's activation for the State's allocation activity.<sup>156</sup>

When it comes to the substantive stipulations of the ECHR for the State's allocation activities, it should first of all be observed that the guarantees contained in the Convention – unlike national and Union law – do not encompass a general principle of equality. Firstly, equal treatment is only guaranteed in accordance with Article 14 ECHR in connection with the exercise of rights that

<sup>152</sup> CFI, Case T-203/96 *Embassy Limousines* [1998] ECR II-4239, para. 85; Kaelble (N. 77) 242.

<sup>153</sup> CFI, Case T-89/07 *VIP Car Solutions* [2009] ECR II-1403, para. 56 ff., in particular para. 61.

<sup>154</sup> EGC, Case T-461/08 *Evropaiki Dynamiki v. EIB*, ECLI:EU:T:2011:494, para. 118 ff. Cf. above, 2.1.1.3.4.

<sup>155</sup> Cf. on this Wollenschläger (N. 9) 109 f. On the significance of the ECHR within the German legal order idem, in: H. Dreier (ed.), *Grundgesetz-Kommentar*, vol. 2 (3rd edition Tübingen 2015), forthcoming, Art. 25, para. 27, and within the EU legal order idem, *Grundrechtsschutz* (N. 118) para. 37 ff.

<sup>156</sup> Cf. for attempts at resuscitation – in the context of public procurement law – also Bungenberg (N. 84) 203 f., 247 ff.; M. Holoubek, 'Grundrechtsschutz im österreichischen Beschaffungswesen unter besonderer Berücksichtigung der EMRK' [2008] *WiVerw* 273; A. R. Ziegler, 'Die Bedeutung von Art. 6 Abs. 1 EMRK für das Rechtsmittelverfahren im Rahmen des öffentlichen Beschaffungswesens in der Schweiz' [2008] *WiVerw* 285.

are guaranteed elsewhere in the Convention.<sup>157</sup> This changes when it comes to Protocol No. 12 to the ECHR, which guarantees a non-accessory prohibition of discrimination.<sup>158</sup> However, it has not yet been ratified by any EU Member States other than Finland, Luxembourg, the Netherlands, Romania, Spain and Cyprus.<sup>159</sup> Moreover, the prohibition of discrimination contained in the ECHR, like furthermore also the prohibition contained in Article 1 of Protocol No. 12, merely prohibits unequal treatment in connection with personal characteristics: Although the list of penalised differentiation criteria that is stipulated – sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth – is not exhaustive ('such as'), a connection with 'other status' however remains necessary.<sup>160</sup> Hence, the ECHR guarantees a specific prohibition of discrimination, but not a general principle of equality before the law. Should it be material, such as when pursuing secondary purposes, it should furthermore be taken into account that unequal treatment is amenable to justification for material reasons.<sup>161</sup>

From the point of view of freedom rights, limits are also placed on the activation of the ECHR for allocation-related issues. The most significant shortcoming in this regard is constituted by the fact that the ECHR guarantees neither the freedom to exercise a profession nor the freedom to conduct a business.<sup>162</sup> It should not be disregarded however that the European Court of Human Rights tries to remedy this by extensively interpreting other guarantees under the Convention. For instance, the Court of Justice regards access to civil service as such<sup>163</sup> – deliberately not included in the ECHR – and the selection of a specific

<sup>157</sup> Cf. only ECtHR, No. 34369/97, Rep. 2000-IV, para. 40 – Thlimmenos/Greece; C. Grabenwarter, *European Convention on Human Rights* (Munich 2014), Art. 14, para. 4; F.G. Jacobs & R.C.A. White & C. Ovey, *European Convention on Human Rights* (6th edition Oxford 2014), 576 f.; J. Meyer-Ladewig, *Europäische Menschenrechtskonvention. Handkommentar* (3rd edition Baden-Baden 2011), Art. 14, para. 5 ff.; specifically for public procurement: Bungenberg (N. 84) 203.

<sup>158</sup> On this Grabenwarter (N. 157) Art. 14, para. 1, 4; C. Grabenwarter & K. Pabel, *Europäische Menschenrechtskonvention* (5th edition Munich 2012), § 26/25 f.; Meyer-Ladewig (N. 157) Art. 14, para. 3 f.

<sup>159</sup> On ratification status: [www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=10&DF=09/12/2009&CL=ENG](http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=10&DF=09/12/2009&CL=ENG) (10 March 2015).

<sup>160</sup> Grabenwarter (N. 157) Art. 14, para. 9 f.; Jacobs & White & Ovey (N. 157) 577 ff.; D. König & A. Peters, 'Das Diskriminierungsverbot', in: R. Grote & T. Marauhn (ed.), *EMRK/GG. Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz*, vol. 2 (2nd edition Tübingen 2013), chapter 21, para. 17, 19 ff. and 194 ff.

<sup>161</sup> Cf. only ECtHR, No. 34369/97, Rep. 2000-IV, para. 46 ff. – Thlimmenos/Greece; Grabenwarter (N. 157) Art. 14, para. 11 ff.; Meyer-Ladewig (N. 157) Art. 14, para. 9 f.

<sup>162</sup> Cf. also Grabenwarter & Pabel (N. 158) § 25/27, who however because of aspects covered by other rights under the Convention speaks with regard to the exercise of a profession of a 'fundamental right under the Convention to exercise a profession'.

<sup>163</sup> Cf. only ECtHR, No. 9228/80, Series A, No. 104, para. 48 ff. – Glasenapp/Germany; No. 9704/82, Series A, No. 105, para. 34 ff. – Kosiek; No. 17851/91, Series A, No. 323, para. 43 f. – Vogt/Germany; Meyer-Ladewig (N. 157) Art. 10, para. 24.

profession<sup>164</sup> as not covered by the Convention; nonetheless, it stressed in two recent rulings that a far-reaching, long-term exclusion of the possibility to exercise a profession is covered because of its impact on private life by virtue of the right to respect of the latter (Art. 8 ECHR).<sup>165</sup> In this context, however, allocation procedures that are relevant for access to a profession may fall under the ECHR.<sup>166</sup> Moreover, the European Court of Human Rights has assigned concessions and licences which facilitate the exercise of a profession to the right to property guaranteed by Article 1 of Protocol 1 of the ECHR since they embody an economic value.<sup>167</sup> The facts that have been ruled on are however characterised by a relation to existing property positions, namely an established company from which the licences necessary for the activity were withdrawn or to which they were not granted. The first-off acquisition of a concession as such can hence not be attributed to the right to property if and because they only relate to future potential earnings – which are not protected by Article 1 of Protocol 1 of the ECHR.<sup>168</sup> Case constellations are different in which licences are requested with a view to an existing business operation, and hence (also) the use of the existing property or the reduction in its value is at risk should it be refused.<sup>170</sup> Further interest attaches in the context of the right to property with a view to allocation procedures to the recent inclusion of rights to social benefits of any kind in Article 1 of Protocol 1 to the ECHR without, as was stipulated in the earlier case-law of the European Court of Human Rights, it being conditional on the beneficiaries' having contributed own resources.<sup>171</sup>

Moreover, depending on the circumstances of the specific case, links to further guarantees of the ECHR are conceivable, for instance if the contract

<sup>164</sup> ECtHR, No. 34369/97, Rep. 2000-IV, para. 41 – *Thlimmenos/Greece*.

