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CHAPTER 6. REQUIREMENTS UNDER EU LAW ON THE ALLOCATION OF SCARCE EUROPEAN SUBSIDIES

1. Introduction

For years, the European Union (hereinafter: the EU) has tried to achieve its policy objectives partly through the provision of European subsidies. These subsidies are not only provided by the European Commission and European executive agencies, but also by national authorities. Examples of European subsidies are the subsidies from the Structural Funds,¹ which aim among other things to reduce the economic differences between EU regions, and the research and development grants that are provided under the so-called Horizon 2020 programme.²

European subsidies qualify as public rights as this concerns individual rights which are granted by administrative authorities.³ More specifically it concerns claims to governmental support. Because there is a limited amount of funding available for most of the European subsidy programmes,⁴ as is the case for most national subsidies, it concerns limited public rights.⁵

Because it is likely that the amount of European subsidies requested will exceed the limited budget,⁶ both European and national authorities responsible for the allocation of

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¹ The European Social Fund (ESF) and the European Regional Development Fund (ERDF).

² See Regulation No 1291/2013 of the European Parliament and of the Council of 11 December 2013 establishing Horizon 2020 – the Framework Programme for Research and Innovation (2014–2020) and repealing Decision No 1983/2006/EC [2013] OJ L347/104. This programme is the successor to the Seventh Framework programme in 2007–2013. See Decision No 1982/2006 [2006] OJ L412/1.

³ See Chapter 1, Section 4.

⁴ An exception exists for certain European subsidy schemes that are funded by the European Agriculture Guarantee Fund (EAGF). This concerns the export refunds and the single payment. For these schemes, anyone who meets the subsidy conditions and abides by the obligations, qualifies for European subsidy. These European subsidies can therefore not be classed as scarce.

⁵ See Chapter 1, Section 4.

⁶ In the Netherlands this is usually the case.

European subsidies will have to consider what requirements exist under European law in this allocation procedure. What allocation mechanism should be chosen, to what extent do the European general principles of equal treatment and transparency developed in procurement law apply and, if so, what obligations arise from these? These questions are considered for both the European subsidies that are provided by the European Commission and the European executive agencies, as well as the European subsidies that are provided by national authorities.⁷ This chapter will go on to demonstrate that for each category of European subsidies, differences exist with regard to the requirements for the allocation.

As a starting point the European rules applying in the programme period 2007–2013 have been chosen. This is due to the fact that there has not been much experience so far with the regulations for the current programme period 2014–2020 concerning the allocation of EU subsidies. Because these regulations were not adopted before December 2013, the Member States could only then start drafting their own obligatory national programmes on the basis of which they intend to grant European subsidies. This means that most Member States allocated EU subsidies in the current programme period not earlier than the end of 2014. It remains to be seen what problems will occur in the coming years. The above also has the consequence that Financial Regulation No 1605/2002 will be taken as a starting point.⁸ When I use the term Financial Regulation, I mean therefore Regulation 1605/2002. Although the new Financial Regulation has been applicable since 1 January 2013, it did not apply to European subsidies which were granted in the programme period 2007–2013.⁹ However, interesting changes in the Financial Regulation as well as the regulations for the current programme period that are relevant for the topic of this chapter will be mentioned.

Before the question can be addressed concerning the requirements that have to be met under European law on the allocation of scarce European subsidies, Section 2 first discusses what can be understood under the term 'European subsidy'. Attention is paid to the distinction between European subsidies that are provided by the European Commission and European executive agencies on the one hand, and by the national authorities on the other hand. Section 3 then goes on to discuss which allocation mechanism should be chosen for the allocation of European subsidies, to what extent the principles of equal treatment and transparency apply and if so, what the resulting obligations are. Section 4 provides a conclusion.

⁷ Concerning the provision of European subsidies by Dutch authorities and the problems that occur see J.E. van den Brink, *De uitvoering van Europese subsidieregelingen in Nederland. Juridische knelpunten en uitdagingen*, Kluwer, Deventer 2012.

⁸ Council Regulation No 1605/2002 of 25 June 2002 containing the Financial Regulation applicable to the general budget of the European Community [2002] OJ L248/1.

⁹ Regulation No 966/2012 of the European Parliament and the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation No 1605/2002 [2012] OJ L298/1 and the accompanying Commission delegated Regulation No 1268/2012 on the rules of application of Regulation No 966/2012 [2012] OJ L362/1. The new Financial Regulation came into force on 1 January 2013. However, the provisions concerning the implementation methods of the budget will come into force on 1 January 2014. See Article 214, opening words, under a, of the new Financial Regulation.

2. European Grants in Various Shapes and Sizes

2.1. *The Concept of European Subsidy*

Before dealing with the question of what requirements under European law have to be met on the allocation of European subsidies, this paragraph will look at the actual concept of European subsidies. How should this term be understood and what kinds of European subsidies exist? Since 2002 a definition of the concept of European subsidy has been included in the Financial Regulation, the European legislative instrument for the implementation of the EU budget. The old as well as the new Financial Regulation¹⁰ refers to direct financial contributions, by way of donation, from the budget in order to finance a) an action intended to help achieve an objective forming part of a European Union policy; or b) the functioning of a body that pursues an aim of general European interest or has an objective forming part of a European Union policy.

The most important category of European funding does not fall within this definition. It concerns funding which, although paid from the EU budget, is provided through the intervention of the Member States. Examples are the important agricultural subsidies and subsidies that are provided from the Structural Funds, the European Social Fund (ESF) and the European Regional Development Fund (ERDF). In budget terms these subsidies are provided ‘under shared management’. The section on Grants in the Financial Regulation – listing various conditions for the provision of European subsidies – does not apply to the provision of these ‘European subsidies’.¹¹ However, the focus of this chapter does not only concern the direct financial contributions charged to the central EU budget, but also the ‘European subsidies’ provided by national authorities under shared management. The definition of European subsidy of the Financial Regulation is therefore too limited in the context of this chapter. The only difference with European funding provided by national authorities under shared management is that it doesn’t concern a *direct* financial contribution from the EU budget. Apart from this, it matches the description of the Financial Regulation. To avoid having to distinguish between European subsidies in the sense of the Financial Regulation and European funding provided by national authorities under shared management, I have opted in this chapter for a broader definition of the term ‘European subsidy’, but will as much as possible keep to the description of European subsidy contained in the Financial Regulation:

A European grant is a financial contribution directly or indirectly financed by the EU budget, by way of donation to finance an action intended to help achieve an objective forming part of an EU policy.

¹⁰ See Article 8 of Council Regulation No 1605/2002 and Article 121 of Regulation 966/2012.

¹¹ This follows on from the word ‘direct’ contained in Article 108(1) of the Financial Regulation. The second paragraph stating what does not qualify as a grant within the meaning of the Grants title refers under (e) to the European subsidies provided under shared management, in other words European subsidies that are first paid into the budget of the Member State. These subsidies are explicitly excluded from the concept of European subsidy. See in the new Financial Regulation Article 121(1) and Article 121(2)(e).

The term *financial contribution* indicates that European subsidies are not just about the payment of money; they can also be contributions that may be perceived as monetary. For example, the provision of a loan at a favourable rate or a guarantee. Secondly, the above definition shows that the contribution is paid for from the EU budget; so it does not concern subsidies that are paid for from a national treasury. Thirdly, the financial contribution can be both direct, i.e. from the European Commission and European executive agencies, and indirect, i.e. provided by Member States. Fourthly, it concerns a donation; a European subsidy is not the same as a public contract which involves payment for the delivery of movable or immovable property, the performance of work or services. Such considerations are indeed absent in the context of a European subsidy. It concerns, after all, the funding of an action that is intended to help achieve an objective that is part of an EU policy. These EU objectives are contained in Article 3 of the Treaty on European Union (TEU). For example, the realisation of freedom, security and justice, a broadly competitive social market economy aimed at full employment and social progress and economic, social and territorial cohesion.

Note, however, that the concept ‘European subsidy’ is nowhere to be found in European law pertaining to the provision of European subsidies. This refers, among other things, to ‘community support’ – to be distinguished from national support,¹² premium,¹³ ‘subsidy’,¹⁴ ‘support’ and ‘aid’.¹⁵ If the definition formulated above has been met, then in the context of this chapter a European subsidy is intended.

The next paragraphs take a closer look at the various types of European subsidies that fall under the definition formulated above. For the purpose of this chapter this is relevant, because the requirements under EU law on the allocation of these various types of European subsidies vary. Paragraph 2.2 looks at the European subsidies provided by the European Commission and the European executive agencies. These are the European subsidies that also fall under the subsidy definition contained in the Financial Regulation to which the section Grants therefore (directly) applies. Paragraph 2.3 looks at the European subsidies that are provided via the Member States. In that context, a distinction should be made between European subsidies that are provided under shared management (paragraph 2.3.1.) and that therefore do not fall under the grant definition of the Financial Regulation on the one hand, and the European subsidies that are provided by

¹² See Article 1, opening words and under 1, of Council Regulation No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) [2015] OJ L277/1.

¹³ See Article 79 of Council Regulation No 73/2009 of 19 January 2009 establishing common rules for direct support schemes for farmers under the common agricultural policy and establishing certain support schemes for farmers [2009] OJ L254/73 (EAGF).

¹⁴ See Article 14(1) of Decision No 573/2007 of the European Parliament and the Council of 23 May 2007 establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme ‘Solidarity and Management of Migration Flows’ (ERF).

¹⁵ See Council Regulation No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 [2006] OJ L210/25 (Structural Funds), version 01.07.2013.

organisations of the Member States under public and private law on the other hand. The section Grants of the Financial Regulation No 1605/2002 does apply to this latter category of European subsidies. Paragraph 2.4 looks briefly at the new Financial Regulation No 966/2012, which has the consequence that commitments made as of 1 January 2014 concerning subsidies that are provided by organisations of the Member States under public and private law no longer fall under the grant definition.¹⁶

2.2. *European Subsidies provided by the European Commission and European Executive Agencies*

The first category of European subsidies to be discussed are the subsidies that are provided directly by the departments of the European Commission, and subsidies which are delegated to be provided by European executive agencies.¹⁷ In budget terms, these European subsidies are provided on a centralised basis.¹⁸ Examples of these are the ‘Seventh Framework’¹⁹, ‘Life+’,²⁰ and ‘Progress’.²¹ An example of a European

¹⁶ See Article 58 to 63 in conjunction with Article 214, opening words and under a, of Regulation No 966/2012.

¹⁷ European executive agencies are legal persons under European law to whom – for the account and under the responsibility of the Commission – the implementation of a European programme or project can be delegated either in whole or in part, pursuant to Regulation No 58/2003. See Article 55 of the Financial Regulation. See also Council Regulation No 58/2003 of 19 December 2002, which determines the status of the executive agencies to which certain management tasks in the community programmes have been delegated [2003] OJ L11/1. On European executive agencies see for example P.P. Craig, ‘The constitutionalisation of Community administration’ (2003) *ELRev.* 840 and Wolfgang Schenk, *Strukturen und Rechtsfragen der gemeinschaftlichen Leistungsverwaltung*, Mohr Siebeck, Tübingen 2006, p. 183 f.

¹⁸ See Article 53 of the Financial Regulation which states that the budget of the Commission can be implemented a) on a centralised basis, b) by shared or decentralised management and c) by shared management with international organisations.

¹⁹ See Decision No 1982/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007–2013) [2006] OJ L412/1. The procedure for the provision of grants can be found in Regulation No 1906/2006 of the European Parliament and of the Council of 18 December 2006 laying down the rules for participation of undertakings, research centres and universities in actions under the Seventh Framework Programme and for the dissemination of research results (2007–2013) [2006] OJ L391/1. In the current program period the programme has been renamed into Horizon 2020 from the programme period 2014–2020. See the Regulation No 1291/2013 of the European Parliament and of the Council of 11 December 2013 establishing Horizon 2020 – the Framework Programme for Research and Innovation (2014–2020) and repealing Decision No 1983/2006/EC [2013] OJ L347/104.

²⁰ See Regulation No 614/2007 of the European Parliament and of the Council of 23 May 2007 concerning the Financial Instrument for the Environment (LIFE+) [2007] OJ L149/1. For the current programme period this regulation has been replaced by Regulation No 1293/2013 of the European Parliament and of the Council of 11 December 2013 on the establishment of a Programme for the Environment and Climate Action (LIFE) and repealing Regulation No 614/2007 [2013] OJ L347/185.

