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**Author:** Wieland, J.
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Introduction

In the last 15 years, competitive interests have increasingly become the focus of administrative proceedings. That is not really surprising. Government decisions, after all, can have huge impacts on businesses’ competitive positions. If, say, chocolate manufacturer A gets a subsidy, and chocolate manufacturer B does not, A has gained a competitive advantage against B. Likewise, if the municipal council adopts a zoning plan which provides for the establishment of a new DIY store, a DIY store already located in the neighbourhood will be faced with heightened competition. What’s more, if the new DIY store is also subject to less stringent requirements concerning, for example, fire safety and the environment, a situation of unfair competition has arisen. The growth in ‘competitor case law’ coincides with two major developments under administrative law. The first development has to do with the sharply increasing integration between European and national law. Through European regulations, case law and legal principles, general administrative law is becoming ever more entwined with EU law. As a result, national legislative, administrative and judicial bodies must base and substantiate their decisions in part on EU law. Because free and fair competition is a critical element of EU law, it seems logical for competitors to seize upon the process of Europeanising administrative law to defend their competitive interests through administrative-law means. The second development pertains to the subjectification trend occurring in administrative law. A shift is going on as regards the purpose of administrative case decisions. Originally, these decisions were meant to provide a counterbalance to administrative authorities through the administrative court’s monitoring of compliance with objective law. With the subjectification of procedural administrative law, the predominantly monitoring nature of administrative law is giving way more and more to offering legal protection to individuals. The most eye-catching aspect of the subjectification trend is the introduction of a relativity requirement (relativiteitsvereiste) under administrative law. Pursuant to this requirement, an administrative court will no longer reverse a decision based on the fact that it is contrary to a written or unwritten legal rule or general legal principle if this rule or principle is obviously not intended to protect the interests of the party invoking it. Unlike in the past, violation of the standard is no longer sufficient in and of itself to obtain reversal of the disputed decision. The standard violated must also be intended to pro-
tect the interests of the party invoking it. The problem for competitors is that many administrative-law standards are not intended to protect competitive interests.

**Problem description**

The developments discussed above give rise to the following main research question: to what extent does Dutch administrative law offer protection to businesses whose competitive positions have been affected by government decisions?

The answer to this question involves three traditional administrative-law doctrines: the interested party concept; the purpose-bound administrative powers notion and the relativity requirement. This leads to the following three sub-questions.

- To what extent can businesses, based on their competitive positions, be viewed as interested parties to a decision?
- To what extent can competitive interests be a factor in the weighing of interests to be made by administrative authorities in exercising their administrative power and in the administrative court’s review of this?
- To what extent does the relativity requirement impede the protection of competitive interests when an administrative court reviews a decision?

The research takes a practical approach to these issues, and primarily concentrates on identifying potential problems which crop up with the protection of competitive interests under administrative law and on finding solutions to these problems. Because the research focuses on the consequences of government decisions on competitive conditions, competition law, which mainly relates to the market conduct of companies, will not be looked at for the most part. The government’s behaviour as a market participant will not be addressed, either.

**Research design**

Chapters 3, 5 and 6 constitute the crux of the research. The three sub-questions mentioned above will be examined and answered in these chapters. Before this, in chapter 2, the various competitive interests and the importance of competition will be described. Chapter 4 will talk about the position which competitive interests occupy under EU law. This chapter will serve as a prelude to and a frame of reference for chapters 5 and 6, in which the position of competitive interests under Dutch administrative law will be analysed. Finally, in chapter 7, conclusions will be drawn and a proposal will be made to achieve better protection of competitive interests under Dutch administrative law.
2 Competitive interests and the importance of competition

Competitive interests
For purposes of this research, ‘competition’ is defined as the battle between businesses for the consumer’s favour. Against this background, three types of business interests may be distinguished. First, businesses have an interest in remaining safeguarded against or getting rid of competing businesses. In particular, the fewer the competitors, the less of a battle which has to be waged to gain the consumer’s favour and, in general, the higher the profits. Second, businesses have an interest in fair competition. This entails their being able to fight for the consumer’s favour based on equivalent starting positions and thus having equal opportunities to keep this consumer as a customer. These first two interests concern the relationship with other companies and can therefore be characterised as competitive interests. Finally, businesses have an interest in unhampered business operations, so that they can fight for the consumer’s favour as freely as possible. Strictly speaking, this interest does not represent a competitive interest, because it is not really about the relationship with other businesses. Hence, this interest will be discussed only indirectly in this research.

