THE PRINCIPLE OF TRANSPARENCY IN EU LAW

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THE PRINCIPLE OF TRANSPARENCY IN EU LAW

Het transparantiebeginsel in het recht van de Europese Unie
(met een samenvatting in het Nederlands)

Proefschrift

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te Leiden

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PREFACE

For the past four years, I have been working, living, and breathing transparency. It was, overall, a quite pleasant experience, made more so by the unwavering support of my supervisors, the pleasant atmosphere created by my colleagues at the Institute for Constitutional and Administrative law, and the willingness of others interested in transparency to listen to my ideas, and to enlighten me with their own. Rob, Henk, thank you for your mentorship, and for generously lending me your brains. HK, I couldn't wish for a better travel companion in the fourth spatial dimension.

Of course, writing this thesis has also turned me into a frothing monomaniac and a social recluse. Thank you, family and friends, for putting up with that. Dirk, Guido, Colinda, I'm glad you're still here. Jan Jaap, Hestia, Govert, Sanne: may there be many more interventions. Remko, Thijs, Nico, Tom: de samenleving could not exist without you, nor I without it. Dad, you may not have been able to write my book for me, but you and mom gave me all the tools I needed to write it myself. This book is for you.

CONTENTS

CHAPTER 1. INTRODUCTION

1.1 Introduction

From the enactment of the first public access to information Act in 18th century Sweden to the upheaval surrounding Julian Assange's WikiLeaks, and from the discussion on classified EU documents to the opening up of the market for internet gambling: transparency is, has been, and remains a topic of interest. It is the subject of intense public debate in international forums as well as in the EU and on the national level.

On the one hand, its importance as a policy principle has been growing, as its various beneficial effects are being celebrated worldwide.[1] Countless laws granting public access to information have been enacted.[2] NGOs fight for transparency. Some employ fairly conservative tactics like education and lobbying, others take a more hands-on approach either by making available information more accessible like Wobbing Europe, or by publishing as much information as they can, no matter what, like WikiLeaks. Meanwhile, international organisations push transparency reforms in their member states,[3] and, more recently, in their own organisational structures.[4]

Advocates of transparency celebrate it for its role in realising democracy, equality, economic development, improvements in education, poverty relief, and a decline in corruption.[5] It is thought to improve the legitimacy of public institutions' decisions, as well as the faith the public has in them. This excellent reputation is not entirely undeserved. Empirical research supports the claim that transparency has positive effects, suggesting a correlation between transparency and, for example, low inflation rates[6] and a decreased occurrence of famine.[7] Transparency is not just valued for its positive effects, though. It is also argued to be a right, valuable in itself,[8] and justified by the fact that the government is there to benefit the people, and that it cannot hide information from them that it has collected on their behalf.[9]

At the same time, transparency has powerful enemies. Roberts indicates there has been a decline in transparency in the US since the beginning of this century.[10] The debate about transparency in the EU continues with gusto, with the Commission and the

[1] Banisar 2006; Roberts 2006.
[2] Banisar 2006, p. 16.
[3] Wouters & Ryngaert 2005; Woods 2000.
[4] Wouters & Ryngaert 2005; Addink 2008, p. 21 on transparency in the WTO, Woods 2001 on the IMF and the World Bank.
[5] Bansiar 2006, p. 6-8; Heald 2006a.
[6] Chortareas et al. 2001.
[7] Besley & Burgess 2002, see also Burchi 2001.
[8] Curtin 2000; Birkinshaw 2006a, 2006b; Pedersen 2005; Stiglitz 1999; Addink 2008.
[9] The argument is presented in different ways by different authors. See e.g. Birkinshaw 2006b; Stiglitz 1999.
[10] Roberts 2006, p. 36.

Council fighting to protect their secrets, and the parliament fulfilling an ambiguous role representing the people yet claiming privileged access for its own members.[11]

Either way, the debate about transparency is here to stay. The concept has not only become topical in the public debate, but also in a number of scholarly disciplines, law being only one of them. In the past decades, our understanding of transparency, how it functions, and how it can benefit us, has much increased. Rational choice theory, information economics, public management theory and the doctrine of good governance all indicate that transparency has important value. Some of these theories will be discussed at length in chapters 2 and 4.[12] For now, a short introduction will suffice.

Rational choice is a theory for understanding and modelling social and economic behaviour. It predicts that people rationally choose the best means available to achieve their ends.[13] Because people may not know in advance what course of action has the highest chance of success, rational choice theory is subjective: people do not necessarily take the course of action that will achieve success, but the course of action that they determine has the best chance of success. They must determine what this course of action is, but in this determination they are limited by the resources that are available to them.[14] The most important resource constraint is a lack of information, either because the information is non-existent, or because it is not available to the decision maker.[15] Under rational choice theory, better informed decisions will lead to better outcomes: the chance that the course of action that is deemed the most likely to lead to success actually does lead to success increases.

The importance of transparency is underscored by the developments in economic theory. Classic economic theory operates under a number of assumptions. One of those assumptions is that information is perfect:[16] all information is available at no cost, and the costs for processing the information are zero.[17] This assumption is of course false, but the analysts assumed that as long as real world conditions did not deviate too far from the assumption, their predictions would still be valid.[18] Unfortunately, this turned

[11] See the overview of current developments by Dahllöf 2011. In particular the developments with regard to the classification of sensitive documents are troubling to advocates of transparency. On the national level, the Dutch Wob is under pressure, with proposals to give public authorities more freedom to refuse proposals that they deem abusive.

[12] For rational choice theory, see chapter 2, paragraph 3.3.1; for information economics, chapter 4, paragraph 2.2.

[13] Although the theory is generally thought not to predict individual behaviour very well, it has gained considerable influence. See Rubin 2005, p. 1098-1099 and the literature mentioned there for objections against rational choice, and Rubin 2005, p. 1100-1102 for an explanation of its impact.

[14] Rubin 2005, p. 1094.

[15] Rubin 2005, p. 1094.

[16] Stiglitz 2009, p. 55.

[17] A more nuanced approach would be that in markets all information is communicated through prices: they convey information about the scarcity of products, their quality, and even risks (The price of labour that is dangerous to workers would be higher than that of safe labour e.g.). See. Stiglitz 2009, p. 4.

[18] Cooter & Ulen 2004, p. 15.

out to be false: even small information imperfections could lead to significant market failures.[19] In the 1970s, a new economic discipline surfaced, that of information economics, and it became clear that transparency is very important for the proper functioning of the market.[20]

At the same time, the impact of economic theory on government has increased. Managerial reforms in government, taken to their extremes in the doctrine of New Public Management, promote an approach to government management more akin to the one used in the private sector.[21] According to Lane NPM is a form of public management policy where governments try to insert market mechanisms into their public organisations.[22] Customer service, entrepreneurship, contracting and governance became key terms in modern public management.[23] These reforms were presented as brought about by economic rationality,[24] and they would allow public institutions to function more effectively and efficiently, thus enabling them to provide better service to the public.[25]

Somewhat related to the developments in public management theory, was the emergence of good governance. This concept inhabits the border regions between governance and law, and was originally developed by international financial institutions. The principles of good governance were to foster economic growth in developing countries, and were a condition for receiving financial aid. They were soon embraced outside of this original context though, and legal thought about good governance soon centred on the more general question about the role that the law can fulfil in realising qualitatively outstanding governance. The focus on development was abandoned, but the idea that governance was a means to an end remained. This meant that compared to traditional legal scholars, good governance adepts paid more attention to issues of effectiveness. The instrumental function of the law gained importance, and the protection of the individual against an all-powerful government – although still important – had to surrender some of its importance to ensuring the realisation of democratically legitimised policy goals. In the literature on good governance, transparency is considered as an important condition for high quality governance,[26] although the implementation must meet certain standards if it is to produce the desired results.[27] In other words: transparency can have beneficial effects if implemented in the right way, but with sloppy implementation it will not do much good. Although it started out as a policy principle, individual principles of good governance are increasingly considered to be binding principles of law and are getting legal status on different levels.[28] Interestingly, the ECJ has accepted good governance as a principle of law and the Charter of Fundamental Rights contains

[19] See Stiglitz 2009a, p. 62-64 for an overview of problems faced by markets with incomplete information, and the pivotal articles by Akerlof 1970 and Spence 1973.
[20] Stiglitz 2009a, pp. 53-94.
[21] Hood 1995, p. 94.
[22] Lane 2005, p. 228.
[23] Lane 2005, p. 5.
[24] Hood 1995, p. 94.
[25] Lane 2005, p. 5.
[26] Addink 2010, p. 28; Islam 2003; Weiss and Steiner 2007; Ottow 2006, p. 211 Ala'i, 2008.
[27] Curtin & Meijer 2006; Meijer 2007; O'Neill 2006; Prat 2005; Prat 2006.
[28] Curtin & Dekker 2005; see also Hirsch Ballin 2000.

a right to good administration in article 41, which includes a number of obligations to be transparent.[29]

1.1.1 Transparency & the law

These developments have not passed the realm of law without notice, and transparency is on the rise as a legal concept. Transparency as a legal phenomenon is not altogether new. The definition of transparency is not an easy matter, and treatment of the issue is reserved to chapter 2. We can for now suffice with the observation that to be transparent, government should make information on its actions and performance available to outsiders, and should make it as easy as possible to observe what it is doing by using procedures that are clear, known, and simple. Understood in this way, the importance of transparency has long been recognised in legal systems. Hood links transparency to the concept of legal certainty, which requires laws to be knowable and stable, so that people can adjust their behaviour accordingly.[30] A certain degree of transparency is essential to ensure the rule of law. Others have linked transparency to the duty to give reasons, which again requires public authorities to inform third parties about the reasons for their policies and is therefore a fairly specific transparency obligation. Even the idea of public access to information as a necessary requirement for democracy is not new. Its introduction into Sweden, which for nearly two centuries remained the only country to have public access to information regulation, was apparently inspired by ideas of the ancient Chinese.[31] Although the law has always contained 'transparency obligations,' i.e. obligations incumbent on public authorities to be transparent towards third parties, the term transparency was not used to refer to them, nor were these transparency obligations considered as a coherent collection of legal phenomena that were derived from one common principle.[32]

However, since the 1980's, transparency has been considered with new fervour,[33] and it appears that not only its name is new.[34] There has been a boom in freedom of information legislation. As we saw above, international organisations have been promoting transparency as an aspect of good governance, turning it into a condition for receiving financial aid, and thus stimulating its acceptance as a legal norm. As a principle of good governance, transparency is gaining force in many legal systems, not only in developing countries. Explorative work is done in international economic law into the existence of a general principle of transparency.[35] Interestingly, in Europe the enthusi-

[29] For an overview of the legal developments with regard to good governance, see Addink 2005. He considers the right to access documents held by the EU institutions in article 42 of the Charter as an aspect of good governance as well.
[30] Hood 2006a, p. 5 & 14.
[31] Hood 2006a, p. 5.
[32] Hood 2006a, p. 19.
[33] Hood 2006a, p. 3
[34] Banisar 2006, p. 16; Hood 2006b, p. 211-213 for a nuanced assessment of the actual growth in transparency.
[35] Zoellner 2006.

asm for transparency has culminated in the emergence of a new general principle of EU law.

1.1.2 Transparency in the EU

The developments in the EU are characterised by the simultaneous emergence of a principle of transparency in various fields of law. The obligations derived from the principle varied from providing the widest possible access to documents held by the institutions to a prohibition to change the terms of a tender after the contract was concluded.[36] The isolated occurrences of the principle of transparency created a highly diffuse image, and for a long time it remained unclear whether they were indeed emanations of the same principle, and what the importance of this potential new principle would be.

Like elsewhere, the idea of transparency was not new, but was already implicit in much of EU law. There were transparency obligations inherent in other principles of EU law, like the duty to give reasons and the rights of defence.[37] When developing the principle of transparency, the EU institutions clearly indicated they were building on established legal concepts, and expanding them in the context of the Union.[38] Still, transparency beyond what was traditionally, and implicitly, required by law apparently met a need. When we look at the developments in EU law, we see an increase in attention for and appreciation of transparency in a variety of contexts.

The most topical development is probably the granting of the public right to access documents held by the institutions as first granted in article 255 EC, and now in article 15(1) of the TFEU and article 42 of the Charter of Fundamental Rights. Although this aspect of transparency is developed in detail in Regulation 1049/2001, it is only one aspect of a much broader development towards more transparency. This started with the adoption of Declaration 17 to the Treaty of Maastricht, in which the member states pointed out the dual character of the principle of openness, stressing that 'transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration,' and resulted in the adoption of article 1 TEU, which requires that decisions are taken as openly as possible – a very broad requirement indeed. This broad approach of transparency is also apparent in a number of Commission Communications, where improved access to information is only one of a number of measures to improve the openness of the decision-making process, with other measures being the annual publication of a working program, faster publication of Commission documents in all EU languages, and priority to the codification of EU law. In addition, the Commission takes the view that access on information does not only include public access to information, but also access to administrative files for citizens who are party to legal proceedings, and access to one's own file.[39]

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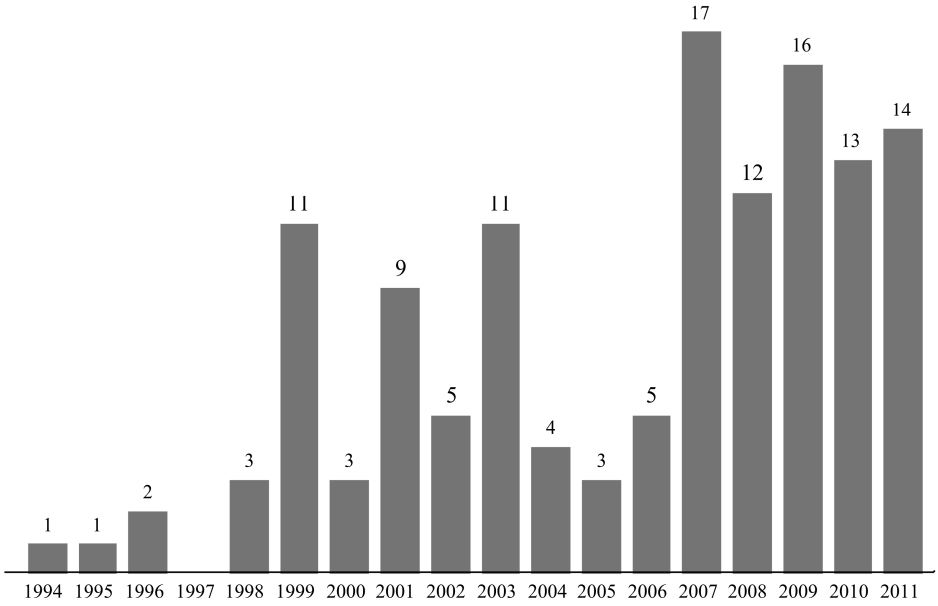
[36] Case C-496/99 P *Commission v. CAS Succhi di Frutta SpA* [2004] ECR I-3801.
[37] Vesterdorf 1998, p. 903, 907.
[38] Commission Communication 93/C 156/05 of 5 May 1993, OJ 1993, C156/5.
[39] Communication 93/C 156/05 of 5 May 1993, OJ 1993, C156/5 and Communication 93/C 166/04 on openness in the Community, OJ 19993, C 166/4.

In the case law of the courts, the principle of transparency first emerged in 1995[40] in Carvel v. Council,[41] a case on public access to information, and not much later, in 1996, in Commission v. Belgium as a principle of public procurement.[42] Both strands of the principle were further developed in considerable detail in subsequent case law. Not soon after, the principle of transparency started to surface in other fields as well,[43] and it has remained present in the case law of the courts ever since.

# of occurrences of the principle of transparency in cases before the European courts



The principle of transparency also served as a basis for secondary EU regulation, including the public procurement directives, but it also featured as early as 1990 in the ONP directive.[44] Although transparency is not attributed principle status, it is recog-

[40] There is an earlier mention in the 1994 Bayer case, where the applicant relies on the principle of transparency of the forms of notification of measures adversely affecting those to whom they are addressed. The ECJ gives no indication of accepting the existence of such a principle though. See Case C-195/91 P *Bayer AG v. Commission* [1994] I-5619, paragraph 16.

[41] Case T-194/94 *John Carvel and Guardian Newspapers v. Council* [1995] ECR II-2765.

[42] Case C-87/94 *Commission v. Belgium/Walloon busses* [1996] ECR I-2043.

[43] Early examples include Case C-186/96 *Demand* [1998] ECR I-8529 on milk quota; Case C-149/96 *Portugal v. Council* [1999] ECR I-8395 on international trade agreements, and Joined cases T-134/94, T-136/94, T-137/94, T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94 *NMH v. Commission* [1996] ECR II-00537 on competition law.

[44] Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for

nised as an important value in the 1980 transparency directive,[45] which requires public authorities in the member states to be transparent about their financial relations with undertakings.

Initially, legal doctrine was hesitant to recognise transparency as a new principle of EU law. The authoritative sources on principles of EU law either fail to mention the principle of transparency,[46] or have a limited conception, arguing that the principle of transparency requires that the public has the widest possible access to documents, and leaving it at that.[47] On the other hand, transparency is firmly established as a principle of procurement law.[48] Despite the steady widening of the scope of the obligations derived from that principle, it took a long time before it wrestled free of those roots, and became considered as a general principle.

However, early mentions of the principle of transparency provide an image that is as colourful and varied as the one sketched in the Commission communications. One of the first occurrences of the principle of transparency was in connection to the gender equality directives. Some authors in this field already spoke of a principle of transparency as early as 1993,[49] although the Court has never acknowledged the existence of a

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telecommunications services through the implementation of open network provision, OJ L 192, 24/07/1990, p. 1-9. Other examples include Directive 89/105/EEC of 21 December 1989 relating to the transparency of measures regulating the pricing of medicinal products for human use and their inclusion within the scope of national health insurance systems; the 1990 directive on aid to shipbuilding which included a 'principle of transparency of aid for shipbuilding and ship conversion Council Directive 90/684/EEC of 21 December 1990 on aid to shipbuilding, OJ L 380 , 31/12/1990 p. 27-36.

[45] Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, OJ L 195, 29.7.1980, p. 35, now Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, OJ L 318/17, 17/11/2006, p. 17-25. Note that there are as much as four directives which are designated as 'the transparency directive': 'The' transparency directive can also refer to: Council Directive 88/627/EEC of 12 December 1988 on the information to be published when a major holding in a listed company is acquired or disposed of, OJ L 348, 17.12.1988, p. 62–65*;* Council Directive 89/105/EEC of 21 December 1988 relating to the transparency of measures regulating the prices of medicinal products for human use and their inclusion in the scope of national health insurance systems, OJ L 40, 11.2.1989, p. 8–11*;* Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, OJ L 390, 31.12.2004, p. 38–57.

[46] Tridimas 2007.

[47] Groussot 2006, p. 250; Craig & De Burca 2007, p. 562. Craig 2012, p. 366 argues for a general principle of transparency, but retains the focus on public access to information.

[48] Bovis 2007, p. 65; Arrowsmith 2002; Pijnacker Hordijk 2009, p. 30; Essers 2006, p. 181.

[49] With regard to the equal pay directives: Freedland 1993, p. 498-500, and McCrudden 1993, p. 349. The latter argues that the principle of transparency has not been explicitly articulated by the Court, but is 'embedded in the approach adopted in several provisions of the Directives which require publicity about the rights in the Directives, and in the approach taken in several of the equality cases.' McCrudden, p. 349. Already, McCrudden implies that the principles' importance extends beyond equal pay and equal treatment to the field of social security. McCrudden 1993, p. 321.

principle of transparency in this context. In telecommunications law, the principle of transparency was already recognised in the 1990 ONP Directive, and legal doctrine followed shortly after.[50] When it comes to network sectors, transparency is now considered one of the principles of good market governance.[51] In antitrust law, the principle of transparency was mentioned as early as 1991, and similarly required that the policies of regulators were clear to all concerned.[52]

However, there slowly emerged a strand of thought that took a more integrative approach toward the principle of transparency. We can see early developments towards such an integrated approach in Vesterdorf, who argued that transparency was not just a vogue word, but an important legal concept including public access to information, the right to a statement of reasons for a decision, the right to be heard before a decision is taken, and a party's right of access to the file.[53] He also argued that these were only some aspects of transparency, and that there were more that he did not include in his article.

The integrated approach was placed on the agenda once more by Prechal[54] and Prechal & De Leeuw.[55] They identify a number of different elements of transparency, and observe that these are applied on different levels. Although these elements are open-ended, and must be specified to get concrete results in in specific cases, they suggest that they might be building blocks for an overarching principle of transparency.[56] In the remainder of their article, Prechal & De Leeuw exclude the constitutional level, and focus on transparency on the more concrete level of administrative relations between public authorities and individuals. They observed that the principle of transparency was not limited to being a corollary to equal treatment, like it was in public procurement law, but was also mentioned in connection to sound administration, and legal certainty. Their conclusions remain tentative though, and many authors keep limiting themselves to the rather narrow conception of transparency that sprang from public procurement law.[57]

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[50] In telecommunications law, the term had also found its way into legal literature by 1993: Austin 1993, p. 110. The 1990 ONP Directive already includes the principle of transparency, as one of the principles 'essential for ensuring that the liberalization and harmonization of telecommunication services develop in line with the process of European integration and the 1992 program.' Austin p. 110. Like in public procurement law, the principle is mentioned in one breath with the principles of non-discrimination and objectivity. See also Bangemann 1994, p. 6, 14.

[51] Hancher et al. 2003, p. 3.

[52] Ehlermann 1992, p. 555. He refers to transparency as a necessity for regulatory authorities. "What is essential is that the enforcement policies of all regulatory agencies should be clear to all concerned." The publication of merger enforcement guidelines is one way to achieve this (the once chosen in the Directive), but Ehlermann proposes that the publication of reasoned decisions is another, maybe even better, option.

[53] Vesterdorf 1998, p. 903.

[54] Prechal 2008a.

[55] Prechal & De Leeuw 2007; a more cautious approach can be found in Widdershoven et al. 2007, p. 87.

[56] Prechal & De Leeuw 2007, p. 53

[57] E.g. Drijber & Stergiou 2009; Communier 2006.

1.1.3. Why is research necessary?

There are many reasons to conduct research on the principle of transparency, both from a pragmatic point of view and out of sheer academic interest. First, the origin of the principle of transparency appears to be different from traditional principles of European law. Although public access to information legislation was present in some member states, the economic incarnation of the principle of transparency was not derived from the legal traditions of the member states, and it is questionable whether it was based on internationally accepted norms.[58] There certainly was no general principle of transparency either in the member states or in international law. This begs the question as to why it was introduced in the first place, and of how it could gain such prominence. Being an anomaly in European law, it warrants research on that account alone.

Second, the principle of transparency pops up in many different contexts. Sometimes, these occurrences are clearly related, like when the ECJ expanded the scope of the obligations derived from the principle of transparency in the public procurement directives to cases outside the scope of those directives. At other times, the principle of transparency seems to appear out of nowhere, either at the instigation of an appellant before the Court, in the preamble of a piece of secondary legislation, or in the writing of legal scholars who posit it as a value underlying the rules in a specific area of law they have researched. Because the principle of transparency occurs in such a variety of cases, it is unclear whether we are dealing with the same legal phenomenon in all these cases, and if so, how the multitude of obligations that are derived from it can be explained.

Third, although the emergence of the principle of transparency in EU law is a fairly new phenomenon, the existence of transparency obligations is not. There are many such obligations inherent in the legal system that are not explicitly derived from the principle of transparency. Nevertheless, these obligations clearly require public authorities to be transparent. This raises questions about the relationship between the principle of transparency and existing legal principles. Does the principle of transparency actually add much to existing rules and principles? And regardless of the answer to that question, how come the principle of transparency surfaced at all, given that we already have other principles and concrete rules that require transparency? Maybe the borders between the different principles should be drawn differently, and obligations that are now derived from other principles can be better comprehended when we assume they are derived from the principle of transparency?

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[58] Although transparency is present in the GPA, and arguably in the GATT 1947 as well, European procurement law has influenced the international treaties as much as those treaties have influenced it. Especially the GPA is modeled after the European procurement rules. See Arrowsmith 2002, p. 21, and Gordon, Rimmer & Arrowsmith 1998, p. 163. At the very least, the concrete and detailed obligations derived from the principle of transparency are not present in international law. Even though transparency is not unique as a legal value, its existence and acknowledgment as a general principle definitely is.

Fourth, the area of law where the principle of transparency is applicable is expanding fast. For public access to information, the problem of what is required based on the principle of transparency is not that pressing, as rules have been laid down in Regulation 1049/2001, amongst others. Although the provisions of the regulation are vulnerable to criticism, and prone to change, the framework that should be used for balancing the diverse interests that are involved in a decision on whether to grant access to information is clear. Such clarity is lacking in other fields: the scope of the obligations derived from the principle of transparency in public procurement law is expanding, but it is not quite clear what exactly is required to comply with the principle of transparency outside of the field of public procurement. In those instances where the principle of transparency is deemed to apply but where the link with the principle of transparency as developed in public procurement law is not made, the uncertainty about what is required becomes even larger.

Finally, as one of the principles of good governance, the principle of transparency can strengthen our insight into the doctrine of good governance as a legal concept. Its implementation in EU law can provide insight in how principles of good governance could be operationalised and can show what their added value in addition to traditional legal principles could be.

1.2 The research project

There are many reasons then to conduct research on the principle of transparency, and many perspectives that may be worth pursuing. For this project however, we will start from the basic observations that since the nineties, a principle of transparency has emerged in a number of fields of EU law. Although the exact obligations derived from the principle of transparency vary between those fields, they have one thing in common: they require public authorities to be transparent to the outside world. Working from the assumption that each of these transparency principles is in fact an incarnation from one underlying general principle of transparency, we are then faced with the task of determining how this variety of obligations is derived from that principle. This will increase our understanding of the principle of transparency, and can guide its further development. It will also help us increase our understanding of why the principle of transparency has blossomed in EU law rather than in the laws of the member states,[59] and why it has come to prominence in the particular fields of EU law covered in this thesis.

It is clear that the obligations that can be derived from the principle of transparency vary from situation to situation, depending on its context,[60] the goals that are served by transparency in that context,[61] and the presence of conflicting interests.

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[59] Again, some elements of the principle of transparency are present, and often even more developed, in the laws of the member states. This is particularly true for public access to information. Nevertheless, most member states have fared perfectly well without a general principle of transparency for centuries on end.

[60] Prechal & De Leeuw 2007, p. 51-52.

We will thus answer the following questions:

How do the goals served by the principle of transparency, the context in which it is applied, and the presence of conflicting interests affect the interpretation and application of the EU principle of transparency in a given situation?

This question presupposes that the principle of transparency can be characterised as a general principle of EU law. Admittedly, this is not undisputed. However, it will become clear throughout this thesis that this is indeed the correct way to view the principle of transparency.

1.2.1 Method

To answer this question, we must first determine what legal principles are and which factors affect how they are interpreted and applied in general. To do this end, I consulted the existing literature on legal principles, including both general treatises and those specific to legal principles in EU law. Anticipating on the discussion of this question in chapter 2, we can state now that legal principles are a subset of legal norms whose weight is determined by the importance of the reasons and goals that underlie those principles. This suggests that the application of the principle of transparency can be affected by goals that are specific to a particular field of law, and can explain some of the variation we observe, especially given the wide variation of effects attributed to transparency.

Our following step is to identify the specific factors that affect the interpretation of the principle of transparency in a number of situations, and identify what specific obligations are derived from it in each of those situations. To identify those transparency obligations, an extensive review of the case law on transparency was conducted. In addition, secondary legislation in a number of relevant fields was analysed. To find the rationale of these transparency obligations, I investigated both the general aims of those fields of law as well as the more specific goals underlying the transparency obligations that it contains. To this end, I consulted preparatory documents, policy documents, and literature.

The next step was to compare the different situations, and try to identify the connections there are between the determining factors and the concrete obligations derived from the principle of transparency. To comprehend the relation between the rationale of a transparency obligation and the characteristics of that obligation, it is necessary to understand how transparency functions to bring about certain effects. To gain such understanding, I consulted existing work on the function of transparency in economic theory, rational choice theory, and democratic theory.

Analysing the relation between the rationale of transparency obligations, the characteristics of those obligations, and the way in which transparency functions to help bring

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[61] Heald 2006a, p. 68-70.

about the goals underlying its inclusion in the law will allow us to better comprehend the principle of transparency. It will also enable us to say for those cases which are not yet covered in existing regulation and case law whether there are any factors that require transparency, and if so, what kind of transparency.

Such an exercise requires a broad perspective, and allows for the incorporation of a wide variety of transparency obligations in this research. However, it is impossible to give an overview of all transparency obligations in the vast body of EU law, so a selection is required.

1.2.2 Justifications

Despite the fact that the scope of this thesis is fairly wide, it is not so wide that everything worthwhile could be included. In particular, it is limited to EU law and excludes for the most part both international and national law. In addition, it includes only a limited selection of fields, and does not look into transparency between private parties. On the other hand, it does include the European Convention on Human Rights and the case law of the Strasbourg court. These choices require justification.

1.2.2.1 Focus on EU

The focus in this thesis will be on the principle of transparency as developed in EU law. This is not because the principle is confined to EU law. It has been identified as one of the principles of good governance,[62] and has been recognised as such by a host of international organisations.[63] In public procurement law, one of the fields where the principle of transparency is most developed, international law and EU law influence each other significantly.[64] The focus on the EU is justified for two reasons. First, the concrete developments with regard to the principle of transparency take place in the EU. There is a host of case law and secondary regulation concerning the principle, providing a wealth of data that cannot be found in international law, where regulation is fairly generic, and case law, if available at all, is scarce. Second, the importance of the EU law principle of transparency is evident, as it has to be applied at the national level in the member states, and thus affects everyday legal practice. Other legal systems will get some attention when they can shed light on the rationale underlying the introduction of transparency in a given field though. In chapter 4 in particular we will look into the principle of transparency in international economic law.

1.2.2.2 Relevance for the national level

As said, it is evident that the principle of transparency is having significant effects on the laws of the member states. The actual effects of the principle of transparency for

[62] Addink 2010, p. 28.
[63] Van den Broek 2010, p. 92.
[64] Arrowsmith 2002, p. 21.

the compound legal order of the EU can therefore only be assessed when we take a closer look at the laws of the member states. Although this would certainly be an interesting exercise, this thesis is not the proper place for it: the primary purpose of the research is not to determine the effect of the principle of transparency on national law, but to discover the anatomy of the principle of transparency, so as to further our understanding of the principle and make sensible assessments/recommendations about its development. For that particular goal, the inclusion of the law of the member states is not essential. For practical reasons, a comparative research into the legal systems of a representative selection of member states would be inexpedient given the already broad scope of the research.

Having said that, the analysis of the European principle of transparency does have relevance outside the area of EU law. The interest in transparency is prevalent on the national level as well, both for transparency in a broad sense[65] and for transparency as a principle of administrative law.[66] The same lack of clarity with regard to what the principle of transparency requires persists at the national level. At the same time, the resistance against one umbrella principle of transparency might be larger.[67] This is caused at least in part by a healthy amount of scepticism about whether the principle of transparency requires anything beyond what traditional principles of proper administration require. The Dutch courts tend to classify transparency obligations derived from EU law under other principles of proper administration.[68] Still we can make a similar observation on the national level as we did on the EU level: there is a multitude of transparency obligations, and there are problems in determining in what situations transparency is required, and if it is required, what the exact obligations are that public authorities face. Clearly, understanding the coherence and the underlying logic of transparency as a legal phenomenon will aid both the understanding and the development of transparency on the national level as well.

1.2.2.3 Selection of areas of law

The chapters about transparency in relation to citizen roles are based on research into a limited number of fields of law. We must therefore make some reservations about generalising from our observations. The selection of a wide variety of fields of law should however provide us with a sturdy model of the principle of transparency that will be of

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[65] There are a number of government initiatives that emphasise the importance of transparency: Wallage et al; De Meij et al. 2006; Franken et al., 2000. See also the proposal of Bernd van der Meulen for a general law on government information, Van der Meulen 2006. Public access to information legislation is under continuous pressure, see the letter of minister Donner, Kamerbrief J.P.H. Donner, 2011. See also the Dutch Ombudsman 2010, p. 21, 158, and his recommendations for a more transparent government 2012.

[66] Drahmann 2010; Drahmann 2011a, on transparency in relation to scarce public rights – indeed, transparency in situations of scarcity is a subject of particular interest, see also Van Ommeren et al. 2011; Van Rijn van Alkemade 2012; Drahmann 2011b. A more general approach can be found in Buijze & Widdershoven 2010; Buijze 2011; Prechal & De Leeuw 2007; Prechal 2008.

[67] See the report on the discussion of the principle of transparency during the meeting of the 'Jonge VAR' in 2009: Verhoeven, Van den Brink & Drahmann 2009.

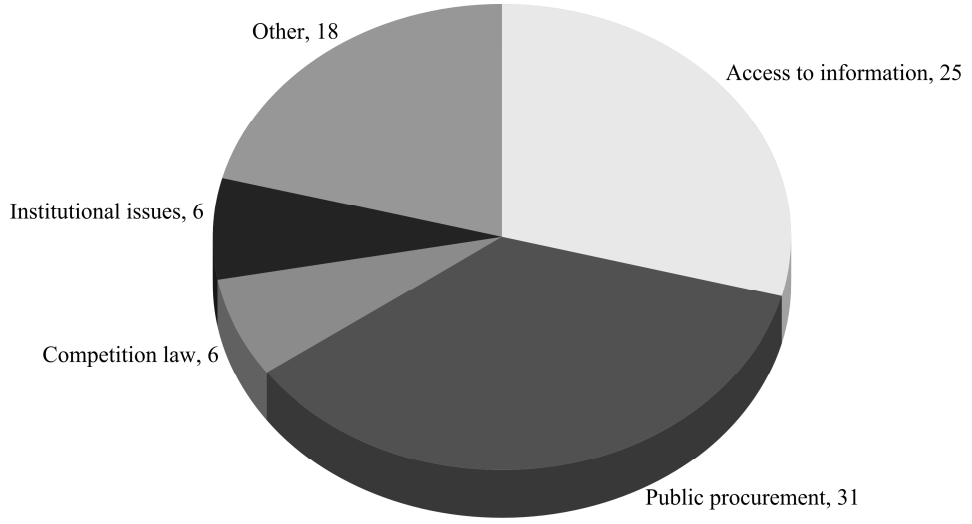
[68] Buijze 2011, p. 248.

great value in increasing our understanding as well as in the further development of the principle. Yet, beyond the boundaries of this research there may be data that can lead to the adaptation and refinement of the model we will develop, and in the spirit of scientific progress, if this happens it should be a cause for celebration.

The fields of law that were to be included in this research were selected based on their importance for the development of the principle of transparency as indicated by both its prevalence in a given field and the novelty of developments with regard to transparency, as shown by case law, secondary legislation, and literature.

