The Opacity of Transparency:

Issues of application of the principle of transparency to public contract awards falling outside the scope of Directive 18/2004

Abstract

Public procurement in EU Member States is harmonized by Public Sector Directive 2004/18, whose scope of application is limited in various (service concessions, sub-threshold contracts and annex IIB contracts). However, a consolidated line of ECJ's cases finds those very contracts to be regulated by EU primary law, including the treaty-based principle of transparency. The purpose of this paper is to assess and clarify the content, the scope and the procedural and remedial consequences of the principle of transparency within the public procurement regime under the Treaty.

1. Introduction[1]

Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts ("the Public Sector Directive") spells out a detailed set of procedural requirements for the award of certain contracts by public (contracting) authorities. It is the successor of three previous Directives – on public service, public supply

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and public works contracts[2] – which contained the relevant part of the detailed European public procurement regime.

The scope of application of the Directive, however, is limited in various ways. In effect, due to a combination of limitations in a "horizontal" sense – such as the exclusion of public service concessions[3] – as well as in a vertical sense – the notorious threshold of 5 million Euro – and the exclusion of the so-called "non-priority services" in Annex IIB, it can be said that, even where the rules of the Directive are scrupulously abided by, a great many procurement procedures do not fall under its obligations (see graph 1).

This *prima facie* exclusion led to a great deal of attention when, in 2000, the Court of Justice, in its landmark case *Telaustria*, made an initially limited yet highly influential statement: it found that public service concessions are not, for the mere fact of not being covered by the detailed rules of what were then the Directives, exempted from all and every procedural obligation under European law. Rather, 'contracting entities concluding [contracts falling outside the scope of the Directives are] bound to comply with the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular'.[4] From that principle, the Court derived – citing its recent *Unitron Scandinavia*[5] judgment – an *obligation of transparency*. That "obligation", as the Court tentatively put it, entails 'ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed'.[6] This infamously vague formulation naturally caused a degree of uncertainty as to the scope and content of that obligation, so that, over the next decade, the Court

[2]Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts; Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors; Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts.

[3]Service concessions are arrangements whereby a public authority entrusts the performance of services to a third party, who bears the economic risk by charging third party users for the service in question, rather than receiving a guaranteed fee from the authority in question.

[4]Case C-324/98 *Telaustria* [2000] ECR I-10745, para. 60. This was confirmed by the Court in Case C-59/00 *Vestergaard* [2001] ECR I-9505.

[5]Which, like the contemporary C-107/98 *Teckal* [1999] ECR I-08121, regarded a contract subject to the rules of the Directives. The extension of the obligation – which subsequently became the principle – of transparency to matters excluded from the scope of the Directives was what made *Telaustria* a landmark judgment.

[6]Case C-324/98 *Telaustria*, para. 61-62.

was put in the position of needing to clarify the exact nature of transparency in a number of subsequent cases, many of them in the course of infringement procedures by the Commission and, progressively, orders for reference.[7]

Regarding its scope of application, that line of judgments progressively extended the reach of the obligation – which became the principle – of transparency to contracts below the pecuniary thresholds of the Directive[8] and to "Part B" services,[9] thereby casting the net so dangerously wide as to capture, potentially, almost any public procurement procedure.

As regards the nature of the obligations imposed on public authorities by the principle of transparency, on the other hand, a certain amount of legal and linguistic refining has led to the Court's statements that the principle of transparency applies where there is 'a certain cross-border interest'[10] or where the contract 'may be of interest to *an* undertaking located in a Member State other that in which the concession is awarded'.[11] It appears that such cross-border interest is rather easy to establish, as what must be proved is, in essence, that there is even a single undertaking somewhere in the European Union which would have been interested, actually or potentially in the contract awarded, but was prevented from expressing such interest by a lack of publicity. The much-debated consequence of this approach, which we will outline below, is a remaining quantum of uncertainty regarding the reach of the principle of transparency.

The third aspect of the Court's case-law which is relevant for a definition of the obligations imposed upon contracting authorities is the "degree of advertising" required, i.e. the substantive nature of the obligations deriving from the treaty-based principle of transparency. The issue is sensitive, as the Court

[7]It goes without saying that the principle of transparency, derived from the principles of non-discrimination and equal treatment in the context of the freedom of establishment and the freedom to provide services, enjoys direct effect. See Case C-91/08 *Wall AG v Frankfurt a. M.* [2010] ECR I-2815, para. 71: 'The obligation of transparency flows directly from Articles 43 EC and 49 EC, which have direct effect in the domestic legal systems of the Member States and take precedence over any contrary provision of national law.'

[8]Case C-412/04 *Commission v. Italy* [2008] ECR I-619.

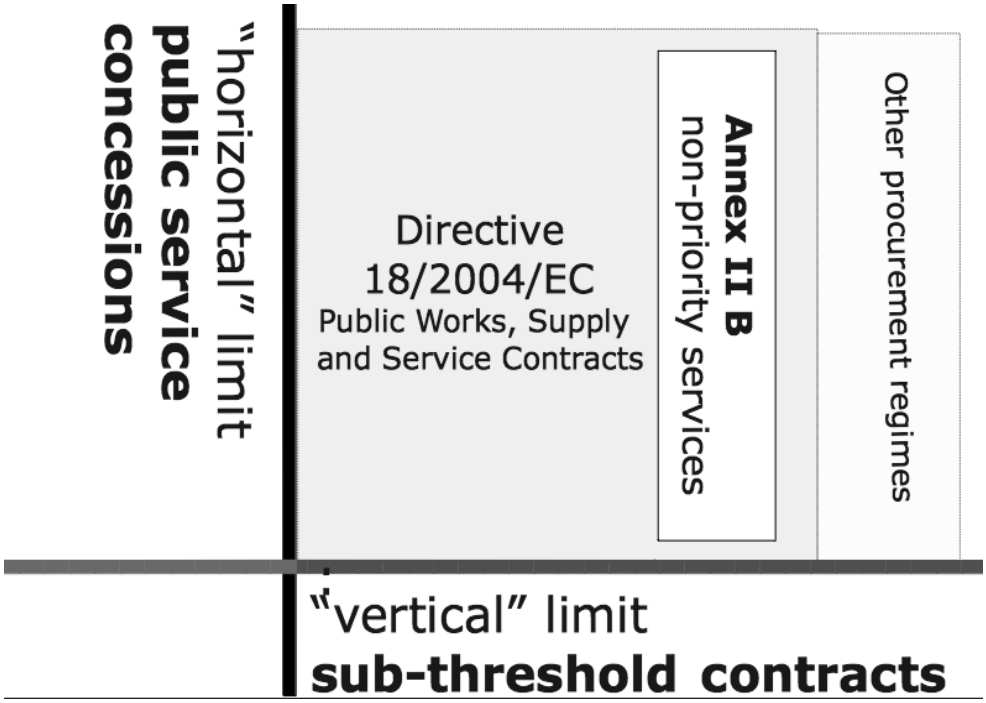
[9]Case C-532/03 *Commission v. Ireland* [2007] ECR I-11353.

[10]Case C-507/03 *Commission v. Ireland* [2007] I-9777.

[11]Case C-91/08 *Wall AG*, para. 34; italics by the authors. See also Case C- 231/03 *CoNaMe* [2005] ECR I-7287, paragraph 17; see also, by analogy, Case C-507/03 *Commission* v. *Ireland*, para. 29 and Case C-412/04 *Commission* v *Italy*, para. 66. In practice it suffices for the Commission to prove the existence of a single economic operator in another Member State who, by reason of nature of the procurement procedure, was deterred from participating in it, in order to establish a cross-border interest.

might tilt the political balance between Union-wide harmonisation and national regulation, giving raise to charges of creeping harmonisation.[12]

We shall now, therefore, turn to an analysis of the concrete obligations resting on public authorities.