The importance of competition
Every time the government grants a licence/permit or exemption, adopts a zoning plan, takes a decision on an enforcement request or awards a subsidy, the market opportunities of businesses are affected directly or indirectly. For instance, if a business obtains a permit to engage in certain economic activities or if a zoning plan provides for the establishment of a business, an existing business will face increased competition and, consequently, diminishing market opportunities. This is not to say, though, that protection of the competitive interests is necessary in all these cases. Competition is not as such a phenomenon which must be combatted. To the contrary, one of the fundamental ideas in Western market economies is that full competition ultimately results in optimal prosperity and that competition is desirable. It is not in the public interest for administrative law to offer protection against competition as such. In addition, competition arises in markets and, accordingly, by its nature is not amenable to protection by law. This is different, however, if competition becomes distorted. If equal opportunities are not provided, prosperity is harmed and competition needs to be protected. This doctoral thesis, then, ponders the extent to which the importance of fair competition – often referred to as ‘equal opportunities’ or a ‘level playing field’ – is protected by administrative courts.
Competitive interests and being an interested party

For legal protection to be offered in administrative proceedings, there has to be access to such proceedings first. Under Sections 7:1(1) and 8:1(1) of the Dutch General Administrative Law Act (*Algemene wet bestuursrecht*), only an interested party may object to and lodge an appeal against a decision. Thus, a business which wants to contest a decision – because it believes that its competitive interest will be affected by the decision – needs to be regarded as an interested party within the meaning of Section 1:2 of this Act. A business will be considered an interested party to a decision based on its competitive position if its competitive interest is directly involved in a decision. Under the case law of the Dutch Trade and Industry Appeals Tribunal (*College van Beroep voor het bedrijfsleven*) (‘the Tribunal’) and the Dutch Council of State’s Administrative Jurisdiction Division (*Afdeling bestuursrechtspraak van de Raad van State*) (‘the Division’), this is so if the business engages in activities, or has specific plans to do this, in the same market segment and the same service area as the beneficiary of the decision. These two criteria will be discussed in more detail below.

**Criterion 1: market segment**

The first criterion used in assessing whether businesses compete with each other relates to the market segment in which they operate. Businesses are competitors of one another if they operate in the same market segment. In assessing whether this is the case, the Tribunal and the Division apply as a standard whether the two companies offer similar products or services. A sliding scale comes into the picture here. If the two companies offer more or less homogeneous products or services, then it is almost automatically assumed that they are active in the same market segment and, hence, are reciprocal interested parties with respect to decisions directed at the other party. For example, two businesses in Vietnam which manufactured chocolate decorations by hand for export were deemed to be active in the same market segment. The more heterogeneous the products or services offered are (and therefore the less similar they are), the less likely it is to be assumed that the same market segment is at issue. Accordingly, the owner of a cheese shop was not deemed an interested party concerning the granting of an exemption to an antique shop where curios and articles for home furnishings were sold. There is a large area between these two extremes in which it is sometimes more and sometimes less obvious that similar products or services are involved. In one case, for instance, a party providing ‘hop on, hop off’ transport by boat through the Amsterdam canals protested against the granting of an exemption to another party offering ‘hop on, hop off’ tourist transport by bus. Although it could not be denied that a boat and a bus differ from each other, both businesses were aimed at transporting tourists who were in Amsterdam for only a brief period and who wanted to see as much of Amsterdam as possible during that period. Still, the Tribunal held that this was not the same market segment.
Research shows that administrative courts determine whether products and services are similar on a case-by-case basis. It is noteworthy that the question whether companies are active in the same market segment is often addressed rather cursory. In many instances, the administrative court, after mentioning the products or services offered by the particular companies, suffices with the remark that they are active in the same market. What is also striking is that the product or service range is usually described in general terms, without the specific characteristics of the product or service being examined. From the standpoint of protecting competitive interests, the administrative courts’ cursory and not very specific manner of defining the market segment is to be applauded. To wit, it means that it is quite readily assumed that companies operate in the same market segment and thus, based on their competitive positions, may be seen as an interested party with regard to decisions directed at and in favour of the other party. Yet access to the administrative court can be expanded even further, by not just looking at the similarity of goods and services, but also at the interchangeability of products and services, as occurs in defining the market under competition law. An interchangeability approach in the aforementioned case of ‘hop on, hop off’ transport by bus or boat would have resulted in accepting that the protesting business in that case was indeed an interested party.

