REVIEW OF EUROPEAN ADMINISTRATIVE LAW; VOL. 13, NR. 2, 33-53, PARIS LEGAL PUBLISHERS © 2020

Finding a balance between equal treatment, transparency, and legal certainty when allocating scarce authorisations

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Abstract

The Dutch Council of State recently ruled that potential applicants should have the right to compete in a transparent procedure when scarce authorisations are allocated. This right to compete is based on the Dutch principle of equality, and is inspired by the European principles of equal treatment and transparency. Until this ruling, most scarce authorisations in the Netherlands were granted for an indefinite period of time, with no transparent allocation procedure. The question which follows is: should these scarce authorisations be withdrawn, or would this be contrary to the principle of legal certainty? By looking at the definition of a scarce authorisation and the development of the principles under EU, ECHR and Dutch case law, I conclude that competent authorities are allowed to withdraw the old scarce authorisations ex officio after a transitional period or payment of compensation. However, in my opinion, competent authorities are not obliged to withdraw old scarce authorisations, since old scarce authorisations cannot be amended substantially and therefore will become available in due time. In this way, old scarce authorisations remain intact for a longer period of time and, therefore, the infringement of the right of property is reduced. In other words, in the end, competent authorities should be allowed to decide what the best option is: either (1) withdrawing the authorisations ex officio after a transitional period or payment of compensation or (2) awaiting a request to amend the authorisation – with due regard to the circumstances of the case.

1. Introduction

In 2016, the Dutch Council of State ruled in the *Vlaardingen casino* case[1] that, when a scarce authorisation – in this case the scarce authorisation for a municipal casino – is allocated, potential applicants should be al-

* DOI 10.7590/187479820X15930701852201 1874-7981 2020 Review of European Administrative Law

1 *Vlaardingen casino* (Council of State, 2 November 2016) ECLI:NL:RVS:2016:2927 Wolswinkel AB 2017/426.

lowed to compete for such a scarce authorisation in a transparent procedure.[2] This right to compete is based on the Dutch principle of equality, and is inspired by the European principles of equal treatment and transparency. On the basis of these principles, scarce authorisations may only be granted for a limited period of time. In the past, however, scarce authorisations were granted for an indefinite time period and with no transparent procedure. As regards these scarce authorisations: can, or even must, they now be withdrawn, or would it be contrary to the principle of legal certainty? The contribution will be answering this research question in Section 4. For a better understanding of the issue, I will first define what a scarce authorisation is (Section 2) and then proceed to describe the scope of the European and Dutch principles of equal treatment and transparency (Section 3). In Section 5, I will conclude that, in my opinion, competent authorities are allowed, but not obliged, to withdraw scarce authorisations that are valid for an indefinite period of time. Since scarce authorisations cannot be amended substantially, they will in any case become available in due course. Moreover, competent authorities should be allowed to decide the best option in a specific case, which would be either withdrawing the authorisations *ex officio* after a transitional period or payment of compensation, or awaiting a request to amend the authorisation.

2. What is a scarce authorisation?

In accordance with the Services Directive,[3] the term "authorisation" is used here as an umbrella term covering all permits, licences, approvals, concessions, and exemptions that entrepreneurs could need prior to the start of their business activities.[4] Entrepreneurs are required to file an application for an authorisation with the competent authorities. A distinction must further be made between authorisations in relation to public procurement contracts or concession contracts. As will be explained in more detail in Section 3, under the Public Procurement Directive[5] and the Concession Directive[6], these contracts must be in accordance with the principles of equality and transparency. In general, an authorisation will not qualify as a "public contract", since it is

2 ibid.

3 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36 [Services Directive].

4 See Services Directive, recital (39) and art 4-6.

5 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance [2014] OJ L94/65 [Public Procurement Directive].

6 Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts Text with EEA relevance [2014] OJ L94/1 [Concession Directive].

not a contract concluded for pecuniary interest.[7] This contribution, however, specifically focuses on whether the principles of equality and transparency also apply to authorisations that are not covered by public procurement law. In the Netherlands, the qualification as a public contract or authorisation is also relevant when it comes to determining the competent court, since the award of public contracts is governed by civil law, whereas the granting of authorisations is governed by administrative law. As a consequence, the jurisprudence of the Dutch Supreme Court regarding the principles of equal treatment and transparency in public procurement cases was considered irrelevant in relation to administrative law cases.

Usually, if required, an operator can apply for an authorisation, and the competent authority will subsequently assess whether the operator fulfils the conditions; if so, the operator will receive the authorisation. In the case of scarce authorisations, the competent authority has set a maximum for the number of authorisations it intends to grant. Once that maximum – also referred to as a ceiling – has been reached, all applications will be refused from that moment on.[8]

Moreover, a scarce authorisation is also referred to as an authorisation 'granting a limited public right'.[9] One could say that this is a more accurate description, since it is the amount of rights (such as the right to operate a municipal casino) that is being limited. In this contribution, the term "scarce authorisations" is used because, firstly, it is the term used by the Council of State in the *Vlaardingen casino* ruling. Secondly, the scope of the right granted by an authorisation is always in some way limited, due to the authorisation requirements which must be observed. An authorisation for a municipal casino might, for instance, be limited to certain opening hours. The term "limited public right", therefore, does not make it entirely clear that the actual number of authorisations is limited. Finally, the Services Directive also states that a selection procedure for potential candidates must be held if the 'number of authorisations available for a given activity is limited' because of the scarcity of the available natural resources or technical capacity.[10]

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7 See, *inter alia*, Case C-220/05 *Auroux* [2007] EU:C:2007:31 and Case C-399/98 *Scala* [2001] EU:C:2001:401,

8 See, for a more extensive description of the concepts of scarcity and scarce authorisations that I refer to: Luis Arroyo and Dolores Utrilla, 'Administrative allocation of limited public rights: some keystones for a general theory' [2015] 2 Ius Publicum Network Review 1 and Johan Wolswinkel, 'The Allocation of a Limited Number of Authorisations Some General Requirements from European Law' (2009) 2 REALaw 61.