<sup>165</sup> ECtHR, Nos. 55480/00 and 59330/00, Rep. 2004-VIII, para. 47 f. – *Sidabras and Džiautas/Lithuania*; Nos. 70665/01 and 74345/01, unpublished, para. 34 f. – *Rainys and Gasparavičius/Lithuania*; see also Grabenwarter (N. 157) Art. 8, para. 17.

<sup>166</sup> Far-reaching: Grabenwarter & Pabel (N. 158) § 25/29: Right to non-discriminatory access to public service.

<sup>167</sup> ECtHR, Nos. 8543/79, 8674/79, 8675/79 and 8685/79, Series A, No. 101, para. 41 f. – *van Marle et al.*; No. 10873/84, Series A, No. 159, para. 53 – *Tre Traktörer Aktiebolag*; No. 12033/86, Series A, No. 192, para. 41 ff. – *Fredin*; further Grabenwarter (N. 157) Protocol No. 1 Art. 1, para. 4; Wollenschläger (N. 9) III f.

<sup>168</sup> Cf. only ECtHR, No. 61302/00, unpublished, para. 81 – *Buzescu/Romania*; Meyer-Ladewig (N. 157) Art. 1 Protocol 1, para. 10.

<sup>169</sup> In turn very largely: Grabenwarter & Pabel (N. 158) § 25/31, presuming that licence requirements can be reviewed by Art. 1 Protocol 1 of the ECHR. *Reserved Bungenberg* (N. 84) 251.

<sup>170</sup> Cf. ECtHR, Nos. 8543/79, 8674/79, 8675/79 and 8685/79, Series A, No. 101, para. 41 f. – *van Marle et al.*; No. 12033/86, Series A, No. 192, para. 41 ff. – *Fredin*; No. 61302/00, unpublished, para. 81 ff. and 88 – *Buzescu/Romania*; H.-J. Cremer, 'Eigentumsschutz', in: *Grote & Marauhn* (N. 160) chapter 22, para. 48.

<sup>171</sup> ECtHR, Nos. 65731/01 and 65900/01, unpublished, para. 47 ff. – *Stec et al.*; on this also Grabenwarter (N. 157) Protocol No. 1 Art. 1, para. 5.

award is made to depend on (non-)affiliation to specific religious communities, and hence Article 9, in conjunction with 14 ECHR, is affected.<sup>172</sup>

It is finally worth mentioning the two procedural guarantees contained in the ECHR: Article 6 and Article 13. Article 6 § 1 ECHR reads: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' The civil law nature of the dispute that is necessary for the application of this guarantee is not determined according to the respective national law, but is to be adjudged autonomously according to the Convention on the basis of a comprehensive review.<sup>173</sup> Following the rich case-law of the European Court of Human Rights, it is to be affirmed in particular if the dispute impacts positions under civil law or relates to asset claims, but not if sovereign issues are essentially affected.<sup>174</sup> In the context which interests us here, for instance, the European Court of Human Rights extended Article 6 § 1 ECHR to cover the purchase of real estate<sup>175</sup> or permissions relating to the exercise of a profession<sup>176</sup>. Public procurement is also covered.<sup>177</sup> As to access to public service, finally, the guarantee of legal protection does not cover disputes about the allocation of posts which are related to the exercise of core sovereign tasks.<sup>178</sup> As to the content of the guarantee, Article 6 § 1 ECHR guarantees not only access to courts, but also an effective protection of rights before them.<sup>179</sup> Proportionate restrictions of the guarantee

<sup>172</sup> Cf. Bungenberg (N. 84) 203 f.

<sup>173</sup> Cf. only ECtHR, No. 8848/80, Series A, No. 97, para. 34 – Benthem/Netherlands; No. 10426/83, Series A, No. 125-A, para. 35 – Pudas/Sweden; No. 44759/98, Rep. 2001-VII, para. 24 – Ferrazzini/Italy; Grabenwarter (N. 157) Art. 6, para. 3 ff.

<sup>174</sup> Cf. for instance ECtHR, No. 44759/98, Rep. 2001-VII, para. 25 ff. – Ferrazzini/Italy; Grabenwarter (N. 157) Art. 6, para. 3 ff.; D. Kunz, *Verfahren und Rechtsschutz bei der Vergabe von Konzessionen* (Bern 2004), 310.

<sup>175</sup> ECtHR, No. 44759/98, Rep. 2001-VII, para. 27 – Ferrazzini/Italy.

<sup>176</sup> ECtHR, No. 8848/80, Series A, No. 97, para. 36 – Benthem/Netherlands; No. 10426/83, Series A, No. 125-A, para. 36 ff. – Pudas/Sweden; No. 44759/98, Rep. 2001-VII, para. 27 – Ferrazzini/Italy. Cf. for the granting of concessions further Kunz (N. 174) 310.

<sup>177</sup> Austrian Constitutional Court, judgment of 28 November 2005, B 817/05-8, 6; Bungenberg (N. 84) 247 ff., with a reference to further rulings of the Austrian Constitutional Court and of the Swiss Appeals Commission; Holoubek (N. 156) 275 – there also on the issue of the applicability of Art. 6 § 1 ECHR to the public procurement procedure itself (275 ff.); Ziegler (N. 156) 292.

<sup>178</sup> Cf. only ECtHR, No. 28541/95, Rep. 1999-VIII, para. 58 ff. – Pellegrin/France; Meyer-Ladewig (N. 157) Art. 6, para. 14 ff. Narrower further No. 63235/00, unpublished, para. 42 ff. – Eskelinen et al./Finland. Greater detail on this Grabenwarter (N. 157) Art. 6, para. 12; Jacobs & White & Overy (N. 157) 255 f.

<sup>179</sup> In place of many, ECtHR, No. 37571/97, unpublished, para. 70 – Veeber/Estonia; Grabenwarter (N. 157) Art. 6, para. 66; Jacobs & White & Overy (N. 157) 262; Meyer-Ladewig (N. 157) Art. 6, para. 31; Streinz (N. 107) 306 ff. On consequences for public procurement law in the case-law of the Austrian Constitutional Court: Holoubek (N. 156) 278 ff.

are admittedly possible,<sup>180</sup> so that secondary legal protection (damages) may also be sufficient<sup>181</sup>. Moreover, Article 6 § 1 ECHR influences the allocation procedure which must be designed in a way securing effective legal protection. For instance, obligations to state grounds can be derived from this.<sup>182</sup>

Apart from the right to a fair trial contained in Article 6 § 1 ECHR, Article 13 ECHR, finally, guarantees ‘an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity’ for everyone whose rights and freedoms, as set forth in this Convention, are violated. The effectiveness of the possibility to complain is in turn to be judged with a view to the circumstances of the individual case.<sup>183</sup>

### 2.3 EU Competition Law

EU competition law constitutes a further source of EU primary law standards for allocation procedures. This will only be outlined here and has been discussed in more details elsewhere.<sup>184</sup> First, in the context of the privatisation of public undertakings and the sale of state property, notably real estate, it has to be secured that the purchaser does not benefit from state aid contrary to Article 107 TFEU by only paying an amount below the market value. To this end, it has become established in the Commission’s practice that not only an independent expert evaluation of the market value,<sup>185</sup> but also following a bidding procedure which is sufficiently well publicised, open and unconditional constitutes a guarantee for the market conformity of the transaction and is thus able

<sup>180</sup> Cf. only ECtHR, Nos. 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81 and 9405/81, Series A, No. 102, para. 194 – *Lithgow et al.*; Dörr (N. 108) 141; Grabenwarter (N. 157) Art. 6, para. 67 ff.; Meyer-Ladewig (N. 157) Art. 6, para. 37.