Graph 1: the structure of the European public procurement regime.

2. Substantive Obligations Deriving from the Principle of Transparency

In 2006, prompted by a need for certainty as to the nature of the obligations imposed on public authorities by the Court's case-law, which had by then become settled, the Commission produced an Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives.[13] That instrument gives some very general guidance to contracting authorities as to how and to what extent they need to publicise their intention of awarding certain types of contracts. In principle, it is for the public authority to decide on the most appropriate means for ensuring 'a [sufficient] degree of advertising', bearing in mind such criteria as 'the relevance of the contract to the internal market', the subject-matter and value

[12] For instance, Germany challenged the Commission's 2006 Communication before the General Court, but to no avail (the challenge was found inadmissible). See Adrian Brown, 'EU Primary Law Requirements in Practice: Advertising Procedures and Remedies for Public Contracts Outside the Scope of the Procurement Directives', *PPLR* (2010) 5, p. 169-181.

[13] 2006/C 179/ 02.

of the contract as well as 'customary practices' in the sector.[14]

2.1. Transparency in Advertising a Public Contract in Practice

In the more daring part of its Communication, the Commission puts forward a number of options[15] from which a contracting authority could choose, thus providing a somewhat safe harbour.

The first option is contacting 'directly [...] a number of potential tenderers',[16] so long as they are located in different Member States. The Commission, however, does not consider this practice sufficient to 'exclude discrimination against potential tenderers from other Member States, in particular new entrants to the Market'.[17] It has been suggested that this view of the Commission is too restrictive and might not withstand rigorous scrutiny: where the specific conditions in the market so warrant, such as where a market is highly concentrated, or where there are a limited number of potential suppliers, this option might be viable. It would, however, be wise for the authority to combine direct contact with some additional form of advertising as put forward options.[18]

The second possibility is advertising in newspapers or journals. This too presents a number of problems, such as the geographically limited reach of such means, the onerousness of multiple publication in various languages or, alternatively, the limited number of publications with an EU-wide circulation. However, where the value, subject-matter and geographical situation of a contract suggest that only a few adjacent Member States may be of relevance.[19]

The third option is placing a notice on the public authority's own website.

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[14] The issue was of incidental relevance, for instance, in Case C-532/03 *Commission v. Ireland*, which regarded a long-running arrangement between the Irish Eastern Regional Health Authority and Dublin City Council, which was not the subject of any contract in writing. The Commission argued that the Council was still obliged to respect the principle of transparency. Ultimately, the action failed because it was not demonstrated that there had been an award of a public contract due to the nature of the two authorities.

[15] See also Adrian Brown, 'EU Primary Law Requirements in Practice: Advertising Procedures and Remedies for Public Contracts Outside the Scope of the Procurement Directives', *PPLR* (2010) 5, p. 169-181.

[16] A.-G. Fennelly in Case C-324/98 *Telaustria*, endorsed by A.-G. Stix-Hackl in Case C- 231/03 *CoNaMe*, at para. 93.

[17] Commission 2006 Communication, under point 2.1.

[18] Adrian Brown, 'EU Primary Law Requirements in Practice: Advertising Procedures and Remedies for Public Contracts Outside the Scope of the Procurement Directives', *PPLR* (2010) 5, p. 169-181.

[19] Ibid.

This combines the advantage of low cost and simplicity with the fact that the Commission, in its 2006 Communication, considers this an 'adequate and commonly used' means of publication, provided that the information is 'presented in a way that potential bidders can easily become aware of the information',[20] which means, presumably, that it should be easy to locate and accessible.[21] It is unclear for how long the notice needs to be in place, but it seems that two weeks can constitute an adequate period.[22]

The fourth option is the publication of a voluntary notice in the Official Journal of the European Union, mirroring the obligation to publish in the OJEU under the Directive as a (since 1997 electronic) supplement on the Tenders Electronic Daily.[23] Such notices are published in full in the language of submission, and in a shorter version in all the official languages. This remains a possibility, but an OJ notice is a singularly inflexible instrument,[24] in that the model form for public sector contracts is clearly based on the premise that the rules of the Directive apply.[25] In this regard, it is true that Regulation 1150/2009 introduced a form of 'voluntary ex ante transparency notice'. That notice, however, is expressly intended merely to allow 'contracting entities and contracting authorities [to] include the justification referred to in (the Remedies Directive 2066/07)'.[26] This means that a voluntary transparency notice, followed by a standstill period of ten days, removes the possibility for third parties to apply to have the contract declared ineffective. The objective of the measure is not, therefore, to promote transparency but to provide a defence for public

[20] 2006/C 179/ 02 at point 2.1.2.

[21] Adrian Brown, 'EU Primary Law Requirements in Practice: Advertising Procedures and Remedies for Public Contracts Outside the Scope of the Procurement Directives', *PPLR* (2010) 5, p. 169-181.

[22] On 20 November 2009 the Commission published a press release (IP/09/1759) stating that it had closed an infringement procedure against Slovakia. The Ministry of Infrastructure had advertised by publishing a notice on a restricted part of its website for a period of two weeks. The Commission took exception to the fact that access was restricted but not, significantly, to the period of publication.

[23] http://ted.europa.eu/TED/main/HomePage.do.

[24] Adrian Brown, 'EU Primary Law Requirements in Practice: Advertising Procedures and Remedies for Public Contracts Outside the Scope of the Procurement Directives', *PPLR* (2010) 5, p. 169-181.

[25] In this context, it is interesting to note that the Court found, in Case C-45/87 *Commission v. Ireland*, that the publication of a voluntary notice in the OJ does not, in itself, oblige the contracting authority to follow the detailed rules of the Directive.

[26] Commission Regulation (EC) No 1150/2009 of 10 November 2009 amending Regulation (EC) No 1564/2005 as regards the standard forms for the publication of notices in the framework of public procurement in accordance with Council Directives 89/665/EEC and 92/13/EEC, considerandum n. 2.

authorities. This form is not immune, either, from an amount of complexity and inflexibility which amounts to a significant deterrent for public authorities.[27]

The fifth option, for which the Commission has expressed a clear preference in its 2006 Communication, is the publication of a notice on a specialist portal website, if such a portal exists in the territory in question. The Communication described, for instance, the British government's website *supply2.gov.uk*[28] as a best practice.[29]

2.2. Transparency in Subsequent Stages of Public Contract Awards Procedures

Besides the *de facto* obligation to publish a notice, preferably – but not necessarily exclusively – through one of the means described above, the principles of equal treatment, non-discrimination and transparency apply throughout the stages of a procurement procedure,[30] *inter alia* to technical specifications, selection and award criteria, choice of procedure and time-limits.[31]

In its 2006 Communication, the Commission spelled out the minimum requirements for public procurement procedures not covered by the Directive.[32] Firstly, public authorities are under an obligation to give a non-discriminatory description of the subject-matter of the contract, which 'should not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production unless such a reference is justified by the subject-matter of the contract and accompanied by the words 'or equivalent' ', and no conditions imposing a direct or indirect discrimination should be set.[33] Secondly, time-limits for the 'expression of interest and for submission of offers