9 Paul C Adriaanse and others (eds), *Scarcity and the State I: The Allocation of Limited Rights by the Administration* (Intersentia 2016) and Johan Wolswinkel, 'An Allocation Perspective to Public Law: Limited Public Rights and Beyond' *ReM* 2014-05 <https://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2014/05/RENM-D-13-00006.pdf> accessed 1 March 2020.

10 Services Directive, art 12.

Thus, to summarise this section, if the number of available authorisations is limited, it concerns a scarce authorisation. In the Netherlands, well-known examples of scarce authorisations are the following: public transport concessions; frequency permits; the exemption for the Sunday opening of supermarkets; terrace permits; event permits; market permits; operating permits for canal boats; gambling permits.

3. The principles of equal treatment and transparency

This section outlines the scope of the principles of equal treatment and transparency at both the EU and the national level. According to settled case law of the European Court of Justice and the Dutch Supreme Court, contracting authorities must respect the principles of equal treatment and transparency when awarding a public contract[11] or concession[12]. The aim of the principle of equal treatment is to promote the development of healthy and effective competition between undertakings. All tenderers must be afforded equal opportunities when formulating their tenders, which therefore implies that the tenders of all competitors must be subject to the same conditions. The transparency obligation, on the other hand, arises from this principle of equal treatment, and its purpose is to guarantee the preclusion of any risk of favouritism and arbitrariness by the contracting authority. Further, it implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents. This is done in order to ensure that, first, all reasonably informed tenderers exercising ordinary care can understand the exact significance of the conditions and rules and interpret them in the same way. Second, it ensures that the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applicable to the relevant public contract.[13]

3.1. Development of the EU principles of equal treatment and transparency

The EU principles of equal treatment and transparency are laid down in the Public Procurement Directive[14], the Concession Directive[15] and

11 As defined in the Public Procurement Directive.
12 As defined in the Concession Directive.
13 See, *inter alia*, Case C-496/99 P *Commission v CAS Succhi di Frutta* [2004] EU:C:2004:236 and *Ricoh vs Utrecht* (Supreme Court of the Netherlands, 9 May 2014) ECLI:NL:HR:2014:1078.
14 See, *inter alia*, Services Directive, ch III section 2.
15 Concessions Directive, art 3.

the Services Directive.[16] However, it follows from case law of the Court of Justice, developed over the last 20 years,[17] that these principles also apply outside the scope of these directives. Stergiou distinguishes three "generations" of case law from the Court of Justice on the topic of equal treatment and transparency.[18] The first generation runs from 1998 to 2005 and concerns concessions; in that period, no directive existed to regulate concessions. Nevertheless, the Court of Justice ruled that, when awarding these concessions, the principles of equal treatment and transparency must be complied with.[19] This is because the contracting entities are bound to comply, in general, with the fundamental rules of the Treaty on the Functioning of the European Union (TFEU)[20] and, in particular, with the principle of non-discrimination on the grounds of nationality. In the second generation of jurisprudence – from 2006 to 2008 – the Court of Justice ruled that the principles of equal treatment and transparency must be taken into account not only when awarding concessions, but also when awarding public contracts that fall outside the scope of the Public Procurement Directive.[21] Although the EU legislature in its policy expressly chose to exclude public contracts under a certain threshold from the advertising regime in the Public Procurement Directive, the Court of Justice ruled that, if such a public contract is of a certain cross-border interest, the award must be in accordance with the transparency principle. A works contract could, for example, have a cross-border interest because of its estimated value in conjunction with its technical complexity or with the fact that the works are to be located in a place which is likely to attract the interest of foreign operators.[22] In the third generation of case law – from 2008 onwards – the Court of Justice ruled that the principles of equal treatment and transparency apply also to national autho-

16 Services Directive, arts 11 and 12. See also Case C-340/14 *Trijber vs Amsterdam* [2015] EU:C:2015:641. Article 11 of the Services Directive states that an authorisation shall not be granted for a limited period, unless the number of available authorisations is limited. In *Trijber*, the Court of Justice ruled that no discretion may be conceded to competent national authorities, since this would undermine the objective of the Services Directive to secure service providers' access to the market in question.

17 See, for an overview of relevant case law, Johan Wolswinkel, Frank van Ommeren and Willemien den Ouden, 'Limited authorisations between EU and domestic law: comparative remarks from Dutch law' (2019) 25 European Public Law 559.

18 H M Stergiou, 'Het Hof van Justitie: Engelbewaarder van het transparantiebeginsel' (2011) 3 NtER 77.

19 See, *inter alia*, Case C-275/98 *Unitron Scandinavia* [1999] EU:C:1999:567, Case C-324/98 *Telaustria and Telefonadress* [2000] EU:C:2000:669, Case C-231/03 *Coname* [2005] EU:C:2005:487, Case C-458/03 *Parking Brixen* [2005] EU:C:2005:605 and Case C-324/07 *Coditel Brabant* [2008] EU:C:2008:621.

20 Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/49 [TFEU], arts 49 and 56 TFEU (formerly arts 43 and 49 EC Treaty).

21 See, *inter alia*, Case C-507/03 *Commission v Ireland* [2007] EU:C:2007:676 and Case C-412/04 *Commission v Italy* [2008] EU:C:2008:102.

22 Joined Cases C-147/06 and C-148/06 *SECAP and Santorso* [2008] EU:C:2008:277.

risation schemes and exclusive rights.[23] If an authorisation scheme grants an authorisation to one operator or a few, the transparency principle must be observed, because the effects of such a licence on undertakings established in other Member States and potentially interested in that activity are the same as those of a service concession contract.[24]

It follows from the abovementioned case law that Member States must comply with the principles of equal treatment and transparency in order to comply with the fundamental rules of the TFEU. As a consequence, these EU principles can only be invoked if the public contract, concession or authorisation has a certain cross-border interest. To determine whether such a cross-border interest exists, it is not necessary that an operator has actually manifested its interest: once a certain cross-border interest has been established, the obligation of transparency benefits any potential tenderer, even where it is established in the same Member State as those authorities.[25]

To conclude, if a public contract, concession or authorisation falls outside the scope of the Public Procurement Directive, Concession Directive or Services Directive[26] and there is no cross-border interest, the EU principles of equal treatment do not apply.