The European Courts have traditionally played an important role in the development of principles of European law, and when we look at the principle of transparency, we see that it does indeed occur regularly in their case law. The subject matter of the cases where the principle of transparency is discussed, either by the courts or the AG, is varied. Of the cases decided up till 2008, about one third was concerned with public access to information, approximately one third was related to public procurement or cognate fields of law, and another third was comprised of cases about the institutional structure of the Union, competition and state aid law, and a number of more or less isolated occurrences.[69]

[69] State aid (3 cases), telecommunications (3 cases), VAT, regulation of the energy market, equal pay, consumer law, data protection, Treaty freedoms/licenses (2 cases), language rules, milk quota, notification of a Commission decision, research grant.



Based on that, the inclusion of public access to information and public procurement was a logical choice, and supported by the existing literature on the principle of transparency. In the competition law cases, the principle of transparency is usually relied on by applicants, who argue that since a transparent market is beneficial to general welfare, they should be allowed to share information with their competitors.[70] The court does not accept this argument, and these cases cannot teach us much about the principle of transparency.[71] The institutional cases deal with highly specific questions – mostly about the appropriate legal bases of Commission decisions – and the principle of transparency usually features only in the opinion of the AG.[72] This field was therefore also not selected for the research.

[70] Case T-136/94 *Eurofer* [1999] ECR II-263; Case T-191/94 *Thyssen Stahl* [1999] ECR II-347; Case T-213/00 *CMA CGM and others v. Commission* [2003] ECR II-913; Case T-18/97 *Atlantic Container Line* [2002] ECR II-1125.

[71] Although the CFI and the Commission acknowledge that transparency is in general beneficial to the market, it explicitly distinguishes the case of an oligopoly. See Eurofer, paragraphs 97, 60. The fact that the cases on competition law are illuminating in this regard does not mean that transparency is not relevant to that field of law. Many of the obligations we will encounter in later chapters apply in that field as well.

[72] Case C-189/97 *EP v. Council* [1999] ECR I-4741, opinion of AG Mischo of 11 March 1999; Case C-178-03 *Commission v. EP and Council* [2006] ECR I-107, opinion of AG Kokott of 26 May 2005; Case C-155/07 *EP v. Council* [2008] ECR I-8103, opinion of AG Kokott of 26 June 2008.

Chapter 3 of this thesis focuses on transparency and public access to information. A large part of that chapter is concerned with Regulation 1049/2001/EC, which regulates public access to documents held by the EU institutions. This thesis will most likely offer few new insights on public access to information to its adepts. The inclusion of the public access to information regulation is solely directed at the resolution of the research question, and although it will deepen our understanding of the principle of transparency, our purpose is not to evaluate the current legislation and case law on access to information. To give more depth to the discussion about transparency as a tool to enable people to function in their capacity of *citoyen*, we will also look at the obligations in the Aarhus convention. This will provide more insight into how the interpretation of the principle of transparency is affected by the existence of other public interests than those underlying Regulation 1049/2001.

As regards public procurement, the principle of transparency is firmly established as a principle of European procurement law,[73] and from those humble roots it has developed into a principle with a much wider application.[74] Much of the work done on the principle of transparency focuses on this particular incarnation,[75] and some advocate its further expansion. Yet, it is unclear what exactly the principle of transparency requires outside the scope of the procurement directives. This thesis attempts to identify the characteristics of public procurement law that caused the emergence of the principle of transparency in precisely this field of law. We will try to uncover the relation between those characteristics and the obligations derived from the principle of transparency, so that we can say which of these obligations can be transplanted to other fields of law that share some of these characteristics.

In addition, I included the fields of electronic communications law and state aid. Although the case law on transparency in electronic communications law is scarce, the principle already featured explicitly in the 1993 telecom directives and their recitals, years before the ECJR first applied the principle of transparency in a public procurement case, and the 2002 and 2009 regulatory packages contain many transparency obligations. In addition, transparency has been identified as one of a number of 'principles of good market governance.'[76] The principles of good market governance do not only apply to the regulation of electronic communication markets, but also to the regulation of energy-markets, postal services, broadcasting and transport by rail.[77] However, electronic communications law presents the best example of the new, principle-based approach.[78] Indeed, it appears that the Directives have been very successful in realising in particular transparency in this field.[79] Finally, many of the transparency

[73] Bovis 2007, p. 65; Arrowsmith 2002, p. 5; Pijnacker Hordijk 2009, p. 30; Essers 2006, p. 181.
[74] Drahmann 2010; Prechal 2008a; Communier 2006.
[75] See e.g. Communier 2006, Arrowsmith 2002; Drahmann 2011a.
[76] Hancher et al. 2003, p. 342.
[77] Hancher et al. 2003.
[78] Hancher & Larouche 2010, p. 1.
[79] De Streel 2005, p. 158-159.

obligations in electronic communications law are reminiscent of those in the public procurement directives.[80]

The field of state aid was included for two reasons. First, because the aspect of transparency that is so intimately related to legal certainty is most developed in this field.[81] Second, the principle of transparency has been relied upon before the European Courts in state aid cases, and features in a number of Commission decisions.[82] Its importance in state aid law is confirmed by the classic idea that the member states have to be transparent about their financial relations to undertakings, as witnessed by the 1980 transparency directive.[83] More importantly, transparency is gaining importance in the field of state aid since the Commission in its 2005 State Aid Action Plan announced that it would adopt a more economic approach to state aid regulation, and started to aim at more effective and more transparent state aid. Finally, the complicated relationships between the Commission, the Member States and their authorities, and the aid beneficiaries and their competitors give rise to a wide variety of visions about transparency. So much so that it will be helpful to make a preliminary distinction between two 'principles of transparency' in the field of state aid right from the start. First, there is the principle of transparent aid, which requires state aid measures to be transparent, and hence leads to obligations incumbent on the member states.[84] Second, there is a principle of transparent aid control, which requires the Commission to act transparently in its role as supervisor.

The final area of law selected for the research was inspired by one of the often heard criticisms of public access to information regulation, and a number of ECJ cases where existing transparency rules proved to be insufficient to guarantee individual rights.[85] This suggested that transparency is an important aspect of individual rights protection, and prompted the inclusion of human rights law into this thesis. The regulation of this matter in EU law is a bit haphazard, and is based in part on different principles of EU law, although secondary regulation also plays a role, in particular the Data Protection Directive. The fragmented nature of the law on this point makes it impossible to cover everything. This thesis does not profess to give an overview of each and every transparency obligation in EU law that (also) aims to protect human rights. This means that

[80] As will be shown in detail in chapter 4.
[81] Prechal 2007, p. 53.
[82] 1999/184/ECSC: Commission Decision of 29 July 1998 on aid granted by Germany to the companies Sophia Jacoba GmbH and Preussag Anthrazit GmbH for 1996 and 1997, OJ L 060, 09/03/1999 p. 74 – 82.
[83] See originally Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, OJ L 195, 29.7.1980, p. 35, now Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, OJ L 318/17, 17/11/2006, p. 17-25; and more specifically, the Council Directive 90/684/EEC of 21 December 1990 on aid to shipbuilding, OJ L 380 , 31/12/1990 p. 27-36, which features a tailor-made principle of transparency of aid to shipbuilding and ship conversion.
[84] Pentony 2010, p. 31-32
[85] Case C-369/98 *Queen v. Fisher* [2000] ECR I-06751, and Case T-47/03 *Sison* [2007] ECR II-73. These cases will be discussed in chapter 5.

an assessment of whether EU law succeeds in providing the required level of transparency is difficult. We can, and I do, suspect that are some problems, but the extent of those problems cannot be determined on the basis of this thesis alone. However, this research can provide a more structured approach to individual information rights. Identifying the factors that determine whether there is an individual right to access information in a given case, will make it possible to apply the principle of transparency to those cases not covered by legislation, and will help remedy those gaps that do exist.

Finally, a few words about an area of law that was excluded from this research, despite the prevalence of the principle of transparency: the field of consumer law. This field of law is primarily concerned with the regulation of relations between private individuals. Although transparency to some extent has the same functions as in relations between citizens and public authorities, the normative framework is quite different. Even though transparency in horizontal relations might have the same effect as in the relation between citizens and public authorities, the fact that there is a legal obligation to be transparent for public authorities that aims to achieve that effect does not mean that similar obligation exists in horizontal relations. An analysis of the consumer law principle of transparency is not altogether impossible, and might provide an interesting perspective on the subject matter of this research.[86] However, a thorough analysis of the differences in the normative frameworks that are applied to the different kinds of relations falls beyond the scope of this thesis.

1.2.2.4 Inclusion of ECHR case law

In addition to EU law, we will look at the case law of the ECtHR. It might not be immediately apparent why we should look at the ECHR to further determine the contents of the principle of transparency. Still, this is a useful exercise because the ECHR and the case law of the ECtHR are part of the legal order of the European Union as well as its member states. Although the ECHR does not contain an explicit right to information, and the ECtHR has never wasted a breath on the principle of transparency, one can derive a number of transparency obligations from the Convention and the case law of the Court. Because such transparency obligations are legally binding for the EU institutions and for the member states, they are to be taken into account in the further development of the principle of transparency.

The European Convention on Human Rights is of direct importance for the EU legal order.[87] Although the EU is not yet a party to the ECHR, the ECJ has consistently held that the Convention is part of the European legal order, and that parties can rely on ECHR law before the EU courts and before national courts when they are applying EU

[86] Indeed, it has long been argued that the principles of proper administration are merely civil law norms adapted to a specific context. See Van Gerven 1983.
[87] See also Birkinshaw 2006b, p. 182-183 and footnote 21.

law.[88] This made sense for a number of reasons.[89] The member states of the EU were all parties to the ECHR, and if the ECJ would deviate from the case law of the ECtHR, this might result in problems for the member states. Also, since the member states were bound by the ECHR, its provisions were likely to reflect legal standards common to the member states. This case law has been codified in the Maastricht Treaty and can now be found in article 6(3) TEU, wherein it is held that the rights contained in the ECHR and those resulting from the common traditions of the Member States, shall constitute general principles of the Union's law.

Although accession to the ECHR was impossible for the Union until recently, the Lisbon Treaty has not only provided this option, but does in fact oblige the EU to use it.[90] Negotiations were started in July 2010,[91] and the ascension of the EU will undoubtedly take place in the not so far away future, ingraining the rights contained in the ECHR even deeper in the European legal order.

The influence of the ECHR might increase even before the EU ascension to the Convention. With the entry into force of the Lisbon Treaty the Charter of Fundamental Rights of the European Union has become binding. Because the Charter incorporates rights that are also ingrained in the ECHR, and explicitly refers to the Convention as regards the scope and contents of many of the rights contained in it,[92] the impact of the ECHR on EU law has increased now that the Charter has become binding.[93] Expectations are that reliance on the Charter before the European Courts will increase,[94] and that they might follow the case law of the ECtHR more closely.[95] Indeed, references to ECtHR cases seem to be increasing.[96] The ECJ has created a standard for the interpretation of Charter rights corresponding to Convention articles in the DEB case. Such a provision must be interpreted in its context, in the light of other provisions of EU law, the law of the Member States and the case-law of the European Court of Human Rights.[97]

Although speculations about future developments in the relation between the Luxembourg and Strasbourg courts are interesting, in the current situation the importance of the ECHR is already a given. The EU member states are bound by the EU, and it is standing case law that the EU institutions must respect the fundamental rights en-

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[88] See e.g. Case C-11/70 *Internationale Handelsgesellschaft* , [1970] ECR I-1125; Case C- 4/73 *Nold II* [1974] ECR I-491, Case C-36/75 *Rutili* [1975] ECR I-1219; Case C-44/79 *Hauer* [1979] ECR 3727.
[89] Weiss 2011, p. 188.
[90] Article 1(8) of the Lisbon Treaty.
[91] Council of Europe, press release 545(2010), 7 July 2010. Ironically, the mandate for the negotiations that was issued on 4th of June remains classified.
[92] Article 52(3) of the EU Charter of Fundamental Rights.
[93] Weiss 2011, p. 186.
[94] Barkhuysen & Bos 2011, p. 5.
[95] Barkhuysen & Bos 2011, p. 5.
[96] Joined cases C-317/08, C-318/08, C-319/08, C-320/08 *Alassini* [2010] ECR I-213; joined cases C-92/09 and C-93/03 *Schecke* [2010] ECR I-11063; Case C-279/09 *DEB* [2010] ECR I-13849.
[97] Case C-279/09 *DEB* [2011] ECR I-13849, paragraph 37.

shrined in the Convention. The Charter, which has now become binding, explicitly refers to the ECHR for the scope and contents of the provisions contained therein, although the Charter might offer more protection.[98]

The theoretical importance of the ECHR for the legal order of the EU is clear. But how can the Convention and the case law of the ECtHR help in determining the contents of the principle of transparency? There is no right to information in the Convention, nor does the Court's case law mention the principle of transparency. Hence, the ECHR might not be the first place to turn to when one is researching the contents of said principle. It does not acknowledge any principle of transparency, nor is there a right to information in the Convention – at least not explicitly so. Even so, the idea of a right to transparency, or a right to information, is not at all far-fetched. Although none of the international human rights treaties contain such a right, many people argue that it is already implied in the right of freedom of expression. From the start, the connection between the freedom of expression and access to information was acknowledged, and it appears that the ECtHR might be ready to recognise at least a limited right to access information based on article 10 ECHR, which could differ from the conception of that right in the EU. Since article 10 ECHR does have an equivalent in the Charter (article 11), such a development would be of immediate importance for the public right to access in the EU. Likewise, articles 2, 3, 5 and 8 ECHR have equivalents in the Charter in articles 2, 4, 6 and 7 respectively. As we will see below, the ECtHR has based a limited right to access information on these articles as well.

1.2.2.5 Scope of the research

The research project has a fairly broad scope. This is not an uncontroversial choice. Many authors choose to focus on a more restricted group of transparency phenomena, a particular 'brand' of transparency. This kind of research is valuable, and when well executed it is able to provide a depth and a level of detail that this project cannot hope to achieve. However, such research also runs the risk of creating a series of separate principles of transparency that are connected only through their names: a public access to information principle of transparency, a public procurement principle of transparency, and a good market regulation principle of transparency are only some of the possibilities that spring to mind. Although we cannot completely exclude the possibility that we are dealing with separate principles in advance, the naming suggests at least some kinship, and the following chapters will make it clear that they do indeed have much in common.

In addition, this somewhat haphazard approach of transparency has left us with a problem. The two more or less traditional aspects of transparency defined above leave a gap in the information regime that is not immediately apparent, but which runs the risk of creating injustice: the ECtHR has ruled on several occasions that a failure to provide individuals with certain information, either spontaneously or upon request, breached the provisions of the ECHR, in particular articles 2 and 8. The European law on access

[98] Article 52(3), see Prechal & Widdershoven 2011, p. 38 for examples.

to information does not deal well with such individual rights to information. Legal principles are particularly well-suited to fill such gaps in the law, and the principle of transparency seems the best candidate for the job – but only if we abandon the sectoral approach.

In addition, using a broad approach will helps us gain a better understanding of what factors affect whether and, if so, what kind of transparency is required in a given situation. By comparing for example the principle of transparency as developed in public procurement law to other instances of the principle of transparency, we will be able to isolate the aspects of the public procurement principle that are consequences of the characteristics of that particular field of law. Doing this for several fields of law will give us a picture of how the characteristics of a given field relate to the interpretation of the principle of transparency in that field. That in turn will make it easier to say what obligations should be derived from the principle of transparency in other fields of law, which share some, but not all, of these characteristics. This will allow us to make better predictions about the application of the principle of transparency in those areas where the law, both secondary EU legislation and case law, is still sketchy.

1.2.3 Avenues of exploration

There are a number of factors that one may suspect in advance to have been relevant in the rise of the principle of transparency in EU law in general and in specific fields of EU law in particular, and that affect the answer to the question of whether transparency is a legal requirement in a given situation.

1.2.3.1 Citizen's roles

We explore transparency in the context of the relation between public authorities and private parties. It is likely that the nature of that relationship will affect the normative framework that governs it: the state has different obligations towards voters than towards subjects that it initiates criminal proceedings against.

It is a given that people act in different capacities in their relations with public authorities. The most traditional distinction is that between political citizens, or citoyens, and bourgeois. The citoyen is characterised by his membership in a political community, has the right to participate in the public affairs of the state, and has an obligation to look after the interests of the community.[99] When people act in their capacity of citoyen, they act in the public interest. Bourgeois on the other hands are private individuals, carriers of rights to protect them against arbitrary state intervention, and require the protection of their personal integrity and private property.[100] Both these conceptions have made it through to modern times. The citoyen is the carrier of democratic, political rights, while the concept of the Rechtsstaat is there to protect the rights of bourgeois, or subjects.

[99] Eriksen & Weigard 2000, p. 15.
[100] Eriksen and Weigard 2000, p. 15.

However, the traditional distinction between citoyens and bourgeois is sometimes felt to suffice no longer. The citoyen is further broken down into voter, co-producer of policy,[101] and participant,[102] where the latter two refer to similar functions. This refinement does not reflect a fundamental change in how the relation between citizens and their government is perceived though: the government is the representative of the people, and their relation is ultimately governed by the principle of democracy. A more novel way to perceive the relation between individuals and their government is as one between customers and supplier.[103] This approach is subject to criticism,[104] and does not in itself offer norms which the administration should abide by. Yet, the citizen-customer is part of a broader development, where politics are regarded as an economic process, and public authorities are to provide goods to the general public that the market fails to deliver.[105] Inherent in this approach is a conception of the individual as a rational, utility maximising actor which is quite different from the approach of the bourgeois as a bearer of rights.[106] We can contrast homo economicus with the legal subject, the bearer of rights, or, as we will come to know him in chapter 6, homo dignus. And although both are primarily at home in the private sphere, homo economicus will present policy makers with different arguments than homo dignus, who is characterised by his inherent worth rather than the manner in which he makes decisions. When one looks at the discourse on transparency, it becomes quite evident to look at the relation between the government and its citizens from an economic perspective. Transparency is important for the functioning of markets, it has gained prominence in economic law, and even outside of that area is sometimes justified by appealing to its positive effects on the economy. Transparency in short does not only benefit homo dignus and the citoyen, but also homo economicus. A word of caution is in order though. Economic theory has many interesting things to say on transparency towards homo economicus, but its statements do not in itself have legal or normative value.

In the context of the EU the issue of citizen roles has been tackled by Eijsbouts, who discerns five different types of EU citizen: le citoyen calculateur, le citoyen libérateur, le citoyen organisateur et initiateur, le citoyen électeur, and le citoyen fondateur.[107] Of these five, the citoyen fondateur is of limited practical importance.[108] Le citoyen

[101] Wallage et al. 2001, p. 24; Tops & Zouridis 2000, p. 17, 22.
[102] Hiemstra 2003, who discerns customers, users, participants, subjects and voters. The BMC model used by the VNG which is based on his work distinguishes voters, customers, subjects, partners, taxpayers and neighbourhood residents.
[103] Eriksen & Weigard 2000, p. 21; Tops & Zouridis 2000, p. 6; Hiemstra 2003.
[104] Some authors argue there are few similarities between people using government-provided services and actual customers, see Tops & Zouridis 2000, p. 7; Goldkuhl 2008, p. 2-3. In addition, conceiving of people as customers does not offer a lot of handholds for how they should be treated.
[105] Eriksen & Weigard 2000, p. 17. Indeed, it is possible to see the provision of information and transparency towards people as a service that public authorities provide to the public or to particular individuals. Wallage et al. 2001, p. 25; Canadian Royal Commission on Government Organization 1965, p. 66.
[106] Eriksen & Weigard 2000, p. 18.
[107] Eijsbouts 2011, p. 14-16.
[108] EU law does not even appear to recognise the citoyen fondateur. He features neither in the Treaty

électeur is the voter, whereas the citoyen organisateur et initiateur is the citizen of civil society, an active participant in the social and political arena. Together, these two correspond to the classic conception of the citoyen. The citoyen calculateur correspond to homo economicus, whereas le citoyen libérateur is our homo dignus.

EU law regulates the relation between the governments of the member states and the EU on the one hand, and the citoyen, homo dignus and homo economicus on the other hand. Transparency is relevant in all these relations. People profit from transparent governance in all three capacities: that of citoyen, that of homo dignus and that of homo economicus. The relation between public authorities and citizens in either of these capacities are governed by different normative frameworks, and the characteristics of these relations will determine, at least partly, the extent to which public authorities are required to be transparent towards people.

Indeed, this factor appears to be of key importance when understanding the principle of transparency, and the chapters below have been organised according to capacity in which people benefit from transparency. In chapter 3, we discuss transparency as it enables people to act in the capacity of citoyen. In chapter 4 and 5, we focus on transparency as it benefits economic actors. In chapter 6, we focus on transparency as a means to enable people to exercise their human rights.

1.2.3.2 Instrumentality

A second factor that one may suspect to be of importance is the purpose for which transparency is needed and the way in which transparency functions to contribute to this goal. This is indicated both by the pleas for transparency that tend to appeal to the benefits it yields and by the fact that the weight of legal principles is determined in part by the goals they refer to. In chapter 2 below we will look deeper into the purposes transparency can serve, and try to organise them in a more orderly fashion. The instrumental importance of transparency means that both practical insights about how transparency functions and the policy goals in given fields of law will be relevant in determining what obligations are derived from transparency. The former statement relates to the fact that transparency is only merited when the way in which it functions will actually help to bring about a given goal, while the latter is related to the desirability of bringing about that goal.

For this thesis this means that we must identify the goals that the introduction of transparency in a given field aims to realise, but that we must also examine the manner in which transparency functions. This is complicated somewhat by the fact that transparency is a diffuse concept, and different kinds of transparency might function in different ways. Ex ante transparency for example functions differently from ex post transparency. Nevertheless, for each of the goals identified we must attempt to understand how exactly transparency contributes to the realisation of that goal.

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nor in the case law of the court of justice, although originally, he did appear in the Lisbon Treaty. See Eijsbouts 2011, p.16-17.

1.2.3.3 Competing interests and exceptions to transparency

Lastly, there is the matter of competing interests. The principle of transparency, like all legal principles, does not prescribe outcomes. Rather, it signifies an interest that has to be taken into account in legal decision making, and that has to be balanced against competing interests. The outcome of this balancing will be determined by the weight attached to the principle of transparency and the weight attached to the competing interests, as well as the likely consequences of the decision for the realisation of those interests. The greater the weight attached to competing interests, and the greater the adverse effect of transparency on the realisation of those interests, the smaller the chance that a public authority actually has to be transparent in a given situation.

In addition, there may be circumstances that may interfere with the functioning of transparency. Although transparency may contribute to the realisation of individual rights for example, there may be situations where transparency fails to serve that goal, or is detrimental to it. In such cases, exceptions to transparency are also justified.

1.3 Structure of the thesis

The remainder of this book contains my findings. Chapter 2 has an introductory character and explores the central concepts of this thesis. In it, we discuss what transparency is, and how it relates to information, or the availability of information. We will find that transparency is a diffuse concept, and we will try to categorise the different kinds of transparency. We will also look deeper into the instrumental importance of transparency, and discover that although there is a multitude of positive effects that are attributed to transparency, we can trace all of these back to two basic functions of transparency: it enables people to make better decisions, and it allows them to see what is going on in organisations that are being transparent. We will also explore the nature of legal principles. One of the discerning characteristics of principles, as opposed to rules, is that they tend to be somewhat vague. Whereas rules prescribe clear legal consequences to particular situations, principles do not. They merely indicate an interest that has to be taken into account when making a legal decision, but do not prescribe a particular outcome. The uncertainty surrounding the principle of transparency is at least in part due to it being a legal principle. Nevertheless, a lot of work has been done on how principles are applied in practice, and what factors determine how they affect the outcome of a case. By looking at how legal principles function in general, we can get a preliminary understanding of how the principle of transparency functions. We will also look at the general principles of EU law. We will assess to what extent they conform to the general theory, and whether EU principles have characteristics that discern them from legal principles in general that can help in clarifying the principle of transparency further. All this allows us to sketch a first preliminary outline of what the principle of transparency could look like.

Chapter 3 explores transparency from the perspective of democracy and the citoyen. It describes the mechanisms by which transparency can contribute to democracy and enables people to perform well in their capacity of citoyens. Regulation 1049/2001 regarding public access to EP, Council, and Commission documents and the Aarhus convention and its implementing legislation will be used to illustrate how different public, or citoyens', interests shape the interpretation and application of the principle of transparency. In it, we discover that the optimal amount of transparency from a democratic perspective is not a given, but is subject to public choice. In addition, it not evident that full transparency is the best way to guarantee that public authorities represent the public interest. In rare cases, the execution of the public will might be better served by (limited) secrecy. We will find that the democratic argument for transparency can be separated into two distinct strands. The first is related to the classic conception of democracy as public deliberation, the second takes into account more modern elements like public authorities being accountable to the general public and public participation in administrative decision-making. Both these lines of thought can be the basis for an argument for transparency, but the exact transparency requirements differ somewhat, as does the weight of the argument.

Chapter 4 and 5 explore transparency from the perspective of the internal market and homo economicus. The manner in which transparency contributes to economic efficiency is complex. Market theory at its simplest offers an elegant explanation of how markets achieve efficiency and also offers relatively clear commandments on how to deal with transparency that governments should observe if they want the market to achieve efficiency. The model's simplicity is attractive, but detracts from its accuracy: in practice, markets are prone to a number of failures, and the role of transparency in contributing to efficiency becomes less straightforward. In chapter 4 and 5 we will discuss the application of the principle of transparency in the relation between public authorities and homo economicus. To structure that discussion, chapter 4 focuses on the perfect market, and how EU law reflects the idea that transparency is an essential feature of this market. In chapter 5, we will relax the assumption that markets produce efficiency, and address whether and how government-created transparency can contribute to resolving market failures. The distinction is artificial, and several transparency obligations do not fit neatly in one category or the other. Nevertheless, I found it the best way to clarify the structure underlying the law on this point.

Chapter 4 explores the mechanisms by which transparency can contribute to the proper functioning of the internal market, and enables homo economicus to take better decisions. In this chapter we adopt the assumption that a free market does indeed produce the best possible outcome in terms of efficiency – not because I endorse this point of view, but to allow us to examine the way in which assumptions about the market creating efficiency affect the interpretation of the principle of transparency. We will use the Treaty freedoms and the procurement directives as well as the electronic communication directives and state aid law to show how different economic interests, or rather, the interests of economic actors, shape the interpretation and application of the principle of transparency. Clearly, the observation of the fact that there is an optimal level of transparency (given our assumptions), does not mean that there is a legal obligations to

provide that level of transparency. This is essentially a policy choice. However, by the constitutionalisation of economic rights and the EUs goal to promote the internal market, these arguments have gained considerable weight, and this is reflected in regulation as well as in the case law. We will see that transparency contributes to the empowerment of economic actors in several ways. Although transparency is directly beneficial to economic actors, it is also an important intermediate value. In the case of economic law, it is particular important that it furthers the goal of equal treatment, which is another important condition for an internal market that functions properly. We will see that this function is a specific case of one of the main functions of transparency. Again, we can present a number of distinct arguments for transparency, and again, the particular transparency requirements these arguments suggest differ slightly.

In chapter 5, we will relax the assumption that a free market leads to efficiency when it is not interfered with, and will address a number of market failures that are particularly relevant to the interpretation of the principle of transparency. A number of these failures result from the nature of information as a semi-public good, and paint a lack of transparency as a market failure in itself. Other failures have different causes, and transparency is important because it may help in resolving them. We will revisit the transparency obligations in the telecom directives and the state aid rules as well as those derived from the Treaty freedoms to see how they take market failures into account. In addition, we will address the Services Directive. We will find that although transparency can increase the efficiency of a failing market, it is difficult to determine the exact conditions under which it is able to do so as well as the exact form that transparency obligations should take to accomplish this. Although the efficiency of the market is still an important argument in the application of the principle of transparency, we see that the public authorities in the member states are left considerably more discretionary room on how to achieve their policy goals.

Chapter 6 explores transparency from the perspective of human rights protection and homo dignus. It describes the mechanisms by which transparency can contribute to the protection of individual rights, and enables homo dignus to make better decisions regarding his private life. The case law of the ECtHR and the Charter of Fundamental Rights of the European Unions, as well as the Data Protection Directive, and the general principles of EU law will be used to show how different private, non-economic, interests shape the interpretation and application of the principle of transparency. Noteworthy, although not at all surprising, is the fact that human rights can also present a powerful argument against transparency, because making personal data available to third parties is a potential violation of the right to privacy. Nevertheless, we will see once more that both core functions of transparency provide us with an argument for transparency as a tool to empower homo dignus.

Chapter 7 presents the conclusions of this research and contains some musings about the future development of the principle of transparency.

CHAPTER 2: ON TRANSPARENCY, LEGAL PRINCIPLES, AND TRANSPARENCY AS A LEGAL PRINCIPLE

2.1 Outline

This chapter will address a number of general issues that are of fundamental importance for the rest of this thesis. To tackle the questions about the ramifications of the principle of transparency, it is necessary to have a good understanding of what transparency is, and of what it means for the concept to be incorporated into the law as a legal principle. Therefore, in paragraph 2.2, the concept of transparency will be explored. The popularity of transparency in recent years makes this a difficult task. The term is used in a wide variety of contexts, and the meaning given to transparency varies according to who is doing the talking, and what their ideas are about how transparency can contribute to other things that they deem to be important. Although it will prove hard to give a definition of the concept that will be satisfactory in all contexts and circumstances, we will be able to provide a definition that serves the purpose of this research, and that I believe will be useful for others as well. In addition, we will introduce the term 'transparency obligation' and provide a framework to analyse such obligations. In paragraph 2.3, the reasons for introducing transparency will be discussed. Again, these reasons are varied and complex, but their influence on how the principle of transparency is to be interpreted is both important and impossible to deny. Some authors argue for the intrinsic value of transparency, but even when one agrees with their arguments, the fact remains that the principle's introduction in various fields of law served many different purposes, and this affects how it is applied in those fields. Thus, the largest part of this paragraph is dedicated to the instrumental importance of transparency. We will address some of the positive effects that tend to be attributed to transparency and attempt to classify them in two categories that represent two distinct basic functions of transparency. Next, in paragraph 2.4, we will tackle the problem of legal principles. Claiming that transparency is a legal principle is all very good and well, but without addressing what a legal principle is, the claim is meaningless. The debate about legal principles remains unresolved, and this thesis is not the place to solve it. Instead, we will distil two valid ways of looking at principles and determine the consequences of those views for the principle of transparency, the way in which it is applied by the courts and its future development. In paragraph 2.5, we will address transparency as a legal principle. The existence of the principle of transparency in the European legal order is not unproblematic. Some of the problems with the designation of transparency as a principle will be addressed, like its diffuse identity, its overlap with more traditional legal principles, and whether it can have added value.

2.2 What is transparency?

Transparency is an elusive concept. It is often defined broadly to capture a lofty but imprecise idea. Addink for example points out that transparency may be used in a

broad and a narrow meaning.[109] The broad notion of transparency 'implies openness, communication, and accountability.' Few will object that these things are indeed important to governments, but the broad notion of transparency is hard to implement. As several authors have noted, nobody is opposed to openness, communication, and accountability, but it is unclear what such notions require in practice.[110] Such a definition is sufficient if the purpose is to emphasise the importance of transparency as a value in government, but in the context of this thesis, we need a definition that is a bit more precise. Having a legal principle of transparency implies that transparency is a value that is protected in law, something the legal system as a whole seeks to attain, and that it must be taken into account when designing rules and when deciding concrete cases. To do that, we must know what to take into account. A principle of transparency requires a definition of transparency that can be made operational: one should be able to derive from that principle rules that contribute to transparency, and we can only do that if we know rather precisely what transparency is.

2.2.1 Problems with defining transparency

It is not easy to define transparency. Some authors propose dictionary definitions, like the quality of being easy to see through, or the condition of being transparent, that is of allowing light to pass through so that bodies can be distinctly seen.[111] Such definitions might help us get a grasp of the concept, but due to their generality they do not help us much when we want to place transparency in a legal context. However, if we try to come up with a more specific definition of transparency, we are confronted with a difficult problem. First, the meaning of transparency might differ depending on the context in which it is used, varying depending on 'time, place and, perhaps most important, function.'[112] Hood's exploration of the historical roots of the concept is instructive. He discerns three basic notions of transparency avant la lettre, i.e. "notions of rule-governed administration, candid and open social communication, and ways of making organisations and society 'knowable.'"[113] The first is closely related to legal certainty, and hence not unfamiliar to lawyers. The second was advocated by Rousseau, who envisioned broad lanes and street lights that had to prevent people from escaping the scrutiny of their fellow men, whereas the third heralds the rise of transparency as a means to enable supervision, accountability, and democracy. In the twentieth century, the picture gets even more complicated, when transparency is invoked in a wide variety of contexts, ranging from the new diplomacy doctrine of Woodrow Wilson, who argued that diplomacy had to be conducted in the open to prevent the horrors of another World War, to the corporate governance doctrine where transparency requires the free flow of information between executives and stockholders.[114] Another way of putting the problem we face in defining transparency is that the concept is so broad as to almost defy

[109] Addink 2010, p.53.
[110] Hood 2006, p. 19; Curtin and Meijer 2006 are very critical about transparency used in a broad sense; see also Bovens 2007 on the broad notion of accountability, which appears eerily similar to broad transparency, and the importance of distinguishing clear analytical concepts.
[111] Mock 1999a, p. 295.
[112] Savage 2006, p. 146.
[113] Hood 2006, p. 5.
[114] Hood 2006, p. 11.

definition. Indeed, many authors avoid doing so,[115] often sufficing with a list of elements of transparency that may or may not be exhaustive. Others, like Heald, avoid giving a definition, but instead provide an analytical framework that allows a wide array of instances of transparency to be analysed.[116] Such an approach might appear unsatisfactory at first sight, but will prove to be useful, because it helps us to understand why transparency is so diffuse. In addition, it offers a framework for the analysis of concrete transparency obligations.

Before we turn to our own definition of transparency, I would like to make two remarks about its relation to two other concepts: openness and access to information. Clearly, transparency is related to openness. The distinction between the two is unclear. Some authors argue that transparency is a broader concept than openness, because it includes not only the availability of information, but also its simplicity and comprehensibility.[117] Others argue that openness is broader and comprises transparency and participation,[118] and some simply consider them synonyms.[119] Although all of these approaches can prove useful in their context, one can only conclude that there is no consensus on the matter. In this thesis, transparency and openness will be used interchangeably. Often, transparency is also used interchangeably with another concept: access to information. The equation of the two concepts is not illogical, since transparency is certainly concerned with the availability of information. However, when lawyers speak about access to information, they mean public access to information, whereas transparency is also concerned with individual's access to information.[120] In Hood's list of 20th century transparency doctrines, openness of government information to citizens is only one in a list of seven doctrines.[121] In addition, access to information is usually not concerned with the quality of the information: simplicity and comprehensibility are not included. Thus, the two concepts need to be discerned.