²¹ See Decision No 1672/2006 of the European Parliament and of the Council of 24 October 2006 establishing a Community Programme for Employment and Social Solidarity – Progress [2006] OJ L315/1. In the programme period 2014–2020 Progress has been integrated into the European Union Programme for Employment and Social Innovation (“EaSI”) (see Regulation No 1296/2013 [2013] OJ L347/238).

programme for which the implementation is delegated to an executive agency is the programme 'Europe for citizens'. This programme is managed by the Education, Audiovisual & Culture Executive Agency (EACEA).²² In these cases, through the provision of the European subsidy a relationship arises between the European Commission and the executive agency respectively on the one hand and the final beneficiary of the European subsidy on the other hand.²³

The section Grants of the Financial Regulation applies to the European subsidies that are provided directly by the European Commission and the European executive agencies.²⁴ In both the Financial Regulation and the regulation of the European Commission²⁵ based on it, rules are laid down in connection with the form in which a grant can be provided,²⁶ the principles upon which they are provided,²⁷ the award procedure²⁸ and payment and control.²⁹ The European subsidies that are provided directly by the Commission or the European executive agencies are usually provided via a contract.³⁰

²² This was done by Commission Decision of 26 April 2007 to transfer authority to the Education, Audiovisual and Culture Executive Agency (EACEA), with the aim of implementing activities connected to the implementation of community programmes in the area of education, audiovisual means and culture, particularly including the implementation of grant awards, as established in the budget of the Community under No C(2007) 1842, in accordance with the amendments of 26 May 2008. The Agency was established by the Commission Decision of 14 January 2005 establishing the Education, Audiovisual and Culture Executive Agency, for the management of community action in the fields of education, audiovisual media and culture in application of Council Regulation No 58/2003 [2005] OJ L24/35. This decision was amended on several occasions. Therefore Decision 2005/56 has been replaced in 2009 by Commission Decision of 20 April 2009 setting up the Education, Audiovisual and Culture Executive Agency for the management of Community action in the fields of education, audiovisual and culture in application of Council Regulation No 58/2003 [2009] OJ L101/26. In 2013 this Decision has been repealed by Commission Implementing Decision of 18 December 2013 establishing the 'Education, Audiovisual and Culture Executive Agency' [2013] OJ L232/46.

²³ When European executive agencies entered into a subsidy relationship with final beneficiaries of European subsidies, the question arose in the practical implementation to what extent legal protection was possible in the European courts. To solve this problem Article 22 of Regulation No 58/2003 establishes administrative appeal at the European Commission against acts of an executive agency. If the European Commission rejects the administrative appeal, an action for annulment may be brought before the Court of Justice in accordance with Article 263 TFEU (see Article 22(5) of Regulation No 58/2003).

²⁴ See Article 108 of the Financial Regulation and thereafter.

²⁵ See Commission Regulation No 2342/2002 of 23 December 2002 laying down rules for the implementation of Council Regulation No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities [2002] OJ L357/1 (hereafter: the Commission Regulation).

²⁶ See Article 108*bis* of the Financial Regulation.

²⁷ See Article 109 f. of the Financial Regulation.

²⁸ See Article 114 f. of the Financial Regulation.

²⁹ See Article 117 f. of the Financial Regulation.

³⁰ See Article 108(1), second para. of the Financial Regulation in conjunction with Article 164 of the Commission Regulation.

2.3. *European Subsidies provided by National Administrative Bodies*

2.3.1. Subsidy provision under shared management

When European subsidies are provided under shared management, it means that the European subsidies are granted through Member States intervention to final beneficiaries of the subsidies.³¹ The Member States appoint the national authorities – in this chapter referred to as national administrative bodies – charged with the implementation of the European subsidy scheme in question. Originally the method of shared management only applied to the Structural Funds,³² the European Fisheries Fund,³³ the European Agricultural Guarantee Fund (EAGF)³⁴ and the European Agricultural Fund for Rural Development (EAFRD).³⁵ Currently, this method is applied on a larger scale, for example through the Migration Funds³⁶ and the European Globalisation Fund.³⁷

³¹ See the Second report of the Committee of Independent Experts on Reform of the Commission, Analysis of current practice and proposals for tackling mismanagement, irregularities and fraud, Volume I (10 September 1999), p. 78 and also Article 53 ter of the Financial Regulation. According to Craig ‘shared management’ is equal to ‘shared administration’. See P.P. Craig, ‘Shared administration, disbursement of community funds and the regulatory state’, in H.C.H Hofmann and A.H. Türk (eds.), *Legal Challenges in EU Administrative Law: Towards an Integrated Administration*, Edward Elgar, Cheltenham 2009, p. 34. I make a distinction between both terms. ‘Shared management’ pertains to the joint implementation of the budget by the Member States and the EU, while ‘shared administration’ also pertains to other forms of cooperation.

³² European Social Fund and European Regional Development Fund. See Council Regulation No 1083/2006 (Structural Funds). For the new programme period 2014–2020 a new umbrella regulation has been adopted which also sees on the EAFRD and the EMFF. See Regulation No 1303/2013 of the European Parliament and of the Council laying down common provisions on the ERDF, the ESF, the Cohesion Fund, the EAFRD and the EMFF covered by the Common Strategic Framework and laying down general provisions on the ERDF, the ESF and the Cohesion Fund and repealing Council Regulation No 1083/2006 [2013] OJ L347/320.

³³ In the programme period 2014–2020 this fund has been replaced by the European Maritime and Fisheries Fund. See Regulation No 508/2014 of the European Parliament and of the Council of 15 May 2014 on the European Maritime and Fisheries Fund, [2014] OJ L149/1.

³⁴ See for example Council Regulation No 73/2009 of 19 January 2009 establishing common rules for direct support schemes for farmers within the framework of the Common Agricultural Policy and establishing a number of support schemes for farmers [2009] OJ L30/16. For the new programme period this Regulation has been replaced by Regulation No 1307/2013 of the European Parliament and of the Council of 17 December 2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and repealing Council Regulation No 637/2008 and Council Regulation No 73/2009.

³⁵ See Article 53(1) in conjunction with Part II, Titles I and II, of the Financial Regulation. See Council Regulation No 1698/2005 (EAFRD). For the programme period 2014–2020 this Regulation has been replaced by Regulation No 1305/2013 of the European Parliament and of the Council of 17 December 2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and repealing Council Regulation No 1698/2005 [2013] OJ L347/487.

³⁶ In the new programme period these funds have been integrated into the Asylum, Migration and Integration Fund. See Regulation No 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund [2014] OJ L150/168.

³⁷ See 6.3 under a of the Commission Staff Working Document on the Review of the Financial Regulation. This document can be found via <www.europa.eu/comparl/cont/site/topics/regulation/5dec05_

In the case of shared management, the Commission and the Member States have distinct administrative tasks which are inter-dependent and set down in legislation and where both the Commission and the national administrative bodies need to discharge their respective tasks for the European policy to be implemented successfully.³⁸ The rules governing the relationship between the European Commission and the Member States have been laid down in specific European regulations and decisions. The most important matter in these regulations and decisions is that in the first instance the Member States are responsible for the provision of the European subsidies.³⁹ The rules on how these are provided, however, are mainly to be found in the aforementioned European regulations and decisions.⁴⁰ The responsibility of the Member States is therefore very much subject to European regulation.

In short, the system of the provision of subsidies under shared management is that the Member States draw up a long-term programme in which they indicate – within the limits of the applicable European regulations and decisions of course – what kind of projects they want to have considered for European subsidies and how they think they will realize the implementation of the European regulations and decisions at a national level.⁴¹ These programmes are named, depending on the European subsidy scheme in question, operational programmes,⁴² rural development programmes⁴³ or long-term programmes.⁴⁴ The programmes are submitted to the European Commission for approval before the national administrative body can proceed with the provision of European subsidies. The approval of the European Commission is usually combined with the establishment of the maximum amount of European funding that is available

en.htm>. See Regulation No 1927/2006 of the European Parliament and of the Council of 20 December 2006 on establishing the European Globalisation Adjustment Fund [2006] OJ L406/1. In the new programme period this Regulation has been replaced by Regulation No 1309/2013 of the European Parliament and of the Council of 17 December 2013 on the European Globalisation Adjustment Fund (2014–2020) [2013] OJ L347/855.

³⁸ See the second report of the Committee of Independent Experts on the reform of the Commission, *Analysis of current practice and suggestions for dealing with mismanagement, irregularities and fraud* Volume I (10 September 1999), p. 78. See also the proposal for a Decision (EU, ECSC, Euratom) of the Council containing the Financial Regulation applicable to the general budget of the European Communities, 17 October 2000, COM (2000) 462 final. See furthermore P.P. Craig, *EU administrative law*, OUP, New York 2012, p. 80.

³⁹ See for example Article 70(1) of the Regulation No 1083/2006 (Structural Funds).

⁴⁰ For the sake of completeness, please note that the rules in many cases are laid down in European soft law. For example working documents and interpretative statements stating how certain articles in European Regulations should be explained. Strictly speaking, European soft law is not legally binding, but in practice it can have legal effects. The concept of European soft law will not be discussed here further. See H.C.H. Hofmann, G.C. Rowe and A.H. Türk, *Administrative Law and Policy of the European Union*, OUP, Oxford 2011, p. 536 f and L.A.J. Senden, *Soft Law in European Community Law*, Hart Publishing, Oxford and Portland Oregon 2004.

⁴¹ This does not apply to European subsidies provided from the EAGF.

⁴² The Structural Funds and the European Fisheries Fund.

⁴³ The EAFRD.

⁴⁴ The Migration Funds.

for the programme in question.⁴⁵ On the basis of these approved programmes, the appointed national administrative bodies provide the European subsidies to national beneficiaries, topped up with a compulsory national subsidy. This supplement, paid for with national money, is referred to as national co-financing. Normally obligatory, a 50% level of co-financing is required. The reason for this is that the EU does not wish to spend European subsidies for which the national authorities themselves have no national subsidy available. The payments made to national beneficiaries within the framework of a European subsidy are invoiced by the national administrative bodies to the European Commission by means of so-called payment requests on the grounds of which intermittent payments are made.⁴⁶ Checks are carried out by the national administrative bodies on the beneficiaries of the European subsidies both during the period when the subsidy is provided and at the time the European subsidy is determined. If irregularities are found, the European subsidy must be withdrawn and reclaimed. The Member State can submit a payment request for the final balance of the programme in question until the date stated in the European subsidy scheme.⁴⁷ The programme is terminated after being audited by the European Commission.

If a European subsidy is provided under shared management, two subsidy relationships arise: one between the European Commission and the Member State, on the basis of a programme approved by the Commission, and one between the national administrative body and the final beneficiary of the European subsidy.⁴⁸ If no European rules exist, this latter subsidy relationship is governed by the national law (procedural autonomy).⁴⁹ This national law must fulfil the given European principles of equivalence and effectiveness.⁵⁰

⁴⁵ See for example Article 70(1) of Regulation No 1698/2005 (EAFRD) and Article 53(6) of Regulation No 1083/2006 (Structural Funds).

⁴⁶ The European Commission does pay advances to Member States before the first payment requests are submitted. See for example Article 82 of Regulation No 1083/2006 (Structural Funds). In addition, the European Commission can decide to delay or suspend payments. See Articles 91 and 92 of Regulation No 1083/2006 (Structural Funds).

⁴⁷ In Article 89(1) of Regulation No 1083/2006 (Structural Funds) this date is set at 30 March 2017.

⁴⁸ See also H.P. Nehl, *Europäisches Verwaltungsverfahren und Gemeinschaftsverfassung. Eine Studie gemeinschaftsrechtlicher Verfahrensgrundsätze unter besonderer Berücksichtigung "mehrstufiger" Verwaltungsverfahren*, Duncker & Humblot, Berlin 2002, p. 75 f. In this respect he refers to a 'Mehrstufige Verwaltungsverfahren'.

⁴⁹ On the concept of procedural autonomy see for example P.P. Craig and G. de Búrca, *EU Law, Text, Cases and Materials*, UOP, York 2011, p. 219–220; D.U. Galetta, *Procedural Autonomy of EU Member States: Paradise Lost? A Study on the "Functionalized Procedural Competence" of EU Member States*, Springer, Berlin Heidelberg 2010 and P. Haapaniemi, 'Procedural Autonomy: A Misnomer?' in L. Ervo, M. Gräns and A. Jokela (eds.), *Europeanization of Procedural Law and the New Challenges to Fair Trial*, Europa Law Publishing, Groningen 2009.