3.2. Development of the Dutch principles of equal treatment and transparency: the Vlaardingen casino case

The *Vlaardingen casino* case is about a municipal gambling authorisation. Such an authorisation falls outside the scope of the Public Procurement Directive, Concession Directive and Services Directive;[27] it is also considered to be an authorisation with no cross-border interest, since it has limited economic value. Therefore, the EU principles of equal treatment and transparency do not apply. In addition, the Vlaardingen municipal gambling authorisation is a scarce authorisation, since the Vlaardingen Slot Machines Regulation provides that only one gambling authorisation can be granted by the local authority. In *Vlaardingen casino*, the local authority granted the scarce authorisation to a gambling operator without respecting the principles of equal treatment and transparency, and a competitor appealed against this autho-

23 Case C-203/08 *Sporting Exchange* [2010] EU:C:2010:307 and Case C-64/08 *Engelmann* [2010] EU:C:2010:506.

24 Case C-203/08 *Sporting Exchange* [2010] EU:C:2010:307.

25 Case C-221/12 *Belgacom* [2013] ECLI:EU:C:2013:736.

26 Case C-360/15 *Visser Vastgoed vs Appingedam* [2018] EU:C:2018:44. Here, the Court of Justice ruled that Chapter III of the Services Directive also applies to a situation where all the relevant elements are confined to a single Member State.

27 Article 2-2(h) of the Services Directive states that the Directive does not apply to 'gambling activities which involve wagering a stake with pecuniary value in games of chance, including lotteries, gambling in casinos and betting transactions'.

risation. The local authority argued that the EU principles of equal treatment and transparency did not apply and that no similar principles under Dutch law existed. In his opinion, Advocate General Widdershoven took the view that a legal standard should be recognised which implies that there should be some form of competition when granting scarce authorisations.[28] This national legal standard would be in line with EU law, because EU law already requires – for scarce authorisations for services with a cross-border interest and services within the scope of the Services Directive – that the competent authorities must apply some form of competition in their allocation. Secondly, in his view, the recognition of this legal standard also has a good reason in substance, since most scarce authorisations have asset value: it is a typical feature of the allocation of scarce authorisations that this asset value is granted to one or more applicants and not to others. According to Widdershoven, it is only logical that the municipality must give all potential applicants the opportunity to compete in one way or another. If it fails to do so, it will, for no apparent reason, favour one applicant over others, and the accusation of arbitrariness becomes imminent. Potential applicants should therefore have a chance to compete, so that the municipality does not favour certain applicants without a clear reason.[29]

The Dutch Council of State followed the opinion of the Advocate General, and ruled that in Dutch law, when scarce authorisations are allocated, the legal standard where applicants and potential applicants must in some way be given the opportunity to compete for an available scarce authorisation applies. The Council of State explains that this right to compete follows from the Dutch principle of equality, which is considered an unwritten principle of good governance.[30] In the context of the allocation of scarce authorisations, this principle of equality is intended to offer equal opportunities.

The *Vlaardingencasino* case shows that two important obligations follow from the principle of equal treatment. Firstly, scarce authorisations cannot, in principle, be granted for an indefinite period of time, but only on a temporary basis. The Council of State ruled that the reason for this was that the authorisation holder would otherwise be given a disproportionate advantage, because it would then be virtually impossible for newcomers to enter the market. Secondly, in order to achieve equal opportunities, it is necessary for the competent authority to ensure an appropriate degree of publicity. This means that the competent authority must make the following information public: (1) the fact that a scarce authorisation is available; (2) the allocation procedure which will be followed; (3) the period when applications can be submitted; and (4) the

28 Conclusie *Vlaardingen casino* (Council of State, 25 May 2016) ECLI:NL:RVS:2016:1421 Wolswinkel AB 2017/426.

29 ibid.

30 Under Dutch law, governing bodies are bound by these unwritten principles, and the principles can be invoked before the courts.

criteria that will apply. This information must be published in good time – before the start of the application procedure – using an appropriate medium.

Notably, the municipality argued that the criterion used for the granting of the scarce casino authorisation was the order in which applications were received. According to the Council of State this criterion is permitted, provided that all potential applications have had an equal opportunity to compete for the scarce authorisation. Furthermore, based on the obligation of transparency, an appropriate degree of publicity must be observed: each potential applicant should have an equal opportunity to be aware of the allocation procedure, the application period, and the criteria to be applied. Since the local authority in Vlaardingen did not publish an explicit invitation to tender (the authorisation was granted based on an application that was filed prior to the date that the Regulation entered into force), this transparency obligation had been violated. Thus, under Dutch law, scarce authorisations can be granted by means of various allocation methods. In addition to a tender, other permitted allocation methods are: allocation by the order in which applications are received; a drawing of lots; or an auction.

3.3. Interim conclusion

The *Vlaardingen casino* case is ground-breaking because the principles of equal treatment and transparency now also apply to scarce authorisations which fall outside the scope of the Public Contracts Directive, Concession Directive, and Services Directive, and to scarce authorisations that have no cross-border interest. Since the *Vlaardingen casino* ruling, the Dutch Council of State has ruled that competent authorities must also comply with these principles when granting scarce subsidies.[31] The *Vlaardingen casino* case can therefore be considered as an example of 'voluntary' adoption of an EU principle into national law: the Dutch Council of State voluntarily Europeanised the Dutch principle of equality into a principle of equal treatment. Wolswinkel, Van Ommeren and Den Ouden rightly advocate that, instead of emphasizing the distinction between national and EU allocation regimes, the principle of equal treatment should be embraced as the underlying basis for some *ius commune* on allocation issues.[32]

Although the *Vlaardingen casino* case provides clarity on the legal standards that apply when granting a scarce authorisation, the ruling has also raised new questions. One of these questions is how these new principles relate to the principle of legal certainty. In the next section, an attempt will be made to answer

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31 *Geobox vs Noord-Brabant* (Council of State, 11 July 2018) ECLI:NL:RVS:2018:2310.

32 Also Johan Wolswinkel, Frank van Ommeren and Willemien den Ouden, 'Limited authorisations between EU and domestic law: comparative remarks from Dutch law' (2019) 25 European Public Law 559.

this question. In any case, it can be noted that the *Vlaardingen casino* case marks the starting point for a new doctrine in Dutch administrative law.