Although transparency is hard to define, our task is somewhat simplified in that our context is given. We must define transparency as it applies to the government, or rather, in the relation between governments and individuals. To come to our definition we will use the work of Mock as a starting point, as he has based his definition on a broad selection of legal and non-legal literature, and has adapted it to make it usable in a legal context.

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[115] E.g. the Danish Institute for Human Rights' Handbook 'An Introduction to Openness,' which defines openness as 'measures taken to make government affairs as transparent and participatory to the surrounding community as possible, and to strengthen the general trust in public institutions,' yet fails to define what it means to make government affairs transparent. Likewise, Privacy International's 2006 'Freedom of Information around the World' report celebrates the importance of transparency, yet fails to define it.

[116] Heald 2006b, p. 40.

[117] Heald 2006b, p. 26. This is supported by the UN Convention on Anti-Corruption, which includes the simplification of administrative procedures as an element of transparency, and by the Commission, which does the same for the consolidation of EU law.

[118] Meijer et al. 2012.

[119] Heald 2006b, p. 26.

[120] See chapters 4-6 below.

[121] Hood 2006a, p. 11.

2.2.2 Defining transparency

To come to a definition of transparency, Mock identifies a number of elements in how the literature treats transparency. First, it arises in the context of governmental and organizational action. Second, it involves the availability of information. Third, the audience for or recipients of the information tend to be defined. Although the target may be as broad as 'the public', it can also be a more limited category. Finally, transparency requires fundamental accuracy and clarity.[122]

As regards the first element, as our focus is on transparency in public law, we can incorporate it in our working definition for this thesis. The obligation to be transparent is incumbent on public authorities. We must discern between the bearer of the obligation and its scope though. It is public authorities that have to be transparent, but they can be transparent about their own affairs, or they can create transparency in a more general sense, like when they publish data about emissions.

As regards the second element, we have seen already in chapter 1 that information is indeed an important element of transparency. After a review of the dominant schools of thought on information, Mock comes to a definition that is in keeping with the mainstream thinking of information scholars, and is workable in a legal context. He defines information as *that processed data which bears a reasonable possibility of altering the world perception of someone receiving the data*.[123] Such data can make the world more transparent, but do not necessarily do so. Mock proceeds to define transparency as *a measure of the degree to which the existence, content, or meaning of a law, regulation, action, process, or condition is ascertainable or understandable by a party with reason to be interested in that law, regulation, action process, or condition.*[124] Hence, it is only a specific category of information that contributes to transparency, namely information that contributes to making the existence, content, or meaning of a law, regulation, action, process or condition ascertainable or understandable. Note that it is not only the availability of information to interested parties that determines their understanding. The level of complexity of laws, regulations and processes is also a factor of importance. Mock's definition pertains only to transparency about official activity, which is more limited than what the principle of transparency appears to require.

Mock then proceeds to give a simpler approximation of this definition: *Transparency is a measure of the degree to which information about official activity is made available to an interested party.*[125] There is some detail lost in his approximation, because unlike his 'full' definition, it does not cover the simplicity of laws and regulations, which will also lead to better understanding, or the quality of information. It just assumes the availability of information to a person will lead to understanding. Although Mock's

[122] Mock 1999b, p. 1079-1081.
[123] Mock 1999b, p. 1075.
[124] Mock 1999b, p. 1082.
[125] Mock 1999b, p. 1082.

definitions are useful as a starting point, for the purposes of this thesis, they require some modification. Both Mock's definitions describe transparency as a measure rather than a quality. This is useful when one wants to assess the quantity of transparency in a given situation, but is less useful when constructing transparency as a legal norm. Hence, we must rephrase Mock's definition so it becomes a quality rather than a measure. So, transparency occurs when the existence, content, or meaning of a law, regulation, action, process, or condition is ascertainable or understandable by a party with reason to be interested in that law, regulation, action process, or condition. Both Mock's definitions are focused on a government that is transparent about its own actions, and not so much on a government that creates transparency in a more general sense.[126] In the first case, the definition above suffices. In the second case, it is too narrow. Take for instance the case of access to environmental information. This will often not concern laws or regulations, or government actions and processes, yet is generally considered an example of transparency. A more general definition that is not limited to transparency in relation to government activity could be:

Transparency is the state that occurs if people can easily ascertain and understand the state of the world and predict how their own actions will affect that world.

This is more in line with the dictionary definition of transparency, because it refers to a quality of something rather than a measure of a quality. It also acknowledges that transparency can contribute to the understanding of phenomena that are not directly related to the government, even if it is the government that is providing transparency. Because the purpose of this thesis is to investigate the transparency obligations that are incumbent on governments, we must still reconnect this definition with government action, without limiting it to transparency *about* government action.

A transparent government is one that provides people with the information they need to ascertain and understand the state of the world and to predict how their own actions will affect that world, and that does not unnecessarily complicate that world.

This definition will form the basis for this thesis. I do not intend to say by defining transparency in this way that governments are under an obligation to provide this kind of transparency to their people. The extent to which the principle of transparency actually requires governments to be transparent is to be answered in later chapters. It will allow us to determine which legal obligations actually contribute to making government transparent though. Our definition indicates that information will contribute to transparency, but contains a classification, because not all information will contribute to certainty and understanding. It also is broader than mere access to information, because it includes the quality of information as well as the simplicity of procedures. The latter is an important element: since complicated procedures are harder to understand, they interfere with transparency.

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[126] Although Mock 1999b seems to indicate that government should do the latter as well, since the underproduction of information in a market economy is a market failure that government has to resolve. This appears to go further than providing information only on official activity, p. 1082-1084.

This definition is still broad in that it does not allow us to indicate one particular manner in which this kind of transparency can be achieved. Both a catalogue of elements of transparency and an analytical framework to help us categorise examples of measures that aim to improve transparency will be helpful.

2.2.3 Elements of transparency

When we turn to the elements of transparency, we can compose a list of those elements that occur frequently. These include access to information, including both public access to information[127] and access to one's file.[128] According to Savage, information may have to be processed before it is made public, requiring the active interpretation and analysis of data.[129] The government has to respond to requests for information, but might also have to make information available of its own accord, so transparency can require both proactive and reactive action.[130] Access should be given to information about laws and other regulations, both on their content and their development, about individual decisions, the reasons for those decisions, and the information upon which government bases its decisions. In addition, government should be conducted according to fixed rules,[131] which must be accessible, clear, and intelligible. Decision based on those rules should be foreseeable. In addition, decisions must be reasoned.[132]

When we look at the different elements that are identified as instances of transparency, we can see that transparency is closely related to accountability. Hood includes 'methods of accounting or public reporting that clarify who gains from and who pays for any public measure' in his catalogue of transparency obligations.[133] Addink includes budgetary reviews and audits in his list of elements of transparency.[134] It is true that these instruments contribute to making information about government activity open and freely available.[135] It is important to realise though that these activities will often include an evaluative element as well, and to the extent that government behaviour and expenditure are judged, they go beyond mere transparency.[136] Thus, transparency is a necessary condition for accountability, and particular instruments, like audits, can contain elements of accountability in addition to transparency obligations.

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[127] Craig 2012, p. 357; Prechal 2008a; Banisar 2006, p. 6; Hood 2006a, p. 14; Söderman 2001, section 1; Vesterdorf 1999, p. 913; Curtin 2009, p. 207, and many others.
[128] Prechal & De Leeuw 2007, p. 52, Vesterdorf 1999, p. 903, 910.
[129] Savage 2006, p. 146.
[130] Curtin & Meijer 2006, p. 111; Prechal & De Leeuw 2007, p. 51; Hofman 2003.
[131] Hood 2006a, p. 5.
[132] Söderman 2001, Vesterdorf 1999, p. 903.
[133] Hood 2006a, p. 5.
[134] Addink 2010, p. 53.
[135] Which is the hallmark of transparency, according to Addink 2010, p. 53.
[136] See also Bovens 2005, Bovens 2007; although accountability includes the communication of information as one of its elements, it goes further in that the forum that receives the information passes judgment based on that information.

All these elements do not in themselves guarantee transparency as defined above. Rather, they are examples of instruments that contribute to realising that quality.

2.2.4 An analytical framework

To further improve our understanding of transparency, and the different transparency obligations that can be discerned, we turn our attention to David Heald. As noted, Heald does not define transparency. Instead, he picks the concept apart, revealing that there are many different kinds of transparency.[137] The first notion that Heald introduces is the direction of transparency. He discerns four different directions, two vertical and two horizontal. The first is upwards transparency, where there exists a vertical relationship where the ruled party is transparent to the rulers. The second is downwards transparency, where the rulers are transparent to the ruled party. This thesis is of course mostly concerned with downwards transparency, where the government has to be transparent to the people. However, the opposite happens as well, mostly in the context of government institutions that have to be transparent to hierarchically superior institutions, to enable supervision and control. This latter instance of transparency is also sometimes based upon the principle of transparency. The third direction of transparency is inwards, where insiders are transparent to outsiders: those outside an organisation can look into it, and are able to understand how it works. When there is outwards transparency, those inside the organisation can look outside.

More important are the three dichotomies that Heald observes: those between event transparency and process transparency, between real time transparency and transparency in retrospect, and between nominal transparency and effective transparency. Event transparency is concerned with information about inputs, outputs, and outcomes, and hence with the information upon which government decisions are based, the outcomes of analyses conducted by the government, and the actual decisions it takes. Process transparency is concerned with information about the way in which the government processes information and takes decisions. The distinction between transparency in retrospect and transparency in real time is quite clear. Again, both are mirrored in the definitions and lists of elements of transparency described above. Transparency in retrospect requires that the government communicates about its decisions and how it came to take them when the decision-making process is finished. Although this kind of transparency is useful for some purposes, like allowing judicial review, it is insufficient for others, like enabling citizens to participate in decision-making processes. To achieve that, real time transparency is needed: people need to be aware of the fact that a decision is about to be taken, and of how it will be taken, to be able to influence it. The distinction between nominal transparency and effective transparency corresponds to that of information being accessible and information being both accessible and comprehensible.

Heald's genealogy of transparency has a point to it. He argues that transparency is often justified with an appeal to its positive effects. However, not all sorts of transparency

[137] Heald 2006b.

have the same effects. Therefore, when deciding on what forms of transparency to introduce, it is wise to consider the purposes one hopes transparency will contribute to. Heald's categories of transparency are probably best characterised not as different brands of transparency, but as different categories for sorting transparency instruments or obligations that aim to realise the quality of transparency. After all, all transparency measures that governments take that fall into one of the categories Heald discerns, can contribute to transparency as defined above: a situation where people can easily ascertain and understand the state of the world and predict how their own actions will affect that world.

2.2.5 Summary of findings

We found that governments are transparent if they give people the information they need to ascertain and understand the state of the world and to predict how their own actions will affect that world, and if they do not unnecessarily complicate that world.

There are a number of measures that governments can take to achieve this. It appears that the notion of 'information' is key: to be transparent, the government should make information available to the general public, but also more specifically to interested parties. The quality of the information is included in the notion of transparency: information should be understandable and, according to some authors, simple. The kinds of information that must be made available are not limited, but include information about concrete decisions and events as well as information about procedures and processes, and can also include information that does not pertain to government activities.

Rule-governed decision making also contributes to transparency. In the framework provided by Heald, it can be seen as an ex ante transparency-enhancing instrument about which decisions can be taken by public authorities, and the way those decisions are going to be taken. Likewise, the obligation to give reasons for decisions is nothing more than an ex post transparency obligation about the decision making process and about the information that was used as a basis for the decision.

All this confirms that there are rules and principles in the legal systems of the member states as well that contribute to transparency, although they are not always labelled that way.

A government that wants to increase transparency still has a lot of options available. It has large amounts of information at its disposal, and it can communicate this information to any given number of potential receivers, in many different forms. In addition, it could elect to impose transparency obligations on others, saving itself the trouble of collecting, processing, and making public certain information.[138] Although it is possible

[138] A striking example is the South African constitution, which includes a right to information held by private parties. According to article 32 (1), everyone has the right of access to a) any information held by the state; and b) any information that is held by another person and that is required for the exercise or protection of any rights.

to argue that government should be as transparent as possible, and should therefore communicate as much information as possible, to as many people as possible, in the most adequate form, this is not what the principle of transparency requires. Instead, the legislator and the court derive the concrete transparency obligations from the principle of transparency that they think are best suited to accomplish the goals that they feel the principle of transparency promotes. A transparency obligation will look something like this: An actor X has to communicate to Y certain information I, at moment t, complying with quality standard Q, either actively or passively, subject to a number of exceptions E. These transparency obligations are the meat on the bones of the notion of transparency, and the elements of transparency identified by the authors cited above can be seen as examples of these obligations. The duty to give reasons for example is an obligation incumbent on an administrative authority (X) to communicate to the addressee of a decision (Y) the reasons for its decision (I), when it notifies this decision to the addressee (t), in such a way as to enable the addressee to review the legality of the decision, and whether an appeal would be likely to succeed (Q), actively, and with very few exceptions.

When we encounter transparency instruments in later chapters, these can be analysed by answering the following set of questions:

- what is the reason for the obligation?
- who must be transparent?
- to whom?
- about what?
- when?
- actively or passively?
- are there quality standards for the information that is being supplied?
- what are the exceptions?

2.3 The value of transparency

In paragraph 2.2 I argued that transparency is a diffuse concept, the interpretation of which varies according to time, place, and most important, function. It is made tangible through concrete transparency obligations. The precise transparency obligations that a given author considers to be an essential part of transparency are at least in part determined by the effects he believes transparency should contribute to. Authors who focus on transparency as a tool to improve democracy for example will have a strong focus on public access to information, and will tend to disregard those transparency obligations that have a more specific target. This paragraph provides an overview of the beneficial effects that have been ascribed to transparency. I will start though with the analysis of a different approach, where transparency is considered to be intrinsically valuable – a ‘good thing’ that deserves to be pursued for its own sake. This often, but not necessarily, coincides with the idea that transparency is a fundamental right.

2.3.1 Transparency as an intrinsic value

Although transparency is usually lauded for its beneficial effects on everything from access to education to trust in public institutions to participatory democracy, a significant number of authors insist that transparency is intrinsically important, or at least also intrinsically. Many authors argue specifically for the intrinsic value of access to information, but most of their arguments work just as well for transparency as a whole. Sometimes the argument that transparency, or access to information, is an intrinsic value is based upon its recognition as a fundamental right in authoritative legal sources. Usually, a right to access government-held information is read into articles that protect the freedom of expression, which includes the right to receive information.[139] That position can be defended, although it is all but uncontroversial.[140] If transparency is recognised as a human right, it becomes desirable in and of itself. Yet, even if access to information is eventually recognised as a fundamental human right, the reasons for that recognition are still relevant, if only because such a right must be further interpreted.

Those promoting freedom of information and transparency as a human right seek to affiliate it with other concepts that are already well-established: they claim that freedom of information is fundamental because it is a necessary condition for democracy and (collective) self-determination. Although this does not mean that transparency cannot be a goal to be striven for, one must not lose sight of the fact that its value is derived from that of democracy and self-determination. Thus, according to these lines of reasoning, transparency is an intermediate value. This approach can be found in Hins & Voorhoof, who argue that "the transparency of public administration is essential in a democratic society."[141] Again, it is closely related to the freedom of expression. The latter enables people to freely participate in the public debate. However, to engage in a meaningful exchange about public affairs, we need information about them. Therefore, the right to impart and receive information is widely recognised as being part of the right to freedom of expression.[142] Since governments hold a significant amount of information that is necessary for an informed debate about public affairs, including the functioning of the government, it would certainly be highly useful if this information was available to the public. That it would be useful does not mean there is a legal obligation though. Governments have been reluctant to accept an obligation to provide access to governmental records implicit in the freedom of expression.[143] The ECtHR

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[139] Hins & Voorhoof 2007, p. 114 make this argument for article 10 ECHR. Banisar 2006, p. 9, makes the argument for article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. See also Mendel 2006, p. 2.

[140] Birkinshaw 2006a, p. 49, despite his heartfelt plea for the adoption of a right to access information, recognises that such a right does not exist yet. If one accepts the idea that there is a public right to access information based on article 19 of the Universal Declaration of Human Rights, it is certainly one of the most violated human rights of that period, as only Sweden recognised a right to access information at that point.

[141] Hins & Voorhoof 2007, p. 114. It is also embraced by AG Sharpston in her opinion on joined cases C-92/09 and C-93/03 *Schecke* [2010] ECR I-11063.

[142] E.g. Banisar 2006, p. 9.

[143] Roberts 2001, p. 260.

has been reluctant to accept a public right to access government-held information as being included in the right to freedom of expression.[144]

There is an alternative complementary approach though, based on the importance of information for the functioning of individuals, not only in their capacity as citizens, who need information to take part in democratic processes, but in their capacity as individuals as well. Without information, we cannot accomplish such basic tasks as acquiring food, taking care of our health, working, etcetera. In this sense, information is necessary for the realisation of more or less all other fundamental rights, and an important aspect of personal autonomy (which, according to some, is inherent in article 8 ECHR for example). After all, autonomy requires us to take our own decisions, and to take decisions that serve our interests and our goals, we need information.

A simple example can clarify this. A bridge player that knows which cards his fellows hold is much more likely to win the game. Whoever lacks information is hampered in his ability to pursue his own goals, when he is faced with criminal persecution or life threatening pollution in his backyard as well as when he is playing a card game.

The perceptive reader will notice that the way in which transparency contributes to the realisation of – for example – the right to a clean environment is not so different to the way in which it contributes to the realisation of democracy. In both cases, information is needed to exercise these rights. But there is a difference as well. Whereas the realisation of democracy requires that people have access to information about the government that will enable them to judge it, the realisation of other rights requires access to a much broader category of information, not all of which will be held by the government. If such information is in fact held by the government, the decision on whether it should be public is different from that made for information about the functioning of the government. For the latter category, where people need certain information to realise fundamental rights, where that information is not held by the government, there might exist an obligation to gather such information and dispense it to the public afterwards. The information in that case has to come from somewhere else though, and since information is a valuable resource, the source of the information might not be willing to give it up lightly. Forcing someone to give information to the government and then distributing it to the general public is an intervention with the rights of the original holder of the information, and will therefore require strong justification.

All this notwithstanding, the EU has recognised certain aspects of transparency as being a fundamental right of its citizens. Article 8(2) of the charter gives everyone the right to access personal data, article 41(2) gives parties in administrative and legal procedures the right of access to the file, and article 42 codifies the right of access to documents held by the EU institutions. Nobody will argue with the fact that those

[144] See chapter 3 below for an extensive treatment of the approach of the ECtHR. See also Hins & Voorhoof 2007, p. 217; Banisar 2006, p. 11. Although the inclusion of a right to access government records was considered during the drafting of the ECHR, this proposal was rejected by the parties to the convention. See Davis 1999.

rights are not absolute though, and their exact scope is open to discussion.[145] As we shall see in paragraph 2.4, one of the characteristics that separate principles from rules, is that principles have 'weight.' They can have weight because they are intuitively intrinsically important, but also because they contribute to the realisation of other desirables. Therefore, their recognition as fundamental rights does not diminish the importance of the instrumental value of transparency. The goals that underlie its introduction must still be taken into account if we are to interpret these rights in the proper way.

The most outspoken – and aggravating – argument for the position that governments should in principle be fully transparent, independent of any goal that is served by being transparent, is that the government does not hold information on its own account, but on account of the public. It is closely related to the argument that government has no interests of its own, but rather protects the public interest. A government can therefore not 'own' information: government-held information is owned by all citizens, who should therefore be free to access it, unless there is a public interest that overrides this right. As Kierkegaard puts it: "In a modern democracy, a very significant part of the totality of information held by ''others'' is in the hands of the state. That body of information is produced, collected and processed using public resources and it ultimately belongs to the public. The government holds the information as a custodian for the public, and is under a general obligation to make it available, save when a compelling public or private interest dictates otherwise."[146] The same argument can be found with various other authors.[147] However, even if one accepts that the government has no interest of its own, and holds information on account of the public, the conclusion that all people should therefore at all times be able to access this information does not follow. Although the state should act in the interest of its citizens, saying that it merely holds and manages information for the people[148] is stressing it. The state is more than just a servant of the people: it is a part of 'the people' in which they have invested some of their powers, of course with the intention that the state will use those powers in their interest, but not necessarily with the condition that they can take that power back at any given time. The conclusion that the state is merely an instrument of the people without power of its own does not follow. Imagine someone holding an analogous argument about the power to use force: the people as a whole have attributed this to the state. It is not originally a power that belongs to the state; it is a power inherent in all people. Yet few would argue that at any moment, we should be able to take it back from the state.

There is another reason this argument might lack the power to persuade many out there. Individual citizens living in a democracy might well make the democratic decision to gather certain information as a collective (i.e. they attribute this task to the government), without thinking it is a good idea that all this information is available to private citizens. They may be willing to supply information to the state, but not to all their individual fellow citizens, or be willing to supply information for some purposes, with-

[145] Curtin 2000 and Hins & Voorhoof 2007 propagate a broad interpretation; Driessen 2005, p. 680 argues that the right does not cover access to all documents.
[146] Kierkegaard 2009, p. 4.
[147] Stiglitz 1999, p. 7-8; Neuman 2002, p. 41.
[148] Neuman 2002, p. 41.

out allowing the state to use it for other purposes. The 'ownership' of the information might not be full ownership at all, but merely a right to gather certain information for strictly defined purposes and use it in strictly defined ways. The public cannot claim a right of ownership that goes beyond the one it has awarded to its representatives.

The difference between accepting a right to transparency because we own everything the government owns and a right to transparency because it is a necessary requirement for a functioning democracy is important. Whereas the first justification for a right to access requires access to all information, the second 'only' requires access to information that helps people in their capacity of citizens, i.e. participants in the democratic decision-making process.[149]

Birkinshaw proposes another argument for considering access to information a fundamental right: we have a right to know how the government acts, because it acts on our account, and in our name.[150] In a sense, all government actions are on our head, and we should know what we are responsible for. This somewhat implies that the government is democratically elected, and indeed Birkinshaw argues that access to information is exclusive to "advanced participatory democracies" and requires "a developed sense of democratic entitlement, and social and public structures that are capable of sustaining its onerous claims."[151] This argument is perhaps the most convincing, but its scope is somewhat limited. It pertains to information about government activity, but not necessarily to government-held information about matters that are not directly related to that. It flows from the fact that government is the agent of the people and that it acts on their behalf, and will be addressed in further detail in paragraph 2.3.3.2 below.

To conclude: there are a number of arguments for attributing intrinsic value to transparency. Not all of these arguments are equally satisfactory. The ownership argument in particular takes a somewhat peculiar view of government, and ignores the fact that information that has been collected for a particular purpose by a particular entity cannot be used by anyone in whatever manner strikes their fancy. It is possible to argue that transparency, or access to information, is a human right, yet such a right is justified by the argument that transparency is necessary to realise other, better-established human rights. The argument can be used in relation to other arguments in favour of transparency as well: because transparency contributes to good governance, transparency acquires intrinsic value when one accepts good governance to have intrinsic value. Because transparency can contribute to food security, transparency acquires intrinsic value when one accepts food security to have intrinsic value. However, even if we accept this line of thought, only those species of transparency that actually do contribute to food security or good governance can derive intrinsic value from them. Thus, the position that transparency has intrinsic value because of its relation to human rights is not unreasonable, but the interpretation of a right to transparency would still depend on

[149] The difference is not purely academic: an example of how the different foundations for a right to access information can lead to different outcomes can be found in the opinion of AG Sharpston in Joined cases C-92/09 and C-93/03 *Schecke* [2010] ECR I-11063, paragraph 117.
[150] Birkinshaw 2006a, p. 47.
[151] Birkinshaw 2006a, p. 50.

the extent to and the manner in which transparency contributes to the realisation of those other rights. Although turning transparency into a human right will emphasise its importance, it will not fundamentally change the way in which the principle of transparency should be applied in concrete cases.

2.3.2 Transparency as an instrumental value

Although transparency can be seen as intrinsically important, it owes its popularity to a large extent to its instrumental value.[152] If we make an inventory of all the benefits that have been ascribed to transparency, we can come up with an impressive list indeed; so much so that transparency has been described as a 'pervasive cliché' of a 'quasi-religious nature.'[153] However, transparency is rarely a sufficient condition to achieve all the laudable goals it contributes to, and one is well advised to be cautious in expecting too much from the introduction of transparency.[154] In addition, not all kinds of transparency are suited equally well to all goals.[155] Heald for example warns that real time transparency, as opposed to transparency in retrospect, is ill-suited to improve the efficiency of an institution.[156] In this paragraph, I will address the theoretical benefits of transparency that have been identified in the doctrine as well as the assumptions underlying the introduction of transparency by policy-makers.

In addition, we will address the empirical research that is available about whether the assumed effects of transparency are actually realised. The aim is to provide an overview. In later chapters, the way in which transparency contributes to these goals will be discussed more in depth. We will then analyse which kinds of transparency obligations are included in particular fields of law, and whether these obligations are well suited to accomplish the goals underlying the introduction of transparency in that field of law.
It will turn out that although transparency can have many positive effects, not all of these have played a significant role in the development of the principle of transparency that took place in the EU since the early 90's. Still others have played a significant role in policy development, but are hard to take into account when applying the law. In the remainder of this thesis, only the legally relevant purposes of transparency will be considered.

A final remark: some authors insist on a rather sharp distinction between transparency as a legal principle and transparency as a policy principle.[157] Although I will not deny that some aspects of transparency are hard to regulate legally, there is no water proof division between the two. Policy considerations have influenced the legal principle of transparency, and will keep influencing it in the future. In paragraph 2.4 on legal prin-

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[152] Heald 2006a, p. 59.
[153] Hood 2006a, p. 3.
[154] Curtin & Meijer 2006, p. 120 warn about a number of dangerous 'transparency myths' that inform policy making, but are rooted in reality only to a limited extent.
[155] Prat 2006, p. 101; Heald 2006b.
[156] Heald 2006b, p.32.
[157] Curtin 2009, p. 207; Curtin & Meijer 2006, p. 111.

ciples, the question of how policy consideration can – and should – influence the application of legal principles is addressed in-depth.

2.3.2.1 Democracy

First, transparency is said to contribute to democracy. As we have seen, the availability of information can fuel the public debate, and helps with the process of will-formation.[158] In addition, transparency is considered a necessary, albeit not sufficient, condition for participation[159], which allows people to exert influence on different types of governmental activities,[160] and accountability, [161] which ultimately allows people to judge government actions and attach consequences to them.[162] Transparency will not automatically bring about participation and accountability. Rather, the realisation of those values requires additional political rights that allow people to either influence the actions of public authorities, or to take some kind of action if those actions do not satisfy them. Nevertheless, when such rights are present transparency is a necessary condition to allow people to use them in a meaningful way. The relationship between democracy and transparency is fairly uncontroversial, and there is empirical data which supports the idea.[163]

The fact that transparency improves democracy may have played a somewhat limited role in its introduction in the EU legal order, but the idea has had considerable impact on its further development. Although with the introduction of transparency into the European legal order, lip service was paid to values of democracy, participation and accountability, democracy was initially not a major concern.[164] This is most true with regard to those aspects of transparency that preceded the introduction of public access to information. However, even the introduction of public access to information may have been driven more by a desire to increase legitimacy and trust in the institutions,[165] and by this their efficacy, than by a desire to improve democracy.[166] Even if democracy is mentioned, it takes a backseat to other considerations. As Piris puts it: "The essential point remains, however, that in order to be effective, the actions of the institutions must

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[158] Curtin 2000, p. 7 argues this is the most important function of public access to information.
[159] Addink et al. 2010, p. 54-55; Stiglitz 1999, p. 7; Banisar 2006, p. 6.
[160] Addink et al. 2010, p. 54.
[161] Addink et al. 2010, p. 53; Banisar 2006, p. 18; Stiglitz 1999, p. 7.
[162] Bovens 2007, p. 12.
[163] Kaufmann 2005, p. 15.
[164] Curtin & Meijer 2006, p. 114 argue that only in the second, political rather than legal, phase of development of transparency in the EU was it perceived to be a tool for a more democratic way of working and reaching decisions; Roberts 2006, chapter 8; Piris 1994, p. 470-476.
[165] In the sense of social legitimacy, or the acceptability of their decisions. See paragraph 2.3.2.2 below for a discussion of different kinds of legitimacy and how transparency is thought to contribute to them.
[166] Roberts 2006, p. 174; Söderman 2001 is also extremely critical about the Institutions' commitment to transparency: "I would go further and say that transparency is an essential part of democracy. It is obvious that the debate and adoption of laws should be carried out in public. I know of no legislative body that claims to be democratic and which adopts legislation behind closed doors – except the Council of the European Union."

be accepted by citizens and that, for this to occur, these institutions must be closer to the citizens, lend them an ear, be under their control, in a word, to be more democratic."[167] In other words, the institutions must become more democratic to be able to adopt and execute their policies in an effective manner, effectiveness being the final value here. As we shall see, this approach is also implicit in subsequent Commission and Council documents about transparency and the manner in which it is justified. In his description of the transparency developments on the European level, Roberts points out that transparency was introduced as a cure for the crisis of legitimacy that the European Union faced in the 1980's and 90's.[168]

Democratisation might not have been a priority when the Commission and the Council took their first steps on the way to more transparency, but by now this has changed. The institutions are coming around to the view that transparency also serves to improve democracy, and promote it for that reason. Curtin & Meijer see this development taking place from 2000 onwards, although they argue that transparency in this sense is a policy concept rather than a legal one.[169] However, since democratic values are enshrined in our legal order, it is no surprise that the recognition that transparency is necessary to have an optimally functioning democracy has an effect on the law as well.

The fact that transparency improves democracy has been recognised in authoritative legal sources as well. Declaration No 17 to the Maastricht Treaty indicates that the right of access to the documents held by the EU institutions is linked to the democratic nature of these institutions.[170] The case law of the European courts shows that its interpretation of the right to access information is affected by the importance of transparency for real democracy. It holds that transparency strengthens the principle of democracy and respect for fundamental rights,[171] and has on occasion decided on requests for information based on whether a refusal to release the information would interfere with democratic accountability.[172]

We can conclude that the way in which transparency contributes to the realisation to democracy - by enabling the formation of the public will and as a precondition for participation and accountability - is relevant for this research. The matter will be addressed in greater detail in chapter 3 on public access to information.

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[167] Piris 1994, p. 461.
[168] Roberts 2006, p. 174.
[169] Curtin & Meyer 2006, p. 114. Curtin 2009, p. 207.
[170] See Declaration No 17 to the Final Act of the Treaty on European Union signed at Maastricht on 7 February 1992.
[171] Case C-41/00 P *Interporc Im- und Export GmbH v. Commission* [2003] ECR I-2156*,* paragraph 39; Case T-211/00 *Kuijer v. Council* [2002] ECR II-485, paragraph 52.
[172] Joined cases C-92/09 and C-93/03 *Schecke* [2010] ECR I-11063, paragraph 83.

2.3.2.2 Increasing trust and legitimacy

Transparency is often thought to increase the legitimacy of the EU institutions as well as the trust that EU citizens have in them.[173] This in turn improves the efficacy of the institutions, as people are more inclined to accept their decisions, and enforcements costs will be lowered.[174]

Despite the popularity of the phrase democratic legitimacy, the concept of legitimacy cannot be equated with democracy. Legitimacy is a broad concept, which includes input legitimacy, and requires that people have a fair chance to exert influence over decision-making.[175] It also includes output legitimacy, which means that people agree that an authority should exist because they are convinced that it brings them a net benefit; social legitimacy, which refers to 'the affective loyalty of those who are bound by it, on the basis of deep common interest and/or strong sense of shared identity';[176] and formal legitimacy, which requires that an authority is constituted and acts according to accepted legal rules and procedures.[177] Democracy is a way to guarantee input legitimacy, but does not guarantee the other forms of legitimacy.

Transparency is thought to contribute to input legitimacy, output legitimacy, and social legitimacy. However, one can reason just as easily that it has adverse effects.

In the context of the EU, the institutions seem to believe that their input and output are already up to par. Transparency can help in making the general public realise this. Thus, input transparency is increased, because it allows people to see how experts and other participants are selected, and what is done with their input.[178] Output legitimacy is increased because it helps people to realise that the EU brings them a net benefit.[179] The institutions also hope that social legitimacy will be increased if people know what the EU does.[180]

Transparency may contribute in a more indirect way as well, by making it easier to participate in the EU. An increase in participation could increase input legitimacy, because it gives people a better chance to influence decision-making processes.[181] It could increase output legitimacy, because by providing information that the institutions

[173] Banisar 2006, p.6; O'Neill 2006, p. 76, Lenaerts 2004, p. 317-318.
[174] Piris 1994, p. 461; Curtin & Meijer 2006, p. 116.
[175] Curtin & Meijer 2006, p.112.
[176] Curtin & Meijer 2006, p. 112.
[177] Curtin & Meijer 2006, p. 112.
[178] Curtin & Meijer 2006, p. 116.
[179] Curtin & Meijer 2006, p. 117.
[180] Curtin & Meijer, p. 112; European Commission White Paper on European Governance, 2001.
[181] Curtin & Meijer 2006, p. 116-117; Arvai 2003 finds that citizens are more willing to accept a policy when they know there has been public participation, even when they have not participated themselves, and were not offered the opportunity to do so, then when the policy was based on expert and government input alone. In other context, these findings could not be replicated though. Wiedemann & Schütz 2008 find no positive effect on the acceptance of decisions about the siting of mobile communication base stations.

themselves do not have, participants can increase the quality of decisions.[182] It could increase social legitimacy, because people may feel more involved with the EU if they can participate in it.[183]

On the other hand, transparency may detract from legitimacy as well. Increased openness may give a malevolent press more options to attack the EU, while ignoring the positive, which could decrease the perceived benefits, and thus the output legitimacy, and also social legitimacy.[184]

Transparency about the decision-making process may also convince people that input legitimacy is lacking. Participating in EU affairs is not something the average individual can do, and people may feel the EU decision-making process is dominated by experts, and real democratic control is lacking.[185]

Resources that are deployed to make the EU more transparent cannot be used for other things, and thus transparency may diminish the effectiveness of other policies, and thus of output legitimacy. Overly formal procedures may also hamper creativity and entrepreneurship of EU officials, making them less effective.[186]

Whether transparency actually has a positive effect on legitimacy is debatable. Yet, the idea is not without merit. Curtin & Meijer designate the proposition that transparency contributes to legitimacy as a myth, but also hold that such myths are not without value. They represent shared values and enable people to coordinate their behaviour. They can guide future developments and be used to rally support for institutional reform, although they do not present a fair picture of how transparency actually functions in practice.[187]

We already saw in the previous paragraph on transparency and democracy that the European Institutions were interested in furthering transparency in the Union to a large extent because they thought it would improve their legitimacy and the trust European citizens would place in the Union. In Declaration 17 to the Treaty of Maastricht, the member states point out that the transparency strengthens not only the democratic nature of the institutions, but also the public's confidence in the administration. According to the Commission, social legitimacy is increased by transparency because "providing more information and more effective communication are a pre-condition for generating a sense of belonging to Europe."[188]

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[182] White Paper on European Governance, p. 10, 15; Addink 2010, p. 55.
[183] Curtin & Meijer, p. 112.
[184] Curtin & Meijer 2006, p. 119.
[185] Curtin and Meijer 2006, p. 117 question whether NGOs participating in the EU are seen as representing EU citizens.
[186] Curtin & Meijer, p. 118.
[187] Curtin & Meijer 2006, p. 120.
[188] White Paper on European Governance, p. 11. Better access to information is a means to bring the public closer to the Community Institutions

Although the CFI and the ECJ have paid lip service to the idea that transparency increases the legitimacy of EU decisions in their early case law on access to information, the actual influence that the theses that transparency increases trust and legitimacy has had on the *legal* development of the principle of transparency, appears to be limited.[189] In the preamble to Regulation 1049/2001 it is said that openness guarantees that the administration enjoys greater legitimacy.[190] It thus provides a general argument in favour of transparency. As such, it features in the Turco case, where the ECJ held that the release of a legal opinion could not be justified with the argument that this would lead the public to doubt the legality of the Council's decision. The ECJ holds that it is in fact a lack of openness which will lead to doubts about the legality of decisions, and to doubts about the legitimacy of the decision-making process as a whole. The argument that transparency adversely affects the legitimacy of the EU and the public's faith in them cannot be used as a justification for a limitation to transparency, because the Regulation is based on the assumption that it does just the opposite. However, if there are legitimate reasons to keep information secret, the legitimacy argument does not play a prominent role in the balancing exercise that follows. This is to be expected, because it is not clear how the principle of transparency should be interpreted to increase the trust in EU institutions. In other words: one can resolve to interpret the principle of transparency in such a way that it will increase the trust in EU institutions, but if it is unclear how transparency contributes to this goal, one cannot decide which concrete norms to derive from the principle of transparency that will achieve this goal. The ideas about transparency as a tool to increase the legitimacy of the Union has certainly served to emphasise the importance of transparency as a value though, and may have stimulated the acceptance of transparency as a legal principle, even if it has limited effect on its interpretation.

