

The principle of transparency in public procurement

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4 June 2012

State Aid and Public Procurement in the European Union

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Buzzword or legal principle?

Transparency is a buzzword for today's politicians and policy makers. While 10 years ago it was hardly used, nowadays, due to its apparent positive connotation, it has become common political lingo. There are "calls for transparency", politicians acting in "clear and transparent ways" or urging for "thorough and transparent actions", and so on. Transparency is the solution to all problems if politicians are to be believed.

However, it often remains unclear what transparency actually means, which is maybe also the reason behind the terms' popularity. Recently, transparency itself has also been criticized and doubts were cast on its positive results. For instance, making the top salaries in the (semi-)public sector in the Netherlands transparent did not have the desired outcome (which was lowering the salaries). Instead, when these salaries were made public they rose even further since no one wanted to stay behind their competitors.¹ Scholtes argues that transparency often oversimplifies issues and could even undermine other values such as trust.²

The term transparency originates from the economic literature, where, according to Michener and Bersch, Danish economist Svendsen was the first to coin the expression in 1962.³ The term has been used in association with market functioning and is closely linked to the notion of the rational agent who makes well-informed decisions based on complete information. Transparency can help to close information asymmetry gaps which are detrimental to these well-informed decisions. After its development in the economic field, transparency has also been incorporated within good governance, linking it not only to companies, but also to national and international governments.⁴

For instance, in combating corruption transparency is supposedly to make (financial) information regarding costs and benefits of corrupt behavior readily available, thereby making it more visible, risky and therefore less attractive, which in the end then results in lower corruption. Transparency can then be referred to in reference to the provision of information. For information provided to be fully or maximally transparent it needs to be complete, reliable, timely available and comprehensible.

¹ NRC Handelsblad, 'Transparantie is voor politiek een verslavende kruidendrank', 21 April 2012.

² E. Scholtes, *Transparency, Symbol of a drifting government* (Den Haag 2011).

³ G. Michener and K. Bersch, 'Conceptualizing the Quality of Transparency', *Political Concepts, Committee on Concepts and Methods Working Paper* No. 49 (2011).

⁴ E. Scholtes, *Transparency, Symbol of a drifting government*, p. 4.

The term transparency is used in many fields and different fields of application use different definitions. According to Merriam Webster's dictionary its etymological origins are the Latin words *trans* and *parere*, where *trans* stands for "on the other side, to the other side of, over, across, through; so as to change thoroughly; and above and beyond" and *parere* for "to be visible, to come forth". Scholtes ascribes seven meanings to transparency, which she calls "tales": the heart of democracy, implying a recognizable, accessible and trustworth⁵hy government; empowerment, meaning the protection of positions and the enabling of choices; in complete command, i.e. verifying whether the rules, laws and agreements are lived up to; naming and shaming, by exposing unwanted behavior but also by rewarding best practices; forcing the market to work; showing your hand, by denouncing abuses, creating trust in government; and transparency as a navigation system enabling citizens to know where to find what.

These tales are accompanied by more concrete functionalities. Concerning the internal market transparency specifically allows for the entrance of newcomers. Transparency is a means, mostly in the hands of supervisors to correct unwanted market behavior such as cartels. New markets that were formally carried out government monopolies are to be introduced by means of transparency. By doing so transparency strives to achieve opportunities for newcomers, honest policies and equal opportunities for the concerned parties.⁶

Other characteristics for transparency are according to Scholtes: government information is publicly available, government actions can be monitored, legal security, opportunities for participation, strengthening positions, representing interests, enabling choices, fostering existing markets, correcting existing markets, creating new markets, preventing conflicts of interests, providing information, clarification, making things easily navigable.⁷

It becomes clear that transparency as used in the public discourse has a very broad meaning. In this paper the topic of transparency will be discussed in relation to public procurement law. The questions will be: to what extent is transparency an independent principle within public procurement law, how is it put into operation by the European Court of Justice (ECJ) and how does this use of transparency relate to the theoretical framework of Scholtes. In order to answer these questions, this paper will have the following outline. The

⁵ Ibid.

⁶ Ibid., p.11.

⁷ Ibid., p.14.

introduction, having set the framework of Scholtes will be followed by the first chapter concerning a brief outline of a specific legal perspective on transparency. The second chapter will outline the codification of the transparency principle within European Union (EU) Law. Chapter three will illustrate the development of the transparency principle within the case law of the ECJ. Chapter four discusses the relationship of the transparency principle with other legal principles. The final chapter summarizes and concludes.