[27] Adrian Brown, 'EU Primary Law Requirements in Practice: Advertising Procedures and Remedies for Public Contracts Outside the Scope of the Procurement Directives', *PPLR* (2010) 5, p. 169-181.
[28] Now *www.businesslink.gov.uk*.
[29] See Adrian Brown, 'EU Primary Law Requirements in Practice: Advertising Procedures and Remedies for Public Contracts Outside the Scope of the Procurement Directives', *PPLR* (2010) 5, p. 169-181.
[30] See A.-G. Trstenjak's Opinion in Case C-160/08 *Commission v. Germany,* [2010] ECR I-3713.
[31] Opinion of A.-G. Stix-Hackl in Case C-231/03 *CoNaMe*, para. 84.
[32] 2006/C 179/ 02, point 2.2
[33] Contracts falling under Annex IIB of Directive 18/2004 are, naturally, subject to the applicable rules in the Directive as regards technical specifications.

should be long enough to allow undertakings from other Member States to make a meaningful assessment and prepare their offer'. Thirdly, public authorities may take 'measures to limit the number of applicants to an appropriate level, provided this is done in a transparent and non-discriminatory manner'. Objective criteria such as the experience of the applicants, their technical and professional abilities and capabilities, and so forth, are therefore permissible. This comes with the *caveat* that, as has been pointed out in case-law, certain rules under the Directive apply, *mutatis mutandis*, to procedures subject only to the Treaty principles.[34]

3. Scope of Application of the Treaty-Based Principle of Transparency

The treaty-based principle of transparency and the ensuing obligations apply, in principle, to the entire field of public procurement in the European Union. However, its reach is not unlimited in that its development has, naturally, gone hand in hand with the development of limitations and exceptions, both general and specific. Where the Public Procurement Directives set out a detailed regime for a particular case, the principle of prior application of secondary legislation precludes the application of the treaty-based principle of transparency. Directive 14/2008, however, has in itself a limited scope of application.

A first limitation, which we have called "horizontal", regards matters excluded *in toto* from the scope of the Public Sector Directive, such as public service concessions,[35] whereas public work concessions are subject to limited rules.[36] This type of contract establishes a peculiar relationship between the contracting authority and the economic operator, as the second assumes the economic risk inherent in the service in consideration only of *the right to exploit the service or [of] this right together with payment*. Service concessions have been regarded by some Member States as a legal relationship quite apart from "usual" public procurement, so much so that the Public Sector Directive

[34] Examples are the duty of full and prior disclosure of the criteria for the selection of the economically most advantageous offer in Case C-532/06 *Lianakis* [2008] ECR I-251, the in-house exception in Case C-458/03 *Parking Brixen* [2005] ECR I-8585, or the possibility for a public authority to exclude abnormally low tenders from the procedure in *Wall AG*. For a more detailed discussion see Part 2 below.

[35] Article 17 *juncto* 1(4) of Directive 2004/18/EC.

[36] Article 56 - 61 of Directive 2004/18/EC.

acknowledges the difference.[37] However, service concession contracts, due to their long duration and potentially high profitability, might easily affect cross-border trade, as European economic actors other than the concession holder might be interested in competing for the concession.[38]

Secondly, the Directive is "vertically" limited, i.e. its detailed rules do not apply to contracts falling below its threshold. By way of a third limitation, the application of the detailed procedural rules is excluded for certain non-priority services listed in Annex IIB.[39] Whether this is an exception in or a limitation of the Directive will be discussed below. It is however worth mentioning at this stage that both categories of contracts do not differ in nature from those subject to the full regime, save for their presumed lack of cross-border interest.[40]

In addition to this limitation of the application of the principle of transparency, case law and scholarly writing[41] suggest that certain special circumstances may constitute general limitations to the obligation of transparency. We will now turn, firstly, to an analysis of these general limitations and, secondly, discuss whether and how the specific exceptions contained in the Directive apply, *mutatis mutandis*, to procedures subject to the rules under the Treaty.

3.1. Objective Circumstances

[37] S. Arrowsmith, 'The Public Sector Directive 2004/18: Scope of Coverage, in S. Arrowsmith (edt), EU Public Procurement: an Introduction', EU Asia Inter University Network for Teaching and Research in Public Procurement Regulation, Nottingham University, 112, http://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/eupublicprocurementlawintroduction.pdf (last visited 30 May 2012).

[38] Ibid.

[39] A procedure for the award of a contract regarding non-priority services listed in Annex IIB is covered, pursuant to Article 21 of Directive 2004/18/EC, only by the provisions in Articles 23 and 35(4), i.e. the rules regarding technical specifications and notification of award. Procedures for Annex IIB services are, therefore, excluded to a very large extent from the detailed rules of the Directive, and to that extent subject to the treaty-based principle of transparency. A different interpretation would not be compatible with the principle of priority of application of secondary law.

[40] S. Arrowsmith, 'The TFEU Rules', in S. Arrowsmith (edt), 'EU Public Procurement: an Introduction', EU Asia Inter University Network for Teaching and Research in Public Procurement Regulation, Nottingham University, 81, http://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/eupublicprocurementlawintroduction.pdf (last visited 30 May 2012).

[41] See, for instance, Brown, A., 'Seeing Through Transparency: The Requirement to Advertise Public Contracts and Concessions under the EC Treaty', *PPLR* (2007) 1, 1-21.

The starting-point of our analysis must be that the principle of transparency, derived as it is from the Treaty, cannot enjoy broader a scope of application than the Treaty itself. The absence of a cross-border interest in a public service contract will, therefore, preclude the application of the principle. In this context, the Court of Justice has developed a number of criteria over the years which have gone towards mitigating the uncertainty created by its statements in *Telaustria*. In essence, two factors must be taken into account in order to determine whether the award of a contract is subject to the application of the principle of transparency: the modesty of the pecuniary value of the contract or concession on one hand, the proximity to national borders on the other.[42]

Advocate General Stix-Hackl, in her Opinion in *CoNaMe*, considered that "[t]he estimated value of the contract awarded is an essential criterion"[43] in determining whether or not the principle of transparency is applicable to the award of a particular contract, and that further elements to be taken into consideration are the subject-matter of the contract, i.e. whether it falls squarely outside the scope of the Directive of whether it is subject to the "lighter regime" for Annex IIB services, as well as the complexity of the contract.[44] In its judgment in that Case, the Court conceded that 'because of special circumstances, such as a very modest interest at stake, it could reasonably be maintained that [the cross-border effects would be …] too uncertain and indirect' for the principle of transparency to apply.[45] The point was subsequently refined by the Court[46] when it stated that, in order to prove a breach, it must be established that 'the contract was of certain interest to an undertaking located in a different Member State'.[47] This is even more true for public service concessions which, in spite of being excluded from the scope of the Directive, may nevertheless be of

[42]These are the two general criteria. It goes without saying, however, that an analysis of the circumstances of each case is necessary in order to determine whether a contract is relevant to the internal market. The 2006 Commission Communication reads, at point 1.3: "[The Commission] will assess the Internal Market relevance of the contract in question in the light of the individual circumstances of each case. Infringement proceedings [...] will be opened only in cases where this appears appropriate in view of the gravity of the infringement and its impact on the Internal Market."

[43]Case C-231/03 *CoNaMe*, Opinion of AG, at para. 7.

[44]The latter two criteria will be examined below, at 2.5.

[45]Case C-231/03 *CoNaMe*, para. 20.

[46] Case C-507/03 *Commission v. Ireland.*

[47]Case C-507/03 *Commission v. Ireland*, para. 32; reiterated in Case C-91/08 *Wall AG*, para. 34.

significant value.[48] In this regard, the threshold in the Directive may serve as a guideline, even though it does not create an automatic presumption of irrelevance to the internal market.[49]

The second criterion developed in case law as a means of assessing the existence of 'a certain cross-border interest' is the geographic proximity to a border. It stands to reason that, the closer to a national frontier a contract is to be carried out, the more likely it is that an undertaking from another Member State may be interested in that contract.[50]

In summing up, it can be said that, as far as the two criteria of value and border proximity for the determination of the scope of application of the principle of transparency are concerned, the necessity of carrying out a case-to-case appreciation of the factual situation creates an inevitable degree of uncertainty. Beyond that, the criterion of border proximity can even be said to create a geographically varied and potentially very complex scope of application.