<sup>181</sup> Affirmative: Dörr (N. 108) 139 f.; Streinz (N. 107) 311. The ECtHR has however not yet ruled on this, cf. Grabenwarter (N. 157) Art. 6, para. 76 with further references. Cf. however – in the context of Art. 13 ECHR – ECtHR, No. 30210/96, Rep. 2000-XI, para. 159 – *Kudła/Poland*; further No. 57220/00, Rep. 2002-VIII, para. 17 – *Mifsud*: ‘a remedy is “effective” if it can be used either to expedite a decision by the courts dealing with the case, or to provide the litigant with adequate redress for delays that have already occurred’; equally No. 40063/98, unpublished, para. 156 – *Mitev*.

<sup>182</sup> Holoubek (N. 156) 279.

<sup>183</sup> ECtHR, No. 30210/96, Rep. 2000-XI, para. 157 – *Kudła/Poland*; No. 40063/98, unpublished, para. 155 – *Mitev*. Further detail on the scope of the guarantee Grabenwarter (N. 157) Art. 13, para. 5 ff. Cf. N. 181 on the question of the exclusion of primary legislation protection.

<sup>184</sup> Cf. for more details Wollenschläger (N. 9) 134 ff.; *idem*, ‘Art. 107 AEUV (Fallgruppen Grundstücksveräußerungen und Privatisierung öffentlicher Unternehmen)’, in: A. Birnstiel & M. Bungenberg & H. Heinrich (ed.), *Europäisches Beihilfenrecht* (Baden-Baden 2013), 216; cf. further I.F. Torres, ‘The role of competition law’, in: *Adriaanse & Van Ommeren & Den Ouden & Wolswinkel* (N. 9) chapter 10.

<sup>185</sup> In view of recent decisions of the European Commission, it has become questionable whether an independent expert evaluation is still an alternative to a bidding procedure in case of the sale of public undertakings, cf. on this Wollenschläger ‘Art. 107 AEUV’ (N. 184) para. 491 ff. with further references.

to eliminate suspicion of state aid from the outset. These principles were first laid down in general terms in the XXIIIrd Report on Competition Policy of the European Commission (1993)<sup>186</sup> and have subsequently been concretised in the Commission's Communication on state aid elements in sales of land and buildings by public authorities (1997)<sup>187</sup> as well as in the European Commission's Guidance Paper on state aid-compliant financing, restructuring and privatisation of State-owned enterprises (2012)<sup>188</sup>. Generalising, what may be permitted in view of the focus of this article,<sup>189</sup> largely comparable requirements to those established under the market freedoms' allocation regime apply.

A sufficiently well publicised procedure implies adequate advertising: According to the guidance paper, the tender 'must be advertised over a reasonably long period in the national press, estate gazettes and/or other appropriate publications. If the privatisation may attract investors operating on a Europe-wide or international scale, the tender should be announced in publications which have a regular international circulation. Such offers should also be made known through agents addressing clients on a Europe-wide or international scale.'<sup>190</sup> Furthermore, sufficient information on the subject of the tender as well as on criteria and procedures has to be provided in advance.<sup>191</sup> It goes without saying that this framework has to be respected during the procedure.<sup>192</sup> Finally, a duty to state reasons and to document the procedure has been acknow-

<sup>186</sup> European Commission, XXIIIrd Report on Competition Policy, para. 403; available at [www.bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en\\_GB/-/EUR/ViewPublication-Start?PublicationKey=CM8294650](http://www.bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=CM8294650) (2 May 2015).

<sup>187</sup> European Commission, Communication on State aid elements in sales of land and buildings by public authorities, *OJ* 1997 C 209, 3.

<sup>188</sup> European Commission, Guidance Paper on state aid-compliant financing, restructuring and privatisation of State-owned enterprises of 10 February 2012, SWD(2012) 14 final, available at [http://ec.europa.eu/competition/state\\_aid/studies\\_reports/studies\\_reports.html](http://ec.europa.eu/competition/state_aid/studies_reports/studies_reports.html) (7 May 2015).

<sup>189</sup> Cf. in more detail (also with further references, in particular to the numerous decisions of the European Commission) Wollenschläger 'Art. 107 AEUV' (N. 184). Cf. further P. Adriaanse & J. Derenne, 'The role of EU State aid law', in: Adriaanse & Van Ommeren & Den Ouden & Wolswinkel (N. 9) chapter 10.

<sup>190</sup> European Commission, Guidance Paper (N. 188) 11.

<sup>191</sup> European Commission, Invitation to submit comments pursuant to Article 88(2) of the EC Treaty, State aid No C 56/06 (ex NN 77/06) – Privatisation to Bank Burgenland AG, *OJ* 2007 L 28, 8, para. 68; Decision 1999/720/EC, ECSC (Gröditzer Stahlwerke), *OJ* L 292, 27, para. 88; Decision 2008/717/EC (Craiova), *OJ* L 239, 12, para. 49; 2008/767/EC (Tractorul), *OJ* L 263, 5, para. 36; T. Jaeger, 'Gemeinschaftsrechtliche Probleme einer Privatisierung' [2007] *EuZW* 499 (501); C. Koenig/R. Pfromm, 'Die Förderlogik des EG-beihilfenrechtlichen Ausschreibungsverfahrens bei PPP-Daseinsvorsorge-Infrastrukturen' [2004] *NZBau* 375 (378 f.); Wollenschläger 'Art. 107 AEUV' (N. 184) para. 501 with further references.

<sup>192</sup> European Commission, Decision 1999/262/EC (Banque Occidentale), *OJ* L 103, 19, V. ii); K. Bauer, 'Das Bietverfahren im EG-Beihilfenrecht bei der übertragenden Sanierung rechtswidrig begünstigter Unternehmen' [2001] *EuZW* 748 (753); Wollenschläger 'Art. 107 AEUV' (N. 184) para. 501. Cf. on the possibility of modifications: European Commission, N 264/2002 (London Underground PPP) para. 86 ff.

ledged.<sup>193</sup> An open procedure requires notably neutrality vis-à-vis the bidders<sup>194</sup> and sufficient time for submitting applications<sup>195</sup>.<sup>196</sup>

An unconditional bidding procedure requires applying criteria not discriminating against specific bidders (not only on grounds of nationality<sup>197</sup>)<sup>198</sup>. In addition, unconditionality has also a specific state-aid law meaning according to which a state aid is indicated in case of applying conditions a private vendor would not stipulate in a similar transaction (private-vendor-test); this requirement, although open questions remain with regard to its scope,<sup>199</sup> limits the possibility to pursue secondary aims when selling state property like demanding from the purchaser of a public undertaking to maintain a certain level of production or number of jobs.<sup>200</sup>

<sup>193</sup> Bauer (N. 192) 756; Wollenschläger 'Art. 107 AEUV' (N. 184) para. 502.