Criterion 2: service area
The second criterion used in assessing whether businesses compete with each other relates to the service area in which they operate. This means the geographic area in which the businesses operate. The first element in assessing whether companies operate in the same service area is the nature of their activities. The more exclusive, the larger the service area is. To take one example, a factory outlet centre has a larger service area than a supermarket, because consumers are willing to travel farther for a day of ‘fun shopping’ than to pick up their daily groceries. Second, the location where the activities are performed plays a role. The higher the local population density, the more limited the service area is. A supermarket, say, in Amsterdam’s city centre has a smaller service area than a supermarket in a village on a remote island. Because of the greater customer density, there are more supermarkets in Amsterdam and a consumer can find a supermarket a shorter distance away.

Effect on the turnover as a third criterion?
In some cases, the Division seems to apply a third criterion besides the market segment and service area in assessing whether a business can be considered an interested party to a decision based on its competitive position. The central issue is whether it is likely that the decision taken (or to be taken) will result in a loss of turnover for the party challenging it. The number of cases in which this criterion has been applied can be counted on one hand, so this cannot be called a consistent trend. Moreover, in a few recent rulings, the consequences of a decision for the turnover were more or less explicitly ignored in assessing whether a business was an interested party.
remains to be seen how the application of the turnover criterion will evolve. If this criterion actually develops into a separate criterion, this will be unfortunate, I believe, since a somewhat more complex economic analysis is often required here, which is not really in keeping with the nature of the assessment of whether someone is an interested party, which, after all, is primarily focused on keeping random third parties at bay.

**Conclusion: broad access to legal protection**
The answer to the first sub-question of this research is that, due to the cursory way in which the market is defined (and in rather general wording, too), a business contesting a decision is already quite readily regarded as a competitor of the beneficiary of this decision and therefore as an interested party to the decision. The nature of the competitive interest sought to be defended is not a factor, because whether somebody is an interested party is a purely factual question.

### 4 Competitive interests and EU law

To put the protection of competitive interests under Dutch administrative law into perspective, chapter 4 of this thesis takes a look at the position which competitive interests occupy under EU law. The European Union’s goal is to promote peace, its values and the well-being of its peoples. A crucial means for achieving this goal has been establishing the internal market and ensuring that this market operates properly. The internal market is based on the ‘free movement’ provisions and the competition rules.

The free movement provisions are chiefly geared towards *creating* an internal market in which production factors and the goods and services which the market produces can move about freely. Due to the elimination of barriers, the national economies are blending with each other, and a level playing field is arising in which companies can compete with one another on an equal footing. The competition rules, including state aid law, are specifically intended to *maintain* this level playing field. Countering distortions of that level playing field and fair competition is key.

While protection of fair and free competition is paramount with both the free movement provisions and competition rules, such protection is not absolute. Imperative public-interest considerations may entail Member States being allowed to limit competition. In this context, the importance of free, fair competition must be weighed against the European Union’s other policy objectives. There must also be an evaluation of whether the measure is suitable for achieving the envisaged goal and whether the measure does not go beyond what is necessary to accomplish that goal.
Competitive interests and purpose-bound assessment frameworks

Occupying centre stage in chapter 5 was the question about the extent to which competitive interests can be a factor in the weighing of interests to be made by administrative authorities in exercising their administrative power and in the administrative court’s review of this. The answer to this question is predominantly determined by the legislature. Specifically, in democratic states based on the rule of law, it is the legislature that determines whether administrative authorities may act to promote certain interests and, if so, which interests. Legal principles and international standards are also relevant in figuring out the extent to which competitive interests may be taken into account.