The subtlety and difficulty of establishing a cross-border interest for public procurement contracts under the Treaty can be thus contrasted with the clearer all-or-nothing approach of the Directive for major procurement contracts, where the cross-border interested is presumed *iuris et de iure*.[51]

3.2. In-House Awards and Absence of An Independent Contractor

In-house awards are, in principle, excluded from European public procurement rules. This constitutes no great novelty, as the rules contained in Directive 18/2004 are 'applicable where a contracting authority, such as a local authority, plans to conclude in writing, with an entity which is formally distinct from it and independent of it in regard to decision-making, a contract for pecuniary

[48] Opinion of A.-G. Sharpston in C-195/04 *Commission v. Finland* [2007] ECR I-3351, para. 93.

[49] See Joint Cases C-147/06 & C-148/06 *SECAP* [2008] ECR I-3565, para. 21.

[50] Joint Cases C-147/06 & C-148/06 *SECAP*, para. 31. This conclusion is supported by the English Court of Appeals' judgment in *R. (Chandler) v Secretary of State for Children, Schools and Families*, UK Court of Appeals [2009] EWCA Civ 1011 (09 October 2009).

[51] S. Arrowsmith, 'Introduction to the EU', in S. Arrowsmith (edt), 'EU Public Procurement: an Introduction', EU Asia Inter University Network for Teaching and Research in Public Procurement Regulation, Nottingham University, 27, http://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/eupublicprocurementlawintroduction.pdf (last visited 30 May 2012).

interest'.[52] In the case of in-house awards, the entity is either not distinct or, more often, not independent. In *Teckal*[53] the Court has, however, specified two criteria for determining what constitutes an in-house award: firstly, the public authority must exercise over the entity to which a contract is awarded a level of control similar to that it exercises over its own departments and, secondly, that entity must carry out the 'essential part of its activities' with the controlling authority.[54]

The issue was central in *Parking Brixen*, regarding the award of a public service contract to an entity controlled by the Contracting Authority, in which the Court stated that '[t]he [above] considerations developed [under the Directive] do not apply automatically' to the application of the principle of transparency. 'Nevertheless, it must be held that those considerations may be transposed' to the application of the rules under the Treaty.[55] For all practical purposes, therefore, the *Teckal* criteria apply outside the Directive also.

4. Exceptions to the Application of the Treaty-Based Principle of Transparency

The application of the principle of transparency and of the obligations it entails are, as we have seen, limited in their scope of application and also, as we shall see, subject to certain exceptions. It will come as no surprise to the discerning reader that a first set of exceptions is provided by the justifications contained in the Treaties and developed in case law. A second set of exceptions, on the other hand is laid out in the Public Sector Directive, and applies also to contracts not or not fully subject to that regime, namely sub-threshold and non-priority service contracts. This has, inevitably, caused problems of overlapping between the rules under primary and under secondary law.

4.1. General Limitations: Justifications

The first relevant treaty-based exception to the application of the principle of

[52] Case C-458/03 *Parking Brixen*, para. 57.
[53] Case C-107/98 *Teckal.*
[54] Case C-107/98 *Teckal* para. 50-51.
[55] Case C-458/03 *Parking Brixen*, para. 60-6.

transparency to public service contracts not covered by the Directive concerns defence and national security *ex* Article 346 TFEU. We will deal with this exception below, in that it is mirrored in the Directive.[56]

A second, broader set of exceptions comprise the exercise of public authority[57] and the protection public policy, public security or public health,[58] as well as measures taken pursuant to overriding reasons in the public interest.[59] Measures restrictive of Treaty freedoms must, in order to be justified, be taken for reasons of overriding public interest, be conductive to the objective pursued and not go beyond what is necessary to reach that objective.

This was recognised by the Court in a line of cases[60] regarding the award of public service concessions for betting activities and games of chance. In those cases, the court has consistently held that a complete failure to publicise the intention of awarding such contracts constitutes a breach of obligations under the Treaty, since a complete lack of publicity necessarily goes beyond what is necessary for the attainment of the objective of the measure.

4.2. Limitations Contained in the Directive: Tension Between Primary and Secondary Law

As regards specific exceptions to the application of the principle of transparency to public service contracts contained in Directive 2004/18, the first problem is whether the exclusion of priority services – i.e. those listed in Annex IIB – must be seen as an exception in the Directive, and as such extended to other kinds contracts such as sub-threshold contracts and public service concessions, or whether Annex IIB services are excluded from the scope of application of that instrument. In the latter case, the principle of transparency would apply to such services. In the former, the principle of priority of application of secondary law would preclude application of the principle of transparency, since an exception in the Directive would thus be rendered nugatory. The second problem is whether

[56] See below, at 2.5.
[57] See for instance Case C-160/08 *Commission v. Germany.*
[58] Artt. 51 and 52 TFEU.
[59] Case C-203/08 *Sporting Exchange*, [2010] ECR I-4695, para. 25; C-42/07 *Liga Portuguesa*, [2009] ECR I-7633, para. 55.
[60] Case C-260/04 *Commission v. Italy*; C-42/07 *Liga Portuguesa*; Case C-232/08 *Sporting Exchange.*

the exceptions contained in the Directive are applicable to sub-threshold contracts. Finally, it must be determined what the substantive contact of the Directive-based exceptions is and what it entails.

4.2.1. Application of Directive Exceptions to Sub-threshold and Non-Priority- Services Contracts

As regards the services listed in Annex IIB, it is the opinion of the authors that the application of a "light regime" to non-priority services is not a *de plano* exception, but a limitation in the scope of the Directive. This reading, which the Court has followed on a number of occasions, is confirmed by the fact that the exception for non-priority services seems based, rather than on objective criteria, on a decision which is political in nature. In two Cases,[61] the Advocates-General discussed and favoured the application of the obligation of transparency to such services,[62] and the Court ultimately agreed. Such an interpretation is, in the opinion of the authors, justified in that it is compatible with the structural nature of the European public procurement regime. That regime contains a number of detailed rules in the Directive and spells out, where those rules do not apply or apply *only to a limited extent*, such as in the case of non-priority services, a minimum set of transparency requirements. To put it differently, Annex IIB services are subject to the principle of transparency only *in so far as they are not regulated* by the Directive itself, i.e. in all but technical specifications and award notification.

As regards the application of the principle of transparency to threshold contracts, on the other hand, it will be recalled that many of the cases cited in this paper stem from Commission actions for breach of obligations, often for contracts falling below the threshold. In those cases the Commission was, on the whole, successful in establishing that the obligations under the treaties deriving

[61]Case C-507/03 *Commission v. Ireland*, at para. 52-55, 65 and 68 and C-532/03 *Commission v. Ireland*. The Court dismissed both actions, agreeing however with the analysis of the A.-G.s in so far as the application of the principle of transparency to Part B contracts and the issue of exceptions went.