4. The principles of equal treatment and transparency versus the principle of legal certainty

The obligation requiring competent authorities to comply with the principles of equal treatment and transparency when allocating scarce authorisations is a new obligation under Dutch law. As a consequence, until 2016 competent authorities granted scarce authorisations with no transparent procedure and for an indefinite period of time. Can, or even must, such scarce authorisations be withdrawn, or would this be contrary to the principle of legal certainty? Now that it is clear that the Dutch principles of equal treatment and transparency were inspired by the EU principles of equal treatment and transparency, it is logical to also consider EU case law in answering this question. Another relevant aspect is whether the withdrawal of an authorisation infringes the right of property of the authorisation holder. In this section, I will first look at case law of the Court of Justice and case law of the European Court of Human Rights (ECtHR). Subsequently, I will compare this case law with case law in the Netherlands.

4.1. Five guidelines following from EU case law

Five guidelines on how to deal with old scarce authorisations can be derived from the case law of the Court of Justice. The first guideline is that national legislation must be amended so that scarce authorisations will be granted in accordance with the principles of equal treatment and transparency. According to settled case law of the Court of Justice, the TFEU precludes Member States from issuing or maintaining national legislation that is contrary to Articles 49 and 59 TFEU or to competition rules in the TFEU, especially with regard to the undertakings to which they grant exclusive or special rights.[33] In other words, national legislation in violation of EU law must be amended so that the issuance of new scarce authorisations is in accordance with EU law. This entails, for example, that an authorisation scheme which allows scarce authorisations to be granted for an indefinite period of time must be amended. However, this guideline only refers to future authorisations and does not answer the question of whether scarce authorisations that were granted in the past (hereafter also referred to as 'old' scarce authorisations) should be withdrawn.

33 Case C-545/17 *Pawlak* [2019] EU:C:2019:260, referring to Case C-250/06 *United Pan-Europe Communications Belgium* [2007] EU:C:2007:783 and Case C-347/06 *ASM Brescia* [2008] EU:C:2008:416.

The second guideline is that there is no obligation to intervene, at the request of an individual, in existing legal situations where those situations came into being before the 2016 *Vlaardingen casino* ruling. This guideline can be derived from the *Tögel*[34] and *Belgacom*[35] cases. These cases concerned the question of whether, under the EC Treaty or the Public Procurement Directive in force at the time, an obligation exists for a Member State to intervene in existing public contracts concluded for an indefinite period that were not entered into in accordance with the Public Procurement Directive. In *Tögel*, the Court of Justice ruled that '[EU] law does not require an awarding authority [...] to intervene, at the request of an individual, in existing legal situations [...] where those situations came into being before the expiry of the period for transposition of [the Public Procurement Directive]'.[36] It could be argued whether the transposition of a directive into national law can be compared to the introduction of a new general principle in national law: this issue is, in fact, the subject of the *Belgacom* case. In this case, the Court of Justice ruled that 'The principle of legal certainty [...] provides ample justification for observance of the legal effects of an agreement [...] in the case of an agreement concluded before the Court has ruled on the implications of the primary law on agreements of that kind and which, after the fact, turn out to be contrary to those implications'.[37] In my opinion, the key question is: until what point in time can a person rely on an obligation that later turns out to be unlawful? In view the *Tögel* and *Belgacom* cases, it can be argued that competent authorities do not have to intervene where a scarce authorisation was granted, prior to 2 November 2016, using no transparent procedure and for an indefinite period of time. Until that date, both the competent authorities and the applicants could not have known that they were obliged to comply with a national transparency obligation.

However, the fact that there is no requirement to intervene does not mean that old scarce authorisations can continue unconditionally. Indeed, the third guideline is that old scarce authorisations cannot be amended substantially: if a substantial amendment is required, a new award procedure should be started. This guideline also follows from the *Belgacom* case. After considering that the principle of legal certainty provides ample justification for observance of the legal effects of an agreement, the Court of Justice ruled that '[this principle of legal certainty] may not be relied upon to give an agreement an extended scope which is contrary to the principles of equal treatment and transparency [...]'.[38] Consequently, it can be concluded from the *Belgacom* case that an old scarce authorisation cannot be amended substantially. Moreover, a great deal of case

34 Case C-76/97 *Tögel* [1998] EU:C:1998:432.
35 Case C-221/12 *Belgacom* [2013] EU:C:2013:736.
36 Case C-76/97 *Tögel* [1998] EU:C:1998:432, para 54.
37 Case C-221/12 *Belgacom* [2013] EU:C:2013:736, para 40 and case law referred to therein.
38 ibid, para 40.

law exists regarding when a public contract or concession is considered to be amended substantially. For instance, the *Wall AG* case[39] explains that '[i]n order to ensure transparency of procedures and equal treatment of tenderers, substantial amendments to essential provisions of a service concession contract could in certain cases require the award of a new concession contract'.[40] This is the case, for example, if the amendments differ materially from the original contract, and therefore demonstrate the intention of the parties to renegotiate the essential terms of that contract.[41] If this guideline is applied to the allocation of scarce authorisations, it can be argued that irrevocable authorisations can remain in force until the authorisation holder wishes to change this authorisation – for example by amending authorisation requirements which provide a significant economic advantage, such as an extension of opening hours. The Dutch Council of State already ruled that both a change in the holder of the authorisation as well as the location where the activities take place can be considered to be substantial amendments.[42] At that time, the scarce authorisation cannot be amended and a new allocation procedure will have to be initiated by the competent authority.