1. Transparency from a legal perspective

Within the legal literature transparency is also referred to as concerning the provision of information. However transparency becomes much broader when it is used in connection with other legal principles, as will be discussed in the fourth chapter.

According to Craig and de Búrca the notion of transparency includes “holding meetings in public, the provision of information and the right of access to documents”.⁸ Vesterdorf, former President of the European Court of First Instance, believes that transparency covers submission to “at least the four following principles: (1) the right to a statement of reasons for a decision, (2) the right to be heard before a decision is taken, (3) a party’s right of access to the file, and (4) the public’s right of access to information.”⁹ According to Advocate General (A-G) Colomer in its opinion in *Commission v Belgium* “transparency is concerned with the quality of being clear, obvious and understandable without doubt or ambiguity. The application of this principle in the field of law is something of an aspiration, as the translation of the law into everyday life is not straightforward and does not always offer clear answers”.¹⁰

Buijze states that transparency, within a public law context, always concerns the availability, accessibility and clarity of government actions.¹¹ In defining transparency scholars remain broad and somewhat vague, but as Buijze, in line with Colomer, states: a certain vagueness is inherent to legal principles.¹² While legal rules connect facts and

⁸ P. Craig and G. de Búrca, *EU Law. Text, Cases, and Materials*, (4th edition, Oxford University Press, Oxford 2008), p. 562.

⁹ B. Vesterdorf, ‘Transparency – Not just a vogue word’, 22 *Fordham Internal Law Journal* (1998-1999), p. 902 – 929.

¹⁰ Opinion of Advocate General: Opinion of Advocate General Colomer in Case C-110/03 *Commission v Belgium* [2005] ECR I-02801, para. 44.

¹¹ A.W.G. Buijze, ‘Waarom het transparantiebeginsel maar niet transparant wil worden’, 7 *Nederlands tijdschrift voor Europees recht* (2011), p. 240 – 248.

¹² *Ibid.*, p. 240.

circumstances with legal consequences, legal principles only point out interests that need to be taken into account.¹³ I-02801

2. Codification of the transparency principle within EU Law

The principle of transparency was not explicitly enshrined in the European Union (EU) treaties until the treaty of Amsterdam was signed in 2007. However, the Member States already explicitly acknowledged transparency with the signing of the Maastricht treaty in 1992 . Declaration No. 17 stated that “transparency of the decision-making process strengthens the democratic nature of the institutions and the public’s confidence in the administration” and Member States acknowledged the right of access to information.¹⁴

Article 1, paragraph one of the Treaty on European Union (TEU) states that “decisions [within the EU] are taken as openly as possible”. Article 15 of the Treaty on the Functioning of the European Union (TFEU) states that the EU’s institutions “in order to promote good governance...shall conduct their work as openly as possible”. Paragraph three of the same article states that “each institution...shall ensure that its proceedings are transparent”. Article 17 refers to transparency with respect to the EU in its relation with churches. These two articles – 15 and 17 – are the only ones where transparency is directly mentioned in the TFEU. The right of access to documents is also enshrined in article 42 of the Charter of Fundamental Rights of the European Union (CFREU).¹⁵ This right concerns access to documents of the European Parliament, Council and Commission documents. It does not concern access to documents of the institutions of the Member States, but the CFREU does apply to Member States when implementing EU law. The concerned right of access to information is worked out in further detail in Regulation 1049/2001.¹⁶

Public Sector Directive 2004/18 – concerning the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts – explicitly mentions in its second preamble that “the award of contracts concluded in Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities is subject to...the principles of the Treaty and in particular to...the principle of transparency”.¹⁷

¹³ Ibid., p. 241.

¹⁴ OJ C191/101, 1992.

¹⁵ Charter of Fundamental Rights of the European Union (2000), C364/19.

¹⁶ OJ, L145, [2001], p. 2.

¹⁷ OJ, L134, [2004], p. 114.

Subsequently, transparency is mentioned in connection with information and communication technologies. The 39th preamble mentions the “spirit of transparency” in reference to the procurement procedure which should be non-discriminatory and where information concerning the procedure should be clear. Preamble 46 again mentions the principle of transparency in the same breath with non-discrimination and equal treatment. Article 2 of the public sector directive is about the principles of awarding contracts and obliges the contracting authorities to act towards economic operators in a transparent way. Chapter VI of the Directive deals with rules on advertising and transparency and provides further detail on information procedures during a tender. The chapter deals with required notices (article 35), time limits (article 38), information requirements and requirements concerning the outcome of the tender.