Competitive interests and the purpose-bound nature of administrative powers

Unlike under EU law, competitive interests only play a very modest role under national administrative law (outside of the competition-law arena, that is). The General Administrative Law Act, which sets forth the general rules of administrative law, does not mention competitive interests. Such limited attention to competitive interests can be explained by the nature of general administrative law. The purpose of the General Administrative Law Act is to standardise administrative proceedings and make them uniform. Consequently, the Act does not refer to the specific interests – including competitive interests – which must be considered in taking a specific decision. Likewise, in the special administrative-law regulations, which grant administrative powers for a particular purpose, competitive interests receive only scant attention.

The degree to which competitive interests may, under administrative regulations, play a part in the decision-making, and be promoted and thus protected in that way, can be reflected in a scale. At the one extreme, there are planning and zoning decisions. The laws and regulations in this area are purely national in nature and do not serve in any manner whatsoever to foster the interest in a level playing field. With planning and zoning decisions, then, the protection for competitive interests is minimal. At the other extreme of the scale can be found decisions which are grounded in administrative regulations which elaborate on EU law, such as the Dutch Medicines Act. Because the interest in free, fair competition is critical under EU law, this interest has also become part of the national assessment framework through the implementation of EU law, and the decision-making has to bear this interest in mind. There is a large area between these two extremes, in which competitive interests sometimes can (as with enforcement decisions) play a role in the decision-making and the review of this, but in many cases cannot. The latter situation is so, because, in formulating many administrative regulations, Dutch lawmakers have rarely given thought to protecting the interest in a level playing field. Only occasionally do Dutch legislators take the
initiative on their own (without EU law forcing them) to embed the interest in a level playing field into special administrative regulations. One example is Section 4 of the Dutch Licensing and Catering Act (*Drank- en horecawet*), which states that, in granting alcohol and catering establishment licences to, say, sports canteens and museums, government authorities must take into account regular catering establishments’ competitive positions.

The protection of competitive interests pursuant to the equal treatment principle
In exercising their powers, administrative bodies are bound not only by laws and regulations, but by general legal principles as well. Administrative courts must therefore not only look at the scope of protection under the laws and regulations, but also need to go deeper, into the realm of legal principles. Fair competition is about providing equal opportunities. As a result, the equal treatment principle is the most logical non-legislative basis for protecting competitive interests. In the past decade, a legal standard based – for now, anyway – on the equal treatment principle has been developing in the area of distributing scarce licences/permits and exemptions. This standard has entailed that administrative authorities must in some way offer candidates and potential candidates room to compete for the scarce rights available. Competitive room should ensure that, for a scarce licence/permit or exemption, all candidates get an equal opportunity to qualify for that right and thereby gain access to the market.

The aforementioned standard is not a general administrative-law standard. It is not applied outside the context of distributing scarce public rights. There is no standard which generally states that, in taking decisions, administrative authorities must keep in mind the importance of having a level playing field between competitors. This is not entirely logical. After all, even outside the context of scarce rights, decisions can affect the level playing field between competitors, for example, if more stringent requirements are imposed on the one licence/permit holder than on the other licence/permit holder. Invocation of the equal treatment principle is often of little consolation in that instance, as cases are not apt to be regarded as similar.

The protection of competitive interests under EU law and the ECHR
Finally, besides the administrative regulations and the legal principles applicable to a decision, EU law and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) determine whether competitive interests can or must play a part in the decision-making.

Because protecting the level playing field is a crucial aspect of many EU regulations, it is not surprising that businesses frequently invoke EU law in administrative cases. National courts and national administrative bodies are obliged to apply EU law that has direct effect, such as the free movement provisions and the state aid rules, and to thereby ignore contrary national law. One limitation here is that this obligation applies only in cases which
Summary

fall within the protective scope of EU law in general (cross-border situations) and of the EU regulations relied on in particular. If this is so, however, the interest in a level playing field must be considered under the applicable EU law. Sometimes, national law can be interpreted in such a way that the application of it will not be at odds with EU law. If this is not possible, national law must, in principle, be set aside and the limits of the purpose-bound assessment framework will be pierced. Nonetheless, the prohibition rooted in EU law on distorting the level playing field is not absolute. Restrictions on free movement may be permissible based on imperative public-interest considerations. The interest in, on the one hand, an open market economy with fair competition needs to be balanced against all sorts of other political and social interests, with the first interest being given a lot of weight, of course. While there is latitude, then, for taking decisions which impact the level playing field, the importance of fair competition must, under EU law, indeed be taken into account in the decision-making, for example, by excluding the application of generally binding regulations which conflict with EU law.