The fourth guideline is that a competent authority is allowed to withdraw an old scarce authorisation on its own initiative. However, should it decide to do so, compensation or a transitional period must be provided for. The transitional period must enable the contracting parties to untie their contractual relations on acceptable terms, both from the point of view of the requirements of the public service and from the economic point of view. In the *Berlington*[43] case, the Court of Justice ruled that '[a company] cannot place reliance on there being no legislative amendment whatever, but can only call into question the arrangements for the implementation of such an amendment'.[44] The principle of legal certainty does not require that there be no legislative amendment; it does, however, require that the national legislature take account of the particular situations of the companies and provide, where appropriate, adaptations to the application of the new legal rules.[45] Furthermore, it follows from the *ASM Brescia*[46] case that a termination of a concession is only possible if a transitional period is provided for. The *ASM Brescia* case concerns a concession granted in 1984, at a time when the Court of Justice had not yet held that, following from

39 Case C-91/08 *Wall AG* [2010] EU:C:2010:182.
40 ibid, para 37.
41 ibid. Also relevant is Case C-454/06 *Pressetext Nachrichtenagentur* [2008] EU:C:2008:351.
42 *SSV vs Kansspelautoriteit* (Council of State, 13 March 2019) ECLI:NL:RVS:2019:774 and *Speelautomatenhal Helmond* (Council of State, 27 September 2017) ECLI:NL:RVS:2017:2611.
43 Case C-98/14 *Berlington* [2015] EU:C:2015:386, para 78.
44 ibid.
45 ibid.
46 Case C-347/06 ASM *Brescia* [2008] EU:C:2008:416.

primary Community law, contracts with a cross-border interest might be subject to duties of transparency. The Court of Justice ruled that the principle of legal certainty forms part of the EU legal order and is binding on every national authority responsible for implementing EU law.[47] This principle of legal certainty 'not only permits but also requires that the termination of such a concession be coupled with a transitional period which enables the contracting parties to untie their contractual relations on acceptable terms both from the point of view of the requirements of the public service and from the economic point of view'.[48]

The fifth and final guideline complements the fourth guideline, and stipulates that the protection of legitimate expectations entails an assessment on a case-by-case basis of whether the authorisation holder could reasonably expect its authorisation to be renewed or continued, and of whether they have made the corresponding investments. In the *Promoimpresa*[49] case – which concerned an authorisation within the scope of the Services Directive – it was claimed that an automatic renewal of authorisations, without a transparent tender procedure, was necessary in order to safeguard the legitimate expectations of the holders of those authorisations, in so far as their renewal enabled the cost of the investments made by those holders to be recouped. The Court of Justice ruled that '[T]he protection of legitimate expectations as a justification entails an assessment on a case-by-case basis whether the holder of the authorisation could reasonably expect its authorisation to be renewed and made the corresponding investments. Such a justification cannot therefore be relied on in support of an automatic extension enacted by the national legislature and applied indiscriminately to all of the authorisations at issue.'[50]

If this guideline is applied to the withdrawal of old scarce authorisations, a case-by-case-assessment should be the starting point. This can be explained by the fact that it can be different for each authorisation holder when and for what amount their last investments were made, and thus how much damage they will suffer if their scarce authorisation is withdrawn.

Wollenschlager has rightfully advocated that it is worth continuing the endeavour of modelling an administrative procedure aimed at allocating scarce goods at the Member State and at the EU level of administrative law.[51] It is therefore worth noting that Article III-35 of the non-binding ReNEUAL model

47 ibid, para 65.
48 ibid, para 71.
49 Joined Cases C-458/14 and C-67/15 *Promoimpresa* [2016] EU:C:2016:558.
50 ibid, para 56.
51 F Wollenschlager, 'EU Law Principles for Allocating Scarce Goods and the Emergence of an Allocation Procedure' (2015) 8 REALaw 205.

rules[52] contains a main rule similar to the case law of the Court of Justice.[53] The Article concerns the withdrawal of decisions which have an adverse effect, and could therefore also be applied to the withdrawal of scarce authorisations. Article III-35 states that if a decision has adverse effects on one party and is beneficial to another party, the authority must balance the conflicting interests of both parties. Even in the case of an unlawful decision that has an adverse effect, the authority is not strictly obliged to withdraw that decision. According to ReNEUAL, the authority has been left with discretion, since otherwise time limits for legal challenges of unlawful decisions would become meaningless.[54] On the other hand, the expiry of a time limit does not prohibit an authority from withdrawing an unlawful decision. Important criteria for this balancing test are: (i) the extent to which the illegality that besets the decisions is obvious; (ii) whether the beneficiary had provoked the earlier decision through false or incomplete information; and (iii) the extent to which the beneficiary undertook irreversible investments because he or she relied on the decision.[55] The application of the guidelines, which can be derived from the abovementioned Court of Justice case law and the ReNEUAL model rules, lead to the recommendation that old scarce authorisations can be withdrawn, but that compensation or a transitional period must be provided for. When withdrawing the authorisation, the competent authority must perform a balancing test that includes the extent to which the authorisation holder has made irreversible investments.

In summary, based on the abovementioned case law, I come to the following five guidelines on how to deal with old scarce authorisations:

1. National legislation must be amended if necessary, so that new scarce authorisations will be granted in accordance with the principles of equal treatment and transparency.
2. There is no obligation to intervene, at the request of an individual, in existing legal situations where those situations came into being before the introduction of the new legal standard in the 2016 Council of State ruling.

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52 The Research Network on EU Administrative Law (ReNEUAL) has developed a set of model rules on EU Administrative Procedure which are designed to reinforce general principles of EU law and identify – on the basis of comparative research – best practices in different specific policies of the EU. The rules are non-binding.

53 Book III of the ReNEUAL model rules concerns single case decision making and is therefore relevant for granting authorisations. Article III-6 states that 'Where the number of applications to be granted is limited and a competitive award procedure is used the rules laid down in Book IV Chapter 2 Section 3 shall apply *mutatis mutandis*'. This Section of Book IV describes the competitive award procedure for the conclusion of EU contracts and includes the obligation that transparency and equal treatment are ensured during the procedure. Since Book IV concerns contracts, it is not relevant for withdrawing authorisations.

54 RENEUAL, 'ReNEUAL Model Rules on EU Administrative Procedure. Book III – Single Case Decision-Making', (*ReNEUAL*, 3 September 2014) 140-141 <http://www.reneual.eu/images/Home/BookIII-Single_CaseDecision-Making_individualized_final_2014-09-03.pdf> accessed 29 February 2020, para 137.

55 ibid, para 137.