3. Development of the transparency principle within ECJ

The first public procurement case which involved the transparency principle was the *Walloon Busses* case.¹⁸ The case concerned the public tendering of the purchase of busses for the Walloon regional transport company (SRWT). While at first the SRWT was more favorable towards an offer of a Flemish company, the SRWT decided to change its position after a Walloon party provided additional information after the deadline of receipt of tenders. In its judgment, the ECJ invoked the preamble of Council Directive 90/531 – regarding the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors – which stated that “a minimum level of transparency” must be ensured.¹⁹ The ECJ argued that the principle of transparency applied at all stages of the procurement process²⁰ and that information should be equally timely available²¹. It also ruled that by taking into account an amendment of only one competitor was SRWT was acting in breach of the transparency principle.²²

The *Unitron Scandinavia* case concerned the concession for the exclusive right to earmark pigs which was granted by the Danish Ministry of Agriculture. Though there was no tendering requirement, the ECJ ruled that the principle of transparency should still apply.²³

¹⁸ Case C-87/94, *Commission v Belgium (Walloon Buses)*. ECR I-02043 [1996]

¹⁹ OJ, L297/3, [1990].

²⁰ Case C-87/94, *Commission v Belgium (Walloon Buses)*, para. 54.

²¹ *Ibid.*, para. 55.

²² *Ibid.*, para. 56.

²³ Case C-275/98 *Unitron Scandinavia A/S* [1999] ECR I-8305, para. 31.

In the *Telaustria* case the ECJ further elaborated on the transparency principle.²⁴ It stated that the principle of non-discrimination implies an obligation of transparency consisting of such a degree of advertising to, firstly, enable competition on the internal market and, secondly to enable the ability to review procurement procedures.²⁵ According to Stergiou the

ECJ caused some confusion by suggesting in *Telaustria* that a procurement procedure should have place *per se*, in order to comply with the principle of transparency.²⁶

The *SIAC* case concerned a tender for sewer works to be awarded to the most competent contractor in respect of costs and technical merit. Based on a consultancy report, the contract was not awarded to the cheapest contractor (in casu *SIAC*) but to another party. The ECJ allowed this course of events but posed as a condition that “the obligation of transparency also means that the adjudicating authority must interpret the award criteria in the same way throughout the entire procedure”.²⁷

On 29 April 2004, the ECJ further elaborated on the principle of transparency in the *Succhi di Frutta* case, which concerned a tender for the supply of fruit juice as development aid for nations in the Caucasus. The tender prescribed that payments by the Commission for these supplies were to be made in apples and/or oranges. The winning tendering company, besides accepting to be paid apples and oranges, also offered to accept peaches for remuneration. The ECJ ruled that the Commission was not allowed to amend conditions of the tender, unless the contract explicitly provided for such an arrangement.²⁸ However, explicitly mentioning the possibility that out of one publicly tendered contract a second non-tendered contract could follow was rejected by the ECJ in *Commission v France*.²⁹ In *Presstext* the ECJ ruled regarding amendments to public contracts that “in order to ensure transparency of procedures and equal treatment of tenderers, amendments to the provisions of a public contract during the currency of the contract constitute a new award of a contract”.³⁰

In the *Medipac* case a Greek hospital issued an invitation to tender for the supply of surgical sutures. Although it fulfilled the tender requirements, *Medipac* was ruled out by the Greek hospital. The ECJ ruled that contracting authorities were not allowed to reject tenders that were set out conform the tender procedure, stating that the principle of equal treatment

²⁴ Case C-324/98 *Telaustria Verlags GmbH* [2000] ECR I-10745.

²⁵ *Ibid.*, para 61 and 62.

²⁶ H.M. Stergiou, ‘Het Hof van Justitie: Engelbewaarder van het transparantiebeginsel’, 3 *Nederlands tijdschrift voor Europees recht* (2011), p. 77 – 87.

²⁷ Case C-19/00 *SIAC Construction Ltd* [2001] ECR I-07725 para. 43.