⁵⁰ On the principles of equivalence and effectiveness see J.H. Jans, S. Prechal and R.J.G.M. Widdershoven (ed.), *Europeanisation of Public Law*, Europa Law Publishing, Groningen 2015, p. 43 f.

2.3.2. Provision of subsidies by Member State bodies governed by public law or private law

The provision of European subsidies by national administrative bodies is not only carried out in the context of shared management. On the grounds of Article 54(2)(c) of the Financial Regulation, the European Commission can have European subsidies provided by national bodies governed by public law or private law that have a public service mission, providing adequate financial guarantees and complying with the conditions provided for in the implementing rules.⁵¹ Despite national administrative bodies being engaged for the execution of such European subsidy schemes, this concerns European subsidies that are provided (indirectly) on a centralised basis. Since the European subsidies are not first paid into the budget of the Member State, this is a *direct* financial contribution paid by the European budget. The section Grants of the Financial Regulation is therefore applicable to these European subsidies. However the payments of the operational costs to the aforementioned national bodies do not fall within the subsidy definition.⁵²

The most important European subsidies that are provided by national bodies governed by public law on the grounds of Article 54(2)(c) of the Financial Regulation, are the subsidies relating to the Lifelong Learning and Youth in Action Programmes.⁵³ The implementation of the European subsidy schemes Lifelong Learning and Youth in Action is done on the grounds of the European subsidy legislation partly by the executive agency EACEA⁵⁴ and partly by national agencies. According to decisions of the Commission in which the responsibilities of the Member States, the Commission and the national agencies concerning the implementation of the Lifelong Learning and Youth in Action Programmes are laid down respectively, the national agencies are responsible for the provision of European subsidies.⁵⁵ Once again two subsidy relationships exist: one

⁵¹ In this respect see the Statement of the Commission to the Council and the European Parliament, management of the community programmes by networks of national agencies, COM (2001) 648 (final). In addition see Craig 2003 and Schenk 2006, p. 207 f.

⁵² It should be noted that Article 108(2) opening words and under f, of the Financial Regulation is not very clear. According to the European rules applicable to the indirect centralized subsidies such as the Lifelong Learning and Youth in Action Programmes, Article 108 of the Financial Regulation f. is applicable. As a result, this must constitute a subsidy in the sense of Article 108(1) of the Financial Regulation.

⁵³ See Decision No 1720/2006 of the European Parliament and of the Council of 15 November 2006 establishing an action programme in the field of lifelong learning [2006] OJ L327/45 and Decision No 1719/2006 of the European Parliament and of the Council of 15 November 2006 establishing the 'Youth in Action' programme for the period 2007 to 2013 [2006] OJ L327/30. In the new programme period 2014–2020 both programmes have been integrated into Erasmus+. See Regulation No 1288/2013 of the European Parliament and of the Council of 11 December 2013 establishing 'Erasmus+'; the Union programme for education, training, youth and sport [2013] OJ L347/50.

⁵⁴ See the Commission Decision of 20 April 2009 setting up the Education, Audiovisual and Culture Executive Agency for the management of Community action in the area of education, audiovisual and culture in application of Council Decision No 58/2003, [2009] OJ L101/26.

⁵⁵ See Article 4(1) and appendix 2 of the Commission Decision of 26 April 2007, C(2007) 1807 final (Lifelong Learning) and Article 4(1) and appendix 2 of the Decision of 30 April 2007, C(2007) 2828 final (Youth in Action).

between the European Commission and the national agencies and one between the national agencies and the final beneficiaries of the European subsidies. As a result, there is no subsidy relationship between the European Commission and the final beneficiary. The subsidy relationship between the European Commission and the national agency is arranged on the basis of the guides for national agencies and annual financial agreements.⁵⁶ If there are no European rules, the subsidy relationship between the national agencies and the final beneficiaries of the European subsidy is governed by national law (procedural autonomy).⁵⁷ This national law must also fulfil the already mentioned European principles of equivalence and effectiveness. However, the provision of European subsidies by the national agencies is more Europeanised compared to European subsidies provided under shared management. For example, the calls for proposals are published in the European official journal, also concerning the applications that must be submitted to the national agencies. Also, the annual programme guides issued by the European Commission state exactly which projects are eligible to receive European subsidies.⁵⁸ And contrary to the European subsidies provided under shared management, the Member States do not draw up programmes that are approved by the European Commission. However, it appears from legislation on European subsidies that the national agencies select subsidy applications and enter into a subsidy relationship with final beneficiaries under their own responsibility. Disputes in the context of this relationship are eventually resolved in a national court.⁵⁹ Decisions made by national agencies are therefore not attributed to the European Commission.⁶⁰

2.4. *Recent Developments*

In 2012 the European Parliament and the Council adopted a revision of the Financial Regulation.⁶¹ The subsidy definition remains unchanged. However, the methods for the implementation of the European budget have been simplified. As stated by the Commission itself in a version of the proposal for a new Financial Regulation, the provisions of the former Financial Regulation on indirect, centralised, and shared management were so complex that no one knew what the original objective of these

⁵⁶ See Articles 4 and 5 of the Commission Decision of 26 April 2007, C(2007) 1807 final (Lifelong Learning).

⁵⁷ See Article 4(1) and appendix 2 of the Commission Decision of 26 April 2007, C(2007) 1807 final (Lifelong Learning) and Article 4(1) and appendix 2 of the Commission Decision of 30 April 2007, C(2007) 2828 final (Youth in Action).

⁵⁸ See for example the Lifelong Learning Programme Guide 2012, parts 1, II a and II b: <http://ec.europa.eu/education/lip/doc848_en.htm>.

⁵⁹ See for example Article VII of the standard Grant Agreement for an Erasmus Intensive Programme under the Lifelong Learning Programme, version 2010, made available by the European Commission.

⁶⁰ Schenk 2006, p. 214.

⁶¹ See Regulation No 966/2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation No 1605/2002 [2012] OJ L298/1 and the accompanying Commission delegated Regulation No 1268/2012 on the rules of application of Regulation No 966/2012 [2012] OJ L362/1.

was.⁶² This explains why the Commission in the proposal for a new Financial Regulation opted for a simplification of the methods of implementation of the budget. This proposal had as a consequence that a distinction was to be made only between European subsidies that are provided according to the method of direct management on the one hand and subsidies that are provided according to the method of indirect management on the other hand.⁶³ The European subsidies granted through the services of the European Commission and through intervention of European executive agencies were to be granted according to the method of direct management.⁶⁴ The category indirect management was intended to include firstly the European subsidies that are currently provided under shared management. Secondly, contrary to the old Financial Regulation, the European subsidies granted by the current national agencies Lifelong Learning and Youth in Action will be provided according to the method of indirect management.⁶⁵ However, due to amendments by the European Parliament⁶⁶ the final new Financial Regulation still makes a distinction between three ways of implementation of the budget by the Commission: direct management by the Commission's departments and executive agencies, under shared management with Member States and indirect management by entrusting budget implementation tasks to amongst others bodies governed by the private law of a Member State.⁶⁷ These amendments though do not change the fact that the consequence is that the section Grants in the Financial Regulation in the current programme period 2014–2020 is no longer applicable to the provision of European subsidies by national agencies concerning Erasmus+, in which Lifelong Learning and Youth in Action are integrated.⁶⁸

For the rest of this chapter, however, the situation in the programme period 2007–2013 is taken and a distinction is made between European subsidies that are provided by the European Commission, European executive agencies and national agencies on the one hand and European subsidies provided under shared management on the other hand. In this programme period, the section on subsidies in the Financial Regulation applies to the first category of European subsidies. It will become clear in the next section that this

⁶² This follows on from para. 5.2.1 of the Proposal for a regulation of the European Parliament and of the Council establishing that the Financial Regulation is applicable to the general budget of the EU of 28 May 2010, COM (2010) 260 final. This concerns a different version than the proposal of 22 December 2010.

⁶³ See Article 55 of the Proposal for a regulation of the European Parliament and of the Council on the financial rules applicable to the annual budget of the EU of 22 December 2010, COM (2010) 815 final.

⁶⁴ See Article 108 in conjunction with Article 55(1), under 1, of the Proposal for a regulation of the European Parliament and of the Council on the financial rules applicable to the annual budget of the EU of 22 December 2010, COM (2010) 815 final.

⁶⁵ See Article 55(1)(b) of the Proposal for a regulation of the European Parliament and of the Council on the financial rules applicable to the annual budget of the EU of 22 December 2010, COM (2010) 815 final.

⁶⁶ See the position of the European Parliament adopted at first reading on 23 October 2012 with a view to the adoption of Regulation No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union and repealing Council Regulation No 1605/2002 (EP-PE_TCI-COD(2010)0395).

⁶⁷ See Article 58(1) under a, b and c, of the new Financial Regulation.

⁶⁸ See Article 121(2)(e) of the new Financial Regulation.

has consequences for the European requirements set on the allocation of the European subsidies.

3. Requirements under European Law for the Allocation of Scarce European Subsidies

3.1. *General*

The introduction already briefly mentioned that there is a limited budget available for most European subsidies. This limited budget is reflected, in the case of the European subsidies that are granted by the European Commission and the European executive agencies in the applicable European subsidy scheme.⁶⁹ In the case of Youth in Action and Lifelong Learning the level of the European subsidy available for a Member State is determined in an annual agreement between the European Commission and the national agencies.⁷⁰ In the case of the European subsidies provided under shared management, the Commission states how much European funding is available for a programme in separate decisions in which the programmes discussed above drawn up by the Member States are approved.⁷¹ Ultimately, the available European subsidies are based on the long-term financial framework that is drawn up by virtue of Article 312 of the Treaty on the Functioning of the European Union (TFEU). Within this framework it is laid down how many funds the EU will have available during seven years to finance among other things European subsidies.⁷²

In the current legislation on European subsidies, no provision can be found that states that subsidy applications have to be declined if there is insufficient budget available. Of course the fact that the budget is limited implies that not every application for European subsidy can be granted; the available amount should be divided among the various subsidy applications. Section 3.2 first looks at the extent to which European law prescribes a particular system for the allocation of European subsidies. Next, Section 3.3 goes on to discuss the European requirements on the division of European subsidies granted in a centralised (indirect) manner. This concerns the European subsidies that are provided by the European Commission, the European executive agencies and the national agencies. To illustrate this, the award procedure for the European subsidy programmes Lifelong Learning and Youth in Action will be looked at. It will become clear that the allocation

⁶⁹ For example, Article 10(2) of the European subsidy regulation Life+ states that the financial award for the execution of this scheme in the period 2007 to 31 December 2013 amounts to 2,143,409,000 euro.

⁷⁰ See section 3.2 of the agreement between the European Commission and the National Agency Lifelong Learning 2011 which pertains to 2011 (not published).

⁷¹ See for example Article 53(1) of the Regulation No 1083/2006 (Structural Funds).

⁷² In the programme period 2007–2013 this concerns the interinstitutional agreement between the European Parliament, the Council and the Commission of 17 May 2006 [2006] OJ C139/1. The interinstitutional agreement for the programme period 2014–2020 dates from 2 December 2013 ([2013] OJ C373/1). The multiannual financial framework for the years 2014–2020 has been laid down in Council Regulation No 1311/2013 (2013] OJ L347/884).

procedure required for European subsidies provided in a centralised (indirect) manner is founded on the principles of equal treatment and transparency. Section 3.4 is concerned with the extent to which these principles also apply to the division of European subsidies provided under shared management. Finally, Section 3.5 discusses the extent to which the European subsidy legislation places requirements on legal protection against violations of the principles of equal treatment and transparency in the division of scarce European subsidies.

3.2. *Requirements under EU Law on the Allocation System for Subsidies*

This section examines the allocation system that must be applied according to European subsidy legislation when European subsidies have to be divided. Several systems can be envisaged, such as a ‘first come, first served’ system, a tender procedure, allocation by lots or the equal division of the European subsidies over all applications.

With regard to the European subsidies that are provided by the European Commission, European executive agencies and national agencies, it is explicitly required that they are awarded by means of a tender procedure.⁷³ A tender procedure under European law entails that only the applications that score best after certain award criteria have been compared will be honoured.⁷⁴ Dutch literature on this matter also refers to the tender procedure as a ‘beauty contest’.⁷⁵

For the European subsidies provided under shared management, in many cases national administrative bodies are required to set up procedures for the selection of projects to be considered for subsidies.⁷⁶ This also includes the system in which scarce European subsidies are allocated. However, it is not possible to distinguish a specific prescribed allocation system.⁷⁷ So, unlike the European subsidies that are provided on a centralized

⁷³ Articles 115 and 116 of the Financial Regulation.