[62] However, voices to the contrary were, at least at the time, all but uncommon, arguing that such services form an exception rather than a limitation, and that it would be inappropriate to create, by means of judiciary interpretation, rules where the legislator intended that there should be none. Adrian Brown, 'Seeing Through Transparency: The Requirement to Advertise Public Contracts and Concessions under the EC Treaty', 2007 *PPLR* 1, 1-21.

from the principle of transparency had, indeed, been breached. The problem, however, is conceptual: once it is accepted that contracts whose pecuniary value falls below the threshold provided for in European public procurement legislation have to be awarded in a transparent manner, can the exception provisions of the Directive be applied to such awards? As Advocate-General Jakobs put it in his Opinion in Case C-525/03 *Commission v. Italy*, 'the principles which flow from the Treaty cannot impose a requirement of publicity which has to be satisfied even when the Directives expressly provide for a derogation, or that derogation would be nugatory. [...] Where circumstances would normally justify recourse to a negotiated procedure, it would be absurd for that justification to be lost where the value of the contract falls below the threshold laid down in the Directive'.[63]

More light was shed on the relationship between the principle of transparency and the exceptions specifically provided for by the Directive by the Court of Justice in *CoNaMe*, where it stated that 'for the purpose of [...] attributing a particular award to a particular [...] set of rules, specific circumstances, such as the existence of exclusive rights or urgency, could be taken into account, just as they are in the Directives. Some awards which fall within the scope of the fundamental freedoms could in that way be exempted in full from the obligation to publish a contract notice.'[64]

In summa, where the Directive provides for an exception which is not a mere limitation of its scope, but a derogation from its substantive rules, that derogation must apply to non-priority service and threshold contracts also.[65]

4.2.2. Specific Exceptions in the Directive

The Directive contains a number of exceptions to the application of its detailed procedural regime, linked to the special nature or particular circumstances of a contract.

The first such exception is for the complexity of the awarded contract. Were the procedural rules of the Directive apply, such contracts, subject to the competitive dialogue procedure, would merely fall under an obligation to

[63] At para. 47-48.
[64] At para. 79.
[65] This is confirmed also in Case C-507/03 *Commission v. Ireland.*

advertise the contract notice. However, if a literal reading were given to Advocate-General Trstenjak's analysis in C-160/08 *Commission v. Germany*,[66] the obligation of transparency should be taken to apply to the remaining phases of the award procedure. This, however, would render the exception for complexity largely nugatory. It therefore seems reasonable to state that transparency does not apply to contracts which are or would be exempted from the application of certain rules of the Directive on grounds of complexity. *Mutatis mutandis*, the same can be said for cases of extreme urgency.[67]

A second exception, as Advocate-General Shaprston put it in *CoNaMe*[68] applies in 'certain special circumstances, such as [...] exclusive rights'. This is in line with Article 3 of Directive 2004/18 and stands to reason, both in light of the principles of necessity and proportionality and in light of the nature of such rights.[69]

Thirdly, certain public contracts falling under the rules contained in the Treaty are perforce exempted from the application of the principle of transparency.[70] Firstly, Article 10 of the Directive states that its rules apply subject to Article 346 TFEU, which excludes procurement of military equipment altogether. Secondly, Article 14 of the Directive provides for certain more general exceptions for contracts affected by considerations of national security, such as secret contracts, contracts the performance of which must be accompanied by special security measures and when the protection of special security interests requires exclusion from the rules in the Directive.[71] The same

[66] At para. 105: "a national rule whereby a Member State discharges its obligations under secondary legislation cannot be characterised as a breach of a fundamental freedom. It would call into question the validity of secondary legislation if an authorisation under primary law could be played off against a prohibition under secondary law, or a requirement under secondary law against a prohibition under primary law." to this effect see also: Case C-322/01 *Deutscher Apothekerverband*, [2003] ECR I-14887, at para. 52 & seq.

[67] This is supported by the Opinion of A.-G. Sharpston in Case C-231/03 *CoNaMe*, para. 18-20.

[68] At para. 18-20.

[69] See for instance Peter Dethlefsen, 'Public Services in the EU – Between State Aid and Public Procurement Rules', 2007 *PPLR* 3, 53-64.

[70] Sue Arrowsmith (Ed.), 'EU Public Procurement Law – An Introduction', EU Asia Inter University Network for Teaching and Research in Public Procurement Regulation, 2010, http://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/eupublicprocurementlawintroduction.pdf (last visited 30 May 2012).

[71] In Case C-324/93 *R. (Evans) v Secretary of State for Home Department*, [1995] ECR I-563, the Court indicated that these exclusions do not apply to the procurement of medicinal drugs, as this would not satisfy proportionality, in that a less restrictive measure was viable. Idem in Case C-252/01 *Commission v. Belgium*, [2003] ECR I-11859. Certain aspects now fall under the new Defence Procurement Directive 2009/81/EC, particularly for cases to which art. 346 TFEU does

can be said about certain international contracts contemplated in Article 15, which are covered by special procedural rules for joint projects with certain non-member states, for certain international bodies such as the United Nations and those made pursuant to international agreements for the deployment of troops.

Further specific exceptions are contracts for the provision of certain services such as arbitration or conciliation services and linked financial services (Article 16), or, to a certain extent, contracts linked with the design and construction of buildings for subsidised housing schemes (Article 34), as well as utilities contracts (Article 12), which fall under the specific regime of Directive 2004/1772.[72]

In light of the nature and scope of the treaty-based principle of transparency and the obligations it entails, therefore, a certain tension is inevitable between the exceptions in and the limitations of the Directive, and the principle itself. However, that tension – which was, at the outset, rather more noticeable – seems to have been subsiding as the Court refined its approach, however slowly.[73] Originally, as can be inferred *exempli gratia* from the Opinion of Advocate-General Sharpston in Commission v. *Finland*, many an expert was not convinced of the appropriateness of an overextension of the principle of transparency. It was felt that it would fatally collide with the Directive on one hand, and end up prying too deeply into the conduct of small affairs by contracting authorities on the other.

If an appropriate balance between the two regimes is to be found, it is not merely proper but vital that certain exceptions provided for in the Directive should not be disregarded for the mere fact that a contract does not reach the relevant threshold (all the more so since it is, as far as transparency is concerned, a mere "guideline") or that it is excluded, by compromise or accident, from its detailed procedural rules (service concessions and non-priority services). A certain degree of convergence between the two sets of rules, under primary and under secondary law, has, on the whole, managed to smoothen out most

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not apply.

[72] Directive 2004/17/EC of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.

[73] Adrian Brown, 'EU Primary Law Requirements in Practice: Advertising Procedures and Remedies for Public Contracts Outside the Scope of the Procurement Directives', *PPLR* (2010) 5, 169-181.

creases.[74]

5. Breaches of Transparency in Procedures Under the Treaty

Where the principle of transparency governs a public procurement procedure, subject to the limitations and exceptions mentioned above, its practical significance rests on the remedies for an unjustified breach of the obligations that principle entails.

It is worth mentioning that the Remedies Directives[75] provide a harmonised regime for the enforcement, at the national level, of contracts subject to (fully or partially) harmonised rules. Procedures related to non-priority services listed in Annex II B are therefore partially included, while public service concessions and contracts below the thresholds are left out.[76] Clearly, EU law does not provide for a harmonised set of remedies for breaches of EU law in public contract award procedures under the Treaty.