<sup>194</sup> Decision 1999/262/EC (Banque Occidentale), *OJ L* 103, 19, V. ii); Decision 2008/717/EC (Craiova), *OJ L* 239, 12, para. 67 ff.; Bauer (N. 192) 751 f.

<sup>195</sup> European Commission, Decision 2002/896/EC (Gothaer Fahrzeugtechnik), *OJ L* 314, 62, para. 28; Bauer (N. 192) 755.

<sup>196</sup> Cf. further Wollenschläger 'Art. 107 AEUV' (N. 184) para. 503.

<sup>197</sup> European Commission, Guidance Paper (N. 188) 11; European Commission, Decision 2000/513/EC (Stardust Marine), *OJ L* 206, 6, para. 73.

<sup>198</sup> European Commission, Communication (N. 187) II.1.b and c; European Commission, Guidance Paper (N. 188) 12; European Commission, Decision 2000/628/EC (Latte di Roma), *OJ L* 265, 15, para. 91.

<sup>199</sup> Cf. for an overview with further references Wollenschläger 'Art. 107 AEUV' (N. 184) para. 495 ff.

<sup>200</sup> Cf. European Commission, Guidance Paper (N. 188) 11 ff., in particular 12: 'The tender will be considered unconditional when any buyer, irrespective of whether or not he runs a business or of its nature, is generally free to acquire the assets or company and to use it for his own purposes. According to a well established Commission practice confirmed by the case-law, attaching to the sale of a company conditions that a market operator would not impose justifies the presumption that state aid might be involved. A market economy vendor would normally sell his company for the highest price without imposing conditions that would depress the price. It will need to be demonstrated on a case-by-case basis that conditions imposed on the acquirer do not result in state aid. For instance, conditions may be imposed to avoid purely speculative bids or to ensure swift and secure payment. The existence of such conditions is irrelevant from a state aid perspective and would not make a tender conditional. Also, conditions for the prevention of public nuisance or for reasons of environmental protection would not make a tender conditional if they merely require compliance with pre-existing obligations laid down in the law. On the other hand, a tender will be considered conditional (and may thus entail state aid) if it deviates from best practise by artificially restricting the number of potential buyers, directing the sale in favour of any of them or discriminating between different business strategies. For instance, a tender including a condition that makes it practically impossible for a potential investor intending to follow a different industrial strategy to win the bid simply by offering the highest price will be considered conditional. The Commission will not only assess the conditions expressly referred to in the offer but will also look at de facto conditions.' Cf. further European Commission, Communication (N. 187) II.1.b and c., and its Decisions 1999/720/EC, ECSC (Gröditzer Stahlwerke), *OJ L* 292, 27, para. 87; 2008/717/EC (Craiova), *OJ L* 239, 12, para. 49 ff.; 2008/767/EC (Tractorul), *OJ L* 263, 5, para. 36 ff.; 2010/137/EC (Austrian Airlines), *OJ L* 59, 1, para. 184 f. Cf., however, Decision 2000/628/EC (Latte di Roma), *OJ L* 265, 15, para. 91. Cf. with further references Wollenschläger 'Art. 107 AEUV' (N. 184) para. 495 ff.



Finally, state aid law is also relevant beyond the sale of state property: According to the *Altmark-Trans* jurisprudence of the ECJ regarding the provision of services of general economic interest, choosing an undertaking ‘pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community’ constitutes one criterion to ensure that the undertaking does not profit from state aid contrary to EU law when receiving compensation for fulfilling unprofitable public service obligations.<sup>201</sup>

Second, the State, when acting as an undertaking (and hence not operating in the sovereign field) and taking on a dominant position on the internal market or a major section thereof, must not abuse this position according to Article 102 TFEU. This implies an obligation to distribute goods in a non-discriminatory way and thus in line with substantive and procedural stipulations comparable to those developed under the market freedoms.<sup>202</sup> In this respect, it has to be observed, though, that on national (German) level competition law requirements for allocating scarce goods are much more developed than on EU level.<sup>203</sup>

### 3 Allocation Standards Incorporated in EU Secondary Law

#### 3.1 Overview

The standards for allocating scarce goods derived from EU primary law have also materialised in various acts of secondary law. Fruitful fields of reference, in addition to the prototype of the allocation procedure – that are the EU’s coordinated public procurement directives<sup>204</sup> – are constituted by various acts of secondary law which aim to open up the national service markets – that is both cross-sectoral as in the case of the Services Directive 2006/123/EC,<sup>205</sup> and sector-specific as the Uniform Regulatory Framework for

<sup>201</sup> ECJ, Case C-280/00 *Altmark Trans* [2003] ECR I-7747, para. 93; confirmed in Case C-34/01 *Enirisorse* [2003] ECR I-14243, para. 30 ff. Cf. further Caranta ‘Report’ (N. 9) 143 ff.; Fiedziuk (N. 52).

<sup>202</sup> Cf. for more details, Wollenschläger (N. 9) 150 ff.

<sup>203</sup> Cf. Wollenschläger (N. 9) 183 ff.

<sup>204</sup> Cf. N. 6. Cf. further (for procurement by the EU) Art. 101 ff. Reg. (EU, Euratom) 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union, *OJ L* 298, 1, and Art. 121 ff. Commission Delegated Reg. (EU) 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union, *OJ L* 362, 1.

<sup>205</sup> Dir. 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, *OJ L* 376, 36.

Electronic Communications,<sup>206</sup> the Port Package (remaining in a draft stage),<sup>207</sup> the Regulation on public passenger transport services by rail and by road,<sup>208</sup> as well as the air transport rules on groundhandling at EU airports<sup>209</sup> and on slot allocation<sup>210</sup>.<sup>211</sup> In view of the purpose which they pursue, namely to open up markets, these acts of secondary law are primarily intended to realise the market freedoms; however, other aspects of the primary law allocation regime elaborated above are also integrated here, such as state aid-related aspects in the context of the Passenger Transport Regulation. Finally, it should be noted that the RENEUAL Model Rules on EU Administrative Procedure encompass rules for a competitive award procedure (Art. IV-9 ff.).<sup>212</sup>

Pars pro toto, one example will be introduced here, namely the EU Services Directive 2006/123/EC; a further good example would have been the framework requirements of the new Concession Directive 2014/23/EU. At the outset, it has to be highlighted that it is admittedly not possible to extend these sector-specific provisions enacted by the Union legislature beyond their scope of application, nor may single rules for specific subject-matters be misunderstood as an expression of a (minimum) standard that is per se mandatory under primary law.<sup>213</sup> In view of the primacy of EU primary law over EU secondary law, the latter must moreover be in line with the former (cf. on the relationship also above, 2.1.1.1). The EU directives do nonetheless reflect fundamental patterns for dealing with allocation conflicts by means of Union legislation which might be considered when interpreting EU primary law, notably in case of framework

<sup>206</sup> Dir. 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 33, lastly amended by Dir. 2009/140/EC, OJ L 337, 37; Dir. 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive), OJ L 108, 121, amended by Dir. 2009/140/EC; Dir. 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), OJ L 337, 37, amended by Dir. 2009/140/EC; Commission Dir. 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services, OJ 249, 21.