Thus, we can say that transparency might contribute to legitimacy and to increased faith in public institutions, but we are unsure of the exact impact and the manner in which it does so. Although the argument that transparency has this effect may have contributed to its emergence in EU law, it probably has a very limited effect on the manner in which the principle of transparency is interpreted in concrete cases.[191]

2.3.2.3 Quality of governance

Transparency is thought to contribute to the quality of governance in several ways, both positive, in the sense that it promotes good practices, and negative, in the sense that it prevents harmful practices. It contributes to good governance both directly, in the sense that transparency as such has some positive effects, and indirectly, in that it is a prerequisite for other mechanisms that can improve the quality of governance, like participation and accountability. According to Addink & Ten Berge, high quality governance requires that the government fulfils its tasks in accordance with the norms of

[189] Joined cases C-39/05 P and C-52/05 P *Turco* [2008] ECR I-4723, paragraph 59. See also Case C-506/08 P *MyTravel* [2011] ECR-I-00000, paragraph 113.
[190] Recital 2 to Regulation 1049/2001.
[191] See also Von Danwitz 2010, p. 12-13.

the rule of law and democracy and in an honest and impartial way.[192] This statement implies that there are two aspects to good governance. First, government has to fulfil its tasks – it has to serve its citizens.[193] Second, it has to do so while complying with legal and moral rules and values. To realise this, governments have to comply with the principles of good governance, which include transparency but also participation and accountability.[194]

A good government will fulfil its tasks. In other words, it will manage to realise pre-established policy goals. This is expressed in the good governance principle of effectiveness.[195] Transparency can contribute to this in two ways. First, transparency in itself has a number of positive effects. It attracts foreign investors, and it is a pre-condition for a market economy that functions properly, because it allows economic actors to make better decisions.[196] Second, by ensuring that government policies, regulations and procedures are properly understood, it increases the chance that people will abide by these regulation, or make use of the benefits that are provided to them.[197] A subsidy to stimulate the use of solar energy will not reach its goal if nobody is aware of how to get it. In addition, transparency is a necessary condition for effective participation. The quality of government decisions can be improved by allowing outsiders with relevant knowledge to comment on policy proposals and the like.[198]

Note that it is theoretically possible to have participation without transparency, so the two principles are distinctly different. However, without information about what is going on within government, participation is unlikely to produce the desired effects, as participants will find it hard to determine what contribution would be relevant, and whether their input is put to use at all. Likewise, transparency is a necessary condition for accountability. This too can improve the quality of government decisions, because it will allow public institutions to learn from their past behaviour.[199]

A good government will abide by the norms of the rule of law and democracy, and must be honest and impartial. The requirement of honesty and impartiality also implies a lot of prohibitions. Public institutions and public officials must not be corrupt, fraudulent, or arbitrary. This is sometimes summarised with the requirement that public officials must have integrity. That term in itself resists definition,[200] but is sometimes seen as professional wholeness or responsibility: 'you do what you are expected to do as a professional and you stand for what you are doing.'[201] In the case of public officials: they should do their job to the best of their ability, follow the rules, and serve the

[192] Addink & Ten Berge 2007, p. 12.
[193] Addink 2012, p. 1
[194] Addink & Ten Berge 2007, p. 13-14. Addink 2012, p.3.
[195] Buijze 2009, p. 8.
[196] Kaufmann et al. 2005, p. 8.
[197] Banisar 2006, p. 7.
[198] Craig 2012, p. 231.
[199] Bovens 2007, p.28-29.
[200] Lasthuizen et al. 2011, p. 387.
[201] Lasthuizen et al. 2011, p. 387.

public interest. In short, they should be good agents, i.e. good representatives of the interests of their superiors, who, ultimately, are the general public.[202] Although integrity has a strong moral component, integrity breaches will also lead to diminished effectiveness of government policies. Dishonest behaviour is costly. The possibility of receiving bribes provides an incentive to public officials to take a decision that they know to be of lower quality compared to the one they would take if they were not bribed.[203]

Transparency can help ensuring that public officials act properly: with integrity, and without succumbing to the seductions of bribes and private gains. The mere fact that officials know they are being watched, and that the quality of their work can be checked, is thought to contribute to better government.[204] Transparency also enables the supervision of public officials,[205] both by their superiors and by the courts.[206] This is supposed to motivate them to produce higher quality work, but it also makes it possible to impose consequences on public officials that shirk their duties, or display other undesirable behaviour.

According to Kaufmann et al. transparency does indeed lead to better decision-making. However, measuring the quality of decisions is hard. The World Bank has developed a government effectiveness index based on 17 different indicators,[207] including the quality of bureaucracy, institutional failure, government ineffectiveness, and many others. For some of these indicators, the relation with government effectiveness is tenuous, like for trust in government. In addition, it is unclear how transparency is related to these individual factors. And although more transparent governments are more effective, Kaufmann et al. show that this positive effect only occurs when there is a minimum threshold of political rights.[208] The specifics of the relation between transparency and the quality of government decisions remain a bit clouded. The argument that transparency contributes to participation and participation in turn improves the quality of government has certainly played a part in the policies of the Commission, in particular its policy with regard to participation.[209] In the development of the principle of transparency it is much less prominent.

The idea that transparency diminishes corruption is well-established and uncontroversial, and has been coined over 200 years ago. According to Bentham, exposure to public scrutiny promotes virtue in public officials, and diminishes the chance of dishonest behaviour.[210] 'Sunlight is the best disinfectant,' as Supreme Court Justice Brandeis held

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[202] See paragraph 2.3.3.2 below.
[203] Banisar 2006, p. 6.
[204] Prat 2006, p. 89; O'Neill 2006, p. 76.
[205] Prat 2006, p. 89.
[206] For the relation between transparency and judicial protection, see Man 2008, p. 1.
[207] World Bank Government Effectiveness indicators,
http://info.worldbank.org/governance/wgi/pdf/ge.pdf
[208] Kaufmann et al. 2005, p. 31.
[209] See e.g. Commission communications 93/C 63/02 and 93/C 63/03 of 5 March 1993, OJ 1993, C63/2 and 63/3.
[210] See Baume & Papadopoulos 2012 for an extensive treatment of Bentham's work on transparency.

in 1913.[211] Transparency is often introduced as a tool to fight corruption, and is prominently featured in chapter 5 of the UN Convention against corruption, which deals with the prevention of corruption.[212] The international financial institutions also promote transparency as a tool to fight corruption.[213]

Islam shows that more transparent governments score better on the control of corruption.[214] Kaufmann et al. acknowledge that the transparency and corruption control are positively correlated, but warn that the evidence that transparency leads to a reduction in corruption is not conclusive. In fact, partial transparency might serve to inform potential bribers about the identity of key decision-makers, and might have adverse effects.[215] In the EU, corruption as such does not feature prominently in the discourse on transparency. However, references to milder forms of integrity violations, like arbitrariness, are very common.[216]

For the more general argument that transparency allows supervision and review, matters are less problematic. Although Prat shows that not all forms of transparency, supervision, and review will have desirable effects,[217] the fact that transparency allows review and supervision is uncontested. Supervision is acknowledged by the commission as one of the purposes underlying the introduction of ATI (access to information) in the Member States, as it brings 'checks and balances' that improve the control of government organs.[218] It also played a role in the introduction of many transparency obligations in the Union, and in the interpretation given by the Courts of particular transparency obligations.[219] This argument plays a role in supervision of administrative authorities by hierarchically superior authorities, in review by the courts, and by the addressees of decisions, and stretches across many fields of law. Preventing arbitrariness and nepotism is an important goal of public procurement regulation, and an important reason to introduce transparency in the field.[220]

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[211] He is widely quoted: e.g. Grumet 2003; Roberts 2006, p. 232; Fung et al. 2007, p. 6-7; and has inspired the foundation of the Sunlight Foundation, which works to make government more transparent and accountable http://sunlightfoundation.com/.

[212] Articles 5(1), 7(1)a, 7(3), 7(4), 9(1), 9(2), 10, 12(2)c, and 13(1)a UN convention against corruption.

[213] Wang & Rosenau 2001, p. 28.

[214] Islam 2003.

[215] Kaufmann et al. 2005, p. 12.

[216] Especially in relation to equal treatment. Prechal & De Leeuw 2007, p. 54, 59; Wolswinkel 2009, p. 89, on impartiality; Mock 1999b, p. 1100. See also chapters 4 and 5 below.

[217] Prat 2006, p. 99-100; scrutinising officials too closely can turn them into conformists.

[218] Commission Communication: Towards a Reinforced Culture of Consultation and Dialogue – General Principles and Minimum Standards for Consultation of Interested Parties by the Commission, COM (704) p 19-22.

[219] See the discussion on transparency in public procurement in chapter 4, where one of the main functions of transparency is to allow the court to review whether the procuring authority has complied with the principle of equal treatment.

[220] Addink & Ten Berge 2007, p. 21-22

To summarise: transparency improves the quality of governance, because it is a necessary condition for participation and accountability, and because the idea of being watched can improve the behaviour of public officials and prevent corruption.

2.3.2.4 Realising individual's rights

Fourth, transparency can contribute to the realisation of many social and economic rights, like education, food, and a healthy environment.[221] The availability of information empowers people, and allows them to fight for the realisation of their rights.[222] This argument is particularly popular with NGOs who advocate transparency,[223] and indeed stories about people using FOIAs to secure food, clean water, or a proper education for their children are a strong emotive argument for transparency. This view is also represented in the case law on the ECHR, where access to information rights tend to be based on articles 2, 6 and 8,[224] and in the Convention of the Council of Europe on access to information, the preamble of which claims to give effect to articles 6 and 8 in addition to article 10 on the freedom of expression.[225]

Again, transparency contributes to the realisation of individual rights in several ways. First, a transparent environment empowers people. It enables them to take better decisions, i.e. decision that have a better chance to contribute to the realisation of their personal goals. Transparency also facilitates the utilisation of government procedures that bestow benefits upon individuals. Second, transparency is required to safeguard people's rights from illegal government interferences. Only if decisions with adverse consequences are transparent – communicated to the relevant parties, and with a sufficient statement of reasons – are they able to defend themselves. Finally, some information might be valuable in itself. Knowing who one's parents were is part of the right to family life as protected in article 8 ECHR.[226] Since transparency makes information accessible to individuals, it helps to realise this right.

The evidence for transparency contributing to the realisation of other rights is mostly anecdotal. However, Kaufmann et al. have analysed the effect of transparency on a number of human development indicators – life expectancy, female literacy rates, and child immunisation. They conclude that there is indeed a correlation between transparency and these indicators, but warn that there data are not sufficient to draw any conclusions about causality.[227] Islam concludes that transparency has a positive effect on government effectiveness,[228] a measure that includes the quality of the supply of basic

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[221] In fact, information on the environment has a privileged position in many FOIAs, due to the Aarhus Convention, which is based around the idea that preserving the quality of the environment is a collective effort, and therefore requires that information is available to everyone.

[222] See for examples Roberts 2006; FreedomInfo.org also collects success stories on its website: http://www.freedominfo.org/category/latest-features/

[223] Banisar 2006, p. 7.

[224] See chapter 5.

[225] Recital 3 to the Convention on access to information.

[226] *Odièvre v. France* (App no. 42326/98) ECHR 2003-II.

[227] Kaufmann et al. 2005, p. 32.

[228] Islam 2003, p. 19 and 22.

goods (education and basic health), the quality of infrastructure and public schools, and the satisfaction with public transportation, roads and highways, and public schools, amongst – it must be said – many others.[229]

Although the thesis that transparency contributes to the realisation of social and economic rights is seldom denied, it is clear that transparency alone will be painfully insufficient to do this. Nevertheless, there are some regulations that are, at least partly, based on this idea. It can be found in the Aarhus Convention, which obliges public authorities to communicate all relevant information to individuals in life-threatening situations.[230] It can also be seen in the telecommunications directives, more specifically in the universal services directive. Access to a certain baseline level of telecommunication services is seen as fundamentally important for individuals to be able to function in a modern society. Transparency is one of the ways in which the Union hopes to realise this base level.[231] In addition, more classic transparency obligations are generally thought to protect individual's interests. These are the principles of proper administration that are familiar from the national laws of the member states, like the duty to give reasons, and the right of access to the file. Although these principles were originally not linked to transparency, let alone to a principle of transparency, the considerations that led to their adoption are also relevant in the development of the principle of transparency. These issues will be addressed at length in chapter 5 on access to information as an auxiliary of individual rights.

In short, transparency contributes to the realisation of individual rights because it empowers individuals. It supplies them with the information they need to make their own choices and to realise their goals. Second, it allows them to defend their rights vis à vis public authorities who might try to interfere with them.

2.3.2.5 Economic performance and market efficiency

Finally, transparency is argued to increase economic performance and market efficiency.[232] This argument is somewhat related to the one discussed in paragraph 2.3.2.3 above, since the economic performance of a country is often seen as an indicator of good governance, or even as its goal.[233] High quality government is broader though, because it requires a government to properly fulfil many tasks in addition to stimulating the economy.

As economic decision making is dependent on the availability of information, transparency facilitates good decisions.[234] Access to government-held information is of particular importance, because 'for much of the information relevant to decision-makers in

[229] World Bank indicators for government effectiveness, see http://info.worldbank.org/governance/wgi/pdf/ge.pdf
[230] Article 5(1)c Aarhus Convention.
[231] See e.g. paragraph 11 of the preamble of Directive 2002/22/EC.
[232] Stiglitz 2009; Bovis 2007; Asian Development Bank 1997; Hancher et al 2003, p. 2.
[233] Kaufman 2005, p. 41.
[234] Mock 1999a, p. 303-304.

political and economic markets, government is in fact the sole repository (and producer).'[235] In addition, a transparent government is more predictable, which allows economic actors to make better long term decisions. Transparency is also associated with lower costs for administrative procedures, such as the registering of a business, and is thought to attract investments.[236]

The economic argument is most visible in economic law: in market regulation, public procurement, and competition law.[237] In this context, it is associated with greater competition within markets. Transparent procurement procedures lead to competition among suppliers, which in turn should result in lower prices for goods and services.[238] In the same vein, the liberalisation of formerly monopolistic markets is to open the doors to competition, and efficiency and consumer benefits are expected to follow in its wake.[239] The economic argument is also made for transparency, access to information, and the publication of economic data in general. This approach, although not as old as the road to Rome, is at least as old as the Swedish FOIA, whose spiritual father advocated transparency at least partly as a means to level the playing field for Finnish traders, who were too far removed from the capital to catch important news through the grapevine.[240]

The idea that public access to information is beneficial to the economy is especially prevalent with the international financial and trade organisations, who promote the introduction of transparency and FOIAs with the argument that it stimulates national economies and international trade.[241] Part B of the WTO's Trade Policy Review Mechanism for example states: "Members recognise the inherent value of domestic transparency of government decision-making on trade policy matters for both Members' economies and the multilateral trading system, and agree to encourage and promote greater transparency within their own systems," acknowledging that the implementation of domestic transparency must be on a voluntary basis and take account of each Member's legal and political systems. According to the World Bank "strong, efficient and transparent government institutions are fundamental to economic growth and social development."[242]

The Commission also notes that access to information might lead to the better management and allocation of resources.[243] However, economic considerations are much

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[235] Islam 2003, p. 3.
[236] Kaufmann & Belver 2005, p. 7, 29; Mock 1999a, p. 303.
[237] Zoellner 2006; Jellema 2002; Ottow 2006.
[238] Evenett & Hoekman 2005, p. 15.
[239] 1987 Commission Green Paper on the development of the common market for telecommunication services and equipment.
[240] Manninen 2006, p. 32. He also provides valuable insight into the relation between the thought of Chydenius, the father of the Swedish freedom of information act, and that of Adam Smith.
[241] Roberts 2006, p. 179-180, for the WTO approach to transparency that is mostly aimed at liberalization.
[242] Corruption and Good Governance, 1997 Annual Meetings World Bank Group Issue Brief, available at http://www.worldbank.org/html/extdr/am97/br_corr.htm.
[243] Commission Communication: Towards a Reinforced Culture of Consultation and Dialogue –

more prevalent in the public procurement directives, and the various market regulation directives.[244]

Kaufmann et al. present evidence that there is a correlation between transparency and economic performance.[245] There is a lot of debate about the existence of a causal relation though, and the direction of that relation. According to some authors, a certain level of affluence and development is required for transparency, so countries that do well economically speaking are more likely to be transparent as a result of that.[246] Others contest this, and say that significant steps to improve transparency can be taken at low cost, although this does require a committed government.[247]

Thus, transparency contributes to economic performance because it enables people to make informed decisions about economic acts. Because transparency also allows for participation and accountability, it will allow interested parties to try to prevent public authorities from taking decisions that have an adverse effect on the economy as a whole

2.3.3 Two main functions of transparency

The previous paragraphs show that transparency contributes to a number of goals in a variety of ways. When we look back at our findings, two distinct functions of transparency will emerge. Each of these functions can aid people in all the capacities they act in that we have discerned in chapter 1: the citoyen, homo economicus, and homo dignus all profit from transparency in both manners.

- In paragraph 2.3.2.1 we have seen that transparency aids the citoyen and contributes to democracy, because it facilitates the public debate and the process of will-formation.
- It also contributes to democracy because it is a necessary requirement for both participation and accountability. It is a first condition for people to be able to influence government action, and to impose consequences upon a government that acts contrary to its wishes.

- In paragraph 2.3.2.5, we saw that transparency aids homo economicus and contributes to the proper functioning of the market. It does this by creating a transparent environment, thus allowing economic actors to make better decisions.

General Principles and Minimum Standards for Consultation of Interested Parties by the Commission, COM (704) p 19-22.

[244] See Chapter 4 for a detailed analysis.

[245] Kaufmann & Belver 2005, p. 29.

[246] Birkinshaw 2006b, p. 188, 216.

[247] Kaufmann & Belver 2005, p. 28. They do acknowledge that certain forms of transparency can be costly to implement (p. 27), yet these are not required for transparency to have a significant effect on economic performance.

- It also allows accountability of public authorities. It allows economic actors to see whether they are treated impartially and equally, and hence is a necessary condition for them to take action if they are not.

- Finally, we saw in paragraph 2.3.2.4 that transparency aids homo dignus and contributes to the realisation of individual rights. It does this by creating a transparent environment, thus allowing individuals to take decisions that are better suited to help them realise their individual goals.
- It also allows people to see whether their rights are breached, and hence is a necessary condition for them to take action if they are not.

In addition, transparency can benefit public authorities themselves.

- In paragraph 2.3.2.3, we saw that transparency contributes to the quality of government. In part, it does this because it allows the targets of government policies to adapt their behaviour to existing laws and policies. Incentives simply do not work if people do not know about them. Transparency therefore improves the effectiveness of government policies because it aids the targets of that policy in decision-making. This effect applies to the citoyen, homo economicus, and homo dignus alike.
- Transparency also contributes to the quality of government because it is a necessary requirement for both participation and accountability. It is a first condition to allow outsiders to exercise influence on what public institutions do, and for public authorities to be able to profit from outside expertise. The observance of undesirable behaviour is a necessary condition for its correction. Thus, transparency is the first step to learn from mistakes in the past, and to correct bad practices. Again, transparency has this effect by virtue of its ability to allow outsiders to observe government behaviour, and to take appropriate action based on those observations. It improves the effectiveness of government policy because it allows outsiders to participate and hold accountable, again independently of whether the outsider is acting as a citoyen, homo economicus, or homo dignus.

- Finally, we have seen in paragraph 2.3.2.2 that transparency may contribute to social, input, and output legitimacy and to the public's faith in public institutions. The exact mechanisms are not entirely clear. However, if transparency does indeed contribute to legitimacy, this is again an indirect effect, obtained mostly through its positive effects on democracy, participation and government quality.

When we look at this list, we see that transparency functions in two distinct ways. First, in a transparent environment, people can make better decisions, because their ability to predict the consequences of their actions increases. This is true whether they

make political decisions, decisions about their private lives, or about their consumption pattern. In this manner, transparency facilitates democratic decision-making by the citoyen, economic decision-making by homo economicus, and private decision-making by human rights carriers.

Second, if an organisation, in this case the government, is transparent about its own actions, people can observe what it is doing. This then allows them to use any tools they might have to affect its actions in a meaningful way. Again, this is true whether they are defending the public interest, the competitive position of their company, or their private interests. In this manner, transparency allows the citoyen to control its representatives, homo economicus to defend his economic interests vis à vis public authorities, and homo dignus to hold public authorities that breach their rights to account.

Thus, transparency:

1) Facilitates decision-making
2) Allows outsider to observe what a transparent organisation is doing.

2.3.3.1 The first function

The first function of transparency is that it facilitates decision-making. A transparent environment is one in which people can easily ascertain and understand conditions, and can predict how their own actions will affect that world. People living in such an environment will be able to make better decisions, because it is easier for them to predict what consequences they will have.

The dominant theory about how people make decisions is rational choice theory, which provides a strong argument that people do indeed benefit from transparency. This theory predicts instrumental rationality: people have a pre-established set of ends, and then decide on the best means to realise those ends.[248] Rational choice theory has gained a lot of influence in a variety of fields, including policy making. Although the theory does not accurately represent the way in which people make decisions,[249] it offers the clearest model about how people make decisions, and unlike other theories it allows policy-makers to predict how groups of people will respond. That quality makes it quite suitable as a tool in developing policy.[250]

Rational choice assumes people try to achieve their goals in the best way possible. These goals are given, and will vary from individual to individual. To realise their goals, people make an analysis of the options that are open to them, and then select the one that has the best chance of achieving what they want. Because they are not omniscient, success is not guaranteed: it is impossible to determine with absolute certainty

[248] Rubin 2005, p. 1092.
[249] Rubin 2005, p. 1093 and 1100, and the literature referred to there.
[250] Rubin 2005, p. 1101.

what the consequences of a particular course of action will be. People are faced with two different information problems when they make decisions.[251] Some information is non-existent, like who will win the world cup in Brazil in 2014. Other information they simply do not have, like, in my case, who the players will be and what their strengths and weaknesses are. This makes it quite a challenge for me to determine the course of action that is most likely to lead to the realisation of my goal: to win a large amount of money by placing a bet on the outcome of the championship. To improve my chances to achieve my goal, I need more information.

It is quite clear that people need information to effectively achieve their pre-established ends. Rational choice theory does not say anything about those ends themselves though. Whether it is acceptable or desirable to strive for a given goal is not at issue. The only thing rational choice theory says, is that once someone has settled on a particular goal, he will choose the means most likely to result in its achievement, and to select those means, he will need information.

That is not to say that people should always try to gather all information that has some relevance to a decision they are about to make. Gathering additional information has a cost, and if those costs exceed the expected gain from the better informed decision, gathering the information is not rational.[252] In the case of my bet, learning about the past performance of the world cup players may increase my chances to win my bet, but not by an awful lot. Spending the time on writing another article about transparency is probably more likely to benefit me in the long run.

If the state creates a transparent environment though, this would lower the costs of information-gathering, and make it easier to predict the results of our actions. Thus, while expanding the same amount of effort, people can make better decisions. Rational choice theory by itself provides few arguments for the state to actually disperse information though, since it does not make any ethical claims. It does not say anything about the importance of the goals people are trying to achieve, and therefore provides no argument for assisting people in achieving them. Rational choice theory merely shows that people will often have an interest in accessing certain information, but that does not give them the right to do so.

The value-neutrality of rational choice theory might tempt one to assert that people should have access to all information as long as the costs of giving them access do not exceed the benefits. Indeed, in rational choice theory, it is up to the individual to determine which goals he wants to pursue, and thus which information is relevant. This also jives well with the image of human beings as autonomous individuals which we will discuss in chapter 4.

However, transparency enables people to make better choices about their health, their education, their consumption patterns, and their government, but also about the best way to plan a terrorist attack so it does the most damage. Clearly then, government

[251] Rubin 2005, p. 1094.
[252] Rubin 2005, p. 1095.

should not be obliged to assist people in all their endeavours. Rational choice theory may be value-neutral, the law is not. It has goals, and attributes more value to some goals individuals strive for than to others. Taking those values inherent in the law seriously might require making information available to enable people to realise some of their goals (those specifically protected by the law), but not others. If the law does not only require the state to respect it (non-interference) but also to promote it through active measures, the supply of information becomes almost necessary to take such positive action seriously, provided the information cannot easily be procured elsewhere.

Rational choice theory only suggests then, that if government has a goal that involves individuals taking decisions, the realisation of this goal is furthered by providing people with transparency with respect to decisions pertaining to that particular point. If government relies on individuals to rally against polluting companies in order to improve the quality of the environment, it must provide them with information that allows them to determine which companies they want to deal with first, and if it wants them to take legal actions, the procedures for doing so must be clear and easy to understand. The argument for transparency is the strongest when individuals themselves are better suited to determine which course of action will help to realise a particular goal than the government. An example of that situation would be the creation of an efficient market. An omniscient government could just tell everybody what to do to achieve maximal efficiency, but since governments are not omniscient, they depend on individuals' decisions to produce market efficiency.[253] Improving the quality of those individual decisions is the best option to increase market efficiency as a whole.

Rational choice theory in itself does not provide an argument for governments to create a transparent environment, but if they settle on a particular goal the realisation of which depends on the actions of those outside of government, transparency may be necessary for such a policy to succeed.

Rational choice theory provides us with insight in one of the reasons that transparency contributes to the realisation of democracy, individual rights, a smoothly functioning economy and a multitude of more specific policy goals. It empowers the target of transparency measures, whether it is the citoyen, homo economicus, or homo dignus. Throughout the remainder of this book, we will return to rational choice theory to examine in greater detail how transparency empowers people in their various citizens' roles. This will allow us to determine whether an obligation to respect or promote their rights should include a transparency obligation, and if so, what that obligation should look like.

2.3.3.2 The second function

The second function of transparency is that it makes it possible to observe from the outside what organisations are doing. This enables us to see what government is doing

[253] See chapter 4 for a more extensive explanation.

on our behalf, which in itself can be considered valuable,[254] but it is also the first step to ensure that it is actually doing what it should be doing, that is, executing democratically agreed upon policies while observing the rule of law. Transparency on its own is not enough to ensure this, but other instruments, like the right to vote or to participate more directly in public affairs, can only function when transparency is already in place.

The crux of this argument for transparency is that public institutions and officials are not free to act as they please. They have to comply with the law and the principle of democracy, because they work on behalf of the people. They have to represent their interests, not their own, and they must therefore respect the will of the people while refraining from illegitimately interfering with people's interests.

Political science and democratic theory predict that this arrangement can easily lead to problems. Power corrupts, and we need checks and balances, division of power, and review and control mechanisms. All of these serve to prevent public institutions and officials from using their power to further their own interests, or those of a specific group or individual, instead of the public interest. Forms of direct democracy and participation can also be seen as an instrument to prevent public institutions and officials from misinterpreting or downright ignoring the wishes of their principals.

The problem of how to ensure that a representative actually acts in the interests of the one he represents has been studied extensively in principal-agent theory. The results suggest that transparency will tend to improve the performance of representatives, although under certain fairly specific conditions it can have unexpected detrimental effects.

A principal-agent relation exists when one party, the agent, acts on behalf of another, the principal, in exchange for remuneration.[255] Such relations involve only two parties, but of course, within governments matters quickly become more complicated. Government itself does not act on its own behalf, but neither do its organs and its officials. They are agents as well, who work on behalf of principals. The administration is executing the wishes of the representatives that were elected by the people. The administration creates agencies to execute particular tasks on its behalf. The agency in turn employs people to do the actual work. Formal economic analyses are usually limited to dyadic relations, and pay little attention to organisational structures.[256] Yet, the idea of a network of principle-agent relations within government is not new. In early politicological work, it is already asserted that principals and agents need not be individuals, but can also be collectives of various sorts, and might have complicated interrelations.[257] Today, the idea that government is best understood as a network of principal-agent relations is still very much alive.[258] Amongst other things, this means that often

[254] Birkinshaw 2006b, p. 179.
[255] Ross 1973, p. 134; outside of economic theory, remuneration is not a necessary element. Mitnick 1973, p. 1 defines an agency relationship simply as one where one party acts on behalf of another.
[256] Waterman & Meier 1998, p. 178.
[257] Mitnick 1973, p. 2.
[258] Lane 2005, p. 46.

public authorities are not monitored by the general public, in whose interest they ultimately work, but by another public authority, who is attributed the task of supervision by the general public, or its representatives.

Principal-agent theory predicts that there are problems in all principal-agent relations, assuming the interests of the agent differ from those of the principal. First, because classic economic theory assumes people are rational and opportunistic, an agent who can get away with it will further his own interests at the expense of those of the principal. Second, the agent has an information advantage over the principal. The outcome, how well the task attributed to the agent gets performed, is determined by the effort of the agent as well as a number of variables that are not under his control. An example would be a reintegration officer whose job is to help beneficiaries of unemployment benefits to find a new job. His success will be determined by his own effort, in addition to circumstances that are out of his control, like the effort put in by his client and conditions on the local job market. The agent will be better able to judge how all of these factors have contributed to the end result than the principal. Thus, there is a risk that he will not work very hard, blame bad results on external circumstances, and claim payment for effort he only pretends to have exercised. What is happening here is that the agent exploits the information advantage that he has over the principal. Unfortunately this does not only lead to an unwarranted transfer of money from the principal to the agent, but to an overall loss of efficiency. Because the principal does not want to pay high wages to an agent who exerts low effort, he offers low wages, and accepts an agent who exercises little effort. Without the information asymmetry, he would be glad to offer high wages to an agent that he would trust to work hard. Lane demonstrates that in the latter case, both principal and agent are better off, but due to information problems, they will settle for the second-best contract.[259]

There are a number of ways to resolve the tension between the interests of the principal and the agent. Either they conclude a contract in such a way that the agent's interests become better aligned with those of the principal, by making remuneration dependent on the outcome, through profit sharing for example,[260] or the principal can choose to monitor the agent's behaviour.[261]

The first option does not work very well for principal agent relation within governments and between government and the general public.[262] Public officials tend to receive set wages, and since government does not produce any 'profit', they cannot be offered a share of that profit as an incentive to work hard. Although elected officials can be said to have an incentive to perform well to ensure they are being re-elected, their incentives are generally thought to be too complex for this to be a proper substitute for the incentive provided by profit-sharing.[263] Shapiro suggests that this is the

[259] Lane 2005, p. 41.
[260] Sharma 1997, p. 791; Eisenhardt 1989, p. 66.
[261] Eisenhardt 1989, p. 60; Waterman & Wood 1993, p. 686.
[262] Shapiro 2005, p. 268.
[263] Waterman & Meier 1998, p. 185.

reason that when agency theory is addressed in political science, there is much more focus on the question of how the principal can control the agent.[264]

The second option discussed in economic principal agent theory requires the principal to monitor the behaviour of the agent, so he can assure himself of the fact that his agent is in fact doing his utmost to further his interests. By remedying the information asymmetry between the principal and the agent, the principal prevents the latter from exploiting his information advantage. In nearly all cases, the principal will benefit from having more information available.[265] It has been demonstrated by Holmstrom that more information will improve overall efficiency, and can thus be beneficial to both the principal and the agent, who can share its benefits. His analysis was performed under the assumption that acquiring the information is costless though. In practice this will not be the case, if only because the principal has to process the information presented to him,[266] and the benefit of having the extra information available must be balanced against the costs of acquiring the information.[267] When the costs of additional monitoring become higher than the gains, a rational principal would settle for less than perfect behaviour in his agent. The ideal amount of monitoring could theoretically be determined using a cost-benefit analysis.