Moreover, under Article 94 of the Dutch Constitution, the courts and administrative authorities must apply treaty provisions with direct effect in exercising public-law powers and reviewing this. Accordingly, ECHR provisions must be applied, too. Yet it has become evident that the ECHR has limited significance for the protection of competitive interests. An explanation for this is that, unlike under EU law, competitive interests are not interests which are protected under the ECHR. This does not alter the fact that Article 1 of the Twelfth Protocol (prohibition on discrimination) and especially Article 1 of the First Protocol (protection of property) might potentially protect competitive interests. The protection offered by Article 1 of the Twelfth Protocol is more limited, though, than the protection offered by EU law. Specifically, although the Article contains a general prohibition on discrimination, it does not, unlike the free movement provisions, prohibit every barrier to competition. At first glance, the chances that invocation of Article 1 of the First Protocol will be successful seem better, because this Article offers more supplemental protection compared to EU law. A key issue in invoking this provision, however, is what the exact cause is of the infringement of the interest protected by Article 1 of the First Protocol. In theory, very different decisions may adversely affect a business’s property. If, say, a competitor gets a licence or exemption for competing activities, an existing business may lose some of its market share. Such an adverse effect, though, may be justifiable in many instances for public-interest reasons. In addition, it is often questionable whether the eroding of a competitive position is a direct result of the granting of a licence or exemption or of a competitor’s business activities. The argument can be made in many cases that the business activities of a competitor in particular influence a business’s market share, so that protection of that interest should not primarily come from administrative law.
Conclusion: limited consideration of competitive interests

The answer to the second sub-question is that only very limited weight can be given to competitors’ interests by administrative bodies in taking decisions and by administrative courts in reviewing those decisions. There are two reasons for this. First, administrative law includes just a limited number of rules which are intended to protect the level playing field. Second, the administrative authorities and courts have to deal with the division of work under the democratic state between lawmakers and administrative authorities, pursuant to which, in exercising a power, administrative authorities must bear in mind the interest which the legislature sought to promote in granting this power. Exceptions to the rule that, in general, only limited weight can be given to competitive interests arise with (1) decisions taken pursuant to regulations ensuing from EU law in which the importance of a level playing field is embedded, (2) enforcement decisions to which the general duty to enforce applies and (3) the distribution of scarce public rights, with regard to which, based on the equal treatment principle, candidates for a scarce right must get equal opportunities to qualify for that right.

6 Competitive interests and the relativity requirement

Chapter 6 focused on the extent to which the relativity requirement impedes the protection of competitive interests when an administrative court reviews a decision. As regards the protection of competitive interests, it is not only relevant whether those interests may be taken into account when the administrative authorities weigh the interests at stake, but also the extent to which it can be reviewed whether a decision is contrary or not to the laws and regulations. Since 2011, the relativity requirement has constituted a serious limitation here. The relativity requirement sets limits on administrative courts’ power to reverse decisions. Pursuant to this requirement, which has been laid down in Section 8:69a of the General Administrative Law Act, an administrative court will not reverse a decision based on the fact that it is contrary to a written or unwritten legal rule or general legal principle if this rule or principle is manifestly not intended to protect the interests of the party invoking it. Based on the explanation to this provision, the Division’s case law has added that a decision will not be reversed, either, if there is an insufficient connection between the ground for appeal and the interest from which the appellant derives its right to appeal (causality).

Particularly under planning and zoning law, competitive interests are not interests to be protected

To date the relativity requirement has mainly been applied in the area of planning and zoning law. This is precisely the area in which competitors litigate the most. Hence, they are often confronted with the relativity requirement. Because the laws and regulations applicable to planning and zoning decisions are not intended to protect businesses’ competitive interests, the
relativity requirement has become an almost insurmountable obstacle for competitors litigating against these decisions. This, by the way, is not always problematic from an equal opportunities perspective. In many environmental-law cases, businesses are seeking to remain safeguarded against or getting rid of competing businesses. Often, though, the levelness of the playing field is not at stake, since increased competition does not automatically translate into distortion of competition. As long as a business is only concerned about keeping out competitors, there is not an interest which needs protection from a public-interest point of view. Still, situations can be imagined in which violating environmental-law rules would disrupt the level playing field. For instance, a zoning plan might wrongly set less stringent safety and environmental requires for a newcomer than for an existing business, or certain statutory rules might be applied to competing businesses differently.