<sup>207</sup> Proposal for a Dir. of the European Parliament and of the Council on market access to port services, COM (2004) 654 final, OJ C 24, 9.

<sup>208</sup> Reg. (EC) 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road, OJ L 315, 1.

<sup>209</sup> Council Dir. 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports, OJ L 272, 36, amended by Reg. (EC) 1882/2003, OJ L 284, 1.

<sup>210</sup> Cf. N. 7.

<sup>211</sup> Cf. furthermore for the allocation of EU subsidies J. van den Brink, 'Requirements for European administration in the field of European subsidies', in: Adriaanse & Van Ommeren & Den Ouden & Wolswinkel (N. 9) chapter 6.

<sup>212</sup> Cf. on this project H.C.H. Hofmann & J.-P. Schneider & J. Ziller, 'The Research Network on European Administrative Law's Project on EU Administrative Procedure' [2014/2] *REALaw* 45. The rules may be found at [www.reneual.eu](http://www.reneual.eu) (2 February 2015).

<sup>213</sup> Cf. also Brown (N. 85) 170 f., 177.

provisions in EU secondary law.<sup>214</sup> Thus, despite the inverse hierarchical relationship, EU primary law may ‘learn’ from EU secondary law.<sup>215</sup> For instance, when concretising the requirement of an objective administrative award procedure, which follows from the EU market freedoms (cf. above, 2.1.1.3.3.2), Article 30 § 2 sentence 2 of the Concession Directive 2014/23/EU<sup>216</sup> may be considered. It stipulates: ‘In particular during the concession award procedure, the contracting authority or contracting entity shall not provide information in a discriminatory manner which may give some candidates or tenderers an advantage over others.’

### 3.2 The Example of the EU Services Directive

Cross-sectoral significance for allocation procedures attaches to the Services Directive 2006/123/EC concretising the Court’s case law.<sup>217</sup> It extends to all allocation situations regarding a self-employed economic activity.<sup>218</sup> Significant exceptions however apply in this regard (cf. Art. 2 § 2; as well as Art. 17): For instance, it does not apply to transport services including urban transport and taxis (Art. 2 § 2 [d]; recital 21), to healthcare and certain social services (Art. 2 § 2 [a], [f] and [j]; recitals 22 and 27), to services covered by the Telecommunications Directives (Art. 2 § 2 [c]), as well as to acts requiring by law the involvement of a notary (Art. 2 § 2 [c]) and to services which are connected with the exercise of official authority as set out in Article 51 TFEU (Art. 2 § 2 [i]). Observed from another angle, that is from the scope of application that remains, in fact the award of concessions for economic activities, such as in the law on waste, water and mining, as well as the allocation of places for stands at trade fairs and markets (cf. recital 39, but also recital 57), must be measured by the requirements of the directive. Article 17 further excludes in the context of the provision

<sup>214</sup> Cf. for examples N. 102 f. Convergences are also noted by M. Cornils, in: M. Schlachter & C. Ohler (ed.), *Europäische Dienstleistungsrichtlinie. Handkommentar* (Baden-Baden 2008), Art. 12, para. 6, and M. Krajewski, ‘Anforderungen der Dienstleistungsrichtlinie an Genehmigungsregelungen und ihre Umsetzung im deutschen Recht’ [2009] *NVwZ* 929 (932).

<sup>215</sup> This issue has been raised in view of the relationship of German constitutional and administrative law, cf. only M. Kloepfer, ‘Was kann die Gesetzgebung vom Planungs- und Verwaltungsrecht lernen?’ [1988] *ZG* 289 (295 ff.); further J. Kersten, ‘Was kann das Verfassungsrecht vom Verwaltungsrecht lernen?’ [2011] *DVBl.* 585; C. Waldhoff, ‘Kann das Verwaltungsrecht vom Verfassungsrecht lernen?’, in: C. Franzius & S. Lejeune & K. von Lewinski & K. Meßerschmidt & G. Michael & M. Rossi & T. Schilling & P. Wysk (ed.), *Beharren. Bewegen. Festschrift für Michael Kloepfer zum 70. Geburtstag* (Berlin 2013), 261.

<sup>216</sup> N. 6.

<sup>217</sup> N. 205. For details on the development of the provisions that interest us here see D. Hissnauer, *Auswirkungen der Dienstleistungsrichtlinie auf das deutsche Genehmigungsverfahren* (Baden-Baden 2009), 55 ff.

<sup>218</sup> See on the scope of the Services Directive U. Schliesky & A.D. Luch & S.E. Schulz, ‘Überlegungen zum Anwendungsbereich der Dienstleistungsrichtlinie’ [2008] *WiVerw* 151, as well as the relevant comments in: Schlachter & Ohler (N. 214).

of services notably services of general economic interest in certain sectors (e.g. water distribution and supply services and waste water services, lit. d; treatment of waste, lit. e). Finally, it should be taken into account with regard to the scope of the Services Directive that this directive, as a tool for better realisation of freedom of establishment (Art. 49 ff. TFEU) and freedom to provide services (Art. 56 ff. TFEU)<sup>219</sup>, makes direct stipulations only for the treatment of self-employed persons who operate on a *cross-border* basis;<sup>220</sup> the ECJ's Belgacom ruling discussed above (cf. 2.1.1.2) might also have repercussions on this. At any rate, if one however considers that it will be difficult to maintain two parallel regimes in national administrative (procedural) law, it can be anticipated that the regulations will converge for purely domestic and cross-border cases.<sup>221</sup>

The requirements for measuring how the Member States deal with scarcity relate both to situations in which shortages occur, and to how they are overcome. The following section will discuss this by reference to the rules for persons exercising the freedom of establishment. The directive lacks, however, specific rules on allocation for persons providing services in another Member State (the general rules on justifiable requirements and the prohibition to require an authorisation do not suffice in this regard).<sup>222</sup> Moreover, the Services Directive also addresses the State as a service-provider (cf. only Art. 4 No. 3 and Art. 19).

Unlike the shortage resulting from the scarcity of natural resources or technical capacities, a justification is required for arbitrary state-created scarcity of the possibility to operate on a self-employed basis (cf. Art. 11 § 1 [b]; recital 62).<sup>223</sup> The decision on the application of contingents must be based on non-discriminatory considerations that are justified by overriding reasons relating to the public interest, and which are proportionate<sup>224</sup> (Art. 9 § 1). It would not be permissible in accordance with Article 14 No. 5 in this regard to apply contingents to authorisations because of the existence of an only restricted economic need.<sup>225</sup> This prohibition is however placed into perspective to a considerable

<sup>219</sup> See in this regard recitals 5 f.