Indeed, the principle of *national and remedial autonomy* leaves the substantive regulation of Treaty-governed public procurement procedures to the Member States, which are in principle free to legislate as they please, provided that, in so doing, the principles of *equivalence* and of *effectiveness* are respected,[77] as established in a consistent line of cases.[78] The principle of national and remedial autonomy is also part of the Remedies Directive regime.[79]

The *principle of equivalence* posits that the remedies provided for the breach of EU law, including general principles such as that of transparency in public procurement, must be not less favourable than national remedies for similar domestic claims. The *principle of effectiveness*, on the other hand, requires that the conditions for any such remedy must not make it virtually

[74]Ibid.
[75]Art. 1 (1) Directive 89/665/EEC and Art. 1 (1), as amended by art. 1 Dir. 2007/66/EC.
[76]A. Brown, 'EU primary law requirements in practice: advertising, procedures and remedies for public contracts outside the procurement directives', *PPLR* (2010) 5, 178.
[77]S. Treumer, 'Remedies and Enforcement', in S. Arrowsmith (edt), 'EU Public Procurement: an Introduction', EU Asia Inter University Network for Teaching and Research in Public Procurement Regulation, Nottingham University, 293, http://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/eupublicprocurementlawintroduction.pdf (last visited 30 May 2012).
[78]Cases C-46/93 and C-48/93, *Brasserie du Pêcheur*, [1996] ECR I-1029, para. 83.
[79]Art. 2(2) Dir. 89/665/EEC and Dir. 92/13, as amended by Dir. 2007/66/EC.

impossible or excessively difficult to obtain reparation.[80] An analysis of the current *acquis*, however, indicates the existence of a further set of rules regarding national enforcement of transparency obligations in procedures under the Treaty. In essence, courts must be able to review the *impartiality* of such procedures[81] and individuals are entitled to *effective judicial protection* of the rights derived from EU law,[82] in particular when a decision adversely affects a person having or having had an interest in obtaining the contract.[83] These key elements of EU case-law were restated by the Commission in its momentous 2006 Communication.[84]

In this context, it is essential to bear in mind that the Commission supervises upon Member States' compliance with the above-stated principles and rules and it can initiate infringement procedures under Articles 258 and 260 TFEU. Ultimately, however, the impact of the EU rules in the context of procedures subject to the Treaty depends on the actual extent of protection granted to individuals by domestic law.

5.1. Access to justice and judicial remedies

The vigour of EU primary law is strongly dependent on access to justice. Due to principle of national and remedial autonomy, individuals are confronted with wide differences among the various Member States. In this respect, a brief comparative analysis of English and Spanish law is telling.

The English legal system provides two different ways of access to justice to individuals claiming an interest in a unlawful procedure in the case of an alleged breach of the obligation transparency. The first is the *right to judicial review*,[85] granted to economic operators with respect to contracts not excluded by the Public Contracts Regulation (for instance, public service concessions,

[80] A. Brown, 'EU primary law requirements in practice: advertising, procedures and remedies for public contracts outside the procurement directives', *PPLR* (2010) 5, 179.
[81] Case C-324/98, *Telaustria*, para. 62.
[82] Case C-50/00, *Unión de Pequeños Agricultores*, [2002] ECR I-6677, para. 39.
[83] Case C-222/86, *Heylens*, [1987] ECR 4097, para. 15.
[84] Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (2006/C 179/02), point 2.3.1-2.
[85] Sec. 47 (6) Public Contracts Regulations 2006 (UK).

contracts below thresholds, Annex II B Services).[86] This right has been extended by the Court of Appeal to economic operators involved in public procurement proceedings under the Treaty.

In addition, in *R. (Chandler) v. Secretary of State for Children*, the Court of Appeal reasoned that, if a statutory right of action is not provided to individuals who are affected by the procurement regime without being economic operators under the Public Contracts Regulation 2006, then, in case of breaches of the principle of transparency as enshrined in EU law, it is necessary to recognize to such right to any such individual.

In short, the individual needs to inform the contracting authority of the breach or alleged breach of an obligation of transparency (or of any other Treaty-based obligation), as well of the intention to file a lawsuit.[87] The lawsuit must then be filed before the High Court within three months from the date of the alleged breach, save for the discretionary power of the High Court to extend that period for good reasons.[88] Subsequently, the Court can grant an interim order for the suspension of an awarding procedure in breach (in our case) of the principle of transparency.[89] If the breach is proved, the High Court can either order the decision to be set aside or the contract to be amended, or award damages to the individual for any loss or damage consequential to the breach, or both.[90]

The second path open to individuals is to file an action in tort for breach of statutory duties on the part of the contracting authority. In this context, a breach of the Treaty-based obligation of transparency amounts to a breach of the State's statutory duty to live up with EU law under the European Communities Act 1972.[91] The limitation period for this tort is of six years.[92]

In Spanish Law[93], on the other hand, the remedial and procedural regime is fragmented along the lines of the three different public contract awarding regimes: contracts of minor importance, contracts above Directive threshold and

[86]Sec. 47 (1) and (2) Public Contracts Regulations 2006 (UK).
[87]Sec. 47 (7) (a) Public Contracts Regulations 2006 (UK).
[88]Sec. 47 (7) (b) Public Contracts Regulations 2006 (UK).
[89]Sec. 47 (8) (a) Public Contracts Regulations 2006 (UK).
[90]Sec. 47 (8) (b) Public Contracts Regulations 2006 (UK).
[91]A. Brown, 'EU primary law requirements in practice: advertising, procedures and remedies for public contracts outside the procurement directives', *PPLR* (2010) 5, 178.
[92]Sec. 2 Limitation Act 1980 (UK).
[93]Law on Public Sector Contracts, Royal Legislative Decree 3/2011, 14 November 2011 (ES).

contracts subject to harmonized regulation,[94] and contracts above the minor contract threshold and below the EU threshold (i.e. outside scope of Directive). Contracts falling above the Directive's threshold and regarding Annex II B services are excluded from harmonized regulation, as Spain chose to comply with the Directive by providing specific rules for the procurement of the services regulated therein.[95]

Firstly, minor contracts[96] are substantially exempted from procedural and tendering rules.[97] Secondly, the tendering and award of contracts under harmonized regulation is subject to a special regime[98] with more stringent rules on publications in the OJ, but rules substantially equivalent to the provisions contained in the Directive in all other respects. Thirdly, contracts which fall between two stools, i.e. above minor contract-thresholds and below EU thresholds, are governed by the *de facto* general domestic regime on public procurement.[99] This regime is identical to that which applies to contracts subject to harmonized regulation, save for some aspects of publicity[100] and for the judicial review and remedial regime.[101] It must be stressed, for the purposes of this paper, that the procedure applicable to such contracts is subject[102] to a number of principles derived from the case-law of the Court of Justice, *inter alia* the principle of transparency.[103]

However, the Spanish regime on judicial review and remedies contains a degree of divergence between contracts subject to harmonized regulation and Annex II B service contracts, on one side, and the others, on the other.

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[94] Art. 13 (1) Law on Public Sector Contracts, Royal Legislative Decree 3/2011, 14 November 2011 (ES). Certain contracts are expressly excluded by Art. 4, 13 (2).

[95] A. S. Graells, 'Public Procurement below thresholds in Spain', 2011, p. 9, http://www.ssrn.com/abstract=1888186 (last visited 31 May 2012).

[96] Art. 138 (3) Law on Public Sector Contracts, Royal Legislative Decree 3/2011, 14 November 2011 (ES).

[97] Art. 111 Law on Public Sector Contracts, Royal Legislative Decree 3/2011, 14 November 2011 (ES).

[98] Art. 13 – 17 Law on Public Sector Contracts, Royal Legislative Decree 3/2011, 14 November 2011 (ES).

[99] A. S. Graells, 'Public Procurement below thresholds in Spain', 2011, 4-5. Available at http://www.ssrn.com/abstract=1888186 (last visited on 31 May 2012).

[100] the Contracting Authority has a wider choice regarding the publicity tool; cf. Artt. 142-143 Law on Public Sector Contracts, Royal Legislative Decree 3/2011, 14 November 2011 (ES).