Generally, observing the behaviour of an agent is beneficial to the principal. There appear to be some exceptions to this rule though. Negotiations are notorious for being conducted in secret. Principal agent theory suggests that if there are multiple principals and agents, and the agents must negotiate an agreement for their principals, secrecy can indeed be beneficial to the principals.[268] Again, principal-agent theory assumes that the agents have interests of their own, and that they will attempt to further them if they get the opportunity. Transparency can have several effects in a situation like that. It increases the likelihood that during the negotiation the agents represent the interest of their principals, which is clearly a good thing.[269] However, this benefit might be off-set because transparency also provides the agent with incentives to act in a less than optimal way. Negotiators who know that they are observed might make an effort to show how loyal they are to the interests of their principals. They might take a more extreme position than they otherwise would, and make a show of being reluctant to compromise on their constituents' interests, even though this makes it more difficult to negotiate the outcome that best serves the interests of their principals.[270] It might also cause them to adhere to their principals' ideas about what outcome best serves their interests, even if during the negotiations, they come to the realisation that there is a better way to

[264] Shapiro 2005, p. 272.
[265] Dewatripont et al. 1999 provide a theoretical counter-example. In practice, such a situation would be unlikely to arise though. Prat 2006, p. 98.
[266] A daunting task when your agent is the government, even if it presents all relevant data to you on a neatly organised website!
[267] Although some authors argue that with the availability of modern technology the costs have become negligible. See Prat 2006, p. 94-95.
[268] Stasavage 2006, p. 174-176.
[269] Stasavage 2006, p. 166.
[270] Stasavage 2006, p. 168.

achieve this. Rather than appearing to deviate from the point of view of their principals, they adhere to the public opinion.[271]

Prat shows that the observation of agents' behaviour can be an incentive for conformism. In those cases where the outcome of the agents' action does not depend primarily on the effort he puts in, but on his ability to make the right decision, or his 'smartness', more transparency can be detrimental to the principal's interests. Smart agents, argues Prat, can successfully analyse circumstances and determine the most appropriate course of actions. Stupid agents cannot, and should take safe, neutral decisions. When their actions are observed, stupid agents will want to appear smart (to avoid being replaced with a smart agent), and will make riskier decisions, mimicking the smart agent. By not observing the behaviour of their agents, but only the outcomes, principals would prevent dumb agents from deviating from their optimal neutral behaviour.[272] The problem is worst if actual outcomes are difficult to observe. Prat concludes that this mechanism is the rationale behind the exemption of pre-decision information from the open government principle.[273] Because this information is prepared before actual policy decisions are made, the outcome is not observable. Hence, making this information public would give officials incentives to be less than candid with their advice. However, following Prat's argument, such documents could be made public with a delay: when the final outcome of the policy process can be observed, the disclosure of the agent's behaviour has less negative effects. Because the outcome will be known as well, a dumb agent has little to gain by pretending to be smart when the results prove him wrong.[274]

Delayed release of information might be beneficial in other circumstances as well.[275] Arya et al. describe how in complicated principal-agent relations the early release of information might act as an incentive for less than optimal behaviour in a principal who is at the same time an agent.[276] Theirs is by no means a plea for general delayed transparency though: they warn that the practical application of their analysis may be limited, and plead for more research.[277]

The assumptions underlying the economic analysis of principal agent relations are of course simplistic. Neither the assumption that the agent has more information than the principal nor the assumption that their interests will conflict are necessarily true,[278] nor is the more basic assumption that humans are purely self-interested actors, whose acts are rational and opportunistic. Outside of economic theory, there are alternative mechanisms to reduce agency costs, including professional ethics, careful selection and training procedures, and embeddedness, where agency relationships are embedded in

[271] Stasavage 2006, p. 169.
[272] Prat 2006, p. 99.
[273] Prat 2006, p. 100.
[274] Prat 2005, p. 100.
[275] Arya et al. 1997.
[276] Like a mid-level manager.
[277] Arya et al. 1997, p. 572.
[278] Waterman & Meier 1998, p. 177. Majone 2001, p. 65 argues that sometimes principals will benefit from selecting agents with preferences different from their own.

'an ongoing structure of personal relationships.'[279] Such mechanisms provide an alternative way to align the agent's interests with those of the principal.

In some cases, people or organisations acting on behalf of others are difficult to characterise as agents. The opinions about the exact circumstances such an actor stops to be an agent are varied.[280] They appear to have in common though, that the principal can exercise precious little control over the behaviour of his representative. Such representatives are called fiduciaries.[281] An example would be someone who has power of attorney over a patient in coma: he is supposed to act in the interest of the patient, but since the latter has no control over his actions, he must be characterised as a fiduciary rather than an agent. Majone explains there can be reasons to consciously make the choice to have a fiduciary acting on one's behalf rather than an agent, where a fiduciary relation is characterised as one where power has been fully transferred to the fiduciary, and the principal no longer has control over how it is going to be used, and can no longer use it itself. Doing this can be an instrument to show commitment: by delegating the power to decide on monetary policy to an independent central bank for instance, a state can commit to a consistent policy over time, without democratically elected organs falling prey to the temptation to use monetary policy for short-term or electoral gains.[282] In such cases, alternative mechanisms to ensure that the fiduciary represent the interests of his trustee are of even greater importance.

To conclude, principle-agent theory suggests that agents will tend to display undesirable behaviour, and that transparency is a way to prevent such behaviour, at least if there is some mechanism in place that allows the principal to attach consequences to the observed behaviour. This confirms other theories from political science and constitutional law that power needs to be checked. It is possible that the principal appoints a second agent, to control the first, although that raises the question of who controls the controller. Although principal-agent theory confirms that transparency will usually be beneficial, it also suggests there are some exceptions to this rule. These results are difficult to generalise or to readily apply to real-world situations. The assumptions underlying principal-agent analyses can be questioned, and some relations within governments are difficult to characterise as principal-agent relations to begin with. Nevertheless, it does provide us with the most detailed account of how transparency contributes to desirable behaviour in officials and it will be interesting to see to what extent these ideas are mirrored in the development of the principle of transparency as a tool to stimulate norm-compliance and accountability.

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[279] Shapiro 2005, p. 272, 276, 277.

[280] According to Majone 2001, p. 75: when property rights (of which political property rights are an example) are transferred completely to a representative. According to Shapiro 2005, p. 277 fiduciaries are 'the individuals and organizations acting on behalf of those for whom the asymmetries of information, expertise, access, or power are so great that they cannot pretend to control their agents.'

[281] Note that fiduciary is used as a general term for all representatives of an interest not their own. Thus, all agents are fiduciaries, but not all fiduciaries are agents. Shapiro 2005, p. 277. Here, the term fiduciary will only be used for fiduciaries who are not agents.

[282] Majone 2001, p. 210.

Principal-agent theory helps us to understand the manner in which transparency contributes to accountability, and through that to the realisation of democracy, individual rights, the proper functioning of the internal market and other more specific policy goals. Transparency allows outsiders to see what public authorities are doing, and the citoyen, homo economicus and homo dignus can all profit from this. Throughout the book, we will revisit principle-agent theory to examine how transparency contributes to accountability, and improves the performance of public authorities whose task it is to serve the interests of citizens. This will allow us to determine whether there ought to be transparency obligations that make this happen, and if so, what these obligations should look like.

2.3.4 Conclusions

Before we address the next issue, about legal principles, it is time to tie together our findings till this moment. As we have seen, transparency is a diffuse concept. Its meaning varies dependent on time, place, and context, and depending on its function. However, transparency is always concerned with the availability, clarity, and intelligibility of information. Transparency can be made concrete by identifying transparency obligations, which require the communication of certain information by an actor to a third party, either passively or actively, at a prescribed moment. Such transparency obligations usually serve an identifiable purpose and may be subject to exceptions. Various authors will consider various transparency obligations as fundamental to transparency, but in general, what transparency obligations are chosen to make transparency operational is dependent on the function transparency is expected to serve.

Transparency is often considered to be intrinsically important, but more often, it is lauded because it can contribute to a variety of other desirables. These are the proper functioning of democracy, through the stimulation of public debate, and as a necessary condition for accountability and meaningful participation; increasing the trust in and the legitimacy of public institutions; improving the quality of government, including the prevention of corruption; enabling the realisation of (other) fundamental rights; and stimulating market efficiency, welfare gains, and economic growth. We have seen that transparency achieves these things in two basic ways: it improves people's capacity to make the right decisions, and it allows them to see what is going on in government, which is a first condition for accountability and participation mechanisms to function, and thus helps to ensure that governments and their officials do what they are supposed to do: act in the interest of the people, while complying with the principles of democracy and the rule of law. The theoretical and empirical support for some of these notions is stronger than for others, and not all beneficial effects transparency might have are equally relevant for the way it has developed in the EU in the past decades.

The instrumental value of transparency presents us with a number of sound policy reasons for introducing transparency, but does not explain how or why transparency has turned into a legal principle. We fare better in this respect if we acknowledge transparency as intrinsically valuable, or at least as a human right. However, what starts out as

a policy consideration can turn into a legally relevant principle. The next paragraph on legal principles will show this.

2.4 On the nature of legal principles

We now have a good idea about what transparency is. However, that does not tell us anything about how this concept is to be incorporated into the law. As we have seen in chapter 1, transparency is an important consideration in many fields of law, where it has achieved the status of a legal principle. Indeed, transparency appears to have evolved into a general principle of law.

All the occurrences of the principle of transparency can be related to the concept we described above. They all require that public authorities communicate information to third parties or that they create transparency in order to enable third parties to better comprehend (some aspect of) the world in which they live. This still leaves a lot of question unanswered. The number of transparency obligations that could be imposed on the government is nigh infinite, so we need a way to determine what transparency obligations are legally valid and which are not. Of course, the first way to answer this question is to look at established rules that make the principle of transparency operational. But beyond that, what does the principle of transparency require? To answer that question, we have to know what a legal principle is, what distinguishes it from a legal rule, and how it functions. The debate about legal principles is complex and as of yet unresolved.[283] This thesis is not the place to resolve all the issues that are still under discussion. Nevertheless, if we are to determine what the principle of transparency is, and what the consequences of its emergence in the EU legal order will be, we need at least a basic idea of what a legal principle is.

As a preliminary remark, when we observe the literature on legal principle we can observe that there are two valid, but essentially different sorts of 'legal principles.' The word is best viewed as a homonym. Admittedly, the two concepts are related, but they are distinctly different.[284]

The first sort of principle is a legal phenomenon: a specific kind of legal norm with certain characteristics that is applied by courts and/or legislators when rules run out or lead to an unsatisfactory result.[285] The properties of those principles are at least in part uncontested. Their origins on the other hand are debated: one can pose the question where these principles come from and how courts and legislators determine which principles they apply, and then sit back and watch controversy ensue. Fit, a measure of how well principles match with earlier practice and decisions,[286] certainly plays a part here, but it is far from decisive. The same is probably true for morality.[287] Policy objec-

[283] See e.g. Borowski 2010; Marmor 2011, paragraph 1; Addink 2012, paragraph 4.3.
[284] Leiter 1997, p. 908.
[285] Dworkin 1977, p 103.
[286] Dworkin 1986, p. 255.
[287] Dworkin 1986, p.96-98; Waldron 1997, p. 857.

tives might be incorporated into the law and play the part of a legal principle as well.[288] For the EU, it is clear that fit played a significantly less important role in the development of legal principles than usual. After all, when the EU legal order was young, there was little that principles could fit with.

The second sort of principle is a metaphysical concept, more or less akin to Newton's gravity laws, that is coined by legal scholars to explain certain legal phenomena. These are the kind of principles that are discovered through a process of induction. The dimension of 'fit' is important here: a principle should explain as many of the observed phenomena as possible. We see this approach with Addink and Ten Berge, when they hold that the principles of good governance form an interpretation of relevant practices and legal materials.[289] Principles are thus a way to categorise and explain legal phenomena. This is also reflected in the idea that something qualifies as a legal principle when it is the underlying principle for many different rules.[290] Whether such principles are explicitly mentioned by courts or legislators does not matter. They are solely to be judged on their ability to explain legal phenomena. Principles in this sense have no prescriptive value. They give a description of the legal system as it stands, and can be used to predict the outcome of future cases, but they are not norms themselves and as such are not applied by legal actors.

The principle of transparency can be viewed from both of these perspectives. It is both an actual legal norm, which is applied by the European courts and observed by the institutions, and a theoretical explanation for legal phenomena we observe in practice. This thesis focuses on the second perspective, as it studies a collection of legal phenomena that have a common theme, but that are in practice not always explicitly derived from the principle of transparency. Nevertheless, a proper understanding of the first kind of legal principles is important, because the principle of transparency as applied by the Courts is of key importance in discovering any underlying theoretical principle of transparency.

The Anglo-American discussion about legal principles, and to a lesser extent the global discussion as well, focuses on a particular conception of legal principles which has been influenced to a great extent by Ronald Dworkin. In this school of thought, principles are legal norms.[291] According to Dworkin, the contents of legal principles are determined to a significant extent by morality through a complicated interpretative exercise performed by the courts and, although he pays significantly less attention to this, the legislator.[292] It is this aspect of Dworkin's work that is the most controversial. Legal positivists frown upon the prominent place given to morality in Dworkin's theory.[293] Other sceptics criticise Dworkin because his legal principles deviate from moral prin-

[288] Schlössels 2004, p. 34 discerns the strategic-instrumental function of principles: principles aim to realise policy and to effectively order the law.
[289] Addink & Ten Berge 2007, p. 13.
[290] Schwarzenberger 1965, p. 50. See also Botchway 2000.
[291] Dworkin 1977, p. 22; Raz 1972, p. 824.
[292] Dworkin 1986, p. 217-218.
[293] Alexander & Kress 1995, p. 753-761

ciples – and are thus morally incorrect – and yet lack the clarity of legal rules – and can therefore not be justified with an appeal to the importance of legal certainty. They combine the worst of both worlds.[294] As we shall see later, the criticism is not entirely fair, because using moral principles to fill gaps in the legal order and to assist in the interpretation of legal rules is not a valid option. But first, we will turn to some of the less controversial aspects of legal principles. As Groussot observes, even Hart admitted to certain 'uncontroversial features' of principles, being their generality and non-conclusiveness.[295]

2.4.1 The application of legal principles

Legal principles are a sub-set of legal norms, which can be distinguished from legal rules. According to Groussot, "it is in the distinction between principles and rules that one may find the basic and proper characteristics attached to the principles."[296] Many authors have juxtaposed legal principles and legal rules, and from their efforts, we can distil the characteristics of both rules and principles that set the two apart.

Ávila's description of the difference between rules and norms is short and appealing: principles are goals to be realised, whereas rules are behavioural norms to be followed.[297] Rules are legal propositions: they connect an operative fact and a legal consequence.[298] In other words, a rule says that if a legally relevant fact or set of facts occur, a certain legal consequence follows. Rules are black and white: they either apply to the facts of a case, or they don't. Either the prerequisites for the occurrence of the legal consequence are met, and then it will set in, or they are not, and then neither will the legal consequence occur. Principles lack this quality.[299] They are always applicable,[300] regardless of the actual situation, but they do not prescribe a particular course of action. Rather, they represent an interest that must be taken into account under all circumstances, and that might affect the outcome, but does not determine it. Principles embody an ideal that can only be fully realised in a utopian world. These principles are also the values that underlie the legal system. Human rights are a good illustration: ideally, everyone would have unlimited freedom of expression, and enjoy unlimited freedom of religion. Both are protected in our legal system, but the fact that they are does not determine the outcome of a case where these interests are involved. Indeed, they may conflict, and have to be balanced against each other.

Principles have a strong normative and moral component, and can provide a justification or an explanation for other norms, both for rules and for other principles. This includes the possibility of *higher order principles*, which justify and explain lower

[294] Alexander & Kress 1995, p. 786.
[295] Groussot 2006, p. 127.
[296] Groussot, p. 127.
[297] Ávila 2007, p. 28-29.
[298] Ávila 2007, p. 9.
[299] Ávila 2007, p. 9.
[300] Bäcker 2010, p. 81.

order principles.[301] According to Ávila, "subprinciples and rules are better justified, the more intensely they are supported by superior principles."[302] To clarify: the principle of democracy is highly regarded in our legal order. Let's say that the ideal state that the legal system tries to realise is one where all citizens are able to exert influence over public decision-making. This goal is furthered by the principle of transparency. The ideal state encompassed in this principle is one where there is enough transparency to allow all citizens to exert influence over public decision-making. A concrete rule that could be derived from that is that the government should release information about its economic performance every year, to allow citizens to take this information into consideration when they decide on whether to keep this government in the saddle or not. The principle of democracy could in its turn be justified and given weight by the principle of autonomy, which embodies the ideal of free and autonomous individuals who are able to decide on their own fate.

So where rules are definitive commands, principles are optimisation commands, or rather, they are the thing that needs to be optimised.[303] Where rules function much like a simple proposition: if x, then y, principles say something like: try to achieve z as good as you can. That does not mean that a principle will always be fully realised – we are not to expect full transparency, or an unconditional freedom of government interference in our personal life. According to Alexy, principles require that something is realised to the greatest extent possible given the legal and factual possibilities.[304] They are always taken into account,[305] but they must compete with other principles, with rules, and with mundane concerns about practicality.

This means that when principles are applied, they must be balanced. This act of balancing requires weight, and indeed, principles are commonly described as having weight.[306] This weight is not a set quality, which explains the difficulty in coming up with a hierarchy of principles. According to Alexy, the concrete weight of a principle in a particular case is determined by 1) the abstract weight of that principle; 2) the reliability of the empirical assumptions concerning what the measure in question means for the non-realisation of the principle and 3) the intensity of the interference with the principle by the proposed measure.[307] Ergo, the weight of a principle is determined by the effects of a concrete measure on the realisation of the ideal state that principle embodies, and the reliability of the empirical assumption that this effect will indeed occur.

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[301] Groussot 2006, p. 127.
[302] Ávila 2007, p. 90.
[303] The original idea is from Alexy. However, this idea can be criticised, because optimisation commands are rules as well: they clearly describe what must be done: X must be optimised, and they apply either fully, or not at all: either one optimises, or one does not. Bäcker therefore proposes that the principle is what must be optimised, and that principles are accompanied by a rule that says they must be optimised. Bäcker 2010, p. 81.
[304] Alexy 2002, p. 47.
[305] Bäcker 2010, p. 81. Optimisation must always take place, even if the outcome of a case is far removed from what would be ideal, it must be as close to that state as possible, given the legal and factual possibilities.
[306] Groussot 2006, p. 127 lists this as one of the uncontroversial characteristics of principles.
[307] Teifke 2010, p. 101.

Alexy obviously has a measure in mind that interferes with the optimisation of a principle, like an administrative decision that interferes with a human right, which may be annulled by a court if the principle has enough weight. However, the same reasons can also be used in deciding whether a positive obligation might be derived from a principle. In the case of the principle of transparency, the question of whether that principle requires a particular transparency obligation, would be determined by considering the effects the concrete measure has on the realisation of the ideal state of transparency, and the reliability of the empirical assumption that this effect will indeed occur. On a related note, Ávila argues that principles do not 'have' weight: "it is incorrect to stress that principles have a dimension of weight. (…) It is decisions that assign principles a weight in regard to the circumstances of the actual cases. Such a dimension of weight is not, therefore, an abstract quality of principles, but a quality of *the reasons and goals which they refer to*, whose actual importance the judge assigns."[308] (italics mine)

The result of the balancing of legal principles by a court is a new rule: for a given set of legally relevant facts, i.e. the facts of the case, it is now clear what the legal consequences are. Hence, the factors that determine the weight of a given principles determine the concrete rules that are derived from a principle to decide a given case. That means that the reasons and goals that transparency refers to, determine the concrete rules that are derived from it in a given case.

At this point, we must make an important remark about the role and importance of legal rules. Rules, whether they are the result of judicial interpretation or a creation of the legislator, are the outcome of the process where different principles are balanced against each other. This means that when a rule conflicts with a principle, the rule will usually prevail. The principle has already been taken into account in the process that led to the creation of the rule. Only if there are lacunae will a resort to principles be necessary.[309] However, if a principle has not been taken into account in the balancing process that led to the creation of a rule, there might be room for contra legem decisions: rules are the result of a balancing of a variety of interests, and the result of this balancing exercise should be respected. If an interest has not been taken into account, setting the rule aside entails not disrespect for the assessment of the legislator.

Why do we need legal principles as a separate category of legal norms? Wouldn't life be simpler if we just made rules for everything? As Ávila points out, rules are shaped by the same considerations that guide the application of principles, but have the benefit of providing people with legal certainty.[310] Principles do not infuse the law with values that are alien to rules. The use of principles is a necessary evil, because rules 'run out'. It is impossible for a legislator to foresee all possible situations that can arise in practice, and occasionally a situation will turn up where the rules don't provide an answer, either because they do not cover the situation, or because they need further interpreta-

[308] Ávila 2007, p. 28.
[309] Ávila 2007, p. 28.
[310] Ávila 2007, 34-39, 59-60

tion before they can be applied. Thus, in the application of the law, legal principles have two purposes: they fill the gaps in the law, and aid in its interpretation.[311]

The above account of principles is, as I have said, fairly uncontroversial. It is acceptable to both legal positivists, advocates of natural law, and to those seeking a middle ground.[312] Nevertheless, it has been argued that legal principles are not needed to perform these functions, and since their existence cannot be shown empirically, they are an unnecessary hypothesis.[313] Instead, courts can fall back on moral principles, or on their own discretion. Both these solutions are undesirable. For moral principles, this is because we live in a morally pluriform society: we disagree to a considerable extent about right and wrong, and we have no satisfactory way of determining who is right. That holds for judges as well, so they are left with no choice but to apply their own subjective moral principles, rather than 'the' moral principles.[314] Legal principles offer a better alternative because they offer a less subjective instrument.[315]

The problem with allowing courts to exercise their own discretion is obvious. Again, the outcomes will be contested, and the democratic legitimization of courts is meagre. The acceptance of their decisions rests on the assumption that they uphold the law, as the rule of law requires them to,[316] not on the assumption that they have been chosen to exercise their discretion. If legal principles are to provide a better alternative, it must be possible to determine their contents with more certainty than that of moral principles. In the next paragraph, I will show that this is indeed possible.

2.4.2 How to determine the content of legal principles

How legal principles contribute to determining the outcome of cases is fairly uncontroversial. This is quite different when we ask the question how the content of legal principles is determined. This question is highly relevant in the context of the principle of transparency, as it is a relatively new principle and its contents are being developed as we speak. A principle embodies an ideal state that a legal system aspires to. The optimisation demand requires that this ideal state is approximated as closely as possible. Its complete realisation remains utopian, both because of practical limitations and because

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[311] Ávila's account of principles is a bit more nuanced, because he rejects the notion that a given norm is either a rule or a principle. According to him, a given norm can be construed as either a rule or a principle. Nevertheless, he does seem to give precedence to rules. Ávila 2007, p. 32-33. In practice, applying a norm as a principle is not so different from applying the principle underlying a given rule. When we consider principles as optimisation commands, or as immediately finalistic, primarily future-regarding norms, which intend to be complementary and partial (Ávila 2007, p. 40), we accept that the legislator has decided it could not prescribe a particular course of action that would lead to the realisation of a social good. Instead, the judge must decide the matter, taking into account the social good whose realisation the legislator has prescribed, or the social good that is contained in the principle underlying actual rules.

[312] Lawson 1997.

[313] Alexander & Kress 1995, p. 753-754.

[314] Perry 1997, p. 817-818.

[315] Waldron 1996, p. 862.

[316] Addink 2012, p. 70, 71.

legal systems tend to protect conflicting interests. Principles describe an ideal state of affairs, but do not say how this state of affairs should be established. It is left open what specific behaviours are most apt to realise it. Because of this, Ávila emphasises that it is important to determine as specifically as possible what the ideal state of affairs that a particular principle points to is.[317]

Courts apply principles when rules run out, to fill gaps in the law, and in the interpretation of rules. But how do they determine the contents of the principles they apply? According to Dworkin, the courts face a Herculean task when determining the content of the principles they apply. They have to analyse all relevant laws and decisions to figure out which principles fit the content of the laws best. In addition, they have to determine what the morally appropriate outcome of a case is. Finally, they decide the case on the basis of the principles that are morally the most attractive, and meet a certain threshold of fit.[318] Dworkin's approach is appealing in some respects. It allows the courts to develop the law, and to improve it.[319] There are grounds for criticism as well. It has been pointed out that the criterion of 'a certain threshold of fit' is extremely vague.[320] In addition, judges do not know for sure what is morally appropriate – nobody does.[321] It is hard to see why their personal opinion on the matter should guide the development of the law.[322]

The moral character of principles is essential to Dworkin's theory. For him, the state, the legislator, and the judge all derive their authority from the concept of 'law as integrity.' It is the very method of legal interpretation and discovery of the appropriate legal principles that give the courts their authority.[323]

However, if the authority of law can be justified in some other way, integrity and the assertion that legal principles are to correspond to the 'right' conception of morality as much as possible can be abandoned. Dworkin tends to focus a lot on the justification of judge-made law, which is different from laws enacted by the legislator. The judge cannot use his democratic legitimacy as an argument to justify what he does. However, the principles of democracy and autonomy are in fact the ultimate justification for the content of our laws. All people are entitled to have a say in public decision making, and they do this through a certain public choice mechanism that has been established.[324] The judge should respect that. This is the common intuition in civil law countries. Therefore, the judge is not guided by morality alone, he should defer to the other powers. Indeed, the democratic argument should weigh stronger than the moral argument, because the real world is inconveniently pluralistic. This is the fairness argument of Györfi: the best option for the judge is to be fair, i.e. to respect public decision-making,

[317] Ávila 2007, p. 50.
[318] Dworkin 1986, p. 247.
[319] Dworkin 1986, p. 189.
[320] Alexander & Kress 1995, p. 82.
[321] Waldron 1997, p. 861.
[322] Waldron 1997, p. 860.
[323] Dworkin 1986, p. 188-190.
[324] Waldron 1997, p. 861.

because he has no better chance of being just than the general public.[325] As Györfi puts it: "Integrity tries to achieve a coherent scheme of justice, but not that of justice as such, but the conception of justice which was reflected in the majority's system of belief."[326]

What this means is that if the judge is required to make law, which is inevitable sometimes, he must strive for coherence and consistency, not based on his own perception of what justice requires, but based on what 'the majority' believes justice requires. He should defer to the principles of morality that the general public ascribes to. Those principles are reflected in public decisions, and therefore in the law. This means that fit remains as the only relevant criterion for determining the contents of legal principles, even though it does not deny there is a relation between law and morality.
This corresponds to the rights model of adjudication that Groussot proposes. In this model, the judge does not create law, but interprets it. He reflects rather than guides social attitudes.

This is also the proper place to point out that many principles are codified. They are already well-established as interests that the law aims to protect. Human rights are the classic example of this. Therefore, when they are determining the content of legal principles, both the courts and the legislator should turn to the written norms that bind them first, and see what principles are explicit in there. After that, they can try to derive implicit principles, based on criteria of fit.

Obviously, the legislator is free to change the law. To what extent is it bound by legal principles when it does that? Generally, if the general public wants change, change is acceptable. The legislator is bound by the democratic principle (or, for countries that lack democracy, by whatever public choice mechanism is in place there). However, the legislator is not entirely free to enact whatever rule it wants. It is bound to certain fundamental principles. These are not grounded in natural law, but in a particular culture, and have become so intertwined with a legal culture that they are resistant to change.[327]

We saw in paragraph 2.3.2 that there are many policy reasons to introduce transparency. In this paragraph I argued that the weight of principles is determined by the reasons and the goals they refer to. So how do policy considerations tie in with legal principles? In answering this question, we should keep in mind that there are two kinds of policy choices: those about what goals the government should try to realise (housing v. healthcare, safety v. education), and those about how the government should try to achieve those goals (compulsory health insurance v. government-funded healthcare).
As we have seen, the courts are bound by democratically legitimised decisions from other organs. That means that if a democratically legitimised organ makes a decision about what goals it should realise, the courts should accept that, especially if this is set down in a legally binding document, either as a principle the government is trying to

[325] Györfi 2010, p. 125.
[326] Györfi 2010, p. 125.
[327] Györfi 2010.

achieve, or as a set of legally binding rules that make the principle operational. Therefore, policy principles that are about the goals government wants to realise can function as legal principles, as long as the government has given them some legal relevance. Of course, the weight of a policy might be limited, even if it is written down in a legally binding document. Often, this principle will have no impact beyond justifying the rules that are derived from it.

Likewise, courts have to accept policy decisions on how certain goals are to be realised, especially if they are set down in binding legal instruments. The norms inspired by such policy decisions will often be rules, but they do not need to be. Thus, instrumental policy principles can likewise function as legal principles.

However, if a certain method is indispensable in realising a democratically agreed upon policy goals that has been set down in legislation, courts should also be able to rule that it is legally required. Thus, instrumental legal principles can be derived from substantive policy goals that have been enshrined in the law.

2.4.3 Legal principles in the EU

When we turn to legal principles in the specific context of the European Union, the first thing that stands out is the enormous popularity of legal principles. Even the casual observer will notice that EU law is rife with principles, both in the Treaties, in secondary law, and in the case law of the European Courts. General principles of law are recognised as one of the sources of EU law, based on article 19(1) TEU.[328] Clearly, legal principles are there, and they play an important role in legal reasoning. We can observe how they are applied by the courts, how the other institutions observe them, and how their seeds are planted. We can follow how legal principles come into being, and how their content is developed. A special category of legal principles are the general principles of EU law. A principle is general when it transcends specific areas of law and underlies the legal system as a whole. Alternatively, it may refer to the degree of recognition or acceptance of a principle.[329] Below, I will discuss how principles of EU law arise, and how they affect the work of the European courts. It will turn out that legal principles in the EU order do not correspond to what Dworkin envisioned when he wrote about his brand of legal principles,[330] but instead is much closer to the description given in the previous two paragraphs.

Tridimas, probably the most authoritative source on principles in EU law, argues that the difference between principles and rules is that principles must be 1) general and 2) of some importance. General means that the principle operates at a level of abstraction

[328] Formerly article 220 EC. See Tridimas 2007, p. 17, 19.
[329] Tridimas 2007, p. 1.
[330] Arguably, Dworkin's theory is problematic in the EU context because it considers the law as a closed system. Unlike the European Courts, his Hercules does not look at different legal orders for inspiration. We already established though that we do not need to accept a specific theory on the origin of legal principles to accept their existence as a species of norm that can be distinguished from rules. The existence of such norms is in a composite legal order like the EU is not problematic.

that distinguishes it from a specific rule, but may also refer to a) principles which transcend specific areas of law and underlie the legal system as a whole, or b) the degree of recognition or acceptance. Principles possess importance if they express a core value of an area of law or the legal system as a whole. "The term general principles may be reserved for propositions of law which underlie a legal system and from which concrete rules or outcomes may be derived."[331] They are to provide the justification for concrete rules. According to Tridimas, a rule answers the question of 'what?' whereas a principle answers the question 'why?' Rules provide answers, whereas principles 'state reasons which give arguments in one direction but do not necessitate a particular result.'[332]

Legal principles got the chance to rise to prominence in the EU, because at its creation, its legal order was necessarily incomplete.[333] The courts saw themselves confronted with questions for which the relatively few rules that were into place offered no solution. The way in which the courts determined which principles they should apply is instructive, and has little to do with the search for principles inherent in the existing legal system that fit and are morally acceptable that Dworkin describes. The courts turned to outside sources instead, deriving principles from the legal orders of the member states, and from the common European constitutional heritage, such as the protection of fundamental rights.[334] In addition, there are principles that are native to the EU legal order, and these are indeed determined by reference to the structure of that order, like the principles of primacy and direct effect.[335]

We saw in the previous paragraph that the content of principles is determined by recognised fundamental values and by policy principles. For the general principles of EU law, these fundamental values could be found in common European legal traditions, and in the law of the member states. However, effectiveness arguments have played an important part in the development of the general principles as well. The application of general principles serves a two-fold function: 'On the one hand, it affords a strong protection regarding individual rights. On the other hand, it protects the effectiveness and uniformity of the EU legal order.'[336] Several authors have remarked that the general principles of the EU are influenced by considerations of effectiveness and policy arguments, and conclude for those reasons that the ECJ and the CFI are not real Dworkinian courts.[337] Instead, they are more consistent with the account of legal principles given above, where the manner in which a concrete behaviour contributes to the realisation of a value that has been enshrined in a legal principle is decisive in its evaluation by the courts. Effectiveness considerations are an essential element of princi-

[331] Tridimas 2007, p. 1.
[332] Tridimas 2007, p. 2.
[333] Groussot 2006, p. 10; Tridimas 2007; Widdershoven 2004.
[334] Tridimas, p. 2-3.
[335] Tridimas, p. 3-4.
[336] Groussot 2006, p. 9.
[337] Groussot 2006, p. 137.

ples, and certainly so in the EU.[338] Principles are not an argumentative trump, but require the goals of the EU, such as the internal market, to be taken into account.

2.5 Transparency as a legal principle

So what do the previous paragraphs about transparency and legal principles mean for the legal principle of transparency? As we have seen, there are two kinds of principles. The first are legal norms, the second are theoretical explanations for observed legal phenomena. Transparency can qualify as a principle of either kind. For the first kind of legal principles, this is easy to see: the courts apply the principle of transparency, the EU legislator refers to it as the basis for some of its regulations. That the principle of transparency also qualifies as a principle of the second kind, and offers a relevant description of a good portion of EU law, will become clearer in the subsequent chapters.

The first sort of principle is a legal norm which describes an ideal state which the law aspires to realise. In the case of the principle of transparency, the ideal state the principle refers to is one where there is a perfect amount of transparency. This is – to say the least – open to further interpretation, which is as it should be. Principles should be interpreted with the help of the reasons and goals that they refer to. What the ideal state of transparency is, is determined by the higher order principles that transparency (co-)operationalises. Hence, if we assume the principle justifying transparency is the principle of market efficiency, the ideal state of transparency is the one that best achieves market efficiency. This ideal state will never be realised fully, but it should be realised to the greatest extent possible, taking into consideration other relevant legal principles and practical circumstances.

As we have seen, and shall see in greater detail in subsequent chapters, not all goals that transparency refers to benefit from transparency in the same way. A transparency measure that benefits the internal market may do little to improve democracy for example. We can therefore expect a relation to exist between the manner in which transparency functions to accomplish a given goal and the concrete obligations that are derived from the principle of transparency.

Like other principles, the principle of transparency does not determine the outcome of a case, but it must be taken into account always. Weight is assigned in particular cases based on the reasons and goals that the principle of transparency refers to. These reasons have been discussed in paragraph 2.3 and include both the purely instrumental reasons for transparency and the arguments for its intrinsic value. This means that even if a particular transparency obligation contributes to the realisation of a higher order goal, competing interests might lead to the conclusion that the obligation does not exist.

Like other principles, the principle of transparency has a normative/moral character. There exists a sense that government should be transparent, which is not rooted in an

[338] See Groussot 2006; Van der Heijden 2001; Buijze 2009.

individual view about morality, but in a public view about morality, which is reflected in the legal system, in particular in art. 1 TEU and art. 15 TFEU. This is not a conclusive argument to assume that transparency has intrinsic value, or at least not in a manner that affects its interpretation or justifies its use as an argumentative trump: clearly, transparency is seen as valuable, but its value is derived mostly from its effects, making it an intermediate value. Thus, although a good number of authors argue that transparency should be considered an intrinsic value and a human right, I believe transparency is best understood as an instrumental value. The arguments about its intrinsic value serve to emphasise the importance of transparency, and rightly so, but for the application and interpretation of the principle of transparency we must still rely on the reasons they put forth for considering transparency intrinsically important in the first place.

As is the case for other principles, the principle of transparency offers an explanation and justification of more specific principles and concrete rules, and aids in the interpretation of these principles. More general legal principles in turn explain and justify the principle of transparency and aid in its interpretation.

Because the principle of transparency is inherent in our legal order, and has been made operational through concrete rules, the defeating of concrete rules by the principle of transparency will be a rare event. After all, concerns for transparency should have been taken into consideration when the rule was created. Transparency can still serve to aid the interpretation of those rules, and if there are rules that do not take the principle of transparency properly into account, it might on rare occasions lead to a contra legem decision.