⁷⁴ Articles 115 and 116 of the Financial Regulation.

⁷⁵ See for example M.J. Jacobs and W. den Ouden, ‘Eerlijk zullen wij alles delen...’, *Ontwikkelingen in de jurisprudentie over de verdeling van de subsidiepot* (2011) *JBPlus* 35, 39 and F.J. van Ommeren, *Schaarse vergunningen. De verdeling van schaarse vergunningen als onderdeel van het algemeen bestuursrecht*, Kluwer, Deventer 2004, p. 12.

⁷⁶ See Article 5(2)(c) of the Commission Regulation No 1828/2006 of 8 December 2006 setting out rules for the implementation of Council Regulation No 1083/2006 and of Regulation No 1080/2006 of the European Parliament and of the Council on the ERDF (Structural Funds); ANNEX VI of Commission Regulation No 1974/2006 of 15 December 2006 laying down detailed rules for the application of Council Regulation No 1698/2005 (EAFRD); Article 27(1)(d) of the Decision ERF (Migration Funds).

⁷⁷ In the European subsidy legislation concerning the Migration Funds though, it is also prescribed that an assessment of the quality should also be carried out. See Article 9(3) of the Commission Decision of 19 December 2007 laying down rules for the implementation of Decision No 573/2007/EG (ERF) as regards Member States’ management and control systems, the rules for administrative and financial management and the eligibility of expenditure on projects co-financed by the Fund [2008] OJ L7/1. Although the quality of applications is only *compared* in tender procedures, an *assessment* of quality is also possible in other allocation systems. For example, in a ‘first come, first served’ system, quality threshold criteria could be applied.

basis, in the European subsidy legislation in the case of the Migration Funds, the Structural Funds, the European Fisheries Funds and the EAFRD, there is currently no explicit obligation to use a tender procedure.

Within the framework of the allocation of European subsidies from the European Orientation and Guarantee Funds for Agriculture (section Orientation) – the forerunner of the EAFRD – in the *JK Otsa Talu* ruling, the Court of Justice found that the Member States should endeavour to provide European subsidy to every eligible applicant.⁷⁸ In the same ruling, it appears that this can be difficult, certainly if the Member State does not have sufficient resources to fund the required national co-finance. In that case, according to the Court it is permissible that the national administrative body limits the circle of national beneficiaries to only those farmers who received a subsidy in the past budgetary year.⁷⁹ So from European case law, it is again not possible to deduce a preference for one of the aforementioned allocation systems.

The above indicates that it does not matter to the EU what system is applied to allocate the European subsidies that are provided under shared management. All aforementioned allocation systems therefore appear to be possible. As will be discussed in the coming sections, there is much to recommend an allocation system that meets the requirements based on the principles of equal treatment and transparency. However, these principles say nothing about which allocation system should be used. They only demand that the rules which arise out of these principles have to be obeyed when implementing the chosen system.⁸⁰

However, the conclusion that national administrative bodies are not required to apply a tender procedure in the provision of European subsidies does not hold in all cases. In the explanatory notes on the Netherlands' decisions in which Expert Committees are set up to allocate ESF subsidies, it appears that in the Commission's view the selection methods 'first come, first served' and/or 'drawing lots' are not permitted in principle.⁸¹ This view seems to be based on the principle of sound financial management which has been laid down in Article 27 of the Financial Regulation. Considering Article 48(2) of the Financial Regulation and the specific European subsidy regulations this principle is also applicable to the granting of European subsidies by the Member States.⁸² According to Article 27(1) of the Financial Regulation the principle of sound financial administration consists of three principles, that is the principle of economy, efficiency and effectiveness. The

⁷⁸ Case C-241/07, *JK Otsa Talu* [2009] ECR I-4323, para. 38.

⁷⁹ Case C-241/07, *JK Otsa Talu* [2009] ECR I-4323, para. 54.

⁸⁰ For example a 'first come, first served' system can also meet the requirements arising from the principles of equal treatment and transparency.

⁸¹ See for example the explanatory notes to the Regulation of the Secretary for Social Affairs and Employment of 23 September 2009 to set up a Committee of Experts subsidy regulation ESF 2007–2013/Actie E, *Stcrt.* 2009/14711, p. 3.

⁸² See for example Article 14(1) and 60, opening words, of Regulation 1083/2006.

principles of efficiency and effectiveness imply it should be guaranteed that only the best projects will receive a European grant. Only in a tender procedure this can be guaranteed, which also appears from the fact that a tender procedure is prescribed for the allocation of the European subsidies that are provided by the European Commission. Although in a 'first come, first served' system quality can be tested, no comparison of the various projects takes place.

In spite of the aforementioned position taken by the Commission, for the time being the European subsidy legislation on the allocation of European subsidies under shared management does not contain an explicit obligation to use a tender procedure. The question arises whether the principle of sound financial management is sufficient to oblige the Member States to apply a tender procedure. In my opinion explicit legislation should have to come from the EU. However, also the regulations concerning the granting of European subsidies by the Member States in the programme period 2014–2020 do not contain such an explicit obligation.⁸³

3.3. *Requirements under EU Law for the Allocation of Scarce European Subsidies that are provided by the European Commission, European Executive Agencies and National Agencies on a Centralised (Indirect) Basis*

3.3.1. General

The allocation of European subsidies provided on a centralised (indirect) basis by the European Commission, European executive agencies and national agencies is, by virtue of Article 109 of the Financial Regulation, subject to the principles of transparency and equal treatment. These principles evolved in procurement law, among other things, which also deals with the division of scarce rights, but then in the case of public contracts.⁸⁴ In the procurement procedure, the principle of equal treatment has to be

⁸³ Article 125(1) of Regulation 1303/2013 of the European Parliament and of the Council laying down common provisions on the ERDF, the ESF, the Cohesion Fund, the EAGF and the European Maritime and Fisheries Fund (EMFF) covered by the Common Strategic Framework and laying down general provisions on the ERDF, the ESF and the Cohesion Fund and repealing Council Regulation No 1083/2006 ([2013] OJ L347/320) only states that the managing authority shall be responsible for managing the operational programme in accordance with the principle of sound financial management. Neither an obligation to apply a tender procedure has been integrated in the various delegated and implementing acts of the Commission.

⁸⁴ See for a good comparison of the award of public contracts and the award of scarce public rights: C.E.C. Jansen, 'De gereguleerde aanbesteding en de verdeling van schaarse publieke rechten: een vergelijking', in F.J. van Ommeren, W. den Ouden and C.J. Wolswinkel, *Schaarse publieke rechten*, Boom Juridische Uitgevers, Den Haag 2011, p. 293–322. With regard to the transparency principle as a Union general principle of Union law see A. Buijze, *The Principle of Transparency in EU law*, BOXPRESS, 's-Hertogenbosch 2013 and A. Buijze, 'The Six Faces of Transparency' (2013) *Utrecht Law Review*, 3.

observed so that all tenderers have an equal opportunity to obtain a European subsidy.⁸⁵ In order to create these equal opportunities on the one hand⁸⁶ and to monitor the observance of the principle of equal treatment on the other hand, the total procurement procedure – from announcement to award – must be ‘transparent’.⁸⁷ The objective of the principles of equal treatment and transparency is to eliminate favouritism and arbitrariness on the side of the procuring body.

In this section, each stage of the tender procedure will be discussed as it applies to the allocation of European subsidies provided by the European Commission, European executive agencies and national agencies. The point of departure will be the rules that have been laid down in the Financial Regulation 1605/2002 and the European Commission regulation based on this. It is interesting to see how these rules are worked out in the regulations and decisions that apply to the separate European subsidies.

However, it would go too far in this chapter to discuss every European subsidy that is provided by the European Commission, European executive agencies and national agencies. Therefore only the subsidy programmes Lifelong Learning and Youth in Action in the programme period 2007–2013 will be taken as an illustration.

These European subsidies are particularly interesting, because national administrative bodies had to obey the principles of equal treatment and transparency when allocating these European subsidies.⁸⁸ They offer therefore a good illustration of the consequences of the applicability of the principles of equal treatment and transparency on the allocation of European subsidies by national authorities in the current programme period.

3.3.2. Pre-announcement of the opportunity to apply for a European subsidy, the procedure and conditions for entitlement to a subsidy

Firstly, the body that provides the European subsidy should publish the call for proposals on the internet site of the European institutions and perhaps in other suitable media, such as the official EU Journal.⁸⁹ The final date for submitting subsidy applications is

⁸⁵ Case T-50/05, *Evropaiki Dynamiki/Commissie* [2010] ECR I-01071, para. 55; Case C-496/99P, *Succhi di frutta* [2004] ECR I-3801, para. 108; Case C-384/07, *Wienstrom* [2003] ECR I-14527, para. 47; Case C-87/94, *Waalse bussen* [1996] ECR I-2043, para. 54.

⁸⁶ Case C-470/99, *Universale Bau* [2002] ECR I-11617, para. 93; Case C-87/94, *Waalse bussen* [1996] ECR I-2043, para. 54.

⁸⁷ See for example Case C-260/04, *Commission v. Italy* [2007] ECR I-7083, para. 24; Case C-496/99P, *Succhi di frutta* [2004] ECR I-3801, para. 109; Case C-470/99, *Universale Bau* [2002] ECR I-11617, para. 91; Case C-19/00, *SIAC* [2001] ECR I-7725, para. 41. Case C-324/98, *Telaustria* [2000] ECR I-10745, para. 62.

⁸⁸ This was caused by the fact that the section on Grants in the Financial Regulation applied to them until 1 January 2014 even though they are provided by national administrative bodies.

⁸⁹ See Article 110(1) of the Financial Regulation and Article 167 of the Commission Regulation. See also the Guide for National Agencies Lifelong Learning Programme 2012, section 3.2.

indicated. In addition, the calls include criteria on eligibility,⁹⁰ exclusion,⁹¹ selection,⁹² and award,⁹³ as well as the corresponding supporting documentation and also the procedure to be followed.⁹⁴ In the case of the Lifelong Learning and Youth in Action Programmes, the calls for proposals – published in the official EU Journal – also refer to the annual programme guides drawn up by the European Commission.⁹⁵ All aforementioned criteria are incorporated. The weighting of the various award criteria should be published on the websites of the national agencies.⁹⁶ In this way it is guaranteed that all potential applicants will be afforded equality of opportunity in formulating the terms of their applications to take part.

3.3.3. Equal treatment of applications received

After the applications received have been registered,⁹⁷ the national agency should make a selection of those eligible for a European subsidy. The principles of equal treatment and transparency require among other things that the criteria on eligibility, exclusion, selection and award may not be changed during the procedure.⁹⁸ In addition, applications that are received too late are rejected.⁹⁹ Restraint is exercised with regard to changes and additions to (incomplete) subsidy applications. This means in concrete terms that the national agency will only accept modifications or complements of information with regard to specific grant applications sent spontaneously by applicants until the closing date for submission.¹⁰⁰ Modifications or complements of information sent after the closing date that change the nature of the grant application by providing new essential elements, are not taken into consideration.¹⁰¹ In case of doubt with regard to any of the exclusion or eligibility criteria a national agency may request further proof from the

⁹⁰ The eligibility criteria contain the formal requirements that have to be met by a subsidy application. See also Article 175a(2) of the Commission Regulation.

⁹¹ The exclusion criteria pertain to situations in which the subsidy applicant finds itself and on the grounds of which they are not entitled to a European subsidy. See also Article 114 of the Financial Regulation.

⁹² Selection criteria make assessable to what extent the organisation/partnership that submits the application possesses the financial and operational capacity to perform the proposed activities. See Article 115(1) of the Financial Regulation. See also the Lifelong Learning Programme Guide 2012, p. 24–26.

⁹³ The award criteria are used to assess the quality of the grant applications; the applications are compared to each other on the basis of these criteria. See the Lifelong Learning Programme Guide 2012, p. 26.

⁹⁴ This follows on from Article 167(1) of the Commission Regulation.

⁹⁵ See for example the call for proposals 2012, Life Long Learning Programme [2011] OJ C233/15, p. 16.