²⁸ Case C-496/99 P *Commission v Italy (Succhi di Frutta)* [2004] ECR I-3801, para. 119.

²⁹ Case C-340/02 *Commission v France* [2004] ECR I-09845.

³⁰ Case C-454/06 *presstext Nachrichten GmbH* [2008] ECR I-04401, para. 34.

and the obligation of transparency “prohibit the contracting authority from rejecting a tender which satisfies the requirements of the invitation to tender on grounds which are not set out in the tender specifications and which are relied on subsequent to the submission of the tender”.³¹

The *La Cascina* judgment clearly expresses what the principle of transparency (taken together with the principle of equal treatment) means regarding the procedural conditions. The procedural conditions need to be “clearly defined in advance, require that the period be determined with absolute certainty and made public in order that the persons concerned may know exactly the procedural requirements and be sure that the same requirements apply to all candidates”.³²

Concerning the principle of transparency the ECJ substantiated its meaning in the *Succhi di Frutta*, remarking that “the principle of transparency which is its corollary [of the principle of equal treatment] is essentially intended to preclude any risk of favouritism or arbitrariness of the part of the contracting authority. It implies that all conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract”.³³ The meaning of transparency used here resembles Scholtes’ analysis. Transparency would prevent negative behavior by contracting authorities and *naming and shaming* would move the internal market into the right direction.³⁴

The ECJ further elaborated on the position it took in *Telaustria* in the *Coname* case, where an Italian municipality directly awarded a service to a company, without an invitation to tender. In its judgment, the ECJ stated that transparency requirements do not necessarily imply an obligation to hold an invitation to tender but that they do require “access to appropriate information regarding the concession” to a level that would allow all EU undertakings to express their interest.³⁵

In the *Parking Brixen* case, which was similar to the *Coname* case, the ECJ judges came to the conclusion that the obligation of transparency consists of “ensuring...a degree of

³¹ Case C-6/05 *Medipac-Kazantzidis AE* [2007] I-04557, para. 54

³² Joined Cases C-226/04 and C-228/04 *La Cascina Soc. coop. arl* ECR I-01347 [2006], para. 32.

³³ Case C-496/99 P *Commission v Italy (Succhi di Frutta)*, para. 111.

³⁴ E. Scholtes, *Transparency, Symbol of a drifting government*, p. 11.

³⁵ Case C-231/03 *Consorzio Aziende Metano (Coname)*[2005] ECR I - 7310, para. 28.

advertising sufficient to enable the service concession to be opened up to competition”.³⁶ A complete lack of competition is, according to the ECJ, in breach of the transparency principle.³⁷

It should be noted that the ECJ in the *Parking Brixen* decisions on the one hand argues that the principles of equal treatment and non-discrimination imply a duty of transparency, and on the other hand argues that transparency is a separate principle.³⁸

The *Parking Brixen* and *Coname* judgment were heavily criticized by the Council of European Municipalities and Regions (CEMR), arguing that the ECJ was acting outside democratic control and damaging local democracy in favor of the internal market.³⁹ Either way, transparency in the aforementioned cases is again interpreted as a tale of forcing the market to work.

Not only the CEMR criticized these judgments, scholars also condemned the legal uncertainty that the ECJ had created.⁴⁰ After all, the phrase “sufficient degree of advertising” is rather mystifying and does not help in clarifying whether or not procurement procedures need to be carried out. The court was also criticized for departing from the principle of internal situations, since most aforementioned cases were national cases. However, the ECJ seemed to find that the potential discrimination against undertakings of other Member States was sufficient ground to establish that there exists a cross-border situation.⁴¹

This position was downplayed in the *An Post* case, which concerned an internal situation in Ireland. Though there was no cross-border activity as such, the Commission went to the ECJ stating that the provision of the service at hand (Part B-services; payment of welfare benefits) was awarded without any advertising. In this instance, the ECJ ruled against the Commission stating that the Commission had not given any evidence of a cross-border situation.⁴² However, the ECJ later nuanced the *An Post* case in its *Wall* judgment stating that the transparency principle applies to all services that “may be of [cross-border] interest”.⁴³ The ECJ nevertheless confirmed in later cases – *Commission v Ireland*⁴⁴ and *Municipio de*

³⁶ Case C-458/03, *Parking Brixen GmbH* [2005] ECR I-08585, para. 49.

³⁷ *Ibid.*, para. 50.

³⁸ *Ibid.*, para. 49 and 50.