[101] Art. 37 – 39 Law on Public Sector Contracts, Royal Legislative Decree 3/2011, 14 November 2011 (ES).

[102] Art. 1 Law on Public Sector Contracts, Royal Legislative Decree 3/2011, 14 November 2011 (ES).

[103] A. S. Graells, 'Public Procurement below thresholds in Spain', 2011, p. 5, http://www.ssrn.com/abstract=1888186 (last accessed on 31 May 2012).

For one thing, harmonized and Annex IIB contracts are subject to an accelerated procedure:[104] economic operators have the EU Remedies Directives' tools at their disposal, i.e. the special review procedure[105] and the nullity of the award.[106] Spanish administrative courts are competent to adjudicate on matters of public procurement procedures and contracts; an action can be brought only after an administrative complaint before a superior authority. Individuals can seek interim relief before the administrative jurisdiction; such relief is granted at discretion of the court. The administrative court further has the power to void the contract based on a decision set aside or annulled, as well as to award damages.[107]

Secondly, other types of contracts are subject to less generous review mechanisms and remedies, as economic operators are forced to rely on the general administrative law regime. That regime is both restrictive from the point of view of *locus standi*, and lengthy. Interim measures (suspensive or not) are granted only at the discretion of the courts.[108] This can hardly be described as an effective regime, to the point where breaches of the obligation of transparency in procedures subject to the Treaty might not be as effectively protected, as required by the EU principles of effectiveness[109] and effective judicial protection.[110]

This short comparative analysis shows the conclusion that, in spite of the fact that contracts subject to the treaty-based principle of transparency are of relevance to the internal market, judicial review and remedies are still extremely fragmented. The wide divergence between national regimes is certainly a discouraging factor for suppliers potentially interested in cross-border tenders. With regards to contracts which fall squarely outside the scope of the Directive, such as public service concessions, not even a limited harmonization of remedies

[104]Ibid.
[105]Art 37-39 Law on Public Sector Contracts, Royal Legislative Decree 3/2011, 14 November 2011 (ES).
[106]Art 40-49 Law on Public Sector Contracts, Royal Legislative Decree 3/2011, 14 November 2011 (ES).
[107]Art. 2 (1) Dir. 89/665/EEC and Dir. 92/13, as amended by Dir. 2007/66/EC. Such damages are infrequently granted. cf. C. H. Bovis, *EU Public Procurement Law*, Edward Elgar, Cheltenham, 2007, 388-9.
[108] A. S. Graells, 'Public Procurement below thresholds in Spain', 2011,p. 5, http://www.ssrn.com/abstract=1888186 (last accessed 31 May 2012).
[109]Cases C-46/93 and C-48/93, *Brasserie du Pêcheur*, [1996] ECR I-1029, para. 83.
[110]Case C-50/00, *Unión de Pequeños Agricultores*, [2002] ECR I-6677, para. 39.

is in place to mitigate the deterring effect of the conditions.

Furthermore, the inconsistencies and shortcomings in domestic procedure and remedies threaten EU-wide compliance with the principle of transparency, as in the Spanish case. The alternative solution adopted by the English Court of Appeal, i.e. the extension of judicial review and remedial rules to public procurement contracts outside the scope of the Directive, appears rather more adequate.

It is currently *mare incognitum* whether these circumstances make a political case for harmonization of judicial access and remedies. Easier access to justice and more effective judicial remedies will, in practice, raise transaction costs on both side of procurement contracts. While such a choice could be justified for above-threshold annex II-B contracts and major service concessions, as transaction costs might be contained in a relatively small proportion of the contract values, those costs might deter contracting authorities from entering into small value procurement contracts or induce them to resort to in house procurement.[111]

A potential alternative to full-blown harmonization is a refinement of the Commission's 2006 Communication. Taking inspiration from the current approach to procurement advertising options laid out therein,[112] the Commission could provide some directions to Member States as to what would regard as equivalent and effective judicial protection; a safe haven from infringement actions would be established, as the Commission would bind itself to those directions via the principle of *patere legem*,[113] while domestic courts would be bound to at least take into account the content of the Communication.[114]

The advantage of this option would lie in the possibility to define broad and flexible guidelines, capable of addressing the relevant concerns. However, a creative thrust by the Commission beyond current case-law could be curbed by the European Court of Justice. The Court can disregard non-binding acts, such as a Commission's Communication, and a reference procedure would allow the Court to reshuffle the deck again.

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[111] C. H. Bovis, *EU Public Procurement Law*, Edward Elgar, Cheltenham, 2007, 388-9.
[112] 2006/C 179/ 02, point 2.1.
[113] Case 68/86, *UK v Council*, [1988] ECR 855, para. 48.
[114] Case 322/88, *Grimaldi*, [1989] ECR 4407, para. 19.

5.2. Standstill obligation

In order to ensure effective protection of the rights of unsuccessful tenderers to challenge the award for alleged breaches of EU law, in *Alcatel*[115] the ECJ construed Article 2 (1) (a) and (b) of the Remedies Directive 89/665/EEC as requiring Member States to ensure the lapse of a period of time between the notification of the award and the conclusion of the contract, so that *medio tempore* the other tenderers will be able to challenge the award.[116] As a consequence, the communication of the award decision and the conclusion of the contract cannot coincide, while the availability of a right to claim damages on grounds of unlawfulness of the public procurement procedure is clearly distinct from existence of the standstill period and bears no consequence upon it.

The requirement of a standstill period has not been expressly extended by the ECJ's case-law to procedures under the Treaty. However, the reasoning which led the legislator to provide for the standstill period in the Remedies Directives also applies to procurement procedures subject to the rules of the Treaty.

On this basis, the Northern Ireland High Court found in *Federal Security v. Chief Constable NI*[117] that, for the very reason stated by the ECJ in *Alcatel*, a standstill period has to be extended to procedures under the Treaty as well.[118]

In that case, a tender for an Annex II B service contract, exempted from transparency duties under Sec. 47 (2) Public Contract Regulation 2006, contained extremely ambiguous selection and award criteria, in breach of the principles of transparency and of equal treatment in European law.

However, the wording of Sec. 47 (9) Public Contract Regulation 2006 appeared to grant the domestic Court only a power of awarding damages to the unsuccessful tenderers for breaches of those EU principles. The Northern Irish Court found that the award of a contract in such circumstances would amount to a breach of EU law: compliance the EU principles of transparency, equal treatment and effectiveness of remedies required the use of a standstill period in

[115] Case C-81/98, *Alcatel Austria and Others*, [1999], ECR I-7671, para. 43.
[116] A. Brown, 'EU primary law requirements in practice: advertising, procedures and remedies for public contracts outside the procurement directives', *PPLR* 5 (2010), 180.
[117] *Federal Security Services Ltd v Chief Constable for the Police Service of Northern Ireland* (NICh 3) [2009] N.I.Q.B. 15.
[118] A. Brown, 'EU primary law requirements in practice: advertising, procedures and remedies for public contracts outside the procurement directives', *PPLR* (2010) 5, 181.

contracts falling outside the scope of Directive 2004/18. In light of the above-mentioned policy reasons these conclusions of the Court are largely worthy of praise.[119]

5.3. Ineffectiveness

When a public contract is awarded pending the standstill period or in breach of publicity requirements, the Public Sector Remedies Directive imposes on the Member States the duty to declare its ineffectiveness.[120]

However, the consequences on the contract so awarded are largely remitted to Member States' discretion.[121] It thus falls to domestic law to establish the consequences of an illegal award. A first option is the termination or the rescission of the contract, with retroactive effect or *pro futuro.* A second option is to provide for a mere declaration of illegality and the granting of damages.[122]