⁹⁶ See for example the Lifelong Learning Programme Guide 2012, p. 26. It should be noted that in procurement law the mutual weighting of criteria does not have to be published in advance. It is also permitted that the weighting of the criteria is decided on after receipt of the tender. See Case C-226/09, *Commission v. Ireland* [2010] ECR I-11807, paras. 43 and 44.

⁹⁷ See the Guide for National Agencies Lifelong Learning Programme 2012, 3.5.1.

⁹⁸ See Article 116(1) of the Financial Regulation and the Guide for National Agencies Lifelong Learning Programme 2012, 3.6.1.2 and 3.6.2.2.1.

⁹⁹ See Lifelong Learning Programme Guide 2012, p. 22.

¹⁰⁰ Guide for National Agencies Lifelong Learning Programme 2012, 3.5.5.

¹⁰¹ Guide for National Agencies Lifelong Learning Programme 2012, 3.5.6.

applicant (e.g. on date of submission).¹⁰² The Youth in Action Programme Guide offers the possibility to the national agency to give the applicant the opportunity to rectify formal and manifest errors in the application within a reasonable deadline.¹⁰³ But the national agency is not obliged to do so. The basic rule is that after an application has been submitted, nothing can be changed.¹⁰⁴ In view of the principles of equal treatment and transparency, the subsidy provider should in any case be cautious in its contacts with subsidy applicants. The Youth in Action Programme Guide states in this respect that although the national agency can offer support during the application procedure, this may not be in contradiction with fair and transparent selection procedures.¹⁰⁵ On the other hand, the same Programme Guide also shows that the equal treatment of applicants is not always sufficient to guarantee that applicants actually have equal chances to obtain a European subsidy. Sometimes it can be necessary in certain categories of applicants – newcomers for example – to provide more assistance because these categories would otherwise have less chance of having their application honoured.¹⁰⁶ Reticence in contacts with subsidy applicants is therefore not always the rule in the tender procedure.

3.3.4. Evaluation Committees and Experts

For the assessment of subsidy applications evaluation committees are established for both the Lifelong Learning and the Youth in Action Programmes.¹⁰⁷ Evaluation committees are responsible for the evaluation process of submitted proposals,¹⁰⁸ in particular to guarantee the equal treatment of all applications through a fair and transparent procedure.¹⁰⁹ The committees are not concerned with an individual assessment of the applications received.¹¹⁰ In the case of the Lifelong Learning Programme, the evaluation committees can be composed of members of the national agency, external experts and stakeholder representatives.¹¹¹

The assessment of whether the applications received meet the criteria on exclusion, selection, eligibility and award is done by the national agency and by experts.¹¹² For the Lifelong Learning Programme the quality of each subsidy application that meets the

¹⁰² See Guide for National Agencies Lifelong Learning Programme 2012, 3.6.2.1.3.

¹⁰³ Youth in Action Programme Guide 2012, p. 124.

¹⁰⁴ Youth in Action Programme Guide 2012, p. 124.

¹⁰⁵ Youth in Action Programme Guide 2012, p. 20.

¹⁰⁶ Youth in Action Programme Guide 2012, p. 20.

¹⁰⁷ See Article 178 of the Commission Regulation. See Lifelong Learning Programme Guide 2011, p. 21. See also Guide for National Agencies Lifelong Learning Programme 2012, 3.6.2.3.

¹⁰⁸ See Article 178(1) of the Commission Regulation.

¹⁰⁹ See Lifelong Learning Programme Guide 2011, p. 21.

¹¹⁰ This is pursuant to Article 178(1) of the Commission Regulation, which sets down a general description of the task of the evaluation committee.

¹¹¹ See Lifelong Learning Programme Guide 2011, p. 21.

¹¹² The experts decide on the score of the subsidy application submitted.

eligibility and exclusion criteria must normally be assessed by at least two experts.¹¹³ From the document ‘Minimum requirements for assessors’ it appears that at least one of the two experts must be an external expert.¹¹⁴ These are experts not employed by the national agency that has organized the European grant award procedure.¹¹⁵ But in the framework of the Youth in Action Programme external experts are appointed as an exception in the procedure allocating European subsidies.¹¹⁶

On the basis of the assessment by the national agency and the experts the evaluation committees put forward a proposal indicating which applications should be honoured, rejected or placed on a reserve list.¹¹⁷ In this context, they should guarantee that all applicants have been treated equally by a fair and transparent application of the procedures.¹¹⁸ The procedure rules that apply to the working method of the evaluation committees must also contain an objective method for classifying the applications that are of equal quality.¹¹⁹

The working method of the experts and the evaluation committee is described in the Guide for National Agencies implementing the Lifelong Learning programme 2012 which has been issued by the European Commission, but not published.¹²⁰ A reference can also be found in the Commission Regulation corresponding to the Financial Regulation.¹²¹ The national agency is obliged to establish procedural rules,¹²² assessment forms and checklists. In addition, the experts and the evaluation committees must be informed by the national agency about the process of subsidy provision and about the

¹¹³ See Article 178(1) of the Commission Regulation. See also Lifelong Learning Programme Guide 2012, p. 21. From the Guide for National Agencies Lifelong Learning Programme 2012 it appears that there is a minimum number of experts. In general it is advised to appoint as many external experts as possible. See 3.6.2.2.3.

¹¹⁴ “Minimum requirements for assessors”, version December 2010.

¹¹⁵ Lifelong Learning Programme Guide 2011, p. 21.

¹¹⁶ Guide for National Agencies Youth in Action 2011, p. 21–22.

¹¹⁷ See the Guide for National Agencies Lifelong Learning Programme 2012, 3.6.2.3.6.

¹¹⁸ See Lifelong Learning Programme Guide 2012, p. 21.

¹¹⁹ See the Guide for National Agencies Lifelong Learning Programme 2012, 3.6.2.3.6.

¹²⁰ Article 4(3) of the Commission Decision of 26 April 2007 on the responsibility of the Member States, the Commission and the national agencies respectively during the implementation of the Lifelong Learning programme (2007–2013) stipulates that the national agency carries out its tasks in accordance with the ‘Guide for National Agencies’, which contains the minimum conditions for internal audit standards that are applicable to national agencies and their management of the projects that are financed. For the working method of experts and evaluation committees in particular, see point 3.6.2 and 3.6.1 of the Guide for National Agencies Lifelong Learning Programme 2012.

¹²¹ For example, on the grounds of Article 178(2) the evaluation committee can request the applicant to provide additional information or an explanation of the supporting documentation submitted with regard to the application, particularly in the case of apparent written errors.

¹²² Guide for National Agencies Lifelong Learning Programme 2012, 3.6.2.3.4. The procedure rules must be established and the evaluation committee must be informed of these before the assessment starts. The procedure rules contain at least a detailed working method of the evaluation committee and the formal decision-making rules. On the grounds of Article 178(1a) the procedure for calling for proposals and submitting them is also notified.

various activities that could be subsidised. In that context, it is prescribed that the national agency gives courses to experts and members of the evaluation committee. The experts and the evaluation committees are of course bound to the criteria incorporated by the European Commission in the Programme Guide and to the weighting of each criterion.

Appointing an evaluation committee and experts ensures that all applications are treated impartially, objectively and equally. To guarantee that the experts and the members of the evaluation committee really are independent, the Guide for National Agencies implementing the Lifelong Learning programme states that they must sign a formal declaration to avoid a conflict of interest.¹²³ In addition, persons who have been involved in the assessment or in the criteria on eligibility, exclusion, selection or award are not permitted to have a deciding role in the evaluation committee.¹²⁴ Furthermore, to guarantee that the experts give their assessment individually and independently, they use a separate assessment form.¹²⁵ Moreover, they are not allowed to receive subsidy in the selection round where they take part in the assessment.¹²⁶ The Dutch contract entered into with experts adds that the expert is obliged to carry out the assessments completely independently without any restrictions from influences, irrespective of the nature or the type, and will inform the national agency immediately of any attempt to influence or exert pressure.¹²⁷ The Guide for National Agencies implementing the Lifelong Learning Programme requires that external experts must be recruited in a transparent manner, preferably by means of a public tender procedure.¹²⁸ Experts in the Netherlands appear to receive a fee for their services rendered,¹²⁹ which also prevents conflicts of interest. However, European subsidy legislation pertaining to the Youth in Action and Lifelong Learning Programmes does not require that the names of the external experts are made public. This means it is difficult for applicants to check whether the experts are really independent. Employees of the national agency can be experts or have a seat on an evaluation committee. Once again, they are then not allowed to apply for subsidy in the case of the Lifelong Learning Programme.¹³⁰

¹²³ See the Guide for National Agencies Lifelong Learning Programme 2012, 3.6.3.

¹²⁴ See the Guide for National Agencies Lifelong Learning Programme 2012, 3.6.3.5.

¹²⁵ See the Guide for National Agencies Lifelong Learning Programme 2012, 3.6.1.5.

¹²⁶ Guide for National Agencies Lifelong Learning Programme 2012, 3.6.3.1.

¹²⁷ See the contract for independent experts for the assessment of project proposals submitted in the framework of the European action programme Lifelong Learning, Leonardo da Vinci.

¹²⁸ Guide for National Agencies Lifelong Learning Programme 2012, 3.6.3.3.

¹²⁹ From the Call for Nominations for the Netherlands National Agency of the Lifelong Learning Programme, it appears that a fee is awarded varying between 75 to 125 euros. The EACEA also appoints experts in the assessment of the applications that are submitted at European level within the framework of the Lifelong Learning Programme. They also receive compensation for this. See the call for expressions of interest for the establishment of a list of experts responsible for assisting the Education, Audiovisual and Culture Executive Agency in the framework of the management of the Community programmes in the fields of education, audiovisual media, culture, youth and citizenship [2008] OJ C67/51.

¹³⁰ See the Guide for National Agencies Lifelong Learning Programme 2012, 3.6.3.1.

As already mentioned, the evaluation committees put forward a proposal on the basis of the assessment by the national agency and the experts, which indicates which applications should be honoured, rejected or placed on a reserve list. In the end, the national agency takes the decision regarding the submitted subsidy applications. If a national agency deviates from the advice of the evaluation committee, a clear justification for this must be provided in the decision on the subsidy application.¹³¹ It is therefore assumed that the advice of the evaluation committee will be accepted. There is good reason for this: if there is an independent evaluation committee which bases its conclusion on independent experts, it cannot be justified without reason that a national administrative body would conclude that the advice of the evaluation committee is unsound. It is advisable that national agencies only deviate from the advice if it is established that the evaluation committee has not followed the procedures or has used incorrect information.

3.3.5. Monitoring the observance of the principles of equal treatment and transparency

In order to ensure that the selection procedures can be monitored to see if they meet the principles of equal treatment and transparency, all stages of the subsidy provision process must be documented. Firstly, the body that provides the European subsidy must keep a suitable register containing all contacts with the applicants during the procedure.¹³² Secondly, following the completion of their activities the members of the evaluation committee sign a report containing all proposals examined and the quality of these and stating which proposals are entitled to European subsidy.¹³³ This report is kept so that it can be consulted at a later stage.¹³⁴ It is not clear if this report is made public, or if the subsidy applicants are notified of it. The obligation to observe the rights of defence, which has been recognized as a general principle of EU law, does not appear to require this. After all, a decision about the quality of a subsidy application at the very worst leads to its rejection. The rights of defence only apply if a private individual is disadvantaged through the action of a national administrative body.¹³⁵ This will not often be the case when a subsidy application is rejected.¹³⁶ This section will examine whether the principle of transparency in combination with the rights of defence can lead to this becoming a requirement.

¹³¹ See Article 178(4) of the Commission Regulation and the Guide for National Agencies implementing the Lifelong Learning Programme, 3.6.2.4.4.

¹³² See Article 178(2) of the Commission Regulation.

¹³³ Article 178(3) of the Commission Regulation.

¹³⁴ Article 178(3) of the Commission Regulation.

¹³⁵ See Case C-32/95, *Lisreta!* [1996] ECR I-5373 in which the withdrawal of an awarded European subsidy is deemed to be an incriminating action.

¹³⁶ Van Rijn van Alkemade refers to the situation in which the rejection marks the end of a long-term subsidy relationship. Zie J.M.J. van Rijn van Alkemade, 'Rechtsbescherming bij de verdeling van schaarse subsidies: motivering en (processuele) openbaarheid', In F.J. van Ommeren, W. den Ouden and C.J. Wolswinkel, *Schaarse publieke rechten*, Boom Juridische Uitgevers, Den Haag 2011, p. 379-409, p. 403.