The scope of the principle of transparency is broad: it eclipses or overlaps with several better established legal principles. Some scholars are critical about the usefulness of the principle of transparency as a legal norm for this reason, and wonder whether one can derive obligations from it that cannot be derived from other principles.[339] But the broad scope of the principle of transparency is not necessarily a problem. We have seen that a more general principle can justify not only concrete rules, but also more specific principles. This does not make either the general or the concrete principle superfluous. An example can clarify this. The principle of autonomy requires transparency to be realised.[340] The ideal state requires a level of transparency that enables individuals to take autonomous decisions and defend their own interests. This in turn requires that individuals receive the information they need for defending their rights vis à vis the government. The principle of access to the file requires that individuals get access to the file when they are engaged in administrative proceedings. This principle in turn is made operational by concrete rules about when people have to get access to the file, in what form, etcetera. The general principles will inform us about the reasons underlying more specific principles, and can thus help in their interpretation. They can also come to our aid when a more specific principle is not relevant to the situation at hand, and

[339] See the report on the discussion of the principle of transparency during the meeting of the 'Jonge VAR' in 2009: Verhoeven, Van den Brink & Drahmann 2009.
[340] See chapter 6 for a more extensive treatment of this issue.

can function as a safety net. Although we can always choose to elect the scope of a principle to include a given transparency obligation, we will not know that a principle should be developed in this way when we do not understand its relation with the principle of transparency, and the importance of transparency in realising the goals underlying the legal system. The specific principles in turn make it easier to apply the general principles. Because principles only describe a state of affairs, and not how this state of affairs is to be accomplished, they are difficult to operationalise: by their very nature, they do not prescribe a particular behaviour. Determining which behaviour contributes to or detracts from their realisation is a difficult task that is made easier the more specific and concrete a principle is.

The value of the principle of transparency as a legal norm is not lessened by the fact it overlaps with existing principles, but should instead be determined by whether it simplifies the task of evaluating the legality of concrete behaviours.

The principle of transparency is applied in concrete cases by the European courts, and has inspired a fair amount of secondary legislation. Its existence as a legal norm is clear. But it can also be seen as a principle in the second sense described above. In that case, it would have to give an accurate description of a portion of positive law. To be accepted as such, it needs significant elaboration from what we know now, because the term 'transparency' as such does not have much explanatory value. The subsequent chapters will answer the question of whether the principle of transparency would make a good descriptive principle. On a preliminary note, the scope of the principle of transparency, which is so wide it can be problematic for the acceptance of the principle of transparency as a relevant legal norm, becomes an asset if we consider transparency as an explanatory principle. If there is one satisfactory explanation for many legal phenomena, this is only to be welcomed – provided that such an explanation can be found of course. The search for that explanation is exactly what this thesis hopes to achieve and whether it has been successful is for the reader to judge. However, this theoretical principle of transparency does in no way diminish from the practical value of the more concrete principles that are actually applied as legal norms: it can only increase our understanding of those principles and guide us in their interpretation.

As a legal norm, the principle of transparency obliges public authorities to strive towards an ideal state of transparency, without prescribing the exact manner in which they should do this. The principle must be applied taking into account the goals and reasons the principle refers to. In the following chapters we will discuss what the principle of transparency as a legal norm requires by doing just that. In chapter 3 we will discuss the application of the principle of transparency as a tool to promote democracy and the rights of the citoyen. In chapter 4 and 5 we will discuss the application of the principle of transparency as a tool to promote the internal market and the rights of homo economicus. In chapter 6 we will discuss the application of the principle of transparency as a tool to promote the rights of homo dignus.

As an explanatory principle, the principle of transparency has added value if it can provide an explanation of a reasonably sized chunk of the law. By examining the co-

herence between the wide variety of transparency obligations in the law, it will become clear throughout this book that the principle of transparency does indeed have that quality. By referring to the two basic functions of transparency we uncovered in paragraph 2.3.3, we will uncover a pattern underlying the transparency obligations in EU law. In chapter 7, we will lay out this pattern in its full splendour.

2.6 Summary

We covered a lot of ground in this chapter. Thus, it is useful to provide a summary of the points we discussed.

We have seen that transparency is a diffuse concept, but have nevertheless arrived at a definition: transparency is the state that occurs if people can easily ascertain and understand the state of the world and predict how their actions will affect that world.[341] A transparent government is one that provides people with the information they need to ascertain and understand the state of the world and to predict how their own actions will affect that world, and one that does not unnecessarily complicates that world.[342]

Transparency obligations are norms imposed on public authorities that aim to create transparency. This can be done in various ways.[343] Thus, a transparency obligation is a norm that obliges an actor X to communicate certain information I to recipient Y, at moment t, complying with quality standard Q, either actively or passively, and subject to a number of exceptions E.[344]

Transparency is valuable to the citoyen, homo economicus and homo dignus. It contributes to democracy, a market that functions properly, and the realisation and protection of human rights.[345] It does so in two distinct ways: first, it facilitates decision-making.[346] Second, it allows individuals to see what public authorities are doing, which is a first condition to attempt to influence their actions, either directly by participating in decision-making processes, or indirectly by holding them accountable for their actions.[347]

There is only a legal obligation to be transparent if there is a legal norm that imposes that obligation. In this thesis, the legal norm we focus on is the principle of transparency, a legal principle we encounter in EU law. 'Legal principle' can refer to two separate concepts. A legal principle can be a specific type of legal norm, but it can also be an explanatory principle that explains the existence of a set of legal phenomena.[348]

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[341] Paragraph 2.2.2.
[342] Paragraph 2.2.2.
[343] Paragraph 2.2.4.
[344] Paragraph 2.2.5.
[345] Paragraph 2.3.3.
[346] Paragraph 2.3.3.1.
[347] Paragraph 2.3.3.2.
[348] Paragraph 2.4.

In the EU, both the value of transparency and the existence of legal principles as legal norms are broadly recognised.[349] The principle of transparency is a legal norm that is applied by the courts and other EU institutions, and that features prominently in both primary and secondary legislation and in the case law of the courts.

In the remainder of this thesis, we will research the application of the legal norm. In addition, we will try to provide an explanatory framework for the legal phenomena concerned with transparency that we observe.

[349] Paragraph 2.4.3.

CHAPTER 3: WE, THE PEOPLE

3.1 Outline

In this chapter we will address transparency from the perspective of the citoyen, a member of a political community, for whom the most important function of transparency is to facilitate the democratic process. We will start in paragraph 3.2 below by clarifying who this citoyen is, and what sort of things he does. Next, we will discuss how transparency enables people to function better in their capacity of citoyen. We will see that citoyens profit from both the functions of transparency we identified in the previous chapter, although on rare occasions, transparency can have less beneficial consequences as well. In general though, a transparent world enables people to decide on the course that they as a community want to take, and allows them to make those decisions that are most likely to contribute to the realisation of the goals that they have as a community. Transparency therefore facilitates the process of will formation. In addition, a transparent government allows people to see what the government is doing, and thus is a prerequisite for trying to influence those actions, and for holding the public's representatives accountable. Since the government is the agent of the people, and their tool to execute the 'public will', the second function of transparency is of prime importance. This second function of transparency facilitates both participation and accountability. In paragraph 3.3 we will focus on how EU law on transparency caters to the interests of the citoyen. We will see to what extent the considerations underlying the introduction of transparency in the EU correspond to the arguments for transparency from the citoyen perspective, and what sort of measures have been implemented to enable EU citizens to perform the role of citoyens. After providing this general overview, we will focus in paragraph 3.4 on Regulation 1049/2001 which is the most topical instrument in this respect. We will describe the obligations that are imposed upon the EU institutions in this regulation, and will see how these obligations are affected by competing interests in secrecy. To show how public interests in openness other than democracy affect access to information, we will focus on the Aarhus Convention. This instrument also shows how participation and accountability require different, more far-reaching, transparency obligations. In paragraph 3.5 we will focus on the ECHR, and see how a different perspective on democracy can lead to a different take on transparency. The ECtHR connects public access to information primarily to the public debate, and only in specific circumstances emphasises the importance of information for the accountability of public officials. Finally, in paragraph 3.6, we will summarise how transparency contributes to the process of will formation, to accountability, and to participation, and how to tailor transparency obligations to achieve each of these goals, as well as how these interests are balanced against interests in secrecy.

3.2 The citoyen

In this thesis, I focus on transparency in the relation between public authorities and the people. In this relation both the authorities and the public, or members of the public, can take on a variety of roles. In this chapter, I focus on the citoyen: the political crea-

ture who is the creator of the government, and the ultimate source of its power. In paragraph 3.2.1 below, we will discover who this citoyen is, and what he does. In paragraph 3.2.2, we will see how transparency can aid the citoyen in performing his function as a member of the political community. In paragraph 3.2.3, we will discuss to what extent transparency should be required from public authorities when they are dealing with people in their capacity of citoyen.

3.2.1 Who is the citoyen?

The citoyen is characterised by his membership in a political community, or rather his quality of being part of that community. He is a political creature, in the sense that he is part of the 'polis,' he acts as part of the polis, in the interest of the polis. The citoyen is not an individual; he is, together with his fellow citoyens, a collective. When the idea of citizenship was developed, individual rights that protected the individual against the collective were not part of the concept.[350] Today a citizen who is merely a citoyen, but who bears no individual rights, is quite unthinkable. But although the modern concept of citizenship depicts the citizen as both a member in a political community and the bearer of individual rights that protect his private interests against that political community, the citoyen as defined in this thesis has been detached from his bourgeois brother. Like the citizens of the ancient Greek polis, the only right he has is the right to participate in the public life of the state.[351] Eriksen and Weigard note that this 'right' of the Greek citizen resembled a duty or responsibility to look after the interests of the community.[352] It is quite explicitly not a right to use the state as a tool to promote one's private interest.

The concept of the citoyen does not say anything about who should have access to the political community. However, it has become closely associated with the modern idea of democracy, where most, if not all, people have citoyen status. The modern idea about the citoyen as the foundation of a democratic community is based on the thinking of Rousseau, who fathered the idea of self-rule, which meant that the identity of the rulers should coincide with that of the ruled.[353] Authority can only be derived from those who are subject to it. Habermas' idea that democracy is ultimately founded in the idea of the autonomous individual is the modern representation of this idea: people should be able to make informed decisions about their life, free from outside pressure, in the public sphere as well as in the private sphere.[354] Democracy is the obvious choice if one wants a political system that does justice to the intrinsic worth of human beings as autonomous decision-makers, because it allows everyone to take part in public decision making. Thus, the democratic citoyen is an autonomous creature operating in the public sphere.[355]

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[350] Eriksen & Weigard 2000, p. 14, 15.
[351] Of course homo dignus, the private counterpart to the citoyen, will not be ignored. His interests will be discussed in chapter 6.
[352] Eriksen & Weigard 2000, p. 15.
[353] Rousseau 1762, book III, chapter 1
[354] Habermas 2001, p. 767-768.
[355] See chapter 6 for a more detailed discussion of human dignity and autonomy.

When everyone has a say, it is tempting to think that the common good can simply be determined by letting different interests fight it out in a sort of 'political market place.' But even when 'all' citizens have citoyen status, the public interest is still something else than the private interests of all individuals added up. It is the common vision about what is good for society as a whole. This is what Rousseau refers to as the 'public will', which can only be discovered through public deliberation, and what Sunstein refers to as the Republican conception of democracy,[356] where the prerequisite for sound governance was the willingness of citizens to subordinate their private interests to the common good.[357] Sunstein as well adheres to the view that the common good is determined through public debate, and cannot simply be derived from private interests.[358] Thus, the citoyen is not defined through his right to promote his private interests in the public arena, but by his right to participate in the process of determining what the public interest is, and in making decisions about how that public interest should be realised.

This view is not uncontested. Sunstein contrasts it with the pluralist view of democracy, where politics are just a means to resolve the struggle between self-interested groups for scarce resources. The 'common good' is to be determined through uninhibited bargaining, so that individual preferences are reflected optimally in government policies.[359] Such a view of democracy eliminates the citoyen, and turns government into a tool for people to realise their private interests. Collective arrangements are made out of efficiency considerations: are my private interests better served if we arrange this through government? If this is true for the majority of people, they will decide that the arrangement will be made. Benefits to other people are of secondary interest. Such an approach seems too limited to me, and empirical research shows that people do take the public interest into account when they act in the public sphere.[360]

The Republican rationale for government action is to me a more convincing one, where government action is justified if society as a whole is better off. It is of secondary interest whether my private interests are satisfied any better by a collective arrangement than if I take care of things on my own. One does not need to be altruistic to accept such an arrangement though: I understand that I am better off in a society where everyone has access to decent health care than in one where I can buy the best health care available, but where bubonic plague and cholera are common because nobody else can.[361]

Thus, in a democracy, all people have citoyen status, which gives them the right to participate in public deliberation about what the public good is, and how it is best

[356] Sunstein 1985, p 31.
[357] Sunstein 1985, p. 31.
[358] Sunstein 1985, p. 31.
[359] Sunstein 1985, p. 32.
[360] See e.g. Funk 2000, who argues that both private interest and fairness play a role in determining public opinion.
[361] Thanks to Barber 2007, p. 136 for the example.

achieved. Interference with the public debate by state authorities is frowned upon. The freedom of expression and the freedom of assembly and organization are geared to protect the public debate from government interference, and as we shall see in paragraph 3.5 below, the European Court of Human Rights is interpreting in particular the right of freedom to expression to afford maximum protection to the public debate.

Practical constraints preclude direct democracy on the level of the state though, and more so on the level of the EU, so the classic interpretation of this right to participate is that people have the right to elect representatives that will do the actual ruling, and the right to run in elections. They can still engage in the public debate, but the conclusions of this debate are drawn by official organs. Other political rights, like the freedom of expression and the freedom of assembly and association are necessary to make this basic mechanism of representation function. These rights enable people to elect the right representatives: those who will correctly infer what the public good is from the public debate, and that will execute the wishes of their constituents – understood as their public wishes – to the best of their ability. Even though in practice participation might not be very extensive, the idea that ultimately power is vested in the people is a powerful one.[362] It puts restraints on what elected governments can do, because they have been elected to serve the public interest, or, as Rousseau would have liked to put it, as a tool to execute the public will. The mechanisms to ensure that they perform this task are many and complex. In addition to exercising their right to vote, people can have a multitude of other rights to participate,[363] and there is an equally varied number of ways to hold government officials accountable.[364]

3.2.1.1 What citoyens do

We have seen that the citoyen is the foundation of state power, and the bearer of political rights. He can participate in the public debate, and help to decide on what the common good is and how it should be executed. In practice, he delegates part of this task, including the execution of the final decisions, to representatives. So what does the citoyen do in practice in the EU?

First, they form the foundation of the power of the Union. This is reflected in the proposed European constitution, which started with the clause: 'Reflecting the will of the citizens and States of Europe.' The idea that power is ultimately derived from the people is less obvious in the EU than in the member states. The will of the people has not made it into the Lisbon Treaty, and officially, the EU derives its power from the member states.[365] Nevertheless, the idea of government in the name of the people has a powerful normative influence in the debate about European law. Because the 'citoyen fondateur' exercises his power only in extreme circumstances, he has few concrete

[362] See also Eijsbouts 2011, p. 17.
[363] See Addink 2009 for an overview of different participation mechanisms used in countries that belong to the Council of Europe.
[364] See Bovens 2007.
[365] Eijsbouts 2011, p. 16 and further.

legal instruments at his disposal though.[366] Like all citoyens, the European citoyen has the right to participate in the public debate. This public debate should focus on determining what constitutes the common good in the context of the European Union, and on how the EU institutions can contribute to realising this common good. The institutions actively try to stimulate this debate, for example through the use of green papers.

Second, the citoyen has the right to vote for the European Parliament. By exercising their vote, they can have ex ante influence on the decision that will be taken in the EU – at least theoretically. In addition, they can exercise ex post control by voting out MEPs who fail to promote what they perceive to be the public interest.

Third, citoyens organise themselves. This is the 'citoyen organisateur et initiateur,'[367] the active participant in civil society. Civil society has an important role in EU policy making. Where the influence exercised through voting for the EP is minimal at best, the EU institutions try to maintain their connection with their constituents through civil society. Thus, civil society is consulted on EU policy, and NGOs and other public interest organisations are a prime mechanism for EU citizens to participate in policy making as well as to hold the institutions accountable.[368]

To summarise: citoyens deliberate, they participate – by voting and by their involvement in civil society, and they hold the institutions accountable – again by voting and by their involvement in civil society. They do all this *in the public interest*.[369] Note that I do not intend to say that the options that EU citizens have to influence EU policy are enough to make the Union truly democratic. The important issue here is that when people engage in these activities, they are acting in their capacity of citoyens. Some tasks have been delegated to social institutions or NGOs; no one has the time to constantly scrutinise parliamentarians, so we rely on the press to alert us when something is amiss.

Although citoyens can delegate their tasks to some extent to social institutions, like the press, or NGOs who participate more actively in government, one must guard against sliding towards a pluralist conception of democracy. Not all participation is participation by citoyens. Private individuals participating in administrative procedures or in policy-making to defend their private interests are not acting as a citoyen, and neither are industries that are consulted about policies and who advise the Commission about

[366] Eijsbouts 2011, p. 16.
[367] Eijsbouts 2011, p. 15.
[368] What Bovens 2007, p. 457 defines as social accountability. On rare occasions, public interest organisations are given standing before the courts so they can help in holding the institutions legally accountable for complying with EU law.
[369] Interest representation democracy is often a contradiction in terms (although not necessarily), because not all interest groups can be said to represent a *public* interest. Hence, participation of industry representatives and private sector lobbyists seems to betray the philosophy that the public interest is no different from aggregate private interests.

their interests and desires. Nor can they be said to be the representatives of groups of citoyens. Not all participation contributes to the (republican) ideal of democracy.[370]

3.2.2 Transparency for the citoyen

Transparency is most often valued for its positive contribution to democracy. As we have seen, a democracy is a form of self-government where 'all' people can participate in the public life of the community – most often the state, but in our case the EU. Thus, from the perspective of the EU citizen, transparency as a tool to improve democracy allows him to perform better in his capacity as citoyen. It allows him to partake in a meaningful way in the public debate, and it is a necessary requirement to make use of what participation rights he has, and of what accountability mechanisms are in place. In the previous chapter, we saw that transparency has two basic functions. First, a transparent world makes it easier for people to determine what actions have the best chance of leading to the realisation of their pre-established goals. Second, a transparent government allows them to see what that government is doing. This is a prerequisite for influencing government actions, or participation, and for holding government accountable.

3.2.2.1 The first function of transparency

We saw in the previous chapter that rational choice theory predicts that people make better choices in a transparent environment – choices that have a better chance of contributing to the realisation of their goals. In principle, this is true for a collective as well. A better-informed collective, functioning in a surveyable environment, can make choices that have a better chance of contributing to the realisation of its goals.[371] This function of transparency is theoretically independent of (the existence of a) government. Therefore it does not only apply to information about the government, or to the clarity and simplicity of administrative and legal procedures, but to all information. Even the public availability of information that is not held by the government can contribute to facilitating this process of will-formation. Data about a potential relation between GSM masts and cancer are relevant in deciding whether it is in the public interest to create regulation about the minimum distance between masts and residential areas for example, irrespective of whether this information is in the possession of a public authority, and even though this information is not related to government.

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[370] Note that it is not objectionable per se to consult undertakings or industry representatives. There can be good reasons for that, but they have nothing to do with democracy, or with allowing people to perform their role of citoyen and ultimately enabling them to engage in self-rule. The motives for allowing this kind of participation will be discussed in chapter 4.

[371] Rational choice theory is also famously used to explain how rational individual choices can lead to irrational collective behaviour. The tragedy of the commons is the best known example of this phenomenon. Such undesirable outcomes are the result of individual choices that aim to realise private interests. A collective that aims to realise the public interest can avoid this pitfall – the exact difference between Sunstein's Republican and pluralist conceptions of democracy.

Information about government and government acts does serve this function too. The fact that a government is in place, that it has a certain structure and certain possibilities to act has to be taken into account when the community decides on the best way to realise its goals. Transparency about government institutions allows people to factor in the existing condition of government, i.e. the ability of existing institutions to tackle a particular social problem. What do we – the public – think we – as a political community – should do and what options for action do our existing political institutions provide us?

Thus, transparency allows people to engage in a meaningful public debate, the aim of which is to decide on the best course forward. It allows people to deliberate about what they, as a community, want to do and achieve. Such a debate is impossible without correct and factual information, and would make the self-determination that is the philosophical basis for democratic decision-making largely illusory.[372]

Transparency is conducive to successful public deliberation. Indeed, one might argue that the public debate is best served with full transparency: a situation where all relevant information is freely available to the general public, and where the outcomes of policy actions are fully predictable. Such a state of full transparency cannot be realised in practice. But to what extent should the state attempt to approximate such a state of full transparency by making information available?

The extent to which the state should facilitate public debate by providing information is not a given. Although some authors argue that the process of will-formation is the most important argument for public access to information,[373] we will see in the following paragraphs that this argument has played a relatively modest role in the arguments brought forward by the EU institutions for the introduction of transparency in the EU legal order. The ECtHR also seems reluctant to embrace this line of reasoning, even though it has in the past recognised positive obligations incumbent on states to stimulate and protect this debate by protecting journalists and the press. It does recognise that the free flow of information is important for the public debate, and therefore for the process of will formation, but it does not derive a broad obligation to provide the general public with information from those premises. Indeed, it has only recognised an obligation to give information that the state has a monopoly on to an NGO, and implied that a similar obligation to supply the press with information would exist, since such institutions are more likely to use the information to get a public debate going.[374]

The argument that information about government itself should be provided to the general public is a stronger one. This information is naturally in the possession of the government, and government will often have a monopoly on this information. Government is the main tool available for the execution of the public will, and people will only be

[372] Note that this requires that relevant information is communicated in advance, so that access to information legislation might not be entirely suited to realise this goal.
[373] Curtin 2000, p. 7.
[374] *Társaság a Szabadságjogokért v. Hungary* (App no. 37374 /05) ECHR 14 April 2009, paragraphs 26-28

aware of what they as a society can potentially achieve if they are aware of the exact tools at their disposal.[375] Thus, information about the government is essential to the public debate. I would expect information about public authorities and what they are doing to be more readily available than information that is more or less coincidentally held by those public authorities, both because it is highly relevant to the process of public will formation and because it is difficult to acquire it in other ways.

3.2.2.2 The second function of transparency

We saw in the previous chapter that transparency enables outsiders to see what an organization is doing. This enables those outsiders, in this case the citoyens, to try to influence the actions of that organization and to attach consequences to behaviour they disapprove of.

When citoyens try to affect the outcome of public decision-making processes during the process, they are participating in public decision-making. Transparency is required to make participation possible and effective. But although participation is important in a democracy, there is no consensus on how participation should be realised, or on what level of participation is required.[376] Without such consensus, it is impossible to say what sort of transparency measures is required to facilitate participation in a democracy. However, if the citoyen is allowed to participate in a given process, transparency is required to effectuate this right: he should know the decision-making agenda, and have relevant information about the subject that is decided upon as well as the decision-making process. Typically, participation requires ex ante and ex durante (or real time) transparency.

Transparency is also required for accountability. More specifically, we have seen that transparency helps a principal to ensure that his agent is indeed doing what he is hired to do: promote the interests of his principal to the best of his ability, in the manner prescribed by the principal.

This means that transparency is a prerequisite for people to hold public institutions to account. Transparency then is of pivotal importance for a democracy to function, because it is required to allow citizens to assess the performance of elected officials, and to not re-elect those that do not meet their expectations.[377] It also allows them to vote for those representatives that they trust to promote the public interest, and thus allows them a measure of ex ante control. In other words, transparency allows people to effectively fulfil their citoyen function of voter.

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[375] See also Birkinshaw's argument that we have a right to know what the government is doing on our behalf, or perhaps: *what we ourselves are doing as a collective*. Birkinshaw 2006b, p. 213

[376] This ties in with the discussion about deliberative democracy versus interest representation in paragraph 3.2.2.1. Indeed, participation might give interest groups the possibility of circumventing public debate and to exercise a more direct influence over public authorities.

[377] Mendel 2006, p. iii-iv.

These arguments hinge on the assumption that we have seen is central to the principle of democracy: that the source of government power lies with the people, and that the government should promote the public interest of its people. As we shall see below, transparency, in addition to enabling participation and accountability, also improves the quality of decisions. Thus, it makes public officials better agents: they are able to contribute to the public good more effectively, because the chance that their decisions actually achieve the public interest goals they aim to achieve increases. So because transparency allows officials to take better decisions, it contributes to a better functioning democracy, and increases the ability of the citoyens to realise the public good.[378]

The idea that democracy necessitates control of government, and therefore transparency, is of course widely accepted. 'Reliable information is essential for accountability.'[379] Curtin explicitly indicates that allowing the control of public bodies is only the secondary function of transparency, in addition to enabling the more essential process of will formation.[380] The very specific obligations to provide information to the general public based on articles 2 and 3 of the ECHR that we will encounter in paragraph 3.5.2.2 are based on it, as they allow the general public to control whether the authorities are complying with these fundamental provisions.

3.2.2.2.1 Representative democracy and principal-agent theory

In chapter 2 we discussed the important role of transparency in principal-agent theory. Because the government can be seen as the agent of the people, the insights in how transparency can help principals improve the quality of their agents' output are relevant to how transparency can help the citoyen improve the government's performance. We do not live in a direct democracy, but appoint representatives to regulate society on our behalf. Representative organs, like the parliaments of the member states, but also the European parliament, are to act on our behalf. Although in the case of the European Institutions, the relation is by no means a direct one, the idea that these institutions are tasked by the people to promote the public interest remains valid. They are, in other words, our agents, albeit agents over whom we have precious little direct control. The most common tools that principals have at their disposal to control their agents are unavailable to us. We cannot, as a rule, make the payment of our agents dependent on their effort, or on the outcome of their actions. Instead, they are appointed for a certain period for remuneration that is set in advance.[381] To ensure they act in our best interest, we can only monitor their behaviour, and if it displeases us, we, or our representatives, can vote them out of office. Of course, we have created other institutions to exercise more direct forms of control, who in the end should also be accountable to us.

If we accept the view that government is the agent of the people, what does that tell us about the need for transparency? Can the need for monitoring that flows from that fact

[378] Mendel 2006, p. 134.
[379] Birkinshaw 2006a, p. 51. See also Héritier 2001, p. 824.
[380] Curtin 2003, p. 7-8.
[381] Prat 2006, p. 96.

provide us with an argument for full transparency, or a general right to all government-held information? The fact that in a democracy the government acts on behalf of its citizens, and is supposed not to have any interests of its own, often leads to the conclusion that all information held by the government is held on behalf of its citizens, and that therefore, in principle, all government-held information should be accessible to everyone.
On closer inspection, this argument does not hold up. In fact, public autonomy and the need for government accountability that flows from it might be better served by implementing certain specific transparency measures than by implementing full transparency.

Let us first turn to the need for monitoring government behaviour. Does this require or benefit from full transparency? We have seen in chapter 2 that if one assumes information is costless, more transparency is usually to the advantage of the principal, in this case, the general public. We must now refine our argument a bit further. Game theoretical research suggests that there are some exceptions to this general rule where transparency acts as an incentive for the agent to act less than optimal. Also, in real life, information is not costless: the direct costs of making information public might be negligible, as some authors have argued,[382] but there can be external costs in terms of e.g. privacy violations, harm to public safety, or to economic interests. These costs might outweigh the benefits of added transparency, and might themselves be detrimental to what the citoyens have decided is the public interest.

Not all kinds of transparency have the same adverse consequences. It turns out that what Heald has defined as real time transparency tends to be more harmful than ex post transparency. We might expect a preference for ex post transparency and outcome transparency in a number of cases. As we saw in chapter 2, transparency can sometimes be an incentive for conformism. Prat suggests that although full transparency should be the default option, when contracts are incomplete the situations might be different. Intense scrutiny of the behaviour of an agent before the outcomes of his actions are known gives him an incentive to behave in the way the principal expects him to behave, which may not be the optimal way.[383] The exemption of pre-decision information from most access to information legislation can be explained within the principal-agent framework. If such information is released prior to the actual decision being taken, the outcome of the agent's efforts cannot be observed, and the principal will only be judged according to his behaviour. Prat shows that this will lead to conformist behaviour on the part of the agent, i.e. he behaves in the way the principal expects him to behave rather than in the way that would best serve the principal's interest.[384] Second, there is the situation where there are multiple principals and agents, where full transparency might hamper the agents' abilities to make decisions, like in the case of the ECB, where members of the Governing Council are supposed to serve the interest of the Eurozone as a whole, but are selected by the member states.[385] This is the argument

[382] Heald 2006a, p. 71.
[383] Prat 2006, p. 102.
[384] Prat 2005, p. 863.
[385] Prat 2006, p. 100.

that some secrecy is needed for negotiations that we already encountered in chapter 2. Openness might reduce negotiators' willingness to compromise, because they do not want to be perceived as weak or caving in to their opponents' demands, even if they realise that compromising is the better way to promote the public interest. Stasavage applies this same argument to the work of the Council: an overdose of transparency might lead the Council's members to take a stand defending national interests, and hamper their ability to reach a compromise that serves the interests of the Union as a whole.[386]

The fact that the general public does not monitor all government actions itself but has instead appointed representatives to do the monitoring for them, also has consequences for transparency. If we assume that government is the agent and the people are the principal, than the government should be transparent to the general public to allow it some control over its representative. But when supervision is exercised on behalf of the general public by another public authority, matters change. In practice, this is almost always the case: as we saw earlier, the public sector is a complex web of principals-agent relations, and there are many agents who require monitoring, either by their direct principals or by special monitoring bodies. Generally, this will shift the burden of monitoring from the general public – whose members most likely have better things to do than to monitor government bodies all day – to their agents. In such cases, one might expect active transparency obligations towards the supervisor (defined as the authority or institution that has been attributed the task of controlling the agent), but there is no reason to limit passive transparency towards the general public. In other words: the supervisor will have the information which it requires to exercise its duties sent to it, but the general public can access that same information if it so desires.

However, sometimes the supervisor will be in a more privileged position: he gets access to certain information that stays hidden from the general public. Requests by members of the public for information that has been provided to the supervisor may be refused. This construction allows a measure of control over those acts that are based on or produce information the release of which would carry high costs in terms of privacy infringements, or damage to other public interests. In such cases, the supervisor becomes a fiduciary rather than an agent. He still acts in the interest of the general public, but is hardly under its control. This means, that the fiduciary cannot be forced to make the information it has been trusted with public, since that would undermine the reason for its existence. Such arrangements have not been subject to much research, and it is not quite clear to what extent they contribute to realising the interests they are trusted to represent.[387] In theory, the fiduciary supervisors allow control of public institutions that the citoyens do not want to exercise themselves: making the information available to them would allow them to monitor the public authority itself, but would also mean the information would be available to anyone who would want to use it, or abuse it, for his private purposes.

[386] Stasavage 2006, p. 174-175.
[387] Shapiro 2005, p. 278.

Such an arrangement is not without risk, but Majone indicates there are some mechanisms which help to ensure that fiduciaries do in fact act in the interest of those they represent.[388] One of those mechanisms is reputation, which can help to build up trust. However, this will only work with a sufficiently long time horizon, for if the fiduciary does not need the trust of those it represents in the future, it has an incentive to pursue its own interests, knowing it will not face retribution for its breach of trust. Reputation therefore does not really work for politicians with an appointment for a couple of years.[389] Independent organs can help to solve this problem, if powers are delegated to them and the delegating authority can no longer exercise them itself, what Majone calls full delegation.[390] Sharma suggests, albeit in a somewhat different context, that agents who are far more knowledgeable than their principals might be tempered in their inclination to pursue their own interests by their altruistic inclinations and by controls in their community of professionals as well as in the organization that employs them.[391]

3.2.3 Conclusion: does democracy require full transparency?

When we see government as the agent of the citoyens, does that in itself provide us with an argument for full transparency? According to Mendel, democracy is about ensuring that governments perform in accordance with the will of the people. Generally speaking, this would be impossible if government did not operate in an open, transparent fashion.[392] It is true that in a democracy, government acts on behalf of the citoyens. The government is their tool to promote what they have decided the public interest to be. The conclusion is inevitable that information is not held in the government's interest, but in the public interest. However, the conclusion that therefore, all government-held information should at all times be accessible to the general public is a non-sequitur, unless one can argue that the public interest does in fact require such accessibility. What the 'public interest' is exactly, is devilishly hard to define. However, the final decision lies with the people themselves, who should be free to decide that it is in the public interest to keep certain information secret, and who may well have weighty reasons for such a decision. The release of information to the citoyens cannot be separated from releasing information to private individuals and economic actors, who may use it for purposes other than the promotion of the public interest. Sometimes, such uses can be detrimental to the public interest. The release of information that can endanger public security may not be in the public interests, and its release does not necessarily contribute to making the government a better representative of its citizens, especially if those citizens value their safety highly.

This would be different if a refusal to provide access to information would make the exercise of public autonomy impossible, which would be the case if the people could no longer ascertain that the government is acting in accordance with their wishes. The need for government accountability however, which is required for the exercise of

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[388] Majone 2001, p. 105 indicates he considers the non-agent actors fiduciaries.
[389] Majone 2001, p. 109.
[390] Majone 2001, p. 113.
[391] Sharma 1997, p. 760.
[392] Mendel 2003, p. 49.

public autonomy, does not require full transparency. The proper functioning of government as the representative of the public interest may in fact be hampered by it. Hence, in a democracy, the people may decide to implement less-than-full transparency without impeding on their autonomy, in particular by making information available with a delay. Indeed, such an approach might enable government institutions to further the public interest in a more effective way.

Of course, in exercising their public autonomy, people should also be free to decide to implement full transparency, perhaps trading in some effectiveness for better accountability. The argument that full transparency can somewhat hamper public decision-making is not a decisive legal argument at all, especially since the disadvantage is at least partially offset by the fact that observation makes agents more likely to act in the interest of their principals.[393] Public officials may be slightly less effective, but they will also be more honest. Likewise, the citoyen is free to decide that he values openness higher than, for example, public safety.

Maximum transparency would not be absolute. We still require at least an exemption for personal data to prevent private interests being sacrificed to the public good.[394] Where transparency harms the rights of homo dignus, the interests of the citoyen cannot automatically take precedence.

In other words, even if we accept that the principle of democracy regulates the relationship between the citoyen and the government, this does not in itself provide us with an argument for full transparency. On the other hand, democracy as the foundation for transparency does not offer an argument to limit the public right to access information to particular categories of information either, even though the release of some categories of information might have adverse effects on how well the government can perform its role as the representative of the citizens. In the end it should be the citizens themselves who decide what information they require for informed decision-making about public matters. Citizens should have the ability to hold government accountable for all its actions, and they should decide for themselves what information is relevant in public-decision making, and hence in the public debate. They should also decide what information it is in the public interest to keep secret, or to reveal only to the fiduciaries they have created to hold particular government institutions accountable on their behalf. Parliament, as the direct democratic representative of the people, can play an important role in this respect,[395] provided it enjoys sufficient democratic legitimacy.[396]

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[393] See also Stasavage 2006, p. 172-174.