The relativity requirement is also applied very occasionally outside environmental law. In enforcement cases, administrative courts apply the relativity requirement to the statutory provisions allegedly violated. If they are not intended to protect the appellant’s interest, reliance on the standard concerned cannot, in principle, lead to reversal of the decision. From the standpoint of protecting the interest in fair competition, this can sometimes be a problem, as non-compliance with rules which are not in themselves intended to protect this interest may still very well end up distorting the level playing field. If, say, business A does not comply with certain environmental requirements and thereby saves costs, while business B does properly comply with those requirements, business A will have an unlawful competitive advantage. This is not changed by the fact that the environmental standard violated is not intended to protect the competitive conditions. In this light, the ‘Widdershoven correction’ developed in the Division’s case law is interesting.

The Widdershoven correction

In 2015, the Division’s President submitted to State Councillor Advocate General Widdershoven the question whether, in applying the relativity requirement, there is latitude for a correction inspired by the ‘Langemeijer civil-law correction’, to the effect that outcomes from applying the relativity requirement which are deemed unjust should be avoided. Widdershoven concluded that administrative courts should correct the application of Section 8:69a of the General Administrative Law Act in the sense that the violation of a statutory standard which is not designed to protect the interests of an interested party, and which therefore by itself could not result in reversal, may support the judgment that the legitimate expectations principle or equal treatment principle has been violated, principles which are in fact intended to protect interested parties’ interests. This correction has since become known as the ‘Widdershoven correction’ (correctie Widdershoven). For this correction to be applied, it is not only necessary that the statutory provision invoked has been violated, but also – and above all – that the legitimate
expectations or equal treatment principle has been violated. Importantly for competitors, this is a recognition that the equal treatment principle has its own separate protective scope.

The rulings by the Division on 28 December 2016, in which the Widdershoven correction was applied for the first time, are of inestimable importance for protecting the interest in fair competition. These decisions involved three enforcement requests which SlijtersUnie (the Dutch Union of Licensed Victuallers) had filed. SlijtersUnie had asked for enforcement action to be taken against three licensed victuallers located in supermarkets. Specifically, SlijtersUnie wanted the prohibition in Section 24 of the Dutch Licensing and Catering Act on having a victualler operate without a supervisor being present to be enforced against them. At the supermarket victuallers, a supervisor was sometimes only present in the supermarket and not in the associated victualler. The independent victuallers were at a competitive disadvantage, because they always had a supervisor on hand and, consequently, had to incur costs. The enforcement requests were denied, since the victualler and the supermarket represented a single establishment and the fact that there was a supervisor present in the supermarket was deemed sufficient. The District Court and the Division disagreed. The issue was whether this could lead to reversal of the denial decisions. One problem was that the standard violated by the supermarket victuallers was not intended to protect the competitive interest which the independent victuallers asserted, so the relativity requirement precluded reversal of the decisions. The Division then moved on to the application of the Widdershoven correction and examined whether the independent victuallers could invoke the equal treatment principle. Although the enforcement requests had come from independent victuallers, while the victuallers against which enforcement was sought were part of a supermarket, this did not mean that the cases were not sufficiently similar. What was crucial, the Division said, was that the independent victuallers were harmed, because obligations had been imposed on them which victuallers located in supermarkets did not have to fulfil, due to the failure to take enforcement action with respect to the violation of Section 24(1) of the Dutch Licensing and Catering Act. These rulings show that the factual difference between the independent victuallers and the victuallers located in supermarkets would specifically result in unjustifiably high costs for independent victuallers if the prohibition stated in Section 24(1) of the Act were applied wrongly. Thus, application of the equal treatment principle in the context of the Widdershoven correction is not really about whether cases are similar, but rather, whether a party is harmed by the distinction made by the government. The importance of equal opportunities in the market is given a prominent place. In terms of protecting fair competition, this is deeply significant.