3. Old scarce authorisations cannot be amended substantially. If a substantial amendment is required, a new award procedure should be started.
4. A competent authority is allowed to withdraw an old scarce authorisation; compensation or a transitional period must be provided for, should it decide to withdraw the authorisation. The transitional period must enable the contracting parties to untie their contractual relations on acceptable terms, both from the point of view of the requirements of the public service and from the economic point of view.
5. The protection of legitimate expectations entails an assessment on a case-by-case basis of whether the authorisation holder could reasonably expect its authorisation to be continued and whether they have made the corresponding investments.

4.2. Case law of the ECtHR

Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms[56] (ECHR) protects the property of legal persons. It states that 'No [person] shall be deprived of [their] possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law'. However, the provision continues by saying that this prohibition does not in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest. According to rulings of the ECtHR, an authorisation to run a business constitutes a possession and its withdrawal is an interference with the right guaranteed by Article 1.[57] The withdrawal of an authorisation is compatible with Article 1 if the following criteria are met: (i) it must comply with the principle of lawfulness and (ii) pursue a legitimate aim by (iii) means reasonably proportionate to the aim sought to be realised. The third criterion leads to a 'fair balance test'.[58]

A case showing how the restriction of an authorisation can form an interference with the right guaranteed by Article 1 is *O'Sullivan McCarthy Mussel Development Ltd vs Ireland*[59]. In this case, a mussel seed fishing business had an authorisation to operate its business, however the company also needed a Natura permit due to new EU legislation. The ECtHR observed that, although the authorisation of the mussel seed fishing business was not actually withdrawn,

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56 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention of Human Rights, as amended) (ECHR).

57 See, for an overview of this case law: ECtHR, '*Guide* on Article 1 of Protocol No 1 to the European Convention on Human Rights' (*ECtHR*, 31 August 2019) <https://www.echr.coe.int/Documents/Guide_Art_1_Protocol_1_ENG.pdf> accessed 1 March 2020.

58 ibid.

59 *O'Sullivan McCarthy Mussel Development Ltd v Ireland* App no 44460/16 (ECtHR, 7 June 2018).

Article 1 applied since the temporary prohibition on mussel seed fishing forms a restriction placed on an authorisation connected to the usual conduct of its business.[60] The fishing business was not required to cease all of its operations, and was able to resume its usual level of business activity one year later. The ECtHR recognised the weight of the objectives pursued, and the strength of the general interest in achieving full and general compliance with its obligations under EU environmental law. The ECtHR was not persuaded that the impugned interference in this case constituted an individual and excessive burden for the mussel seed fishing business, or that the State had failed in its efforts to find a fair balance between the general interest of the community and the protection of individual rights. Consequently, it ruled that there had not been a violation of Article 1.[61]

However, in *Vékony*[62] the ECtHR ruled that Article 1 had been violated. In this case, Vékony had a shop-keeping authorisation to sell alcohol and tobacco products. In 2012, the Hungarian parliament enacted an act on tobacco retail, according to which tobacco retailers would become authorised through a concession tender. Vékony applied for a concession, but was informed that he had not obtained a tobacco retail concession, and therefore his enterprise was obliged to terminate the sale of tobacco products. The remaining sales activities of his enterprise were no longer profitable, which led to the business being wound up. Under Hungarian law, no compensation was available for former holders of tobacco retail authorisations who, by not having been awarded a concession, lost part of their livelihood. According to the ECtHR, Vékony had to suffer an excessive individual burden due to the control measure: not only was his authorisation extinguished without compensation, but authorisation holders were also provided with very short notice to make adequate arrangements to respond to the impending change to their source of livelihood.[63]

Based on the *Vékony* case, it can be concluded that the withdrawal of an old scarce authorisation must be in accordance with the three abovementioned criteria. The "fair balance test" might lead to the conclusion that the authorisation holder qualifies for compensation; such compensation can be paid with money, or by granting a transitional period in which the business can be continued. For the outcome of the fair balance test, also of relevance is whether the authorisation holder could reasonably have been aware of the legal limitations on his property. In *Fredin*[64] , another case, Fredin had an authorisation to exploit a gravel pit. In 1973, an amendment to the Nature Conservation Act empowered the competent authority to withdraw authorisations that were more

60 ibid, para 89.
61 ibid.
62 *Vékony v Hungary* App no 65681/13 (ECtHR, 13 January 2015).
63 ibid, para 37.
64 *Fredin v Sweden* App no 12033/86 (ECtHR, 18 February 1991).

than ten years old. Fredin initiated substantial investments in the gravel pit seven years after the entry into force of this amendment to the Act. According to the ECtHR, Fredin must therefore reasonably have been aware of the possibility that he might lose his authorisation after ten years. Although Fredin suffered substantial losses with regard to the potential exploitation of the gravel pit – had it been in accordance with the authorisation – account has to be taken also of the restrictions lawfully imposed on the use of the pit. When embarking on his investments, Fredin did not have any legitimate expectations of being able to continue exploitation for a long period of time; Fredin was moreover granted a three-year closing-down period. The ECtHR concluded that it cannot be said that the withdrawal of the authorisation was inappropriate or disproportionate.[65]

Based on the *Fredin* case,[66] it can be argued that a lack of compensation is acceptable when the authorisation holder knew, or ought to have known, or could reasonably have been aware, of the possibility of future restrictions. This might be relevant in the case of old scarce authorisations, since it could be argued that, as of the date of the *Vlaardingen casino* ruling, Dutch authorisation holders should have been aware of the possibility of future restrictions to their scarce authorisation. This might limit their right for compensation for investments made after November 2016. On the other hand, it could be argued that it cannot be reasonably expected of, for instance, a local market vendor to be aware of the *Vlaardingen casino* ruling and subsequently understand that this ruling might have consequences for his scarce authorisation. From this point of view, it seems necessary for the competent authority to first inform the existing authorisation holders or to implement this ruling in local legislation *before* the right to compensation can cease to exist.

The European Court of Justice and the ECtHR are unanimous in their judgment that the sudden withdrawal of scarce authorisations without providing for either a transitional period or compensation is in breach of the law. However, the European Court of Justice bases its judgments on the protection of fundamental freedoms as laid down in the TFEU, whereas the ECtHR bases its judgments on the protection of human rights, i.e. the right to property. According to Den Ouden and Tjepkema, this different approach might lead to different outcomes.[67] In the *Vékony* case, the ECtHR found that

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65 ibid, para 55.