[394] See chapter 6.

[395] On the national level, it does. It has a privileged position in the sense that it receives information that is not made available to the general public. In addition it can launch an inquiry into the behaviour of the executive during which otherwise secret information is made public. See Kummeling 1997; Bovend'Eert & Kummeling 2010, p. 265, 320, 375.

[396] Casting the European parliament in the role of the people's fiduciary may be problematic because of this. See Dähllof 2011.

The level of transparency that is required in a democracy can vary. At most, all information is made freely available to everyone at once, subject only to private interest exceptions. Although such a strategy may harm other public interests, it is up to the citoyen to determine whether those interests justify secrecy, or whether they accept the downsides of maximum transparency. However, maximum transparency is by no means required. To say otherwise would deny the citoyen the ability to decide what the public interest requires. Public interest exceptions are acceptable if the citoyen decides that he wants them. Nevertheless, we can only compromise on transparency to a certain degree: there must be enough transparency to ensure that public autonomy is guaranteed. The citoyen must be able to make informed decisions about matters of public interest. No information should be classified a priori as irrelevant to the democratic process, because it is up to the citoyen himself to decide which information is useful. Although secrecy can be acceptable if the public interest is harmed by releasing information, all information should be released eventually and as soon as possible. Finally, there should be a control mechanism to determine whether secrecy is justified. Letting the agents whose behaviour we need to monitor decide on which information should be kept secret is a recipe for disaster. Because the general public is evidently not suitable to that task, it should be delegated to a trusted agent or a fiduciary.

The exact level of transparency should in my opinion be seen as a democratic choice. We cannot derive the optimal level of transparency in a democracy from political theory.

3.3 Transparency for the citoyen in the EU

We have seen in the previous paragraph that transparency enables EU citizens to perform their role of political actors in the EU to greater effect. Indeed, the assertion that transparency contributes to democracy is a common one, and appeals for more transparency from NGOs and academics are often motivated by a desire for more, or more effective, democracy. But to what extent did this function of transparency motivate its inclusion in European law?

Originally, the emphasis was on transparency as a solution for the legitimacy crisis. Transparency was a tool to increase the efficacy of the institutions by enhancing the acceptance of European decisions. It was not primarily the citoyen who benefited from transparency, but the EU itself. Of course the EU works on behalf of its citizens, so what is good for the Union is good for the people, but the difference in approach is poignant. This attitude is quite pervasive. In the White Paper on European governance, the Commission discerns a number of principles of good governance, of which openness is one. All these principles are said to be important for establishing more democratic governance, and to underpin democracy and the rule of law in the member states. However, the specific benefit attributed to openness is its 'particular importance in order to improve the confidence in complex institutions.'[397] The problems that the Commission identifies in its white paper are telling: the EU is *perceived* not to be ef-

[397] White paper on European governance, p. 10.

fective enough, it does not get proper credit when its action are effective, the member states do not communicate well about what the EU is doing, and people fail to understand the difference between the institutions and what they do.[398]

The recent conference titled 'Europe in crisis: the challenge of winning citizen's trust' that the European Ombudsman organised in April 2012 shows that the problem of legitimacy is perhaps more pressing than ever.

The first steps on the road to more transparency were taken hesitantly at best. As we have seen, the rise of transparency in the EU started in the early nineties, when the future of the Union was unsure. As there were conflicting views on the direction which the European project should take, the negotiations surrounding the TEU weren't easy. Nevertheless, there was consensus about two issues: the efficacy and the democratic nature of the European institutions should be increased. Transparency initially was not high on the Maastricht agenda, and entered the discussion fairly late.[399]

Efficacy required that decisions could be adopted when necessary, and as rapidly as possible when appropriate; that those decisions would be acceptable to Member States and other stakeholders; and that they would actually be implemented and achieve good results.[400] One of the roads that supposedly led to increased efficacy (in addition to increasing the number of cases in which the Council acts by qualified majority, thus enabling decisions to be taken more rapidly, and creating a single institutional framework for the Union) was to 'extend and make more thorough-going the possibilities for controlling the legality and the quality of the decisions taken by the institutions, thus encouraging the institutions to exercise more vigilance.'[401] Naturally, transparency was praised for its role in enabling such control.

Although democratisation was also one of the purposes of the TEU, one can wonder about the sincerity of the institutions' commitment to this concept. Quite often one gets the impression that to them, it is a mere necessity. As Piris puts it: 'The essential point remains, however, that in order to be effective, the actions of the institutions must be accepted by citizens and that, for this to occur, these institutions must be closer to the citizens, lend them an ear, be under their control, in a word, to be more democratic.'[402] In other words, the institutions must become more democratic to be able to adopt and execute their policies in an effective manner. As we shall see, this approach is also implicit in subsequent Commission and Council documents about transparency and the manner in which it is justified. In his description of the transparency developments on the European level, Roberts also points out that transparency was introduced as a cure for the crisis of legitimacy that the European Union faced in the 1980's and 90's.[403] Notwithstanding the laudable reference to democracy, the Declaration about transpar-

[398] White paper on European governance, p. 7.
[399] Piris 1994, p. 471.
[400] Piris 1994, p. 454-455.
[401] Piris 1994, p. 456.
[402] Piris 1994, p. 461
[403] Roberts 2006, p. 174.

ency was adopted as part of a campaign to increase efficacy, and in response to a particular perceived problem. Although a number of Member States championed transparency and access to information for their own sakes, others stood by as circumstances forced it upon them. The Treaty of Amsterdam could only be concluded when less transparency-minded Member States realised a larger commitment to transparency was required to make a new Treaty possible at all. A referendum was required before Denmark could ratify the new Treaty, and a new Danish 'no' was expected if transparency wasn't embraced in the new Treaty.[404]

The institutions took a slightly different view: Europe suffered from distrust among its citizens. Brussels was perceived as a nuisance, and all sorts of evil were attributed to it, whilst it received no credit for the good things produced by European integration. If only the public knew what Europe did, the trust in and appreciation of the European institutions would rise, or so it was expected. Transparency and openness were expected to bring the citizens and the institutions closer together, and to improve the trust in the latter. It should be no surprise that the way in which transparency was implemented echoes this problem-solving approach. As discussed above, the Council initially felt it provided enough information, but that it was misunderstood by the general public. It therefore decided that it should provide both press and public with 'more relevant and comprehensible information.' Thus, the image of the Council could be changed. Although Council proceedings were to become more open, the Council felt its negotiations were better held in secret. If that principle was departed from this would lead to decreased efficacy – the special nature of Council proceedings would be undermined and decision-making might come to a stop.

When the Commission shares its views on the importance of transparency, it confirms that transparency is at least in part a tool. Better access to information is a means to bring the public closer to the European institutions.[405] In addition it should stimulate a more intensive debate about EU policies, making citizens feel more involved.[406] Lastly, it should improve the trust of the public in the EU.[407] Communication 93/C 166/04 also mentions that the Commission aims to change its image, and places the developments with regard to transparency within the framework of further measures to improve its relation with the public. Transparency is at least partially also a PR-instrument. This is confirmed by a number of remarks further on, where the Commission declares that its first priority is to explain its actions more clearly and to ensure that the work of the EU is properly understood. To achieve these goals, it shouldn't use existing options more, but it should use them more effectively to communicate its message, to conduct a dialogue with the public and to encourage its participation, as effectively as possible.

The Commission congratulates itself with its open attitude even prior to Maastricht, which it cultivated because it is of fundamental importance for the development of a healthy and efficient policy. Again, it repeats this in 93/C 166/04, where input from the

[404] Roberts 2006, p. 177.
[405] Commission Communication 93/C 166/04.
[406] Commission Communication 93/C 166/04.
[407] Commission Communication 93/C 156/05.

public is considered of fundamental importance for the development of a sound and pragmatic policy.

When we take a closer look at how participation on the European level is organised, the importance that is attached to improving the effectiveness of the decision-making process stands out once more. The 'minimum standards and general principles for consulting interested parties,' are tailored to improving the quality of decision-making. Although transparency is indeed required for participation and this fact is recognised in the standards, participation itself is anything but an unconditional right. According to the standards:

- All communications relating to consultation should be clear and concise, and should include all necessary information to facilitate response. Note the criterion used to determine what information should be provided: enough to allow for useful input in the decision-making process. Of course, the Commission rather than the interested party determines what this constitutes.
- In a consultation process, the Commission should ensure that the relevant parties have an opportunity to express their opinions. Again, it is unclear who the relevant parties are, and it is up to the Commission to decide on this.
- The Commission should ensure adequate awareness-raising publicity and adapt its communication channels to meet the needs of all target audiences. Again, this is hardly a neutral concept. It is assumed that the awareness of the public should be raised. About what issues is, once more, up to the Commission.
- Indeed, it is up to the interest groups to meet criteria of representativeness, accountability and transparency to be allowed to participate in the consultation procedure. It is not the case that anyone can have a say. This is not necessarily a bad thing, but it does show that participation for all is not really the point here. Only parties whose input is perceived as useful by the Commission get a say.[408]

In the same document, the Commission refers to the developments on the national level, and it reminds us of the goals of the original pro-transparency movement: democratisation. Even so, part of the reason for the process of democratisation is a diminished effectiveness of national parliaments – at least in the interpretation of the Commission. Again, more openness supposedly leads to qualitatively better discussions about policy and to improved control of the government and its agencies.[409]

[408] Commission Communication: Towards a Reinforced Culture of Consultation and Dialogue – General Principles and Minimum Standards for Consultation of Interested Parties by the Commission, COM (704) p 19-22.
[409] Obradovic & Vizcaino 2006, p. 1051.

Although the approach from the Council and the Commission does focus primarily on the efficacy of the Union, one of the manners in which the institutions try to achieve these goals is by improving the democratic quality of the EU. In particular the Commission aims to stimulate public debate about its policies, indicates that transparency is necessary to stimulate public participation, and will improve the accountability of EU institutions. By these means, the quality, and perhaps more importantly the perceived quality, of EU policies and decisions are meant to improve. Of course, at least as far as the real quality of the decisions is concerned, this does benefit the citoyen, who sees that the manner in which he is governing himself (through the EU institutions) is successful in realising the public interest goals that he and his fellow-citoyens have democratically decided upon. (theoretically, at least) The efficacy approach is no enemy of the democratic ideal, but the focus on the perspective of the institutions is somewhat suspect in that it detracts from the real issue: government is for the people, it should execute the people's wishes, and its efficacy only matters in relation to this fundamental task. The focus on what transparency can mean for the institutions in the policy papers of the Commission and the Council creates a certain distance between the EU and the citoyen which is contrary to their objective.

In improving the democratic quality of the EU, the emphasis is on civil society, interests groups, and national parliaments more than on individual citizens. As we have seen, this is not necessarily problematic, as one of the characteristics of citoyens is that they can organise themselves in civil society. Hence, if the initiatives of the EU institutions succeed in involving civil society actors in the political process, they do allow people to function better as citoyens. Admittedly, ensuring the participation of civil society is one way to achieve democracy, but not the only way. Direct participation by individuals is another way, although it is highly impractical considering the number of EU citizens. Criticising openness initiatives for not succeeding in creating massive participation by individual citizens is not entirely fair, as it is doubtful this was ever the goal of such regulation.

These tendencies are also reflected in the treaty, according to which openness should 'promote good governance and ensure the participation of civil society.'[410] Granting public access to information is an important way to achieve those goals, and one that is prescribed in article 15(3) TFEU. The Ombudsman has made transparency a central theme of his work 'to empower citizens and strengthen their confidence in the institutions.'[411] The list of concrete measures to achieve this goal shows a very broad understanding of both transparency and its purposes, but does not show a strong commitment to empowering the citoyen as such.[412]

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[410] Article 15(1) TFEU.

[411] European Ombudsman Strategy plan 2010, p. 5.

[412] Promoting rules on public access to documents that ensure transparency in all EU institutions; improving the transparency of the European Commission's procedure for dealing with complaints against Member States; making the EU's procedures - in areas such as recruitment, tenders and grants - fairer and more transparent; working with the European Data Protection Supervisor in balancing the right to data protection and the right of public access to documents; and regularly providing stakeholders with information in all 23 official EU languages and publishing the Ombudsman's decisions on his website.

The Commission and the Council focus primarily on the legitimacy of the European Union. But when we look at the courts, we see that their interpretation of the principle of transparency and subsequently of Regulation 1049/2001 is more explicitly founded in the principle of democracy, and thus on the benefit that the citoyen derives from transparency and access to information. Because the courts have ruled on transparency for the citoyen most often in the context of requests for access to information, their approach will be discussed in the next paragraph.

3.3.1 Public access to information in the EU

The EU institutions newly found enthusiasm for transparency culminated in the adoption of the Code of Conduct concerning public access to Council and Commission documents, OJ L 1993, 340/41, which was implemented through the Council decision of 20 December 1993 on public access to Council documents (OJ L 1993 340/43) and the Commission Decision of 8 February 1994 on public access to Commission documents (OJ L 1994, 46/58). The code of conduct codified the 'principle of the widest possible access to council and commission documents.' When Regulation 1049/2001 was adopted to implement article 255 EC, which was introduced by the Treaty of Amsterdam and provided a basis in primary law for the right of access to EU documents, this principle was retained. At first glance, the principle of the widest possible access looks fairly generous, but it is of course a fairly ambiguous provision. Driessen argues that 'the widest possible access' must be interpreted to mean that European citizens do not have a right to all information that the institutions hold – which is then balanced against other rights and can be restricted if the latter's observance so requires – but rather a right to certain information; apparently only that which it is 'possible' to allow public access to. He proposes a similar reading of article 255: since the exceptions to the right of access find their basis in the Treaty – it is subject to certain principles and restrictions – they are an essential part of this right.[413] Indeed, the Commission and the Council champion a very instrumental approach of transparency. They appreciate public access to information for the contribution it makes to their perceived legitimacy, not so much for its own sake. Indeed, even the most enthusiastic proponents of transparency doubt whether the EU institutions are in favour of a right to all information, and argue that the Decisions and Regulation 1049/2001 which was adopted later fail to reflect their commitment to such a right.[414] Advocates of the Institutions' policy accept it as natural that transparency can't be implemented in full.[415] The disagreement seems to be about the desirability of transparency as a right of citizens rather than its de facto instrumental character.[416]

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[413] Driessen 2006, p. 908-909. (His argument might not be that strong though, because most provisions containing rights also contain an exception clause. That is no different for article 255 EC and does not provide any real arguments against interpreting such exceptions as strict as possible)

[414] De Leeuw 2003, p. 326.

[415] Piris 1994, p. 482, 482; Driessen 2006, p. 909.

[416] De Leeuw 2003, p. 324 also accepts that 'the lack of transparency in the decision-making process was seen as an important reason for the general feeling of alienation from the EU and the public disillusionment with the integration process,' and that this has led to the transparency-enhancing

The Lisbon treaty further developed the right to access information in article 15(3) TFEU and article 42 of the Charter of fundamental rights. Although the right granted in article 15(3) TFEU is wider in scope than that in article 255 EC, since it grants a right to access the documents of all EU institutions, rather than only those of the Council, Commission and Parliament, the Regulation has not been adapted yet. Indeed, the debate about the further development of the right to access documents has been in a deadlock for years.

3.3.1.1 The Courts' approach to access to information

The Council and the Commission are not the only ones who have an impact on the development of the right to access information in the EU. In the early cases about access to documents, the Courts tended to defer to the opinion of the Council and the Commission. In the context of public access to information, the principle of transparency first occurred in the 1995 Carvel case, where the CFI acknowledged its existence relying on the stream of official documents starting in 1992 with Declaration no. 17 of the Treaty of Maastricht. In addition, for its judgment of what the principle requires, the CFI relied heavily on the wording of the relevant Decision and the policy documents which preceded it. Both the existence and the contents of the principle of transparency were dictated by the other institutions, and the CFI seemed to follow their lead. The court repeatedly held that the Council and the Commission Decisions were the 'first, preliminary steps' in the implementation of the principle of transparency. Without such implementation, the principle had no legal significance. In its 1999 Interporc judgment, the CFI held that where there are no rules of higher order law, the internal rules of the institutions are binding. The CFI therefore did not review against a principle of transparency existing outside of the implementation measures, but instead merely reviewed whether the measures themselves have been complied with – even though many considered the Decisions to be not nearly drastic enough.[417]

The purposes of transparency that the Courts recognise are similar to those recognised by the Commission and the Council. Initially the courts stressed that the internal rules of the Commission and the Council were to ensure that their internal operation is in conformity with the interests of good administration.[418] Access to information was a matter for the institutions themselves, to do with their internal functioning.[419]

Later, the Courts became more willing to refer to values of democracy and accountability, stating that transparency strengthens the democratic nature of the institutions and the public's confidence in the administration, and is essential in order to enable citizens to carry out genuine and efficient monitoring of the exercise of the powers vested in the European institutions, and thereby increase confidence in the administration.[420] The

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measures which have been adopted since 1992, the purpose of which was to remedy those problems.
[417] Curtin 2000, p. 36-37.
[418] Case C-58/94 *Netherlands v. Council* [1996] ECR I-2169, paragraph 37.
[419] Curtin 2000, p. 11.
[420]Case T-92/98 *Interporc Im- und Export GmbH v. Commission* [1999] ECR II-03521, paragraph 39.

citoyen is clearly visible in the court's statement that "*The principle of transparency is intended to secure a more significant role for citizens in the decision-making process and to ensure that the administration acts with greater propriety, efficiency and responsibility vis-à-vis the citizens in a democratic system. It helps to strengthen the principle of democracy and respect for fundamental rights.*"[421]

3.4 Regulation 1049/2001

The right granted in article 255 EC has been detailed in Regulation 1049/2001/EC. It also gives effect to article 1 TEU, which enshrines the principle of openness and lays down the ideal of a Union where decisions are taken as openly as possible. After all, 'Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union.'[422] The importance of access to documents pertaining to the legislative process is emphasised in recital 6 of the preamble. The purpose of the Regulation can be found in the fourth consideration of the preamble, which states that it aims to grant the public the widest possible access to documents which are held by the institutions. The principle of the widest possible access is also contained in article 1(a) of the Regulation itself.

Although the Regulation did to some extent codify the practices and case law which had arisen under the earlier rules on public access, the interpretation of some of its provisions was far from self-evident. Most of the cases brought before the courts concerned the exception clauses in article 4(1), 4(2) and 4(3), and presented the courts with the question of how the interest in public access to information could be reconciled with the interests protected in the exception clauses.

The case law of the European courts shows how complicated the task of balancing competing interests can be, and how many factors can be involved in this exercise. It also illustrates that some of the decisions that must be made have a political character. It is quite easy to criticise the judgments of the courts from a perspective of 'optimal transparency,'[423] but it is unfair to blame them for not optimising where the European legislator has already decided upon the less optimal choice. What's more, the courts are ill-equipped to determine what the level of optimal transparency is, not unlike lawyers and other academics. Indeed, only the European citizens, or their representatives, are entitled to make that decision. Nevertheless, there are some elements in the case law of the courts that appear hard to explain.

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[421] Case T-211/00 *Kuijer v. Council* [2002] ECR II-485, paragraph 52; Case T-309/97 *Bavarian Lager* v *Commission* [1999] ECR II-3217, paragraph 36.
[422] Recital 2 of the preamble to Regulation 1049/2001
[423] Heremans 2011, p. 6-7.

The courts' case law also shows how some interests in secrecy or rather some adverse effects of transparency are considered to be already taken into account in the Regulation, so that they cannot justify a refusal to disclose documents. This is true even if the institutions make a convincing argument that some harm occurs. Apparently, those adverse effects are accepted in the interest of transparency.

3.4.1 The absolute exceptions

Article 4(1) contains a number of absolute exceptions. Access to documents must be refused if their disclosure would undermine the public interest, that is, public security, defence or military matters, international relations, and the financial, monetary or economic policy of the EU or a member state. In addition, access must be refused if disclosure would undermine the privacy and integrity of an individual.

The courts leave the institutions a wide discretion to determine whether the public interest would be harmed by the disclosure of a particular document.[424] They will only review whether the procedural rules have been complied with, whether the duty to state reasons has been satisfied, whether the facts have been accurately stated, and whether the institution has not made a manifest error of assessment or misused its powers.[425] They should also examine whether it is possible to grant partial access.[426]

To comply with the principle of the widest possible access, the institutions must establish, for each document that is requested, whether there is a reasonably foreseeable and not purely hypothetical risk that disclosure would undermine one of the protected public interests.[427] This is a procedural requirement. The courts will review whether they have indeed established this, but will not review their evaluation of the risk.

If such a risk has dissipated, the documents must be made public. Article 4(7) provides that the exceptions as laid down in paragraphs 1 to 3 of that article shall only apply for the period during which protection is justified on the basis of the content of the document, with a maximum for 30 years. For the private interest exceptions, where access is refused because it harms commercial interests or privacy, this period can be extended. This provision applies to the exceptions discussed in the two paragraphs below as well, but not to documents classified as sensitive.[428]

As we have seen in paragraph 3.2, a refusal to disclose documents to protect the public interest is no affront to the citoyen. Because he promotes the public interest, he will welcome the possibility to refuse documents when this is necessary to protect the pub-

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[424] Case C-266/05 P *Sison* [2007] ECR I-1270, paragraph 34.
[425] Case T-14/98 *Hautala* v *Council* [1999] ECR II-2489, paragraph 71; Case T-211/00 *Kuijer v. Council* [2002] ECR II-485, paragraph 53.
[426] Case T 14/98 *Hautala* [1999] ECR II-2463, para 75; Case C-353/99 P *Hautal*a [2001] I-9594, para 87.
[427] Case T-211/00 *Kuijer v. Council* [2002] ECR II-485, para 56; Case T-174/95 *Svenska Journalistförbundet* v. *Council* [1998] ECR II-2289, para 112.
[428] For a discussion of classified documents, see Curtin 2011.

lic interest. Whether this is necessary is, of course, up to him. The decision of which interests should be thus protected is one that should be made by the citoyens, or, as happens in practice, by their democratically legitimised representatives. Although one can make critical remarks about the degree in which the European Institutions are fit to make this decision on behalf of the citoyens, this is not a very convincing argument to release the documents, or even to call for stricter review by the European courts. The courts have a legitimacy problem as well. Releasing the documents would not promote the public interest. Their contents could be abused to undermine the protected interests, and it will not make the EU institutions better public promoters of the public interest. So, when we use the principle of democracy to interpret the principle of transparency in the relation between the EU institutions and the citoyen, the public interest exceptions are not problematic.

Documents may also not be disclosed when this would undermine the protection of the privacy and the integrity of the individual. Here, the interests of the citoyen have been balanced against those of homo dignus, and homo dignus has won. The court interprets this provision to give a very generous protection to individual rights.[429] We will discuss this provision in greater detail in chapter 5, where we discuss the relation between citizens as private individuals and the government.

3.4.2 The relative exceptions

Article 4(2) contains a number of relative exceptions. If disclosure would harm one of the interests protected in that article, access must be refused, unless there is an overriding public interest in their disclosure. This exception applies if disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property; court proceedings and legal advice; or the purpose of inspections, investigations and audits.

These exceptions are interpreted narrowly. The institutions must show that harm to the protected interests is reasonably foreseeable, and not purely hypothetical. A general and abstract argument is not sufficient.[430] In contrast to the review performed under article 4(1), the courts will review the merits of their argument.

In particular the argument that providing public access to documents originating from third parties might be an incentive for them to stop cooperating fully with the institutions is not accepted. Only harm to the purpose of a concrete investigation, audit or inspection can justify a refusal. The same argument is used by the institutions with regard to the protection of their decision-making process, and there too it is not accepted. This approach can be seen in Batchelor where the Commission had refused access to a number of documents originating from the UK, in Éditions Jacob, where documents about a merger were refused, and in Agrofert, although in the latter case the

[429] Case C-28/08 P *Bavarian Lager*, [2010] ECR I-6055. Heremans 2011, p. 30.
[430] Case T-111/07 *Agrofert* [2010] ECR II-128, paragraph 141-144; Case C-506/08 P *Sweden* v *MyTravel and Commission* [2011] ECR I-0000, paragraphs 100, 115, 117.

general court left the door open to the possibility that a 'chilling effect' could be proven to the requisite legal standard in the future.[431]

On a related note, a confidentiality promise by the Commission cannot justify a level of protection above and beyond that offered in the Regulation (in casu by article 4(3)).[432] The General Court took this approach to its extremes in Éditions Odile Jacobs. Although there was an explicit provision in the Merger Regulation that prohibited the Commission to use certain sensitive information for any other purpose than the one it was collected for, the Court felt this did not preclude release of the information to the general public under Regulation 1049/2001.[433] Thus, the rights of the supplier of the information were protected vis à vis the Commission, but not vis à vis society, or particular individuals. This judgment is hard to explain using the theory developed in this chapter. Instead of having a public authority deal with sensitive information as our fiduciary, we limit its power to use the information, while allowing private citizens to use it for any purpose they want. Unsurprisingly, the judgment was recently overruled by the Court of Justice.[434] Providing access to the documents "would undermine the system in the Merger regulation that aims to balance which the European Union legislature sought to ensure in the merger regulation between the obligation on the undertakings concerned to send the Commission possibly sensitive commercial information to enable it to assess the compatibility of the proposed transaction with the common market, on the one hand, and the guarantee of increased protection, by virtue of the requirement of professional secrecy and business secrecy, for the information so provided to the Commission, on the other."[435] The Commission can assume the release of this information will result in reasonably foreseeable, not purely hypothetical harm to commercial interests and the purpose of investigations.[436]

Likewise, in Technische Glaswerke and Ryanair, the courts deduced from the State Aid Regulation[437] a general presumption that 'disclosure of documents in the administrative file in principle undermines protection of the objectives of investigation activities.' The assumption is subject to rebuttal.

A similar issue can be seen with regard to the legal advice exception. The institutions have made a general argument before the court that the release of such advice would have an adverse effect on the legal service's ability to supply the institutions with frank, high quality legal advice, and would subject the legal service to outside pressure. The latter argument is outright rejected.[438] According to the court, the publicity of the advice is not the problem, the people who abuse the publicity of that advice to put pressure on the legal service are. Although this is technically correct, the same argument

[431] Heremans 2011, p. 54.
[432] Case T-144/05 *Muñiz* [2008] ECR II-335.
[433] Case T-237/05 *Éditions Odile Jacobs* [2010] ECR II-02245, paragraph 88.
[434] Case C-404/10 P *Éditions Odile Jacob* [2012] ECR I-00000.
[435] Éditions Odile Jacob, paragraph 121.
[436] Éditions Odile Jacob, paragraph 123.
[437] Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [19999] OJ L 83/1.
[438] Joined cases C-39/05 P and C-52/05 P *Turco* [2008] ECR I-4723, paragraph 64.

could be made for all other exceptions that try to prevent information from being abused for illegitimate purposes. The ECJ does recognise the possibility that if legal advice is made public during ongoing procedures, this may result in pressure on the judiciary and the parties to judicial proceedings.[439] However, in the case at hand the Council relied on mere assertions, which were in no way substantiated by detailed arguments, and its refusal could not be justified.[440]

3.4.3 The institution's decision-making processes

Article 4(3) aims to protect the institution's decision-making process. It distinguishes between decision-making processes that have not resulted in a decision yet, and decision-making processes that have been concluded. In both cases, access may only be refused if disclosure would result in a serious undermining of the institution's decision-making process, and is subject to the overriding public interest in disclosure test. For ongoing procedures, all documents relating to the procedure may be refused. For procedures that have ended, only documents containing opinions for internal use as part of deliberations and preliminary consultations within the institution may be refused.

Access may only be refused if there is a risk that the decision-making process will be *seriously* undermined, so the institutions must perform a qualified harm test. In other words, some undermining of the decision-making process is acceptable under the Regulation. According to Heremans, this qualified harm standard can be justified because access to documents relating to the decision-making process is the core of the right to transparency and access to documents.[441] An institution refusing access based on this ground must show that disclosure will concretely and effectively undermine the decision-making process. In addition, the risk that this happens must be reasonably foreseeable and not purely hypothetical.[442] An appeal to the general adverse effects of openness on decision-making is not acceptable as grounds to refuse disclosure. The argument that openness will lead to external pressure being exercised on experts and staffs is treated in the same way. According to the general court, exposure to external pressure is a risk 'inherent in the rule which recognises the principle of access to documents containing opinions intended for internal use as part of consultations and preliminary deliberations.'[443] Only in exceptional cases, the risk of external pressure might lead to a concrete and effective undermining of the decision-making process.[444] It seems strangely inconsistent to me to assume that public officials lack the moral fibre to do their job as they are supposed to when they are not exposed to public scrutiny, and thus requiring transparency, while at the same time arguing that these public officials should be resistant to outside pressure that is a consequence of this transparency, and that the possibility that they may not be perfect examples of integrity cannot factor

[439] Turco, paragraphs 44-46.
[440] Turco, paragraph 63.
[441] Heremans 2011, p. 66.
[442] Muñiz, para 74.
[443] Case T-166/05 *Borax Europe* v *Commission* [2009] ECR II-28, paragraph 70.
[444] Borax, paragraph 71.

into legal reasoning. Again, the negative effect might have been factored in in the balancing act that resulted in Regulation 1049/2001.

Some authors take this doubt a step further and argue that the Court mistakenly fails to recognise the need to have a space to think.[445] Not only do they feel that such a protected sphere is necessary for effective decision-making, they also fear that in the absence of a space to think, institutions will illegitimately create their own, by moving real negotiations to different forums, and substituting oral deliberation for written procedures.[446] As we have seen, there are good arguments to negotiate behind closed doors. The benefits of secret negotiations may or may not outweigh the positive effects of openness: we do not really know. However, with the Lisbon Treaty's explicit adherence to the right to information, the widely recognised principle of the widest possible access to documents, and the apparent acceptance in Regulation 1049/2001 of some undermining of the decision-making process, the Court's position can be justified.

We must also remember that there are some very bad arguments for preserving the space to think, and the institutions show no hesitation to use those before the Court. In Access Info Europe, the Council expressed the fear that the constituents of certain member states would disagree with their position. In other words: they were not acting in what the citoyens considered to be the public interest. Indeed, this is precisely the interest in transparent negotiations that Stasavage himself reminds of when he makes his plea in favour of the space to think: transparency increase the likelihood that negotiators represent the interests of their constituents.

3.4.4. The overriding public interest in transparency

Both the exceptions in article 4(2) and 4(3) are subject to an overriding public interest test. Thus, the interests protected in those provisions must be balanced against the public interest in access to those documents. There has been, and still is, some lack of clarity about what constitutes an overriding public interest. In Turco, the ECJ clarified that the interests underlying the principle of transparency itself: accountability of the institutions, enabling participation in EU governance, and increasing the trust in those institutions, could in themselves constitute an overriding public interest. In particular, these arguments carry greater weight when the documents concern the legislative process. Apart from that, the case law of the EU courts offers little guidance on what constitutes an overriding interest. In addition, the procedural rules could be clearer: sometimes the institutions have to examine the existence of an overriding interest in transparency ex officio,[447] in other cases applicants have to show the existence of such an interest.[448] This leads to a lack of clarity for applicants, and does not sit easy with the Regulation's basic principle that applicants do not have to state an interest.[449]

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[445] Heremans 2011, p. 66.
[446] Heremans 2011, p. 67.
[447] Case T-471/08 *Ciarán Toland v. European Parliament* [2011] ECR II-00000; Turco.
[448] Joined cases C-514/07 P, C-528/07 P and C-532/07 P *API* [2010] ECR I-8533; Case C-139/07 P *Technische Glaswerke Ilmenau* [2010] ECR I-5885.
[449] See also Heremans 2011, p. 83.

Hayes argues that an overriding public interest in the release of non-legislative and internal documents as mentioned in article 4(3) 'is never going to happen' under current practice.[450] This is at least in part due to the lack of clarity about what constitutes an overriding public interest. This shows how important it is to clarify this aspect of the Regulation. Both the Aarhus convention and the case law of the ECtHR can provide guidance for the further development of the 'overriding public interest'.

Regulation 1049/2001 is as of yet only applicable to the European Parliament, the Council and the Commission, but more specific regulation may impose transparency obligations on other authorities. Such obligations are determined using the same principles underlying the Regulation. The Schecke case shows that it is the same principle that underlies these specific obligations.

> *In this case, Land Hesse was obliged under Regulations 1290/2005 and 259/2008, to publish certain data about recipients of funds from the EAGF and EAFRD.*
> *Two of those recipients brought proceedings to prevent publication of data relating to them. The ECJ recognises that under article 8(1) of the Charter of Fundamental Rights, everyone has the right to the protection of personal data concerning him or her. When deciding whether the interference with this right that was created by the publication of the names of the beneficiaries and the exact amounts they had received was justified, The ECJ took into account the goals underlying the publicity requirement in the Regulations: 'to enhance transparency regarding the use of Community funds in the CAP and improve the sound financial management of these funds, in particular by reinforcing public control of the money used.' The Court refers both to the principle of transparency and the Treaty articles where it has been codified and to its case law on public access to information and Regulation 1049/2001.[451] According to the Court, the publicity requirement serves to reinforce public control of the use of money, and enables citizens to participate more closely in the public debate surrounding decisions on the direction to be taken by the CAP.[452]*
> *The Court continues to examine whether the interference with article 7 of the Charter was proportionate to these legitimate goals, and concludes that a less far-reaching publication would suffice to 'provide citizens with a sufficiently accurate image of the aid granted by the EAGF and EAFRD to achieve the objectives of that legislation.'[453]*

The Schecke case shows, first, that the principles underlying the specific duty to publish information in the contested Regulations are the same as those underlying Regula-

[450] Hayes 2005, p. 7.
[451] Joined cases C-92/09 and C-93/03 *Schecke* [2010] ECR I-11063, paragraph 68.
[452] Schecke, paragraph 69-70.
[453] Schecke, paragraph 83.

tion 1049/2001, and that they both flow from the principle of transparency codified in article 15(1) TFEU. Second, that the transparency obligations can be set aside (partially), by considerations of privacy, even when this is not explicitly foreseen in the law.[454] Third, that the goals served by public access to information determine the weight attached to the principle of transparency when balancing it against the right to privacy.

3.5 An alternative take on public access to information: Aarhus and the ECHR

One of the problems with regard to Regulation 1049/2001 is the lack of clarity about what constitutes an overriding public interest in disclosure. That is one of the reasons why it is interesting to take a look at the Aarhus Convention and the European Convention on Human Rights, because both these instruments show how a different public interest can help in interpreting the public right to access information. The case law of the ECtHR is interesting for another reason as well. The Strasbourg court has a more developed vision on the manner in which access to information contributes to the public debate and to accountability for government actions to the general public.