The *Fisher* case is interesting in this context.¹³⁷ The Fishers – farmers – were required to have information about the use of their land in previous years in order to apply for a European subsidy for arable crops. But the national administrative body providing the subsidy refused to provide the information required. Because the Fishers did not have the correct information, their subsidy application contained mistakes which led to a fine being imposed. Because the rights of the defence in an incriminating action must be safeguarded, as a result of the fine being imposed, the required information was provided to the Fishers after all. Buijze and Widdershoven correctly note that this is an unsatisfactory outcome.¹³⁸ If the administrative body had allowed for inspection of the information, the Fishers could have submitted a correct subsidy application, the fine would not have been imposed and the Fishers would not have had to defend themselves.¹³⁹ In the end, the case came before the Court of Justice. The opinion of the advocate general is particularly interesting. It states that the authority is required, even before the application is submitted to actively cooperate in ensuring that the details are accurate, if need be through a corresponding disclosure of information.¹⁴⁰ According to the advocate general, in some cases this can lead to a duty to disclose information if the applicant unconditionally requires the data for his aid application and in order to avoid penalties, and if no third-party rights – in particular rights covered by data protection – constitute an obstacle in that regard. This must be resolved in each individual case by balancing the relevant interests. The transparency of the public administrative may be restricted only if special grounds of justification are shown to exist, the advocate general stated, following a detailed weighting of interests. The advocate general then formulates the prior conditions which according to him must be satisfied before protected data can be made public without the express approval of the involved party. In this case, the advocate general comes to the conclusion that the interests of the Fishers prevail above those of the person the protected data is related to. Buijze and Widdershoven conclude from this that the advocate general believes that when European law acknowledges a certain interest – in this case the economic and financial interests of the subsidy applicant which are apparent in the European regulations – transparency is required when this is necessary to protect that interest.¹⁴¹ The Court also comes to the conclusion that the information should have been provided to the Fishers, but it does not explicitly base the ruling on the principle of transparency.¹⁴² It applies a teleological interpretation; the objective of the regulation is best achieved by providing the Fishers access to the information in an early stage.¹⁴³ According to the Court besides a material obligation there is also a transparency obligation to the extent that the objective of the European regulation is achieved.¹⁴⁴ Buijze and Widdershoven conclude from the ruling

¹³⁷ Case C-369/98, *Fisher* [2000] ECR I-6751.

¹³⁸ A. Buijze & R.J.G.M. Widdershoven, 'De Awb en EU-recht: het transparantiebeginsel', in: T. Barkhuysen, W. den Ouden and J.E.M. Polak (red.), *Bestuursrecht harmoniseren: 15 jaar Awb*, 's-Gravenhage: BJU 2010, p. 589-607, p. 604.

¹³⁹ Buijze and Widdershoven 2010, p. 604.

¹⁴⁰ See the opinion of the advocate general Alber in Case C-369/98, *Fisher* [2000] ECR I-6751, para. 43.

¹⁴¹ Buijze and Widdershoven 2010, p. 604.

¹⁴² Case C-369/98, *Fisher* [2000] ECR I-6751, para. 36 f.

¹⁴³ See Buijze 2013, p. 255.

¹⁴⁴ Buijze and Widdershoven 2010, p. 604.

that the citizen has an individual right to the public access of documents on the grounds of the principle of transparency, when this is necessary to achieve an interest acknowledged by European law.¹⁴⁵ The Court of Justice does point out, however, that in this process account must always be taken of the fundamental right to the protection of personal data.¹⁴⁶

I believe that the Fisher ruling is also relevant in the question of whether an applicant for a European subsidy whose application has been rejected, should be able to inspect the report which contains the quality assessment of all applications submitted. The applicant needs this information to be able to dispute his quality assessment in the case of legal proceedings against the rejection of his subsidy application. This interest is explicitly acknowledged in the European subsidy regulations for the Youth in Action and Lifelong Learning Programmes, since the applicable regulations require that the procedure must be fair and transparent.¹⁴⁷ From the *Fisher* ruling it can be deduced that in the case of an applicant for a European subsidy whose application is rejected, there is an individual right to public access of documents, though account must be taken of the fundamental right to the protection of the personal data of the other applicants.

Not allowing public access to the abovementioned report is also at odds with the principle of effective legal protection. If an applicant has insufficient access to the documents related to the ranking order and the drafting of these, then it becomes difficult to dispute the rejection of the relative subsidy applications.¹⁴⁸ There are enough reasons, therefore, under EU law to accept that providing public access to the evaluation committee's report containing the ranking order and the motivation should be a requirement.

This does not hold, however, if the reasoning of the decision of the national executive organ sufficiently enables the applicants of the rejected application to dispute the rejection decision. In this respect it is relevant that it follows on from the Financial Regulation that the body providing the European subsidy must inform the applicant in writing of the outcome of the application submitted.¹⁴⁹ In the decision not to award the European subsidy, the body should also give reasons why the application is rejected in relation to the pre-announced criteria and priorities.¹⁵⁰ By virtue of Article 178(4) of the Commission Regulation on the Financial Regulation, the body providing the subsidy should state in the decision the names of the beneficiaries, the titles of the actions, the

¹⁴⁵ Buijze and Widdershoven 2010, p. 604–605. Also see Buijze 2013, p. 255.

¹⁴⁶ Case C-369/98, *Fisher* [2000] ECR I-6751, para. 32 f. The right to the protection of personal data is currently laid down in Article 8 of the European Charter and the privacy directive (directive 95/46 of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31).

¹⁴⁷ Lifelong Learning Programme Guide 2012, p. 21.

¹⁴⁸ See in this respect Van Rijn van Alkemade 2011, p. 407.

¹⁴⁹ See Article 116(3) of the Financial Regulation and the Guide for National Agencies Lifelong Learning Programme 2012, 3.6.2.4. Pursuant to Article 179 of the Commission Regulation, this should be carried out within 15 calendar days after the award decision has been sent to the beneficiaries.

¹⁵⁰ See Article 116(3), of the Financial Regulation and Guide for National Agencies Lifelong Learning Programme 2012, 3.6.4.3.

amounts accepted and the reasons for that choice and the names of any applicants rejected and the reasons for that rejection. This provision indicates that one decision is taken which is sent to all applicants. The guide for National Agencies implementing the Lifelong Learning programme, however, seems to assume that separate decisions are taken,¹⁵¹ so that publication of the report is necessary to find out why other applicants were successful or unsuccessful. The above means that each case must be examined to see whether publication of the report is necessary.

3.3.6. Changes due to the entering into force of the new Financial Regulation

The section Grants of the new Financial Regulation and the Commission delegated regulation on the rules of application of the new Financial Regulation (hereafter: the Commission delegated regulation) does not seem to bring big changes in the requirements for the allocation procedure concerning scarce European subsidies that are provided by the European Commission and European executive agencies. Article 125(1) of the new Financial Regulation declares the principles of transparency and equal treatment applicable to grants, just like the former Article 109. However, the thing to notice is that the new Financial Regulation emphasises the importance of those two principles. First of all, the two principles are mentioned as a unity of two parts in Article 125(1). Furthermore, contrary to the former Article 110, in Article 128 it is explicitly stated that the work programmes to which grants shall be subject to have to be published prior to its implementation. Thirdly, Articles 132 and 133 lay down clearly the requirement that the selection as well as the award criteria shall be announced *in advance* in the call for proposals. This is new in comparison to the former Articles 115 and 116. Overall the new Financial Regulation emphasises the relevance of the twin principles. However, as has already been discussed the most important change is that the section Grants does not apply anymore to European subsidies that are provided by national agencies, for example Erasmus+ in which the programmes Lifelong Learning and Youth in Action have been integrated.

3.3.7. Intermediate conclusion

The above paragraphs show that there are all sorts of requirements set under EU law with regard to the allocation of European subsidies provided on a centralised (indirect) basis. Many of these requirements can be traced back to the principles of equal treatment and transparency. They are intended to ensure that every potential applicant has an equal opportunity to obtain a European subsidy. It is not surprising that these principles do not only have significance in procurement law, but are also applicable to the allocation of European subsidies.¹⁵² After all, there is no fundamental difference between the allocation

¹⁵¹ See 3.6.2.4.2.

¹⁵² Note that the principles of procurement law and European subsidy regulations are not interpreted in the same way. For example, in European subsidy regulations I cannot see that the selection criteria have to be formulated in such a way that every reasonably well-informed and careful subsidy applicant will interpret them in the same way. To me, it is self-evident that the selection criteria that are used for the award of European subsidies also have to meet this requirement.

of scarce contracts and scarce European subsidies. Subsidy regulations are increasingly guided by economic considerations: subsidy applicants are increasingly have to compete against each other.¹⁵³ The next paragraph examines whether similar requirements are set under EU law on the allocation of European subsidies that are provided under shared management.

3.4. *Requirements under EU Law on the Allocation of Scarce European Subsidies provided under Shared Management*

3.4.1. **Legal requirements on the allocation of scarce European subsidies provided under shared management in the programme period 2007–2013**

Far fewer regulations have been set at EU level with regard to the allocation of European subsidies provided under shared management. The Financial Regulation and the related Commission Regulation applicable in the programme period 2007–2013 contain no rules at all on the allocation of such European subsidies.¹⁵⁴ However, in the specific European legislation pertaining to the allocation of European subsidies under shared management there are a number of regulations to be found. Firstly, that the national administrative body sets up the procedures for the selection of projects to be considered for European subsidies and establishes selection criteria.¹⁵⁵ Secondly, to a greater or lesser extent it is required that the opportunity to apply for European subsidies is widely published.¹⁵⁶ The European subsidy regulations pertaining to the Migration Funds furthermore require that the selection criteria are made known (in advance),¹⁵⁷ set requirements for the motivation of the decision to award a subsidy¹⁵⁸ and also require that the reasons why projects are not selected be noted down.¹⁵⁹ In the case of ESF and

¹⁵³ See in this respect the case note of W. den Ouden on the judgment of the Administrative Jurisdiction Division of the Council of State of 20 October 2010, AB 2011, 232, with note by W. den Ouden.

¹⁵⁴ See Article 53b of the Financial Regulation.

¹⁵⁵ See with respect to the procedures to be set up for example Article 27(1) opening words and under d, of Decision No 573/2007 (ERF) and Article 5(2), under b, of Commission Regulation 1828/2006 (Structural Funds). On the selection criteria, see Article 75(1), under a, of Regulation No 1698/2005 (EAFRD); Article 59, opening words and under a, of Regulation No 1198/2006 (European Fisheries Funds) and Article 60, opening words and under a, of Regulation No 1083/2006 (Structural Funds).

¹⁵⁶ In the case of the Migration Funds, it is explicitly required that calls for proposals must be published containing, among other things, the objectives, selection criteria and the relevant supporting documents, see for example Article 9(1) of the Commission Decision ERF. Also any substantial change to the content of the calls for proposal should be published. As far as other European subsidy regulations are concerned, the Member States must at least publish the possibility of being considered for European subsidies. See Article 5(1) of the Commission Regulation No 1828/2006 (Structural Funds), Article 29(1) of Commission Regulation No 498/2007 (European Fisheries Funds), ANNEX VI, under 1.1, of the Commission Regulation No 1974/2006 (EAFRD) and Article 8(1) of the Commission Regulation 501/2008 (information and sales promotion actions).

¹⁵⁷ See Article 9(1), under b, of the Commission Decision ERF.

¹⁵⁸ Selection decisions must be explained: see Article 9(6) of the Commission decision ERF.

¹⁵⁹ See Article 9(3) of the Commission Decision ERF. It is not clear if this also means that these reasons must be communicated to the subsidy applicant.

ERDF, the European Fisheries Funds and the EAFRD it is explicitly stipulated that the national executive body provides clear and detailed information to potential beneficiaries concerning at least the description of the procedures for the handling of subsidy applications, the time required for this and the criteria for the selection of the projects to be subsidized.¹⁶⁰ The above requirements can be traced back to the principles of equal treatment and transparency. These principles, however, are not explicitly declared as being applicable to the national procedure that national executive bodies apply in the selection of applications for European subsidies.

3.4.2. Applicability of the principles of equal treatment and transparency to the provision of scarce European subsidies under shared management

The question arises whether the fact that in the programme period 2007–2013 the principles of equal treatment and transparency have not been declared explicitly applicable to the allocation of European subsidies provided under shared management, also entails that these principles and the requirements following on from these – to the extent that these requirements are not prescribed in European subsidy legislation – do *not* have to be observed by national executive bodies. In this section, a number of arguments are discussed which can lead to the conclusion that the aforementioned principles also apply when national administrative bodies provide European subsidies under shared management.