66 See, for more case law: ECtHR, '*Guide* on Article 1 of Protocol No 1 to the European Convention on Human Rights' (*ECtHR*, 31 August 2019) <https://www.echr.coe.int/Documents/Guide_Art_1_Protocol_1_ENG.pdf> accessed 1 March 2020.

67 W den Ouden and M Tjepkema, 'The allocation of limited licences by the administration– requirements under the European fundamental right to property' in PC Adriaanse and others (eds), *Scarcity and the State I: The Allocation of Limited Rights by the Administration* (Intersentia 2016) 277.

'[T]he measure did not offer a realistic prospect to continue the possession because the process of granting of new concessions was verging on arbitrariness, given that (i) the existence of the previous [authorisation] was disregarded; (ii) the possibility of a former [authorisation holder] to continue tobacco retail under the changed conditions accommodating the policy of protection of minors was not considered in the new scheme [...]; (iii) the concession system enabled the granting of five concessions to one tenderer which objectively diminished the chances of an incumbent [authorisation holder] [...] and, finally, (iv) the lack of transparent rules in the awarding of the concessions, which took place (v) without giving any privilege to a previous [authorisation holder], such as limiting the scope of the first round of tendering to such persons.'[68]

By taking the right to property as a starting point, it seems reasonable to give a privileged position to the existing authorisation holders in the procedure for granting new scarce authorisations. From the EU perspective that freedom to provide services should be restricted as little as possible, however, this view is less obvious.

Agreeing with Den Ouden and Tjepkema, I believe that it is not likely that the European Court of Justice will follow the stance of the ECtHR in this area, since the favouring of established parties in the internal market is severely frowned upon by the European Court of Justice. Nevertheless, since in the *Vlaardingen casino* case the Council of State introduced the principles of equal treatment and transparency as national principles when the corresponding EU principles are not applicable, Dutch competent authorities are not bound to the jurisprudence of the European Court of Justice, while they are still obliged to act in accordance with Article 1 of the First Protocol. This leads to possible tension, because the national principles of equal treatment and transparency are based on the EU principles, yet the competent authority is bound by the ECHR. In my opinion, this tension can be resolved if the competent authority offers compensation or a transitional period to the existing authorisation holders, but does not grant them a privileged position in the procedure for granting new scarce authorisations. This solution is in line with the case law of both the European Court of Justice and the ECtHR.

4.3. Dutch case law

There is little Dutch case law on the withdrawal of scarce authorisations. The present case law mainly concerns two questions: (i) is the competent authority allowed to revoke the old scarce authorisation?; and (ii) can an old scarce authorisation remain in place? Both rulings will be described below in more detail.

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68 *Vékony v Hungary* App no 65681/13 (ECtHR, 13 January 2015), para 36.

A power to revoke the old scarce authorisation?

The Dutch General Administrative Law Act does not have a general rule for the withdrawal of authorisations, but most individual laws do have a specific legal basis for the withdrawal of authorisations. Almost all legal provisions state that the competent authority can withdraw an authorisation on the grounds mentioned in that provision. This means that the authority is allowed, but not obliged, to withdraw an authorisation.[69] If a legal provision states that a competent authority is allowed to withdraw an authorisation, this competence is usually limited to the grounds mentioned in that provision. The Trade and Industry Appeals Tribunal ruled in the *Nieuwegein*[70] case that the amendment of a scarce authorisation for an indefinite period into a limited period is not allowed if no relevant ground can be found in the provision.[71] In the case, a general ground that allowed the amendment or withdrawal of an authorisation due to a change of views or circumstances was not included, and the specific grounds – such as a negative influence on safety or public order – were not applicable.[72] It can be deduced from this ruling that a legal provision can limit the competence of an authority to withdraw a scarce authorisation. This ruling has been criticised, since it is generally assumed in literature that the power to withdraw an authorisation is – if the law does not expressly grant it – a power that is implied in the power to grant an authorisation.[73] In 2019, the Council of State ruled in the *Amsterdam*[74] case that the 'change of policy insight due to an interest for the protection of which the authorisation is required' ground for amendment of an authorisation can justify the amendment of a scarce authorisation that is valid for an indefinite period of time. In *Amsterdam*, one of the objectives of the berth authorisation scheme was optimum use of the water, so the scarce berth authorisation could be amended by the municipality.[75] Based on these rulings, it is recommended that a relevant withdrawal ground is included in legislation concerning a scarce authorisation.

Can an old scarce authorisation remain in place?

In the *Apeldoorn*[76] case, the municipality of Apeldoorn introduced new policy rules on granting scarce authorisations for the exploitation of supermarkets on

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69 A rare example of a provision that forces an authority to withdraw a permit can be found in the Nature protection law. This provision states that a permit is withdrawn, if necessary, for the implementation of Article 6, paragraph 2, of the Habitats Directive.

70 *Hoogzandveld vs Nieuwegein* ECLI:NL:CBB:2013:78 Wolswinkel AB 2013/294.

71 ibid, para 4.1.

72 ibid.

73 *Hoogzandveld vs Nieuwegein* ECLI:NL:CBB:2013:78 Wolswinkel AB 2013/294. Wolswinkel refers to RJN Schlössels and SE Zijlstra, *Bestuursrecht in de sociale rechtsstaat* (Kluwer 2017) Section 8.3.8.

74 *Rederij Lovers vs Amsterdam* ECLI:NL:RVS:2019:2892 Wolswinkel AB 2019/496, para 4.2.

75 ibid, para 4.8.

76 *Coop vs Apeldoorn* ECLI:NL:CBB:2013:BZ2025 Wolswinkel AB 2013/293.