³⁹ CEMR, “Public procurement: CEMR slams Court of Justice’s decision as damaging for local democracy”, 19 January 2005 <http://www.ccre.org/en/communiques/view/73> (accessed 2 June 2012); CEMR, “CEMR “baffled” by Court of Justice ruling on public procurement case”, 28 July 2005 <http://www.ccre.org/en/communiques/view/106> (accessed 2 June 2012).

⁴⁰ H.M. Stergiou, 3 *Nederlands tijdschrift voor Europees recht* (2011), p. 79.

⁴¹ Case C-458/03, *Parking Brixen GmbH*, para. 55.

⁴² Case C-507/3 *Commission v Ireland (Post An)* [2007] ECR, para. 33 and 34.

⁴³ Case C-91/08 *Wall AG* [2010] ECR I-02815, para. 34.

⁴⁴ Case C-226/09 *Commission v Ireland* [2010] ECR I-11807.

*Sintra*⁴⁵ – the view that Part B-services, due to their specific nature, do not have, in principle, a cross-border interest.

The line of reasoning in the *An Post* judgment was continued by the ECJ in the *Commission v Italy* case in regard of the procurement of services that fell below the minimum threshold. Though the ECJ stated that, although these below-threshold contracts were excluded from the public procurement procedure, as stated in the Council directives, they would still have to comply with the principle of transparency provided that the service was of cross-border interest.⁴⁶ It can be concluded that concerning Part B-services and below-threshold services there is a presumption of no cross-border activity and therefore no application of the transparency principle.

The *Sporting Exchange (Betfair)* and *Engelmann* cases both concerned gambling licenses, for which public authorities are, on the grounds of the public sector directive not obliged to carry out a public procurement procedure. *Sporting Exchange (Betfair)* concerned an English company that wanted to obtain a license in order to organize gambling games, which was refused by the Dutch authorities. The ECJ ruled that, although a single license was not the same as a service concession the transparency obligation was still applicable, and seen as “a mandatory prior condition of the right of a Member State to award to an operator the exclusive right to carry on an economic activity, irrespective of the method of selecting that operator”.⁴⁷ The ECJ continued its reasoning, thereby following a different wording than in previous cases, stating that “compliance with the principle of equal treatment and with the consequent obligation of transparency necessarily means that the objective criteria enabling the Member States’ competent authorities’ discretion to be circumscribed must be *sufficiently* advertised (italics added)”.⁴⁸ Again, how to determine *sufficiently* remains unclear.

In the *Engelmann* case The ECJ repeated that, although the service concessions are not governed by public procurement procedures, “the public authorities which grant such concessions are none the less bound to comply with [the] obligation of transparency”.⁴⁹ The ECJ follows by restating that “without necessarily implying an obligation to call for tenders, that obligation of transparency, which applies when the service concession in question may be of interest to an undertaking located in a Member State other than that in which the concession is granted, requires the concession-granting authority to ensure, for the benefit of

⁴⁵ Case C-95/10 *Municipo de Sintra / Strong Segurança* [2011] ECR

⁴⁶ Case C-412/04 *Commission v Italy* [2008] ECR I-00619, para. 66.

⁴⁷ Case C-203/08 *Sporting Exchange Ltd. (Betfair)* [2010] ECR I-04695, para. 47.

⁴⁸ *Ibid.*, para. 51.

⁴⁹ Case C-64/08 *Ernst Engelmann* [2010] ECR I-08219, para. 49.

any potential tenderer, a degree of publicity sufficient to enable the service concession to be opened up to competition and the impartiality of the award procedures to be reviewed”.⁵⁰

While in the *Succhi di Frutta* case the ECJ used the phrasing “the principle of transparency”, the ECJ is not very clear in whether transparency is a principle, since it is often choosing to express transparency as an obligation that is an expression of the principle of equal treatment. Whether this difference is important, is unclear. Firstly, the ECJ uses the terms interchangeably thereby suggesting that it does not intent to make a distinction. Secondly, it is unclear what the difference is between acting according to an obligation to be transparent, or acting according to the transparency principle.

What is more important is whether the transparency principle can be seen separately from other principles, which will be addressed in a following chapter.