However, the second option has the effect of depriving the contract of its legal basis.[123]

In *Wall AG*, the Court of Justice established that, as regards public contracts falling outside the scope of Directive 18/2004, a breach of the obligation of transparency does '*not* require the national authorities *to terminate a contract* or the national courts to make a restraining order *in every case* of an alleged breach of that obligation in connection with the award of service concessions'.[124] The consequence of such a breach will be determined by domestic legal orders within the boundaries of the principles of effectiveness and equivalence.[125]

As regards ineffectiveness, a convergence can be inferred between procedures under the Treaty and procedures under the Directive, as in both cases the termination of a contract illegally awarded is left to the discretion of the Member States. However, this exercise of the principle of subsidiarity[126] does not shed much light on the circumstances where a public contract will be terminated,

[119] Ibid., 181-2.
[120] Art. 2d (1) Dir. 89/665/EEC.
[121] Art. 2d (2) Dir. 89/665/EEC.
[122] C. H. Bovis, *EU Public Procurement Law*, Edward Elgar, Cheltenham, 2007, 387.
[123] Ibid., 374.
[124] C-91/08 Wall AG v Frankfurt a. M. (ECR 2010 Page I-02815), para. 71; italics by the authors.
[125] A. Brown, 'EU primary law requirements in practice: advertising, procedures and remedies for public contracts outside the procurement directives', *PPLR* (2010) 5, 180.
[126] Ibid.

nor indeed does it clarify the effects of such a termination.

5.4. Critical Overview of Access to Justice and Judicial Remedies

To sum up our considerations in this part of our analysis, the normative consequences of the treaty-based principle of transparency on the law applicable to procedures under the Treaty add up to a rather patchy framework. One could go so far as to describe the present regulatory situation as sadly inadequate to the requirements of a truly common market.

Those procedures, though not subject to harmonization, are nevertheless of EU interest, especially since they can assume significant cross-border and pecuniary dimensions. The sway of the principle of national and remedial autonomy, a specification of the principle of subsidiarity, affords Member States a large measure of discretion in regulating public procurement procedures under the Treaty, potentially undermining the confidence of cross-border tenderers in their enjoyment of equal opportunities with national tenderers and in the fairness of such procurement procedures.

6. Conclusions

Given their nature and their rationale, it stands to reason that European rules on public procurement should cover, to some extent, contracts other than those specifically provided for in secondary EU law, particularly service concessions, non-priority services and sub-threshold contracts. However, the application of the obligations ensuing from the principle of transparency can be said to fall short of providing the legal certainty economic operators need, if they are to be encouraged to go beyond the national market. Indeed, there is some degree of uncertainty on when transparency applies, on what it entails and on what consequences its breach brings with it.

As regards the first aspect, the scope of application of the principle of transparency is unclear, it that it is based on the specific facts of a case and, particularly, on the value of the award and the geographic location where the contract is to be carried out. These criteria produce a gliding scale of application, so that the degree of “publicity” needed for service concessions and Annex IIB

contracts may be greater than the degree of publicity for sub-threshold contracts, even more so if there is some proximity to a border. The burden of determining the appropriate degree of publicity rests with the contracting authority, subject to judicial review. The applicability of exceptions, on the other hand, is rather better defined, both as regards exceptions under the Treaty, such as overriding reasons in the public interest, and the specific exceptions contained in the Directive. It is, however, doubtful if the latter apply to contracts excluded from the "horizontal" reach of the Directive, such as public service concessions. The argument that non-application of a Directive exception would make that exception nugatory holds true for sub-threshold and non-priority service contracts, but not for concessions which are not contemplated *at all* by the Directive.

Secondly, the substantive content of the obligation of transparency is not clear. Where there is 'a certain cross-border interest' it falls to the contracting authority to decide upon the adequate means for ensuring transparency. A complete failure to advertise – or perhaps even tender – a contract will result in a breach. In its 2006 Communication, the Commission proposed some practical options for such advertising, and public authorities are free to choose others, too. However, what degree of transparency is required – especially in subsequent stages of the procedure – must be decided on a case-to-case basis, and is subject to judicial review. This can result in considerable uncertainty and strain for tenderers.

Thirdly, it is uncertain what consequences a breach of an obligation of transparency entails, as the matter is largely left to domestic regulation within the boundaries of the principle of equivalence and effectiveness and of the principle of effective jurisdictional protection. Procedural and remedial rules display wide differences among the Member States' regimes, some of which regrettably point toward a slow and ineffective protection of the rights of unsuccessful tenderers. The current regime of public procurement under the Treaty does not explicitly provide for a standstill obligation, even in presence of factual circumstance similar to those for on which the Directive's standstill obligation is provided; again, the choice is remitted to the Member States. Further, the consequences of the illegality of an award in a procedure under a Treaty on the public contract are to be established by the Member States, as stated by the Court of Justice in *Wall AG*; the termination of the contract will ensue only in certain (unspecified) cases,

insofar as required by the principles of equivalence and effectiveness.

On the whole, however, the picture is not as bleak as might be inferred from these shortcomings of the present regime under the treaty. It is true that it would be improper for an excessively detailed regime under the Treaty to develop alongside and beyond the detailed regime of the Directive. However, it is by now settled that a competence of the EU to regulate matters of public procurement beyond the rules presently contained in the Directive exists, subject to the limitations set out in the case-law of the Court of Justice.

There are, therefore, two possible ways ahead toward a greater degree of legal certainty. The first and preferable, though politically perhaps less viable, way to ensure a degree of certainty and predictability would be the creation of a "light" regime, or a minimum set of basic transparency requirements, by way of secondary legislation. This would greatly clarify the obligations resting upon public authorities, even though the inherent and, at present, almost insuperable obstacle remains the national diversity of rules on access to justice and remedies for aggrieved tenderers. The Member States continue, in this field, to enjoy great discretion, so that some tensions are inevitable. Certain national approaches – like the one taken in the UK – are, however, more praiseworthy than others.

A more viable way, at least *medio tempore*, would be the issuing, by the Commission, of a revised Communication on contracts not or not fully subject to the rules of the Directive. The last instrument dates back to 2006 and is beginning to look rather vague and obsolete, especially since the issue of the application of transparency to, for instance, non-priority services was decided only subsequent to the publication of the 2006 Communication. The Commission might profit from the experience it has collected in, by now, well over a decade in order the clearer to state its expectations on public authorities and its perception of transparency, both in terms of scope and content. The vagueness of the Court if Justice's indications as regards those criteria regrettably leaves a route for Member States' challenges to such an instrument, so that careful consideration may be needed. It is also to be hoped that the Court might be given an opportunity to refine its case-law as regards parameters of effectiveness and equivalence in national remedial regimes, so as to give effective union-wide protection to the rights of potential and actual tenderers. This path would however contain inherent uncertainties, as the Court could disregard any

innovation introduced by the Commission.

In a word, much has been done to ensure an effective protection of the rights an opportunities of tenderers under the Treaty in public procurement procedures. Much still remains to be done, yet the importance of the issue warrants a greater degree of certainty. The process of refinement is ongoing and the future is certain to hold developments. In Longfellow's words, '[t]hough the mills of God grind slowly, yet they grind exceeding small / though with patience he stands waiting, with exactness grinds he all.'[127]

[127] Henry W. Longfellow: *Retribution* in: *Complete Poetical Works*, available at www.gutenberg.org/files/1365/1365.txt (last visited on 2 June 2012). The poem is a translation of Friedrich von Logau (1605-1655): *Sinngedichte*, Gustav Eitner (Ed.), Litherarischer Verein, Tübingen 1872.