If no rules regarding the allocation of European subsidies have been prescribed in European legislation, the basic rule is that national law shall apply. However, the application of national law is restricted by the principles of equivalence and effectiveness. To the extent that the allocation of national subsidies is not governed by the principles of equal treatment and transparency, it is not problematical that these principles are also not applied to the allocation of European subsidies in view of the principle of equivalence. However, another requirement is that the application of national law is not contrary to the principle of effectiveness. For this purpose, it should be examined whether not applying the principles of equal treatment and transparency does not make the implementation of European law practically impossible or extremely difficult. In this context, it could be claimed that the non-observance of these principles results in a situation where it is impossible to monitor if the authority providing the subsidy is guilty of favouritism and arbitrariness. The result is that it is not guaranteed that each applicant has an equal opportunity to obtain a European subsidy and that the European subsidies do not therefore necessarily go to the best projects. Incompatibility with the principle of effectiveness could therefore be a first reason to put forward the proposition that the

¹⁶⁰ See Article 5(2), opening words and under b and c, of the Commission Regulation No 1828/2006 (Structural Funds); Article 29(2), opening words and under b and c, of the Commission Regulation No 498/2007 (European Fisheries Funds) and Annex VI to the Commission Regulation No 1974/2006 (EAFRD).

principles of equal treatment and transparency are applicable in full to European subsidies provided by national administrative bodies.

Secondly, the general principles of Union law acknowledged by the Court of Justice and which are partly also enshrined in the Charter apply to the actions of the Member States if they are acting within the scope of EU law.¹⁶¹ This is the case for example when national administrative bodies implement EU law including legislation on European subsidies.¹⁶² This is not affected by the fact that national law is also applicable. The situation that no common European rules have been laid down concerning the applicability of the principles of equal treatment and transparency and that also the national law does not provide for such rules, does not therefore result in the general principle in question acknowledged by the Court of Justice not being fully applicable.¹⁶³ This means that even if according to national law a national administrative body is not obliged to apply the principles of equal treatment and transparency and the ensuing requirements to the provision of subsidies, it is obliged to do so under EU law if European subsidies are at stake.

In European case law, the applicability of the principles of equal treatment and transparency to the allocation of European subsidies for which no common European regulations exist, has not yet been explicitly confirmed.¹⁶⁴ In the *IPK International* ruling the General Court found that the principles of transparency and equal treatment apply in general to the procedure for the allocation of subsidies from the EU budget, irrespective of the fact that the old Financial Regulation that applied in that case did not mention these principles.¹⁶⁵ The General Court even rules that in the selection of subsidy applications, any undermining of equality of opportunity and of the principle of

¹⁶¹ See Case C-349/07, *Sopropé* [2008] ECR I-10369, AB 2009, 29, with note by R.G.J.M. Widdershoven. See more recently Case C-617/10 *Akerberg Fransson* [2013], not yet reported.

¹⁶² See Joined cases 201 and 202/85, *Klensch* [1986] ECR 3477, para. 10. See also Case C-241/07, *Otsa Talu/Pollumajanduse* [2009] ECR 2009 I-04323, para. 46; Case C-181/04-C-183/04, *Elmeke* [2006] ECR I-8167, para. 31; Case C-376/02, *Goed Wonen* [2005] ECR I-3445, para. 32; Case C-381/97, *Belgocodex* [1998] ECR I-8153, para. 26; Case 5/88, *Wachauf* [1989] ECR 2609, para. 19. See also S. Prechal, 'Competence Creep and General Principles of Law' (2009) *REALaw* 5, 8 and T. Tridimas, *The General Principles of EU Law*, UOP, Oxford 2006, p. 36 f.

¹⁶³ From Case C-349/07, *Sopropé* [2008] ECR I-10369, AB 2009, 29, with note by R.G.J.M. Widdershoven, para. 38, it follows that the Court in the enforcement of that principle, gives priority to the procedural autonomy of the Member State, if no common European rules exist on a certain aspect of the principle. The enforcement of the principle in that case is determined by the national law, provided the principles of equivalence and effectiveness are satisfied.

¹⁶⁴ For this, the Court of Justice did have the opportunity in the *JK Otsa Talu* ruling (Case C-241/07 [2009] ECR I-4323). The Court finds – as discussed – only that the Member States must make an effort to manage their financial resources so that they can provide support to every entitled applicant for rural development within the meaning of the regulation.

¹⁶⁵ Case T-297/05, *IPK International* [2007] ECR I-7467, AB 2011, 285, with note by A. Drahmman, *SEW* 2012, 49, with note by J.C.A. van Dam and J.E. van den Brink, para. 123. The old Financial Regulation dates back to 21 December 1977 [1997] OJ L356/1. The Financial Regulation at that time was not laid down in a regulation.

transparency constitutes an irregularity invalidating the award procedure.¹⁶⁶ From this, of course, it follows – and also from the current Article 109 of the Financial Regulation – that the European institutions and the bodies that provide European subsidies are bound to the principle of transparency.¹⁶⁷ But in view of the wording ‘subsidies from the community budget’, the ruling can also be understood to mean that all European subsidies are subject to the principle of transparency, even if they are provided by national administrative bodies. This is not certain, because European subsidies provided under shared management – discussed in Section 2.1 – do not fall under the definition of Article 108(1) of the Financial Regulation.

If the above Court ruling is interpreted less widely, then there would also now be another argument on the grounds of which it is conceivable that the provision of subsidies by national administrative bodies must meet the principles of equal treatment and transparency. This argument does not only apply to European subsidies provided under shared management, but also to subsidies that are paid from national funding. The tandem of both principles is increasingly applied by the Court of Justice to procedures outside the area of public procurement. The principles of equal treatment and transparency are no longer only applicable if a tender obligation applies to the national administration, but also if it concerns public contracts under the threshold or the provision of concessions or scarce service licences.¹⁶⁸ A national authority that awards a scarce licence, must also guarantee an appropriate measure of publicity, so that the right to competition exists and the allocation procedure can be tested for impartiality.¹⁶⁹ The Court of Justice considers the principles of equal treatment and transparency to be applicable to the allocation of increasingly scarce public rights. Consequently, the principle of transparency has developed at a European level into a general principle of EU law.¹⁷⁰ This means that the principle can possibly be extrapolated to areas other than procurement law, concessions and scarce licences.¹⁷¹ The principle

¹⁶⁶ Case T-297/05, *IPK International* [2007] ECR I-7467, AB 2011, 285, with note by A. Drahmman, *SEW* 2012, 49, with note by J.C.A. van Dam and J.E. van den Brink, para. 125.

¹⁶⁷ See in this respect also F.J. van Ommeren, W. den Ouden and C.J. Wolswinkel, ‘Schaarse publieke rechten. Wat Bard, Betfair en BNR met elkaar gemeen hebben’ (2011) *NJB (Nederlands Juristenblad)*, 1858-1866, 1864.

¹⁶⁸ Case C-64/08, *Ernst Engelmann* [2010] ECR I-8219; Case C-91/08, *Wall* [2010] ECR I-02815; Case C-260/04, *Commission v. Italy* [2007] ECR I-7083; Case C-410/04, *ANAV* [2006] ECR I-3303; Case C-231/03, *Coname* [2005] ECR I-7287; Case C-324/98, *Telaustria* [2000] ECR I-10745, para. 60–62; Case C-275/98, *Unitron* [1999] ECR I-8291, para. 31. See also Buijze and Widdershoven 2010, p. 593.

¹⁶⁹ This follows on from the so-called *Betfair* ruling (Case C-203/08, *Betfair* [2010] ECR I-4695, AB 2011, 17, with note by A. Buijze, *JB* 2010/171, with note by C.J. Wolswinkel, *NJ* 2010/490, with note by M.R. Mok, *NJ* 2010/491, with note by A.J.C. de Moor-van Vugt, *SEW* 2011/33).

¹⁷⁰ Compare Buijze 2013, p. 73 f. The Court of Justice recognized the principle as such for the first time in Case C-260/04, *Commission v. Italy* [2007] ECR I-7083.

¹⁷¹ R.J.G.M. Widdershoven, M.J.M. Verhoeven, S. Prechal, A.P.W. Duijkersloot, J.W. van de Gronden, B. Hessel and R. Orltep, *Derde evaluatie van de Algemene wet bestuursrecht. De Europese agenda van de Awb*, Boom Juridische Uitgevers, 's-Gravenhage 2007, p. 90. Drahmman believes that the principle of transparency should also apply to the award of European subsidies besides under European law. See A.

of transparency is slowly finding its way from public procurement law into other areas of (European) administrative law.¹⁷²

In this context, it is important that most (European) subsidies are regarded as limited public rights.¹⁷³ I see no principle difference between allocating contracts, concessions and permits on the one hand and allocating scarce subsidies on the other hand. After all, in both cases it concerns rights having an economic value.

However, from the case law of the Court of Justice on the allocation of public contracts, concessions and scarce licences, it appears that the principles of equal treatment and transparency are only applicable under European law if a cross-border interest is involved.¹⁷⁴ This is the case if a business could be interested in a concession or licence that is provided in a Member State other than where the business is established.¹⁷⁵ In that case, it must be possible for other European players to compete for the national concession or licence. From the *SECAP* ruling it appears that – applied to subsidy law – the estimated value of the subsidies to be provided and the place of implementation could be relevant as well.¹⁷⁶ It would appear that it should probably not be concluded too hastily that there is no cross-border interest involved. Moreover, in the provision of scarce European subsidies by national administrative bodies – other than just national subsidies – the question arises if the criterion that there must be a cross-border interest present is relevant. The allocation of European subsidies, after all, definitely falls within EU law because it concerns the implementation of EU law. This indicates that the European principles of equal treatment and transparency are applicable without a doubt. Insofar as there are consequences for the criterion of cross-border interest in the allocation of European subsidies by national administrative bodies, it is also not out of the question that international organizations could be interested in implementing these projects with European subsidies. In this context, it is relevant that it appears from European subsidy regulations that final beneficiaries of European subsidies that fall under procurement

Drahmann, 'Is het strikte onderscheid tussen subsidie- en opdrachtverlening nog houdbaar?' (2011) *Gst. (Gemeentestem)* 620 and A. Drahmann, 'Kan het subsidierecht transparanter?' (2011) *Gst.* 672.

¹⁷² See the case note of W. Den Ouden under the judgment of the Administrative Jurisdiction Division of the Council of State of 15 December 2010, *AB* 2011, 87, point 3, last para.

¹⁷³ Compare A. Drahmann, 'Streven naar een transparante (her)verdeling van schaarse publieke rechten', in F.J. Van Ommeren, Den W. Ouden and C.J. Wolswinkel (eds.), *Schaarse publieke rechten*, Boom Juridische Uitgevers, Den Haag 2011, p. 267–292, p. 285–286.

¹⁷⁴ See for example F.J. Van Ommeren, Den W. Ouden and C.J. Wolswinkel 2011, p. 1863–1864. In other cases there is a so-called 'internal situation'. See also E.H. Pijnacker Hordijk, G.W. van der Bend and J.F. van Nouhuys, *Aanbestedingsrecht, Handboek van het Europees en het Nederlandse aanbestedingsrecht*, Sdu Uitgevers, Den Haag 2009, p. 16 f.

¹⁷⁵ See for example Case C-64/08, *Ernst Engelmann* [2010] ECR I-8219, paras. 50 and 53 and Case C-203/08, *Betfair* [2010] ECR I-46955, *AB* 2011, 17, with note by A. Buijze, *JB* 2010/171, with note by C.J. Wolswinkel, para. 47. In previous case law the Court refers to a 'clear cross-border interest'. It has not yet become apparent to what extent the criterion 'businesses established in other Member States with a possible interest' requires refining. See H.M. Stergiou, 'Het Hof van Justitie: Engelse bewaarder van het transparantiebeginsel' (2011) *NtER* 77, 85.