<sup>220</sup> In the same vein also Hissnauer (N. 217) 124 ff. and 141 with further references, also on the opposing view. This issue has been raised in a reference for a preliminary ruling by the Dutch Raad van State submitted on 14 July 2014, cf. ECJ, Case C-340/14 *Trijber* (pending, OJ C 339, 8), and Case C-341/14 *Harmen* (pending, OJ C 339, 9).

<sup>221</sup> Cf. also Wolswinkel (N. 8) 71.

<sup>222</sup> Cf. on this gap and arguing for a restrictive interpretation of Art. 16 or applying the rules on establishment Wollenschläger (N. 9) 157.

<sup>223</sup> Cf. also Wolswinkel (N. 8) 78 ff.; Cornils (N. 214) Art. 12, para. 5, attributes the provision of a limited supply of state services to the first group of cases, and therefore Art. 12.

<sup>224</sup> For examples see recitals 40 and 56.

<sup>225</sup> Art. 14 No. 5 prohibits 'the case-by-case application of an economic test making the granting of authorisation subject to proof of the existence of an economic need or market demand, an assessment of the potential or current economic effects of the activity or an assessment of the appropriateness of the activity in relation to the economic planning objectives set by the competent authority; this prohibition shall not concern planning requirements which do not pursue economic aims but serve overriding reasons relating to the public interest'.

degree by the fact that the prohibition is not to concern ‘planning requirements which do not pursue economic aims but serve overriding reasons relating to the public interest’. Recital 66 gives ‘the protection of the urban environment, social policy or public health’ as an example of such requirements. This would mean that the number of authorisations to be awarded could not be limited because of a lack of demand, but that this could be done because of a danger to the survival of the (economic) sector in question as a result of oversupply.<sup>226</sup> It is for instance recognised in medical care that demand-related access restrictions are permissible for ensuring the attainment of the objectives of ‘maintaining a balanced high-quality medical service open to all’ or ‘preventing the risk of serious harm to the financial balance of the social security system.’ Such planning ‘may prove indispensable for filling in possible gaps in access to outpatient care and for avoiding the duplication of structures, so as to ensure medical care which is adapted to the needs of the population, covers the entire territory and takes account of geographically isolated or otherwise disadvantaged regions.’<sup>227</sup>

Even when contingents are permissible under EU law, sufficient account must be taken of the opportunities open to new applicants to gain access to the market. Article 12 § 2 demands for cases of scarcity of available natural resources or technical capacity that authorisation is to be granted for an appropriately limited period only, and that it may not be open to automatic renewal. In accordance with recital 62, the ‘duration of the authorisation granted 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.’<sup>228</sup> Furthermore, the authorisation may favour neither its (previous) holder nor persons affiliated with him/her.<sup>229</sup> The same applies to cases of state-created scarcity since the restriction of market freedoms underlying the application of contingents to concessions may only be considered to be justified if the chances open to new applicants are taken into account (cf. also Art. 11 § 1 [b]).<sup>230</sup>

The Services Directive contains substantive and procedural stipulations in order to deal with the scarcity situation. The allocation criteria must be non-

<sup>226</sup> See also Cornils (N. 214) Art. 14, para. 18.

<sup>227</sup> ECJ, Case C-169/07 *Hartlauer* [2009] ECR I-1721, para. 50, 52. Cf. in more detail F. Wollenschläger, ‘Patientenmobilität in der Europäischen Union – von der Rechtsprechung des EuGH zur neuen Richtlinie 2011/24/EU über die Ausübung der Patientenrechte in der grenzüberschreitenden Gesundheitsversorgung’ [2012] *EuR* 149.

<sup>228</sup> On this Cornils (N. 214) Art. 12, para. 21 ff.; Hissnauer (N. 217) 90 and 207.

<sup>229</sup> More detail on this Hissnauer (N. 217) 208 f.

<sup>230</sup> In this vein ECJ, Case C-323/03 *EC v. Spain* [2006] ECR I-2161, para. 47 f.; Frenz (N. 24) para. 1849; Hissnauer (N. 217) 181 and 316. On the implementation problem J. Ziekow, ‘Die Auswirkungen der Dienstleistungsrichtlinie auf das deutsche Genehmigungsverfahrenrecht’ [2007] *GewArch* 217 (220).

discriminatory, justified by an overriding reason relating to the public interest and proportionate, clear and unambiguous as well as transparent and objective (Art. 10 §§ 2 and 3). Furthermore, they must preclude the national authorities from exercising their power of assessment in an arbitrary manner (Art. 10 § 1). The allocation procedure that is to be provided must be transparent and impartial – as stated by recital 62, which is also relevant to the determination of the procurement criteria<sup>231</sup> – ‘with the aim of developing through open competition the quality and conditions for supply of services available to users’: Its (planned) implementation, its procedures and criteria must be suitably made public in advance; it must be guaranteed that applications will be dealt with objectively and impartially (Art. 10 § 2 [f]; Art. 12 § 1 and Art. 13).<sup>232</sup> Having said that, Article 12 § 3 permits the Member States ‘[s]ubject to paragraph 1 and to Articles 9 and 10’ to ‘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.’<sup>233</sup> The purpose of neutrality is furthermore served by the prohibition of ‘the direct or indirect involvement of competing operators, including within consultative bodies, in the granting of authorisations or in the adoption of other decisions of the competent authorities’ contained in Article 14 No. 6.<sup>234</sup>

Finally, the Services Directive also lends concrete shape to the guarantee of effective legal protection: Refusals are to be fully reasoned and are to ‘be open to challenge before the courts or other instances of appeal’ (Art. 10 § 6).

#### 4 Summary: The EU Law Framework for Allocating Scarce Goods

The EU primary law framework for allocating scarce goods is constituted by the market freedoms, the EU’s fundamental rights as well as by EU state aid and competition law. Regardless of their heterogeneous regulatory purposes and scope, comparable substantive and procedural standards have emerged, a finding which is confirmed by cross-references.

<sup>231</sup> Cf. on this Hissnauer (N. 217) 206 f.

<sup>232</sup> More detail Cornils (N. 214) Art. 14, para. 9 ff.

<sup>233</sup> More detail Hissnauer (N. 217) 136 ff. and 209 f.

<sup>234</sup> Art. 14 No. 6 exempts the involvement of professional bodies and associations or other organisations acting as the competent authority from the prohibition; this prohibition furthermore concerns neither ‘the consultation of organisations, such as chambers of commerce or social partners, on matters other than individual applications for authorisation, or a consultation of the public at large’.