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Summary

The relativity requirement in light of EU law

Businesses do not just invoke national laws and regulations. They often rely on provisions under EU law as well. The relativity requirement is also applicable in that instance. It turns out that EU law, and, in particular, the effectiveness principle and the principle of effective legal protection, does not preclude the application of a relativity requirement. In *Commission v Germany*, the European Court of Justice ruled on the permissibility of a provision under German administrative law which was comparable to the Dutch relativity requirement. The Court held that a Member State may determine that, for a government decision to be declared invalid by the competent court, a subjective right needs to have been violated with respect to the requesting party. This strongly suggests that the Dutch relativity requirement is likewise permissible from an effective legal protection viewpoint. Article 6 of the ECHR and Article 47 of the European Charter, which state that there must be access to the court, also do not prevent the relativity requirement being applied, seeing as the requirement does not in essence undermine access to courts.

In applying the relativity requirement where EU-law provisions are invoked, the Dutch administrative courts - as in cases where national-law provisions are invoked - look at the purpose and substance of these regulations to ascertain the personal protective scope of them. If the interest of a business which is involved in a decision, and which it fights for in administrative proceedings, coincides with a right which it derives from the EU-law regulations invoked, the relativity requirement will more or less be automatically satisfied. After all, the ground invoked and the appellant’s interest which threatens to be harmed by the contested decision converge in that case. In competition disputes, businesses frequently invoke the state aid rules, the free movement provisions and the EU Services Directive. The state aid rules protect against disruptions of the level playing field, and the free movement provisions and the EU Services Directive, against barriers to free trade. So, businesses whose interests are affected by decisions can successfully invoke the relevant EU-law provisions. The relativity requirement does not impede this. As regards the application of EU law in competition disputes, then, the relatively requirement does not pose an obstacle.

**Conclusion: the relativity requirement as a stumbling block for competitors**

The answer to the third sub-question is that the relativity requirement raises a high threshold for businesses litigating planning and zoning decisions before administrative courts because, they maintain, their competitive interests have been affected. The major reason for this is that competitive interests barely fall under the protective scope of planning and zoning law.

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2 Court of Justice EU, October 15, 2015, C-137/14, ECLI:EU:C:2015:683 (Commission/Germany).
The relativity requirement sometimes constitutes a barrier in enforcement matters, too, because the standard to be enforced is not designed to protect competitive interests. The foregoing means that, in many cases, administrative courts do not have the power to reverse planning and zoning decisions if a competitor rightly alleges in principle that the decision conflicts with administrative-law provisions concerning planning and zoning law or if a competitor has violated certain provisions. If the level playing field thereby becomes threatened, application of the relativity requirement is problematic. In this connection, however, the Widdershoven represents an important addition to the protection which administrative courts can provide.

Conclusion: limited protection of competitive interests

The main question in this doctoral thesis was the extent to which Dutch administrative law can offer protection to businesses whose competitive positions are affected by government decisions. In the answer to this question, a distinction may be made between, on the one hand, competitors’ access to administrative proceedings and, on the other hand, the degree to which their interests – and especially their interest in a level playing field – can be a factor in taking decisions and in the administrative courts’ review of these decisions.

Access to administrative proceedings

Competitors have exceptionally broad access to administrative proceedings. With respect to assessing whether a business can be viewed as an interested party to a decision based on its competitive position, it is relevant whether a business engages in activities in the same market segment and service area as the beneficiary of the decision. Generally speaking, administrative courts define the relevant market in very general terms, so that it is quite readily found that the businesses operate in the same market segment. Although the access can therefore certainly be described as broad, the access might nonetheless be further broadened, by, in defining the relevant market, not just looking at whether products or services are similar, but also, as occurs when the relevant market is determined under competition law, at appreciating products or services which are interchangeable.

Consideration of competitive interests

The limitation on the extent to which administrative law can provide protection primarily has to do with the limited degree to which competitive interests may play a part in the decision-making and in the administrative courts’ review of this. Two reasons can be cited for this.