In its opinion on the *Sporting Exchange* case, A-G Bot gives a brief outline on the then present case law on the transparency principle. According to Bot, who does not use the term principle but obligation, transparency is “a concrete and specific expression of the principle of equal treatment, which is intended to enable undertakings to exercise effectively the rights conferred upon them by Articles 43 and 49 EC”.⁵¹ Bot continues with the assertion that in the case that public service contracts are not covered by one of the concerned directives, the Member States still need to comply with the obligation of transparency.⁵² The A-G reiterates that the obligation of transparency does not necessarily imply a call for tenders, but does require “a degree of advertising sufficient to [1] enable the public contract or service concession to be opened up to competition and [2] the impartiality of the procurement procedures to be reviewed”.⁵³

Advertising is considered “sufficient” when there is appropriate information published before the contract is awarded which would enable a potentially interest party to express its interest in the concerned concession.⁵⁴ In comparison with a definition of transparency as the complete, reliable, timely available and comprehensible availability of information, the definition used by the ECJ does not seem to suggest that transparency implies complete information, but is already satisfied with an appropriate level of information.

⁵⁰ Ibid., para. 50.

⁵¹ Opinion Advocate General:Opinion of Advocate General Bot in Case C-203/08 *Sporting Exchange* [2009] ECR I-04695, para. 135.

⁵² Ibid., para. 137.

⁵³ Ibid., para. 140.

⁵⁴ Ibid., para. 141.

A-G Bot continues by stating the two exceptions regarding the obligation of transparency. Firstly, the case where there is no cross-border interest. Secondly, when a contracting authority hands out a contract to an entity on which it exercises a control like it is a department of that authority, provided that this entity carries out most of its activities for that contracting authority.⁵⁵

Although stating it as an obligation, the A-G in its conclusion expands on the wider relevance of transparency, formulating it rather as a principle than an obligation. “Transparency, which is growing ever more important in the public life of modern societies, to the point that it is becoming one of the visible marks of democracy, appears here as the fair counterpart of the constraints which the Member States, in exercising their sovereign rights...may impose on the freedom of movement.”⁵⁶ Besides being a democratic mark, transparency as a *naming and shaming* method would constrain Member States in hindering the internal market.

4. Relation between transparency and other legal principles

While the ECJ in its judgments has not been entirely clear, calling transparency an obligation on the one hand and a principle on the other hand, the opinion in academic literature is less ambiguous.

Lennaerts, judge at the ECJ, acknowledges the ambiguous position taken in by the ECJ. Nonetheless he argues that “it can at present hardly be denied that the principle of transparency has evolved into a general principle of Community law”.⁵⁷ In 2007, Prechal and de Leeuw stated that the transparency principle was a legal principle “in gestation”, “a serious nominee”, but in many respects to premature to be recognized as a self-standing principle.⁵⁸

Stergiou appears to take the line of Lennaerts, albeit not explicitly.⁵⁹ According to Buijze, the Court of Justice has not yet made a clear distinction whether the transparency principle is a separate principle or an aspect of the principle of equality. Nonetheless, it appears to be an independent principle since it goes further than the principle of equality.⁶⁰

⁵⁵ Ibid., para. 144 and 145.

⁵⁶ Ibid., para. 170.

⁵⁷ K. Lenaerts, ‘In the Union we trust: trust-enhancing principles of Community Law’, 41 *Common Market Law Review* (2004), p. 317 – 343.

⁵⁸ S. Prechal and M. de Leeuw, ‘Dimensions of Transparency: The Building Blocks for a New Legal Principle’, *Review of European Administrative Law* (2007), p. 51 – 61.

⁵⁹ H.M. Stergiou, 3 *Nederlands tijdschrift voor Europees recht* (2011).

⁶⁰ ⁶⁰ A.W.G. Buijze, 7 *Nederlands tijdschrift voor Europees recht* (2011).

What is clear is that the transparency principle is often used in relation to other principles. Prechal and de Leeuw link transparency with three other principles: the principle of sound administration, the principle of legal certainty and, lastly, the principle of equal treatment, which is according to the authors the most clearly elaborated relationship and the relationship that is relevant with regard to public procurement.