The allocation regime based on the market freedoms has proven to be the most strongly developed. Its stipulations apply to all procedures which allocate market access opportunities and which are of a 'certain cross-border interest'; it has also been incorporated in various acts of secondary law, namely in the Services Directive or the Procurement Directives. Scarcity as such can already require justification under the market freedoms where the State applies contingents with regard to the possibility of engaging in business. Moreover, the allocation of scarce goods has to be based on objective, transparent, non-discriminatory and proportionate allocation criteria as well as on a transparent and objective procedure. Hence, the criteria must be appropriate and adequate in view of the good to be distributed. This does not exclude pursuing secondary purposes (e.g. social or environmental goals when awarding contracts) if sufficiently justified. Furthermore, the criteria must be clear as well as unambiguous – in order to exclude arbitrariness and enable judicial review – and not aim to preclude specific prospective applicants. The chances of new applicants to gain access are moreover to be adequately considered by, for instance, imposing a time-limit on long-term awards. In terms of procedure, the award (notably object, criteria and the applicable procedural rules) has to be sufficiently made public; form and scope of the advertisement as well as possible exceptions depend on the circumstances of the individual case. The modalities of the award laid down at the outset have to be followed unless a deviation may be exceptionally justified. In addition, neutrality vis-à-vis tenderers has to be guaranteed, for instance when it comes to providing information or by excluding decision-makers whose impartiality is doubtful. Finally, the procedure is to be adequately documented, and the award decision has to be motivated, announced to the applicants and be subject to adequate legal protection; in view of the latter, primary remedies are the rule, a limitation to damages is the exception.

No other major stipulations follow from the Union's fundamental rights (applicable to the Member States 'only when they are implementing Union law' [Art. 51 § 1 sentence 1 CFR], though), notably the general principle of equality (Art. 20 CFR). This requires proper and just allocation criteria and the allocation procedure to be shaped in such a way as to ensure that they are implemented in the outcome of the procedure (transparent and objective procedure). The guarantee of effective legal protection (Art. 47 CFR) is also of particular significance not only in terms of standards for judicial review (primacy of primary legal protection), but also in view of designing the administrative procedure in a way that effective legal protection is guaranteed.

If these requirements are met, conformity with the EU's state aid regime (e.g. requirement of a sufficiently well publicised, open and unconditional bidding procedure in the context of the sale of real estate) and competition law rules for distributing goods may normally be assumed. Finally, these standards have been incorporated in various acts of EU secondary law, like the Services Directive or the Public Procurement Directives. Not only concretise these acts of legislation the standards following from primary law and illustrate the

aforementioned tendency towards convergence, but they also constitute the framework for shaping procedures at the national level.

## 5 Modelling an Administrative Procedure Aiming at Allocating Scarce Goods

Developing EU law standards for allocating scarce goods as undertaken in this article does not only serve the purpose of identifying rules applicable to specific allocation situations, either to measure legislative acts against them or, when the legislator has not (fully) regulated a specific subject-matter, as directly applicable basis for allocation. Rather, it is vital for evolving the doctrine of general administrative law. For it allows a distinct type of administrative procedure to be developed tailored to the task of allocating scarce goods.<sup>235</sup> After some general remarks on type formation (5.1) some challenges of developing a distinct type of administrative procedure aiming at distributing scarce goods ('Verteilungsverfahren') shall be highlighted (5.2).

### 5.1 Type Formation: a Task for the Science of Administrative Law

The type formation within the law of administrative procedure proposed here is based on the task to be performed in the respective procedure which is in our case to allocate scarce goods in competition situations. Such task-related type formation acts as an intermediary between the concretion of sector-specific legislation and the abstraction of general administrative law, and hence takes place at a 'medium level of dogmatic system formation' (*Rainer Wahl*).<sup>236</sup> This approach permits sector-specific provisions to be reflected in an abstracting manner without running the risk, because of a level of abstraction that is too high, of losing sight of the structures and challenges that are characteristic of the specific field, such as procedural elements or the interests to be reconciled, and hence it safeguards 'the material and reality orientation which is indispensable for administrative law'<sup>237</sup>. Nonetheless, sector-specific type

<sup>235</sup> Cf. on this and with further references Wollenschläger (N. 9) 6 ff., 668 ff.; idem (N. 11); further P. Adriaanse & F. van Ommeren & W. den Ouden & J. Wolswinkel, 'An Introduction to Current Legal Questions', in: idem (N. 9) chapter 1, 1.

<sup>236</sup> Cf. only R. Wahl, 'Vereinheitlichung oder bereichsspezifisches Verwaltungsverfahren?', in: W. Blümel (ed.), *Die Vereinheitlichung des Verwaltungsverfahrensrechts* (Berlin 1994), 19 (30 ff., esp. 42 ff.). Cf. further for a distinction of three different levels of general administrative law T. Groß, 'Die Beziehungen zwischen dem Allgemeinen und dem Besonderen Verwaltungsrecht' [1999] *Die Verwaltung. Beiheft* 2 57 (79 f.).

<sup>237</sup> R. Wahl 'Neues Verfahrensrecht für Planfeststellung und Anlagengenehmigung', in: W. Blümel & R. Pitschas (ed.), *Reform des Verwaltungsverfahrensrechts* (Berlin 1994), 83 (87).



formation, in the same way as general administrative law, aims to form a system abstracted from sector-specific legislation, and the two approaches must not be played off against one another because of the different findings they permit to be obtained that are specific to the respective level of abstraction.

Against this background, according to *Eberhard Schmidt-Aßmann*, types of administrative procedures constitute ‘constructs which are determined by administrative practice, in which specific procedural elements are composed to form a procedural arrangement with regard to a specific administrative task.’<sup>238</sup> The type formation is based on the presumption that the individual provisions of the administrative procedure that are allocated to one type of procedure are not contingent, but ‘find their justification in the overarching context of a type of procedure and on the basis of the characteristic of the respective type’.<sup>239</sup> Accordingly, as a procedural doctrine, type formation is obliged to a fundamental concern of administrative legal science, namely ‘to analyse the procedures occurring in legislative and administrative practice and to combine their elements to form a systematic doctrine of administrative procedure’.<sup>240</sup> The elements in which the general doctrine of administrative procedure is interested are the different phases of the procedure (notably initiative to open a procedure as well as preparing, finding, forming and announcing the decision), the participants in a procedure, trans-sectoral issues like neutrality, the consequences of irregularities in applying procedural and substantive requirements of law as well as legal protection.<sup>241</sup>

In methodical terms, type formation is based on two approaches:<sup>242</sup> First, as undertaken in this article with regard to EU law, the framework for the State’s allocation activity has to be derived from constitutional law, EU law and trans-sectoral requirements of legislative acts (e.g. competition or budget law) which provide substantive and procedural stipulations for allocation procedures. Second, this deductive perspective has to be supplemented by an inductive approach analysing sector-specific legislation for its fundamental structures. The results obtained by these deductive and inductive approaches are ultimately combined in a final act of system formation; the latter consists of generalising the procedural elements identified in sector-specific administrative law, comparing them on a trans-sectoral level and measuring them against the general requirements derived from notably constitutional and EU law, including the

<sup>238</sup> Schmidt-Aßmann (N. 11) § 27/77.

<sup>239</sup> Wahl (N. 237) 90.

<sup>240</sup> Schmidt-Aßmann (N. 11) § 27/84.

<sup>241</sup> Cf. only and with further references Schmidt-Aßmann (N. 11) § 27/84 ff.; idem, *Das allgemeine Verwaltungsrecht als Ordnungsidee* (2nd edition Berlin 2004), 362 ff.; Wollenschläger (N. 9) 6 ff.