Sunday. In the past, two permits for an indefinite period had already been granted. The new policy rules stated that new authorisations would be granted after a lottery and would be valid for only one year, and that the old authorisations would not be amended. The Trade and Industry Appeals Tribunal ruled that these policy rules were unlawful.[77] The Tribunal does not consider it justified that a permanent exception should be made for the two authorisation holders for the sole reason that these two companies requested such an authorisation sooner than the other companies.[78] Such a permanent exception goes beyond the limits of a reasonable policy provision.[79] This ruling is especially relevant in light of the guideline mentioned above in Section 4.1 (i.e. that an administrative authority is not obliged to withdraw an authorisation) since *Apeldoorn* follows a different line of reasoning. The case implicates that, if the legislation regarding scarce authorisations is amended, this amendment cannot create a permanent exception for old scarce authorisations. In addition, and this time in line with the aforementioned guidelines, in the *Apeldoorn* case the Tribunal recognises that the existing authorisation holders have a special position. Moreover, in order to do justice to such a special position, it will generally be necessary to create a transitional arrangement, possibly even a long-term one, so that the authorisation holder can prepare itself for the situation in which it must compete with others for scarce authorisations.[80] Such a transitional arrangement is a form of compensation for the authorisation holders; in practice, the authorisation holders are granted a transitional period in which they can earn back their investments.

4.4. Comparing the EU, ECtHR and Dutch case law

If we compare the previously mentioned case law, it is clear that all three courts ruled that a competent authority is *allowed* to withdraw an old scarce authorisation valid for an indefinite period; however, should it decide to do so, compensation or a transitional period must be provided for. There is little Dutch case law on the duration of the transitional period and it must also be noted that the abovementioned Dutch case law predates the *Vlaardingen casino* case. As regards the European Court of Justice and ECtHR case law, it is advisable that an assessment is made on a case-by-case basis, and that it is considered to what extent the authorisation holder undertook irreversible investments because they relied on the authorisation.

77 ibid, para 2.9.
78 ibid.
79 ibid.
80 ibid, para 2.10. See also *Coop vs Zwolle* ECLI:NL:CBB:2015:55 Wolswinkel AB 2015/307.

One notable difference seems to be whether competent authorities are *obliged* to withdraw an old scarce authorisation that is valid for an indefinite period. In the *Apeldoorn* case, the Tribunal ruled that, when introducing new legislation for allocating scarce authorisations, it is not justified to make a permanent exception for old authorisation holders based solely on the fact that these two companies requested such an authorisation sooner than the other companies. This seems to implicate, if legislation for allocating scarce authorisations is introduced or amended, that such legislation should also include a provision for the withdrawal of the old scarce authorisations after a transitional period. Looking at the EU case law, I wonder if another reasoning is also conceivable. Earlier, when the EU case law was discussed, it was concluded that there is no obligation to withdraw scarce authorisations; however, this does not mean that these old scarce authorisations will continue indefinitely, since they cannot be amended substantially. Therefore, I find it acceptable that old scarce authorisations remain unaffected: it is clear that, as soon as the authorisation needs to be amended, this amendment request is rejected and instead a transparent allocation procedure is set up. It still remains unclear when the scarce authorisation will become available, which can be seen as one disadvantage of this view. In such a situation, both the competitors and the competent authority are dependent on the current authorisation holder, and the latter may postpone investments if they require a change to the authorisation. Such an attitude may not be in the public interest. On the other hand, one advantage of this view is that the market can slowly become accustomed to the new and current reality where authorisations have to be competed for. At the moment, entrepreneurs in certain sectors are hesitant about this new development, and subsequently competent authorities face much resistance when they take the initiative to withdraw existing authorisations. If this is the case, a more reserved attitude might be justified. One could take, as an example to illustrate this, a situation where a municipality has granted scarce authorisations to sell products at the local market which are valid for an indefinite period of time. However, if it appears that there is a large natural flow of market vendors, it seems justified that the old scarce market authorisations are not withdrawn if they comply with the following conditions: (1) all future scarce authorisations are to be granted after a transparent procedure and for a limited period of time; and (2) the old scarce authorisations are not amended substantially. This will likely lead to a situation of more calm throughout the transitional period, allowing entrepreneurs to better prepare for a competitive procedure. The continuation of old scarce authorisations until they need a significant amendment also fits well with the *Vékony* ruling of the ECtHR: after all, under Article 1 of the First Protocol, scarce authorisations must not be revoked lightly, and competent authorities must consider whether it is proportionate to leave the scarce authorisations unaffected. Ultimately, in my opinion, both options – (1) withdrawing the authorisations *ex officio* after a transitional period or payment of compensation or (2) awaiting a request to amend the authorisation substantially – are acceptable. The compe-

tent authority should be allowed to decide what the best option is, given the circumstances of the case. In addition, the outcome can differ depending on the municipality and the scarce authorisation scheme.

5. Conclusion

The Dutch *Vlaardingen casino* case makes it clear that, under Dutch law, when scarce authorisations are allocated, the legal standard where applicants and potential applicants must in some way be given the opportunity to compete for an available scarce authorisation applies. This right to compete follows from the Dutch principle of equality and, in the context of the allocation of scarce authorisations, the principle is intended to offer equal opportunities. The *Vlaardingen casino* case can be considered to be an example of the voluntary adoption of an EU principle into national law: the Dutch Council of State voluntarily Europeanised the Dutch principle of equality into a principle of equal treatment.

Until 2016, competent authorities granted scarce authorisations for an indefinite period of time using no transparent procedure; a question which then arises is whether such old scarce authorisations should be withdrawn. If we compare the case law of the Court of Justice, ECtHR and Dutch courts, it is clear that a competent authority is allowed to withdraw such an old scarce authorisation; however, should it decide to do so, compensation or a transitional period must be provided for. Less clear is whether competent authorities are also obliged to withdraw these old scarce authorisations. From the Dutch *Apeldoorn* ruling, it could be deduced that – if legislation for allocating scarce authorisations is introduced or amended – such legislation should also include a provision for the withdrawal of the old scarce authorisations after a transitional period. Looking at EU case law, such as the *Belgacom* case, I would advocate that there is no obligation to withdraw old scarce authorisations, since these old scarce authorisations cannot be amended substantially and therefore will become available in due time. This approach would also be in line with ECtHR case law, as old scarce authorisations remain intact for a longer period of time and, therefore, the infringement of the right of property is reduced. In the end, competent authorities should be allowed to decide what the best option is: either (1) withdrawing the authorisations *ex officio* after a transitional period or payment of compensation or (2) awaiting a request to amend the authorisation – with due regard to the circumstances of the case.