In the *Walloon busses* case the ECJ distinguishes equal treatment and transparency as two separate principles⁶¹, but also stresses that an equal treatment reinforces transparency and that a breach of the principle of equal treatment also impairs transparency.⁶² This seems to suggest that transparency is a principle itself *and* an obligation in regards to the principle of equal treatment. The view of transparency as an obligation underlying the principle of equal treatment is confirmed for instance in the *Universale-Bau* case where the court stated that “the principle of equal treatment, which underlies the directives on procedures for the award of public contracts, implies an obligation of transparency in order to enable verification that it has been complied with”.⁶³ In the *Succhi di Frutta* case, the transparency principle is a corollary of the equal treatment principle.⁶⁴

The relationship between transparency and non-discrimination is twofold. First, a public tender procedure that is awarded in the absence of any transparency may constitute an (indirect) discrimination.⁶⁵ Secondly, the duty of transparency enables the concession-granting authorities to ensure that the principle of non-discrimination is complied with.⁶⁶ Out of this reasoning by the ECJ, that the principle of transparency precedes the principle of non-discrimination, Prechal and de Leeuw conclude that therefore the principle of transparency can be separated from the principle of non-discrimination.⁶⁷ While this reasoning may be correct, it *is* possible to separate the transparency principle and non-discrimination principle, the question should rather be *does* the ECJ separate these principles. Herein, as already stated, the ECJ remains ambiguous.

A-G Mengozzi also elaborates on the principle of transparency in *Commission v Ireland*.⁶⁸ In this case, Ireland argued that the principle of transparency in relation to public procurement is subsidiary to the principles of equal treatment and non-discrimination, and

⁶¹ Case C-87/94, *Commission v Belgium (Walloon Buses)*, para. 54.

⁶² *Ibid.*, para. 55 And 56.

⁶³ Case C-470/99 *Universale-Bau AG* [2002] ECR I-11655, para. 91.

⁶⁴ Case C-496/99 P *Commission v Italy (Succhi di Frutta)*, para. 111.

⁶⁵ Case C-231/03 *Conorzio Aziende Metano (Coname)*, para. 17.

⁶⁶ Case C-458/03, *Parking Brixen GmbH*, para. 49.

⁶⁷ S. Prechal and M. de Leeuw, *Review of European Administrative Law* (2007), p. 59.

⁶⁸ Opinion Advocate General:Opinion of Advocate General Mengozzi in Case C-226/09 *Commission v Ireland* [2010] ECR I-11807.

since Ireland complied in casu with the latter two principles the transparency principle had become irrelevant.

To this, Mengozzi argued that it is “settled case-law [that] the principle of transparency has an ancillary role compared with the principles of equal treatment and non-discrimination. However, the fact that it is ancillary does not make it subordinate.”⁶⁹ On the contrary, argues Mengozzi, “the duty of transparency is ancillary in the sense that *its observance makes it possible to ascertain whether the other two ‘main’ obligations have been complied with*. If the authority fails to act transparently, it becomes difficult, if not impossible, to ascertain whether or not it may have failed to fulfil (sic) the requirements of equal treatment and non-discrimination”(italics in original text).⁷⁰

5. Conclusion

In awarding public procurement contracts the principle of transparency applies, regardless of whether the contract in question is covered by a procurement directive. There are two exceptions to this general principle, namely: contracts to which there is no cross-border interest and contracts awarded to entities that are controlled by and solely operating for the contracting authority.

While the ECJ also follows the inherent positive connotation of transparency, for instance in the *Succhi de Frutta case*, it refrains from expanding all to largely on the topic constraining it to the availability of information. A-G Bot in its opinion on *Sporting Exchange* goes furthest by making transparency a mark of democracy and a counterbalance to the powers of the Member States. Criticism by the CEMR on the ECJ’s decisions are rather critiques on the logic of the internal market and is less related to the application of the transparency principle.

Moreover, it has not become clear whether the ECJ concerns transparency to be a principle or an obligation. Considering that it uses the terms interchangeably, this confusion might only be one of semantics. However, it appears that the ECJ does not (yet) use transparency as an independent principle, but in relation with the principle of equal treatment.

Concretely, the principle of transparency obliges contracting authorities to use a sufficient degree of advertizing so as to enable interested parties to express their interest. However, this is not an obligation to tender. Tender procedures should be clearly defined in

⁶⁹ Ibid., para. 33.

⁷⁰ Ibid., para. 35.

advance, precise, unequivocal and provided with absolute certainty regarding timing constraints. As a result all interested parties know the requirements and these requirements apply equally to all. While transparency has a tendency to *buzz*, the use by the ECJ, by narrowing it down to the availability of information and using it in reference to the principle of equal treatment has thusfar avoided this pitfall.