<sup>242</sup> Cf. Wollenschläger (N. 9) 13 ff.; further Adriaanse & Van Ommeren & Den Ouden & Wolswinkel (N. 235) chapter 1, 4.

institutions of general administrative law. At the end of this process, we see the ideal structure of the allocation procedure. Its identification does not only pursue a systematic interest, but at the same time it permits, firstly, the concretions in sector-specific legislation to be evaluated from a general perspective and secondly doctrines to be sought out for general procedural law. In this regard, the formation of a model procedure not only permits identifying deviations in sector-specific legislation and, consequently, raising the question of their justification, furthermore pointing at regulatory deficits and submitting alternative solutions. Moreover, it allows the legislature and the administration to be provided with elements for forming procedures. These goals are all the more important considering the fact that many allocation procedures are important in economic or other terms, but have drawn little attention in academia and are often regulated not at all or only partially by the legislature.<sup>243</sup> Finally, type formation can counter the ‘paucity of types’ of (not only) German administrative law, which has been complained of by *Rainer Wahl* amongst others,<sup>244</sup> and hence develop the administrative doctrine in specific disciplines.

## 5.2 Developing a ‘Verteilungsverfahren’ (Allocation Procedure)

Following this methodological approach just outlined in general terms, the author has developed elsewhere<sup>245</sup> the allocation procedure (‘Verteilungsverfahren’) as distinct type of administrative procedure tailored to the task of distributing scarce goods – an endeavour which would go far beyond the scope of this article primarily dedicated to identifying EU law standards and which thus cannot be undertaken here. Nonetheless, one key research question shall be illustrated with reference to the issue of legal protection.<sup>246</sup>

An analysis of various allocation procedures (and thus the assumption of the inductive perspective) will reveal the fact that administrative decisions allocating scarce goods often take on particular stability, i.e. the possibility to challenge such decisions ex-post, which is the standard model of remedies in (at least German) administrative law, is restricted or even ruled out: An ex-post remedy may be excluded, but substituted by a preventive remedy expediting the process. This is the case in (German) public procurement law (falling within the scope of the EU directives) which excludes an appeal after the contract is awarded, but obliges the contracting authority to inform the unsuccessful bidders of the imminent award and to ‘stand still’ for a certain period in order to give them the opportunity to lodge a complaint which is dealt with in an ac-

<sup>243</sup> Cf. with further references Wollenschläger (N. 9) 17 f.

<sup>244</sup> R. Wahl, ‘Fehlende Kodifizierung der förmlichen Genehmigungsverfahren im Verwaltungsverfahrensgesetz’ [2002] NVwZ 1192 (1192).

<sup>245</sup> Wollenschläger (N. 9); cf. for a Spanish excerpt idem (N. 11).

<sup>246</sup> Cf. on this and further issues of legal protection Wollenschläger (N. 105).

celerated procedure (cf. sections 101a ff. of the German Act Against Restraints of Competition [GWB]). The ex-post remedy may further be substituted by a prospective remedy, as is (sometimes) the case with admission to universities, i.e. the allocation decision cannot be repealed, but if it can be established that it was illegal and the applicant should have received the place, the court obliges the administrative authority to consider the applicant in a future allocation procedure. Finally, primary legal protection may also be excluded completely and substituted by a claim to damages, as has been accepted by the German Constitutional Court ('Bundesverfassungsgericht') for public procurement procedures below the EU thresholds<sup>247</sup>.

This peculiarity constitutes a deviation from the standard model of administrative remedies and thus calls for explanation and justification. It results from a key feature of allocation procedures: They are not characterised by the classic bipolar citizen-state paradigm which applies, for instance, to police law. Rather, a multipolar conflict has to be resolved: The competing interests of a multitude of applicants to win the competition and the interest of the allocating authority in realising effective distribution must be reconciled. This implies, from the perspective of legal protection, that challenging an allocation decision does not only mean challenging an administrative decision concerning the relationship between the acting public authority and the addressee, but also challenging a decision in favour of the initially successful applicant (who might even have received the good in line with legal requirements so that the action is unfounded). Hence, to balance the competing interests and to secure an efficient allocation, ex-post remedies are restricted or even ruled out. Yet, this peculiarity has to be assessed also from the deductive perspective of national constitutional law, EU law and the ECHR. For the question arises as to whether, and if so to what extent, such limitations are in line with the requirement of effective legal protection enshrined in these guarantees (cf. above, 2.1.1.3.4, 2.2.2 and 2.2.3).

Hence, from the inductive perspective, i.e. from a generalising analysis of specific allocation procedures, and against the background of the standard model of ex-post administrative remedies, the (multiform) stability of allocation decisions may be identified as a peculiarity of this type of administrative procedure. Subsequently, the issue of its justification has to be explored and scrutinised by measuring it against requirements of national constitutional law, EU law and the ECHR, i.e. from the deductive perspective. On this basis, a doctrine of legal review in allocation procedures may be developed as one element of forming this specific type of administrative procedure. As highlighted above, this does not only serve systematic purposes, but also allows an assessment of

---

<sup>247</sup> Cf. above, 2.1.1.3.4.

specific allocation procedures and helps administration and legislator to design such procedures.

To conclude, further trans-sectoral challenges related to the multipolarity of the allocation procedure shall be highlighted: In view of the conflicting interests, securing neutrality of the allocating authority is of particular importance, by e.g. prohibiting selective information or vague allocation criteria. Moreover, with regard to the procedural design, two models may be distinguished, namely the allocation of the scarce good by a single administrative decision addressed to all applicants (multipolar structure), or by a multitude of positive/negative decisions addressed to the individual applicants (bipolar structure). Do both models adequately reflect the multipolarity of allocation procedures, in particular in view of remedies or procedural rights? Can a specific multipolar ‘Verteilungsverwaltungsakt’ (administrative act allocating scarce goods) be developed? The multipolarity of the allocation procedure has also to be considered when determining consequences of irregularities in the procedure: under which circumstances is it justified to declare the allocation act illegal? May the principle ‘pacta sunt servanda’ be applied in cases of a contractual allocation? A further question is under which conditions a person has standing to challenge an allocation decision – is an interest in receiving the good by e.g. participating in the allocation procedure sufficient or has it at least to be possible that the plaintiff either may claim the good for herself/himself or – in case of administrative discretion – has a chance to be considered when redistributing the good in line with the court’s findings? Finally, if remedies are limited to damages, have the standards for the proof of causality to be modified in order to secure effective legal protection (reversal of burden of proof, liability for lost chances)? Otherwise, damages and thus legal protection will usually be ruled out from the outset since it is not likely, in particular in case of discretion or procedural errors (e.g. no advertisement), that the claimant is able to prove that only an allocation decision in her/his favour could have been reached.

In view of these challenges, it is worth continuing the endeavour of modelling an administrative procedure aiming at allocating scarce goods on the level of the Member States’ and the EU’s administrative law as well as from a comparative perspective. A promising pan-European debate has just begun.<sup>248</sup> Moreover, type formation will turn out to be fruitful also beyond allocation procedures.

---

<sup>248</sup> Cf. the references in N. 12.