First, Dutch administrative law has very few rules whose purpose is to protect the level playing field and thus the interest in fair competition. In combination with the purpose-bound nature of administrative powers, this
ensures that administrative authorities, in taking a decision, and the administrative courts, in reviewing this, can only accord very limited weight to the interest in a level playing field. Specifically, based on the prohibition against misuse of power, the substance of a decision has to correspond with the substance and the purpose of the applicable regulations. Interests which have not been given a place in these regulations cannot be factors in the substantive decision on whether to take a decision or not. At most, the consequences for other businesses’ competitive positions may be eased somewhat by attaching provisions or limitations to the licence/permit or exemption granted. The lack of administrative-law standards designed to protect the interest in a level playing field also comes into play with the application of the relativity requirement. In particular, the relativity requirement entails that a court will not reverse a decision on the ground that it is at odds with a legal rule or legal principle if this rule or principle is manifestly not intended to protect the interests of the party invoking it.

A second reason why the interest in a level playing field can merely play a limited role in the decision-making is that Dutch administrative law does not include a legal standard which generally states that, when a decision is taken, consideration will be given to the consequences for the level playing field. Such a standard does exist, though, in the specific area of distributing scarce public rights. In this area, the Division and Tribunal have developed in their case law a legal standard, based on the equal treatment principle, to the effect that administrative authorities must in some way offer room for candidates and potential candidates to compete for the scarce rights available. Although, in other areas of administrative law, too, the principles of proper administration, including the equal treatment principle, must be applied, a more general standard has not evolved which says that administrative authorities have to take into account in the decision-making the consequences which a decision will have for the level playing field. An underlying problem is that invocation of the equal treatment principle under Dutch administrative law is rarely successful. This is due to the way in which administrative courts review actions against the equal treatment principle. The review is based on similarity between cases, but such similarity is often absent. Nevertheless, the aforementioned rulings of 28 December 2016 about the enforcement of a provision in the Dutch Licensing and Catering Act provided reason to be hopeful. The review in that case with regard to the equal treatment principle did not concentrate so much on whether the situations were similar, but rather, whether a party suffered harm as a result of the distinction made. This placed the importance of equal opportunities in the forefront.

The conclusion to be drawn is that, while competitors have broad access to administrative proceedings, the extent to which protection can be offered to competitive interests is limited, because competitive interests can only play a limited role in the decision-making and the administrative court’s review of this.
Towards better protection of competitive interests
The limited protection which administrative law can offer to businesses competing fairly with one another is a problem, as this fails to appreciate that government decisions can have a huge impact on competitive conditions and thereby on long-term economic prosperity. Chapter 7 therefore sought to find a means for improving protection of the interest in fair competition.

The crux of the problem is the lack of a general administrative law standard to the effect that, in taking decisions, administrative bodies need to bear in mind the importance of a level playing field. Because fair competition is about there being equal opportunities in a particular market, seeking a solution in the application of the equal treatment principle makes sense. As mentioned, invocation of this principle before Dutch administrative courts is rarely successful. This is because the starting point for these courts’ review is an assessment of how similar certain cases are. Since the cases are usually not similar, the question whether the distinction made is legitimate is often not reached. That does not change the fact that making distinctions can have a huge impact on businesses’ market opportunities. Accordingly, it would be more appropriate not to make the similarity of cases the paramount concern in the review against the equal treatment principle, but to mainly examine the consequences of a distinction made by the administrative authorities. If it is apparent that a natural person or legal entity is truly harmed as a result, this distinction must be warranted. The review model should then be as follows. First, an answer must be given to the factual question whether there is a distinction which needs to be justified, because it results in an actual competitive or other disadvantage for a party (a business). If the answer to this question is ‘yes’, the normative question whether the distinction made is permissible has to be answered. Because, in assessing whether a national measure limiting competition in the internal market is permissible, the European Court of Justice also takes as its starting point the consequences of the barrier, following the assessment framework utilised by the European Court of Justice makes sense in assessing whether a distinction made is permissible under national law. Hence, it must be analysed whether the distinction made serves a legitimate purpose, whether that purpose can be achieved with the distinction made (suitability test), whether the purpose may be achieved with less far-reaching means (subsidiarity test) and whether the distinction made is proportionate to the impairment of the interest in a level playing field (proportionality test). Finally, if it is concluded that the distinction is not warranted, the consequences of this conclusion must be looked at. Preferably, the distinction should be done away with, as this will restore the level playing field.