¹⁷⁶ Joined cases C-147/06 and C-148/06, *SECAP en Santorso* [2008] ECR I-3565.

law – normally government bodies – must observe the procurement regulations, including the principles of equal treatment and transparency when they have projects – financed with European subsidies – executed by third parties. In addition to this, the criterion is also applied that businesses from other Member States could be interested in executing the project concerned.¹⁷⁷ In this context, the Commission takes into account the nature of the contracts, the interests involved and the geographical location where the contracts will be executed and believes that if amounts are concerned close to the threshold, the cross-border interest will depend on the amount itself.¹⁷⁸ In many cases, however, no third party at all is involved, but projects or parts of projects are executed by the final beneficiaries of the European subsidies themselves. This mainly concerns subsidy beneficiaries who are not part of any government body. It is unlikely that the principles of equal treatment and transparency are not considered in cases where the national administrative bodies provide the European subsidies to final beneficiaries that implement the projects themselves, but it's a different matter when the final beneficiary involves a third party to execute the project.

In view of the above, there is much to recommend the notion that the principle of transparency as a guarantee for the fulfilment of the principle of equal treatment, also applies to the allocation of scarce European subsidies that are provided by national administrative bodies under shared management. In this way, national administrative bodies for example may no longer change the criteria to be considered for a European subsidy after the applications have been submitted. Furthermore this means that changes and amendments to the applications may not be accepted without reason, and that, in so far as experts and commissions are appointed, they must perform the assessment of applications independently. In addition it must be possible to check whether the selection procedure satisfied the principles of equal treatment and transparency. It is a fact, however, that there is not yet any European case law in this respect. This section does though demonstrate that the Court of Justice will need few reasons to declare the principles of equal treatment and transparency also applicable to the provision of other European and national subsidies.¹⁷⁹

3.4.3. Changes in the programme period 2014–2020

Due to the new Financial Regulation there can be no doubts anymore on the applicability of the principle of transparency on the allocation of European subsidies by national administrative bodies under shared management from the programme period 2014–2020. This regulation states that the Member States shall respect the principles of sound

¹⁷⁷ For example this appears from the point of view of the Commission in Case T-70/09, *Netherlands v. Commission* [2011] ECR II-114, AB 2011, 368, with note by J.E. van den Brink and C. de Kruif.

¹⁷⁸ See also the point of view of the Commission in Case T-70/09, *Netherlands v. Commission* [2011] ECR II-114, para. 33–34, AB 2011, 368, with note by J.E. van den Brink and C. de Kruif.

¹⁷⁹ In Case T-297/05, *IPK International* [2007] ECR I-7467, AB 2011, 285, with note by A. Drahmman, SEW 2012, 49, with note by J.C.A. van Dam and J.E. van den Brink, paras. 122–126, the link is made between procurement law and case law in this respect.

financial management, transparency and non-discrimination.¹⁸⁰ However, it is not totally clear what is meant by ‘transparency’ in this context. In view of Chapter 8 of the new Financial Regulation, the principle of transparency may only refer to the publication of accounts, budgets and reports, and of information on recipients. Nevertheless, in the Regulations concerning the programme period 2014–2020¹⁸¹ it is explicitly stated that the national authority that provides the European subsidies draws up and once approved, applies the appropriate selection procedures and criteria for choosing specific operations that are non-discriminatory and transparent.¹⁸² However, neither the Regulations concerned nor the corresponding delegated and implementing acts make these provisions more concrete. It has to be seen what exactly these provisions demand from national authorities. In my opinion it is likely that national authorities in drawing up and applying selection procedures and criteria should be inspired by the requirements following from the principles of equal treatment and transparency concerning the allocation of European subsidies in direct management and public procurement, including the case law of the Court of Justice in that respect.

3.5. *Legal Protection against a Breach of the Principles of Equal Treatment and Transparency in the Allocation of Scarce European Subsidies*

Assuming that the European principles of equal treatment and transparency are applicable to the allocation of all European subsidies – regardless of whether they are provided on a centralised (indirect) basis or under shared management – the question arises to what extent the European subsidy regulations place demands on the legal protection against breaches of these principles in the allocation of scarce European subsidies. This normally involves an applicant whose application for a European subsidy has been denied and who believes that these principles have not been observed in the allocation of the European subsidy. There are no specific rules in this respect in the European subsidy regulations on the provision of European subsidies by the European Commission, European executive agencies and national agencies. The same applies for the European subsidy regulations on the provision of European subsidies under shared management. Contrary to the European directives on public procurement, the European subsidy regulations do not provide an effective and fast opportunity for appeal against

¹⁸⁰ See Article 59(1) of the new Financial Regulation.

¹⁸¹ Most proposals had an update in April 2013.

¹⁸² See Article 125(3) under a, opening words and under i, Regulation No 1303/2013 of the European Parliament and of the Council laying down common provisions on the ERDF, the ESF, the Cohesion Fund, the EAFRD and the EMFF covered by the Common Strategic Framework and laying down general provisions on the ERDF, the ESF and the Cohesion Fund and repealing Council Regulation No 1083/2006 [2013] OJ L347/320. The provision concerned pertains to the ERDF, ESF and the Cohesion Fund. Concerning the EAFRD Article 49(1) Regulation No 1305/2013 of the European Parliament and of the Council of 17 December 2013 on support for rural development by the EAFRD and repealing Council Regulation No 1698/2005 states that selection criteria defined by the managing authority shall aim to ensure equal treatment of applicants. Furthermore the member state authority responsible for project selection shall ensure that projects are selected in accordance with the selection criteria and according to a transparent and well documented procedure. See Article 49(2).

the decisions taken by the subsidy provider after it has been announced which projects will be subsidized.¹⁸³ European procurement law also requires – contrary to the European subsidy regulations – that the Court must have the possibility to take provisional measures in order to declare illegal decisions invalid and to award damages.¹⁸⁴ In the case law by the Court of Justice it appears that an appeal for a dismissal must be lodged against the decision to award a public contract, before the contracting authority and the particular private individual can enter into a contract.¹⁸⁵ This possibility must exist beside the possibility to receive damages following the conclusion of the contract.¹⁸⁶ This case law has now been codified in directive no. 665/1989.¹⁸⁷ Codification entails that before the conclusion of the contract, a standstill period of 10 days applies (when sent by fax or email) or 15 days (when sent by other means).¹⁸⁸ As long as the Court has not decided against the award decision or the request to take a provisional measure, the contract may not be concluded.¹⁸⁹ Buijze and Widdershoven correctly deduce from the above that European procurement law favours ‘remedies’ that redress the illegal award of public contracts above alternative compensation.¹⁹⁰

European subsidy regulations do not provide for such a standstill period. It is also unclear whether – in the event the European or national court¹⁹¹ rules that the subsidy award conflicts with the principles of equal treatment and transparency – the European subsidy must be provided anyway, or that the comparative test will have to be repeated, or if just damages will suffice.¹⁹² If both the decision to refuse the subsidy and the decision to award the subsidy are dismissed by the national court, a new decision on the applications will have to be taken. But it would be a thorny issue for the (European) Court to rule that the comparative test had to be repeated, if years after the subsidies had been allocated the conclusion is taken that the allocation procedure at the time had been unlawful. In that case damages would seem to be the better solution. There are (still) no indications in European case law that the requirements for legal protection laid down in European procurement law, arise from the principle of effective legal protection.

¹⁸³ See Article 1(1) of Directive No 665/1989.

¹⁸⁴ See Article 2(1) of Directive No 665/1989. See also on this subject Buijze and Widdershoven 2011, p. 419.

¹⁸⁵ Case C-81/98, *Alcatel* [1999] ECR I-7671, para. 43.

¹⁸⁶ Case C-81/98, *Alcatel* [1999] ECR I-7671, para. 43.

¹⁸⁷ See also on this subject Buijze and Widdershoven 2011, p. 419.

¹⁸⁸ See Article 2a(2) of Directive 665/1989.

¹⁸⁹ See Article 2(3) of Directive 665/1989.

¹⁹⁰ Buijze and Widdershoven 2011, p. 419.

¹⁹¹ Insofar as the European subsidy is provided by the Commission and European executive agencies, it will be the European Court. Insofar as the European subsidies are provided by national agencies or under shared management, the national courts are authorized to take cognizance of appeals against the award of the subsidy.

¹⁹² This is also illustrated by the *Baltlanta* case (Case C-410/13, *Baltlanta*, AB 2015, 116, with note by J.E. van den Brink and J.C.A. van Dam). On issues concerning the settlement of disputes under administrative law on the award of scarce rights because a comparative test is concerned, see B.J. Schueler, ‘Bestuursrechtelijke beslechting van geschillen over de verdeling van schaarse publieke rechten’, in F.J. Van Ommeren, W. den Ouden and C.J. Wolswinkel (eds.), *Schaarse publieke rechten*, Boom Juridische Uitgevers, Den Haag 2011, p. 363–378.

It is doubtful whether proceedings for damages will eventually lead to payment. European case law on European subsidies provided by the European Commission shows that merely the dismissal of the decision to refuse subsidy, does not mean a claim for damages exists.¹⁹³ Damages are only considered if it is established that without the breach of the principles of equal treatment and transparency, a positive decision on the application would have been taken.¹⁹⁴ This means that, apart from the question if a European subsidy should be provided ultimately, to assess the damages the application must be reassessed.

To guarantee that the principles of equal treatment and transparency actually provide protection during the allocation of scarce European subsidies, more specific rules will have to be laid down in European subsidy legislation in respect of legal protection against award decisions that breach these principles. Insofar as legal protection is available in the national courts, minimum requirements could be considered.

4. Conclusion

This chapter has examined what requirements exist under European law for the allocation of scarce European subsidies. It would appear that at a European level in particular, requirements exist on the allocation of European subsidies that are provided on a centralised (indirect) basis; for example, subsidies provided by the European Commission, by European executive agencies and by national agencies. The allocation should be carried out by a tender procedure. The requirements that exist for this procedure can be traced back to the principles of equal treatment and transparency that are declared explicitly applicable in the section on Grants of the Financial Regulation. The aim of these principles is to ensure that every potential applicant has an equal opportunity to obtain a European subsidy.

For the other European subsidies provided by national administrative bodies under shared management, matters were not quite so clear. At a European level in the programme period 2007–2013 it was not explicitly stated which methodology should be applied in the allocation of European subsidies. In addition, there were some European rules about the procedure on the provision of subsidies that could be traced back to the principles of equal treatment and transparency, but these principles were not declared explicitly applicable. However, in Section 3.4.2 a number of arguments were put forward on the grounds of which it can be assessed that in the programme period 2007–2013 the aforementioned principles should also have been observed by the national administrative bodies that provide European subsidies under shared management. However, the lack of clarity in the European regulations in that regard bore the risk that national authorities

¹⁹³ See Case T-478/93, *Wafer Zoo* [1995] ECR II-1497. In this case the Court came to the conclusion that contrary to the principle of legal certainty, the selection criteria were not published. Instead of the principle of legal certainty, the principle of transparency could be filled in.

¹⁹⁴ In the *Wafer Zoo* ruling the Court finds that it must be certain that the applicant would have been entitled to subsidy without the application of a criterion that he was not informed about, because he satisfied the other criteria. However, in this ruling no comparative test was carried out.

did not obey these principles when allocating European subsidies. For that reason it is a good thing that in any event the principles of equal treatment and transparency in the current programme period 2014–2020 apply in full to all European subsidies provided by national administrative bodies. However, it is unclear what this means exactly for national authorities when allocating European subsidies.

In my opinion it is likely that national authorities in drawing up and applying selection procedures and criteria should be inspired by the requirements following on from the principles of equal treatment and transparency concerning the allocation of European subsidies in direct management and public procurement, including the case law of the Court of Justice in that respect. This means, for example, that national administrative bodies cannot change the criteria for entitlement to a European subsidy without reason after the applications have been submitted, that changes and amendments to applications submitted may not be accepted without reason and that, insofar as experts and committees are appointed, they are obliged to carry out the assessment of applications independently. Moreover, it must be possible to check whether the selection procedure satisfied the principles of equal treatment and transparency.

Unfortunately, also in the regulations concerning the programme period 2014–2020 there is – contrary to procurement law – at a European level no provision for fast and effective proceedings in which a breach of the principles of equal treatment and transparency in the allocation of scarce European subsidies can be dealt with. In order to guarantee that the principles of equal treatment and transparency actually offer protection, more detailed regulations on legal protection will have to be incorporated in the European regulations. That does not alter the fact that on the basis of this chapter it can be concluded that the significance of the principles of equal treatment and transparency in the allocation of European subsidies is becoming increasingly important, also for subsidies allocated by national authorities. And that is a good thing. Only then can it be guaranteed that scarce European subsidies will be allocated fairly.