3.5.1 Aarhus

Regulation 1049/2001 is not the only piece of EU legislation which is concerned with public access to information. Other regulations are concerned with public access to specific kinds of information, sometimes for different reasons than those underlying the general regulation.[455] The exact relation between those specific access regimes and Regulation 1049/2001 is not entirely clear.[456] The ECJ seems to interpret Regulation 1049/2001 using the special access rules, where the former cannot deprive the specific access rules of their effectiveness.[457] The specific rules can provide a general presumption in favour of secrecy (or openness), which can be rebutted if it is shown there is an

[454] Indeed, the Court chastised the Council and the Commission for not considering a less invasive method of publishing the information, Schecke, paragraph 81.

[455] Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC, OJ L 106, p. 1-39; Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the common agricultural policy OJ L 2005 209, p. 1, as amended by Council Regulation (EC) No 1437/2007 of 26 November 2007, OJ L 2007 322, p. 1; Commission Regulation (EC) No 259/2008 of 18 March 2008 laying down detailed rules for the application of Regulation No 1290/2005 as regards the publication of information on the beneficiaries of funds deriving from the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD) OJ L 2008 76, p. 28; Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC OJ L 2006 105, p. 54.

[456] Heremans 2011, p. 80.

[457] Heremans 2011, p. 80, Case C-28/08 P *Bavarian Lager* [2010] ECR I-6055; Case C-139/07 P *Technische Glaswerke Ilmenau* [2010] ECR I-5885; Joined cases C-514/07 P, C-528/07 P and C-532/07 P *API* [2010] ECR I-8533.

overriding public interest in transparency that has not been taken into account in the specific legislation.[458]

An example of specific access rules that have garnered a lot of attention are those included in Regulation 1367/2006/EC applying the Aarhus Convention to EU institutions and bodies.[459] EU member states are expected to fulfil their obligations under the Aarhus convention by implementing Directive 2003/4/EC on public access to environmental information as well as Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice. The implementation of the access to information provisions in the Convention has been successful. The Convention secretariat, which monitors the implementation process, applauded the efforts of the EU and its member states in the past.[460]

Some of the arguments for public access to information are echoed in the preamble of the Convention, in which it is stated that public authorities do not hold information in their own interest, but in the public interest. As we have seen, this means that they have to use the information to promote the public interest, which often but not always will mean making it accessible to the general public. Also, according to its preamble, the Convention is thought to strengthen democracy.[461]

The Aarhus Convention clearly addresses people in their capacity of citoyen. Article 1 recognises 'the right of every person of present and future generations to live in an environment adequate to his or her health and well-being.' Its preamble recognises that "adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself." Those rights are realised at least in part through the efforts of the people themselves. The preamble recognises that "every person has the right to live in an environment adequate to his or her health and well-being," but they also have "the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations." The latter is clearly a public interest.

The Aarhus Convention provides a number of tools to individuals to enable them to execute this duty, giving them a right to access information concerning the environment,[462] a right to participate in decision-making in matters that affect the environment,[463] and requiring the signatory states to provide access to justice in environmental matters.[464] The right to access information is of prime importance, and is necessary to enable people to exercise the other procedural rights the Convention bestows upon

[458] Heremans 2011, p. 81.
[459] Aarhus Convention 1999, adopted 25 June 1998, entered into force 30 October 2001.
[460] Economic Commission for Europe 2005, p. 9-11.
[461] See also Mason 2010, p. 11 who says that the Convention is presented by UNECE as 'heralding a more responsive relationship between people and governments.'
[462] Article 4 Aarhus Convention.
[463] Articles 6-8 Aarhus Convention.
[464] Article 9 Aarhus Convention.

them.[465] Access to information is therefore critical to the success of the Aarhus Convention.[466] Although these rights are indeed requirements to effectively make use of democratic rights, democracy is not the end-goal here: the enjoyment of a clean environment is. Here we have a clear example of a public interest in access to information other than the interests underlying Regulation 1049/2001. Indeed, by allowing wider access to environmental information as well as more participation and better access to the courts, people are enabled to defend their interests in a clean environment in a more effective way than their other interests. The choice that a clean environment is a worthwhile goal to pursue is already made.

So how does the public interest in a clean environment affect the balancing of the interest in public access to information against competing interests in secrecy? When the institutions apply article 4(2), first and third indents, of Regulation 1049/2001, there is an overriding interest in publicity if information is related to emissions in the environment.[467] The other grounds for refusal must be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment.[468]

The member states have less freedom to balance the interest in publicity against other interests if information on emissions in the environment is requested. The confidentiality of the proceedings of public authorities, the confidentiality of commercial or industrial information, the confidentiality of personal data and/or files relating to a natural person, the interests or protection of any person who supplied the information requested, and the protection of the environment to which such information relates are deemed to be outweighed by the public interest in disclosure.[469]

With regard to public access to information, Aarhus shows that environmental protection can be an overriding interest in publicity. A number of exceptions do not apply to information about emissions into the environment, because the public interest in publicity is deemed to be important. In other cases, environmental interests must be taken into account when deciding whether there is an overriding public interest in public access to information. How these interests must be assessed is unclear though. Neither the Convention nor the case law of the courts gives much guidance.

3.5.2 The ECHR

The idea of transparency and access to information as a necessary requirement for democracy is closely related to the argument that public access to information should be a human right. Such a right cannot be found in most human rights treaties, but is derived from the freedom to collect and disseminate information (article 19 UDHR), or even from the freedom of expression (article 10 ECHR), from which the former right is then

[465] Mason 2010, p. 16.
[466] Mason 2010, p. 16.
[467] Article 6(1) Regulation 1367/2006.
[468] Article 6(1) Regulation 1367/2006.
[469] Article 3 and 4 of Directive 2003/4/EC.

derived. Both these rights are traditionally justified with the argument that public debate is necessary in a democratic society, and public debate about government actions, which is fundamental, is impossible without knowledge of what that government is doing. According to the UN special rapporteur, "Freedom will be bereft of all effectiveness if the people have no access to information. Access to information is basic to the democratic way of life. The tendency to withhold information from the people at large must therefore be strongly checked."[470] Hence, access to government-held information becomes itself a 'fundamental underpinning of democracy'[471] and a fundamental right.[472]

However, one can acknowledge the positive contribution of transparency to democracy without arguing for its acceptance as a human right. Heald advises to value transparency and public access to information to the extent they contribute to freedom of expression, freedom of information and democracy. It should not be elevated to an intrinsic value though, because it can have all sorts of effects, some positive and some negative.[473] Following Heald, I would prefer not to argue for a right to information, but for a more limited right to information to the extent access is necessary to enable public debate and government accountability.

Although there is no right to information in the ECHR, there is a specific convention on access to information that was drafted in the framework of the Council of Europe.[474] Earlier, the Committee of ministers issued Recommendation (2002)2 on access to public documents, which was preceded by Recommendation no. R(81) 19 on the access to information held by public authorities and the Declaration on freedom of expression and information. The 2002 Recommendation was the main source of inspiration for the 2009 Convention on Access to Official Documents, which contains binding obligations with regard to public access to state-held information for its signatories. Although the Convention gives a signal about the Council's commitment to public access to information, its impact is unlikely to be very large,[475] nor has the Convention entered into force yet, since the number of ratifications remains too low.

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[470] Establishment of a working group of the Commission on Human Rights to elaborate a draft declaration in accordance with paragraph 5 of General Assembly resolution 49/214 of 23 December 1994. C.H.R. res. 1995/32, ESCOR Supp. (No. 4) at 110, U.N. Doc. E/CN.4/1995/32 (1995), para. 35.
[471] Mendel 2006, p. 3.
[472] Birkinshaw 2006a, 2006b.
[473] Heald 2006, p. 62.
[474] Council of Europe Convention on Access to Official Documents, CETS No.: 205.
[475] The Convention has received a lot of criticism from advocates of openness, who considered the instrument too weak. They disapprove of the fact that signatory states could make reservations upon their ascension to the Treaty, the fact that the Convention did not prescribe time limits to respond to requests for information, the wide variety of exception clauses that the Convention allowed, and the limited scope of the right to access official documents, which is due to the rather narrow definition of public authorities in the Convention. Another point of criticism was the composition of the drafting committee. Only a limited number of states were involved, and the input from other members of the Council of Europe was limited. See Kierkegaard 2009.

Nevertheless, it is interesting that the preamble mentions not only article 10 ECHR, but also article 6 and 8. The Council of Europe once more confirms the important relation between access to official documents and the individual rights that those articles seek to protect that is also obvious in the case law of the Strasbourg court. This aspect of access to information in the ECHR will be examined in chapter 5. For now, we focus on the fact that according to that same preamble, the right of access to official documents 'provides a source of information for the public; helps the public to form an opinion on the state of society and on public authorities; and fosters the integrity, efficiency, effectiveness and accountability of public authorities, so helping [to] affirm their legitimacy.' The Convention concerns mainly passive access to documents, i.e., access upon request, and only concerns information already enshrined in official documents. Article 10 contains a rather weak obligation to provide information actively. Hins and Voorhoof put a lot of emphasis on this provision,[476] but similar provisions in for instance the Dutch WOB prove to have little impact in practice, as it is impossible to rely on them in court, and hence to enforce them. Maybe it will turn out that this is different for this Convention, but that seems far from evident to me: article 10 gives very abstract criteria to determine whether information should actively be made public. The Convention is thus unlikely to have a revolutionary impact on the development of the public right to access information. It is more interesting to look at the case law of the ECtHR and the vision on public access to information and the citoyen that is presented therein.

3.5.2.1 Public access to information under article 10 ECHR

It has been argued that article 10 ECHR, which grants the right of freedom of expression, should been interpreted to contain an obligation to allow the public access to official documents. The argument goes as follows: the freedom of expression allows the people of a state to discuss matters of general interest, and thus allows them to form an opinion about such matters, and about the way the state authorities deal with them. Hence, it is of the utmost importance to the functioning of a democracy. However, informed public discussion requires information, and informed discussion about the way the country is ruled, requires information from the authorities that rule it. Therefore, to give full effect to article 10, we have no choice but to read in it an obligation to provide public access to government-held information.[477] It is clear that when the Convention was drafted, such an interpretation of article 10 would appear outrageous. Apart from Sweden, there was no nation that acknowledged the public's right to information. Secrecy was still the norm. That does not preclude the possibility that the court will recognise that article 10 contains such a right sometime in the future. The ECtHR has always been sensitive to changes in the opinion about what obligations arise from the fundamental rights contained in the Convention, and has consistently attempted to interpret them in a way that fits the evolving ideas in this field. Hence, the increasing acceptance of a public right to access information might result in the Court accepting

[476] Hins & Voorhoof 2007, p. 117.
[477] Hins and Voorhoof 2007, p. 122

that article 10, at this point in time, does imply this right. Indeed, it is already taking careful steps in that direction.

But first we must turn to the more traditional interpretation of article 10 that the ECtHR condoned until very recently. The article does not only protect the person who provides information, it also guarantees the right to receive such information, and forbids government interference with this right. In its case law, the Court has linked this right very much to the public debate, just as it has done with the freedom of expression in general: article 10 ensures that there can be a public debate about matters of general importance. Therefore, it affords special protection to journalists, who communicate the information necessary to conduct such a debate to the public. Hence, it is the public's right to access that information that is protected. The public's right to be informed has been recognised in many cases.[478] This right was traditionally seen to be limited though, to information 'that others may be willing to impart.' The government may not interfere with the exercise of this right, but if it itself was not willing to impart certain information, article 10 did not oblige it do so.

'*(…) that freedom to receive information (…) basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him. That freedom cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion.*'[479]

Although the Court left the door ajar – after all it merely said that under the circumstances of the case such an obligation did not arise – it stuck to the argument it made in Leander v. Sweden for a long time.[480] Even the refusal of requests for information that did not need to be collected was not brought under the ambit article 10: in the Guerra case the authorities failed to provide the applicants with emergency plans in case of an accident at a nearby chemical factory, even after those plans had been drafted, although the applicants had been campaigning for that information for quite some time.[481] In all

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[478] *Sunday Times v. the UK* (App no. 6538/74) (1979) Series A no. 30; *Open Door and Dublin Well Woman v. Ireland* (App no. 14234/88) (1992) Series A no. 246A; *Lingens v. Austria* (App no. 9815/82) (1986) Series A no. 103B; *Thorgeir Torgeirson v. Iceland* (App no. 13778/88) (1992) Series A No. 239; *Jersild v. Denmark* (App no. 15890/89) (1994) Series A no. 298; *Hertel v. Switzerland* (App no. 25181/94) ECHR 1998-VI 87; *Colombani and others v. France* (App no. 51279/99) ECHR 2002-V; *Çetin and others v. Turkey* (App no. 40153/98) ECHR 2003-III. This includes a right to be informed of a different perspective: *Sener v. Turkey* (App no. 26680/95) ECHR 11 September 1999. Hins & Voorhoof 2007, p. 117.

[479] *Leander v. Sweden*, (App no. 9248/81) (1987) Series A no. 116, paragraph 74.

[480] *Gaskin v. the UK* (App no. 10454/83) (1989) Series A no. 160; *Roche v. the UK* (App no. 32555/96) ECHR 2005-X; *Guerra and others v. Italy* (App no. 14967/89) ECHR 1998-I 64; *Egan & McGinley v. the UK* (App no. 21825/93) ECHR 1998-III 76.

[481] That puts some doubt on the likelihood of the hypothesis offered by Hins and Voorhoof on the Matky case. (*Sdruženi Jihoceské Matky v. Czech Republic* (Ap. No. 19101/03) ECHR 10 July 2006.) They argue that maybe the fact that the information was already in the possession of the public authorities, and the fact that the applicant made an actual request for the information, might have been the reason the Court brought this case under the ambit of article 10. These factors do not seem to

those cases however, the applicants sought information in which they held a special interest. 'Article 10 does not (…) confer on the individual a right of access to a register *containing information on his personal position*, nor does it embody an obligation on the Government to impart such information to the individual.'[482] This case law does not seem to preclude a public right of access, at least not explicitly. The Sirbu case was in fact concerned with the provision of information on matters of general interest to the general public. However, in that case too, the Court held that the freedom to receive information 'cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to disclose to the public any secret documents and information concerning its military, intelligence service or police.'[483] Note that the sensitive character of the information was not a reason to make an exception to an obligation to supply information to the public. The obligation apparently simply did not exist; the Court failed to elaborate on the reasons for this.

In the Matky case, the Court showed the first signs of a willingness to change its approach. In this case, Matky, an NGO requested access to detailed technical information about the construction of a nuclear power plant, for use in court proceedings. Matky argued that the report about the environmental effects of the plants was incomplete, and therefore sought access to the underlying data. There was a specific procedure available to access the information in question, which was laid down in article 133 of the Construction Act. This article allowed access to people who showed they had an interest in the information, and imposed an obligation on the authorities to safeguard inter alia commercial interests. The national court ruled that Matky had not shown an interest in the information, since all the data needed for the court case were included in the environmental report. The ECtHR did acknowledge the refusal to grant access to the information was an interference with article 10. However, since this interference was clearly provided for by law and necessary in a democratic society, the complaint was manifestly ill-founded. The ECtHR also states that unlike data about the environmental effects of a nuclear power plant, the release of technical data about its construction does not serve a public interest. It also takes into account that power plants require a high level of security,[484] and reminds of the fact that public health and safety, and prejudice to the rights of others, can justify a limitation to the right to access information.

At the 14th of April 2009, the ECtHR, in the Társaság case, ruled for the first time that a refusal to allow access to publicly held information was in breach of article 10. It did not follow through on Matky in the way one might expect though: the Court still did not recognise that article 10 contains a public right of access to government-held information. It took a different, rather surprising, route, although one that was in line with its earlier case law about the public debate and the role of the press in allowing this debate. It emphasised the role played by the free press in stimulating public debate,

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discern the Matky case from Guerra. It might be more likely that it was the fact that in Matky, the applicants had no personal interest in the information they required, and that therefore it was clearly the public access to information that was at risk.

[482] *Leander v. Sweden*, paragraph 74

[483] *Sirbu and others v. Moldova* (App no. 73562/01) ECHR 15 June 2004.

[484] Matky, paragraph 26.

a role which it had recognised in its case law for a long time, and whose importance it has emphasised on numerous accounts. The government should not lightly interfere with this role. Indeed, the ECtHR has several times recognised positive obligations resting upon the state to protect journalists in the exercise of their public function, so article 10 contains at least some positive obligations for the state to support the press in its task to stimulate public debate. The Court continued to state that not only the press can fulfil this role: NGOs such as the applicant can also instigate public debate. Indeed, the applicant organisation had explicitly made this one of its tasks. Therefore, any limitations to the exercise of this press-like function should be scrutinised every bit as careful as an interference with the freedom of the press. Censorship in particular is undesirable.[485] Then the Court took an interesting leap: since the public authorities had a monopoly on the information that Társaság sought, withholding this information would in practice result in government censorship, and hence in a breach of article 10 ECHR. It appears that the status of Társaság as an NGO which concerns itself with human rights and public debate played an important role in this decision. Also, like in Matky, the request did not concern information that concerned the applicant personally, so the article 8 route that the Court usually takes, which is discussed in the next paragraph, was not open. The Court thus took another step to make article 10 the champion of deliberative democracy, but it did not take a further step towards the recognition of a general right of access to government-held information:

'*It considers that the present case essentially concerns an interference – by virtue of the censorial power of an information monopoly – with the exercise of the functions of a social watchdog, like the press, rather than a denial of a general right of access to official documents.*'[486]

Nevertheless, the ECtHR did refer to its judgment in the Matky case, pointing out that its views on whether article 10 ECHR contains a public right to information are changing.[487] Further developments in this direction still remain likely.

Two other cases deserve to be mentioned. In Gilberg v. Sweden, the Court held there had been a violation of the right of two scientists to access information under article 10. It did not come close to recognising a general public right to access information, though. The applicants were entitled to the information under national law, and the national court had already confirmed that they were. They did not receive the information because Gillberg, a professor at Gothenburg University, refused to give it to them, even after the national court's judgment. The ECtHR reiterated that the interference by the state with the reception of information that others are willing to impart is a breach of article 10. That was exactly what Gillberg was doing. Likewise, in Kenedi,

[485] The privileged position of journalists had been extended to other organisations who had taken it upon themselves to provide the public with information to stimulate debate before. Again, the Court builds on existing case law.

[486] *Társaság a Szabadságjogokért v. Hungary* (App no. 37374 /05) ECHR 14 April 2009, paragraph 36

[487] *Társaság*, paragraph 35.

the public authorities that actually held the information refused to provide it to the applicants in defiance of an execution order issued in compliance with national law.

The Court recognised a right to information that people were entitled to based on national legislation, as confirmed by the national courts. The Court found a violation because individual officials were frustrating this right. In other words, these judgments fit seamlessly with the Court's earlier case law that the state and its officials must not interfere with the reception of information that others are willing to impart.[488] There is still no dramatic turn in its case law, although the reference to a public right to access information[489] is again a small step towards the recognition of a more substantial right to access information based on article 10.

The ECtHR's approach does have a certain appeal. Although much of the access to information legislation that is in force grants a right to information to everybody, or to all citizens, such a general right to access might do very different things than enhancing democracy. Indeed, requests by individual citizens will often not contribute to those goals very much. Having information available to 'the public' does not in itself magically guarantee such intangibles as 'accountability', 'public participation' and even democracy. For that, information should be comprehended, debated about, and acted upon by the general public. The press and NGO's can play a role in that process, but it is quite unlikely that a personally motivated request by an individual, such as in the Gaskin case, will bring those things about.

Nevertheless, the approach of the ECtHR is unsatisfactory. In my opinion, the Court is being overly pragmatic. It may well be true that information released to the press or NGOs contributes more to the public debate than information released to individuals, but that argument cannot be decisive. The NGO and the press are supposed to serve the public interest here, as representatives of the citoyen. They too are agents of a sort. Although it is perfectly fine to allow them access to information if this benefits the public interest, it is difficult to see why they should have wider access than the citoyens they represent, and from whose right to be informed their right to access information is essentially derived.

It will be interesting to see how the case law develops. Will the Court maintain the clear divide between article 10 and – mostly – article 8 of the Convention, or will the mounting pressure to accept a fundamental right to access information[490] lead it to change its view and allow individuals access to information for private purposes under article 10? It seems unlikely, but the right to access information under article 10 might be extended to other actors with similar goals as Társaság.

Article 10 – conclusions

[488] *Kenedi v. Hungary* (App no. 31475/05) ECHR 26 May 2009; *Gillberg v. Sweden* (App no. 41723/06) ECHR 4 April 2012.
[489] Gillberg, paragraph 93.
[490] E.g. Hins & Voorhoof 2007; Mendel 2006; Birkinshaw 2006a, 2006b.

Clearly, the primary function of article 10 is to guarantee the freedom of expression. However, it is standing case law that this provision also includes a right to impart and receive information. Recently, the ECtHR seems to have made a turn towards reading an obligation in article 10 to also impart information that only public authorities have access to to organizations that actively contribute to the public debate, but the conditions under which such an obligation will exist remain unclear. This is only a recent development, and it is unclear to what information it applies, what the possible exceptions to such a duty are, and to whom the information should be communicated. The Court does not read a right for all individuals to access government-held information in article 10. Hence, its approach of access to information as a democracy-enhancing mechanism is very different from that adopted in the member states and in the Union, where this goal is usually considered to be the basis for Regulation 1049/2001 and national FOIAs. Under these laws, all individuals have a right to access information, and the purpose for which they need it is often completely irrelevant. The Court on the other hand seems to reject the assumption that access to information for individual purposes contributes to democracy, or at least that this contribution is a sufficient argument for a right to access information. It does recognise that a right to information may exist in such cases, but it bases this on different provisions in the ECHR.[491] The Court's approach has some merit but is ultimately unsatisfactory. NGOs and the press can only have a right to access information that is derived from the rights of the citoyen, and his status as an autonomous decision-maker. The cautious movements of the Court towards a more comprehensive right to information are to be welcomed.

3.5.2.2 Public access to information based on articles 2, 3 and 5 ECHR

Occasionally, the ECtHR does recognise a right for the general public to access government-held information. This right only exists for very specific kinds of information, related to the death of people in state-custody, or at the hands of state officials, as well as information about people who went missing after they were apprehended by state officials. Governments are not only obliged to allow access to such information, they also have a duty to produce it and to disseminate it actively.

Article 2 for example requires the State to have in place a mechanism whereby the circumstances of a deprivation of life by agents of a State receive public and independent scrutiny.[492] This means that the deaths of people in state custody deserve a thorough investigation. This is not in itself a transparency obligation. The results of such an investigation must be made public though, and that is a transparency obligation. This obligation does not benefit the individual right-holder, but instead targets the citoyens. The production and release of this information does not serve the interests of the dead individual, but that of the public as a whole, which needs it to hold its public officials and institutions accountable.[493] Although it is a private interest not to have one's right

[491] See chapter 6.
[492] Van Dijk & Van Hoof 2006, p. 354.
[493] *McKerr v. the UK* (App no. 28883/95) ECHR 2001-III, paragraphs 11,115; *Hugh Jordan v. the UK* (App no. 24746/94) ECHR 4 May 2001, paragraph 105.

to life violated, it is a public interest to live in a society where that right is not violated.[494] The ECHR has ruled in several cases where an individual was killed by state officials, usually police officers, that there must be an investigation into their deaths, and that the results of those investigations must be made public to reassure the public and the relatives of the deceased that the rule of law has been respected.[495] All in all, the obligation to conduct an investigation upon the death of someone in custody of the state, or killed by an officer of the state, is a transparency obligation in itself. The state is obliged to gather certain information, and to dispense it to the public and the next of kin. A refusal to inform the public about what has actually happened to such a person, a likely result if the decision on whether to provide the information or not was left to the official involved in the killing himself, would violate article 2.

Likewise, if upon apprehension someone goes 'missing', the state can be held to be in violation of article 2 if it is likely that he or she died in detention.[496] The government should be able to provide 'a satisfactory and plausible explanation as to what has happened to them.'[497] Although the prohibition to make people disappear is not a transparency obligation, the obligation to provide an explanation to the general public is. The consequence of failing to live up to this obligation is severe: if the state cannot provide a reasonable explanation, its responsibility for the deaths of such persons is engaged. As it does not show any justification in respect of the use of lethal force by its agents, the deaths are attributable to the government and result in a violation of article 2. Hence, to avoid responsibility for such deaths, the state is forced to be transparent about what happened. Again, we are not so much confronted with a personal right to information that exists to protect the rights of the deceased, or even his or her next of kin. Rather, transparency enables the public scrutiny of the behaviour of public officials, which in turn is hoped to increase their respect for the right of life of those in their custody. Essentially, we see a public right of access to specific information that is deemed relevant for the realisation of a particular goal: ensuring that the state respects the lives of its subjects, and allowing the public to review whether it actually does.

A similar right exists under Article 3, which also implies a positive obligation for the state to investigate alleged instances of malconduct of its agents.[498] Just like under article 2, there must be a sufficient element of public scrutiny.[499] In Aksoy, the Court held that if 'an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation as to the causing of the injury, especially if those allegations were backed up by medical reports, failing which a clear issue arises under article 3.'[500] In Salman, the court held that in a situation 'where the events in issue lie wholly, or in large part, with-

[494] Van Dijk & Van Hoof, p. 367-368.
[495] McKerr; Jordan; *Kelly and others v. the UK* (App no. 30054/96) ECHR 4 May 2001, paragraphs 94, 98.
[496] Van Dijk & Van Hoof, p. 380 and further.
[497] *Akdeniz v. Turkey* (App no. 25165/94) ECHR 31 May 2005, paragraph 95.
[498] *Ahmet Özkan and others v. Turkey* (App no. 21689/93) ECHR 6 April 2004.
[499] *Slimani v. France* (App no. 57671/00) ECHR 2004-IX.
[500] *Aksoy v. Turkey* (App no. 21987/93) ECHR 1996-VI 26, para 61.

in the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during such detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.'[501]

In the latter case, we see that if the government has a monopoly on certain information, this might impose a duty to supply the information to the general public that would not exist otherwise. Here, we see a parallel with the Társaság case.

The same idea becomes apparent in the case law on article 5: unacknowledged detentions are unacceptable. 'Article 5 must be seen as requiring the authorities to take effective measures to safeguard against the risk of disappearance and to conduct a prompt and effective investigation into an arguable claim that a person has been taken into custody and has not been seen since.'[502]

3.5.2.3 Conclusions ECHR

Based on the ECHR, the general public has a right to access certain specific information. This information is about highly salient topics and allows the general public to hold the state and its officials accountable for extreme violations of fundamental rights; breaches of the right to life, physical integrity, and liberty. Such information should not only be made accessible, it should be actively produced as well. Clearly, in the terms of Regulation 1049/2001, where documents contain such information, the existence of an overriding public interest in disclosure is highly likely. For the press, and for NGOs who contribute to public debate in similar way to the press, there is a wider right to access information. This is in line with the earlier case law of the court about the role of the press in a free democratic society, but is ultimately unsatisfactory. Hence, the case law of the ECtHR is chiefly useful to help in the interpretation of the overriding public interest exception in Regulation 1049/2001.

3.6 Evaluation and conclusions

In this chapter we focused on transparency for the citoyen. The citoyen is the European citizen in his capacity as member of the European political community – the theoretical collective of Europeans who together pursue the common European good. The relationship between the citoyen and the EU institutions is regulated by the principle of democracy, which recognises people as autonomous individuals who are entitled to participate in public decision-making by virtue of their intrinsic worth as human beings. It embodies the ideal of self-rule, where the identity of the rulers coincides with that of the ruled. It also implies that the rulers exercise their function on behalf of the ruled. Thus, the EU institutions rule in the interest of the citoyens, meaning that they pursue the common good as determined by their constituents. To realise this, citoyens

[501] *Salman v. Turkey* (App no. 21986/93) ECHR 2000-VII, para 100. Van Dijk & Van Hoof, p. 426.
[502] *Kurt v. Turkey* (App no. 24276/94) ECHR 1998-III 74, para 124; Van Dijk & Van Hoof, p. 462.

must be able to engage in a meaningful public debate, which requires that they are well-informed about matters of public interest, and in particular about the structure and the actions of EU institutions. They must also be able to ensure that the institutions perform the task that they have been given. This requires accountability and participation, although the exact manner in which those two values are realised can vary. Both accountability and participation require transparency to function. We have seen that not all forms of transparency are equally successful in helping to realise democracy as understood here. Sometimes, transparency may make public officials worse representatives of the citoyen. In addition, transparency can be harmful to other interests, in which cases those interests must be balanced against the interest in openness.

So does Regulation 1049/2001 succeed in bringing democracy to the European citoyen, in the sense that it contributes to public deliberation, accountability and participation, so that the institutions will be successful in promoting the public interest as determined by their constituents?

The answer is inconclusive. It is impossible to derive an 'optimal' level of transparency from the doctrine of democracy. Assuming we should understand the optimal level of transparency as the result of a cost-benefit analysis of various levels of transparency, where the most beneficial level is selected, there are two problems. First, there is ample empirical uncertainty about the costs and benefits associated with transparency. Second, the task of attributing value to the various positive and negative consequences of transparency is a political exercise, and one that should be democratically legitimised.

We have seen that there are arguments against full transparency. Public interests, like national safety, can be harmed by the release of information. In addition, transparency may not contribute to the values of democracy, accountability and participation in all cases, since it might make public officials less capable of acting in the (democratically defined) public interest. Transparency would then detract from our ability to determine as autonomous members of a society how we, as a society, want to act. As we have seen, it is devilishly hard to determine the specific cases in which transparency will detract from those values. Although in some cases there is consensus about a certain need for secrecy, in most cases the adverse effects of transparency occur in very specific circumstances, and empirical evidence for such effects is often not unequivocal. Even if there is a negative impact on the performance of public authorities, this may be countered wholly or partly by the fact that public authorities who have to be transparent are less likely to put their own interests before the public interest. Given that there are vested interests in secrecy in the public administration that do not correspond to what we as a society feel are valid reasons for secrecy, a general presumption in favour of transparency appears well-justified. This can help counter the secrecy incentives that stem from the fact that secrecy is more beneficial to public officials than to the public. Such a general presumption should be rebuttable though, given the indications that secrecy can sometimes cause harm.

Full transparency may not be the best way for the citoyen to realise the public interest. However, because it is not possible to determine the optimal level of transparency be-

yond a doubt, and because we may expect a tendency in public officials to strive towards secrecy that goes against the public interest, this does by no means provide a decisive legal argument against full transparency. Full transparency is not necessarily the 'most democratic option', but there is no other option that we can say for certain is more democratic. This also means that there is no decisive legal argument in favour of full transparency. Again, we cannot be sure it is the most democratic option.

Nevertheless, there are decisive legal arguments to accept certain boundaries that political decisions on the desired level of transparency must respect. Full transparency is unacceptable. The decision about whether the public interest can justify exceptions to the principle of transparency is a political one, but the citoyen cannot decide to trample over private interests in the name of democracy. We will address this issue in greater depth in chapter 6. There are certain minimum requirements to transparency as well. There must be enough transparency to ensure that public autonomy is guaranteed. The citoyen must be able to make informed decisions about matters of public interest. Restrictions to access information that is relevant to the public debate that the government has a monopoly on require more justification. No information should be classified a priori as irrelevant to the democratic process, because it is up to the citoyen himself to decide which information is useful. Although secrecy can be acceptable if the public interest is harmed by releasing information, all information should be released eventually and as soon as possible. Finally, there should be a control mechanism to determine whether secrecy is justified.

In addition, a commitment to either accountability or participation does entail an auxiliary transparency obligation. Although the exact participation mechanisms that are in place are a matter of public choice, once they have been selected, participants should receive the information they need to have a meaningful impact on the decision-making process. Likewise, if institutions are to be accountable – and as we have seen there can be reasons to make them accountable to other institutions that function as fiduciaries of the citoyens rather than to the general public – they should be obliged to supply the accountability forum with all relevant information. Imposing an obligation to be accountable or granting a right of participation is meaningless if there is no accompanying transparency obligation.

Under EU law, the institutions are required to give access to all documents they hold, except when an exception applies. There are both absolute exceptions and relative exceptions. The absolute exceptions are to be interpreted narrowly, but the institutions are in practice given a wide margin of discretion to determine whether they apply. The relative exceptions must also be interpreted narrowly, but here the review of the courts is more intensive. In addition, the institutions must determine whether there is an overriding public interest in publicity, which means that for each request, they have to balance the public interest in access against the interest in secrecy.

It is not altogether clear what constitutes an overriding interest in publicity, but with the information contained in this chapter, we can shed some light on how this balancing exercise should be performed. We already saw in chapter 2 that when the principle of

transparency is applied, it must be interpreted referring to the goals and reasons it refers to. The manner and the extent to which transparency contributes to realising the rights of the citoyen are therefore decisive in the weight that is attributed to public access to information in this balancing exercise. When deciding on a request for information, the institutions will have to take into account whether the disclosure of the information will contribute to the public debate and the process of will formation, meaningful participation in democratic process, and the accountability of public authorities to the general public. In addition, the impact on these interests of a refusal to provide the information must be taken into account.

More concrete, public institutions must take into account:

- Whether access to the information concerned will contribute positively to the realisation of what has already been recognised as a public interest, like the protection of the environment.

- Whether public access to the information is required under articles 2 or 3 ECHR, or is otherwise necessary to hold public institutions accountable for the manner in which they deal with fundamental rights.

- Whether the EU has a monopoly on the information.

- Whether the information is related to the legislative process.

- Exceptions that are unlimited in time are to be frowned upon.

So does EU law stay within the boundaries that we sketched above? First, all documents held by the institutions fall within the scope of the Regulation. There is no information that is considered a priori irrelevant to the public debate or to the realisation of accountability. That is to be applauded. Second, the principle of the widest possible access seems to suggest that the Courts should err on the side of openness. Some harm to other interests is taken for granted. We have seen that this is acceptable. Third, the interests of private individuals receive ample protection. Because this is the only exception to public access to information that is absolutely mandatory, this is to be welcomed.

The time limit to exceptions to the public right to access provided for in article 4(7) shows that the EU legislator has recognised that ex post transparency is even more important than ex ante and real time transparency.

There are some causes for concern as well. Especially where the institutions decide that secrecy is required based on the public interest exception of article 4(1), there should be some mechanisms in place to ensure that it is indeed the public interest that inspires the decision. Delayed transparency when the danger to the public interest has evaporated is one of the ways to do that, but may prove to be insufficient. The fact that article 4(7) is not applicable to sensitive documents is troublesome in that respect, because

there is little control on whether documents are classified as sensitive for the right reasons. The optimistic view supported by Driessen, that the administrative hassle to classify a document is enough of an incentive against overclassification is not entirely reassuring.[503]

More in general, the exceptions contained in the Regulation are acceptable in principle, but only if they are applied faithfully to further the public interest. Democratic control to ensure that this is what is happening in fact could be improved.

[503] Driessen 2005, p. 693.

4. THE EPIC ACHIEVEMENTS OF HOMO ECONOMICUS

4.1 Outline

In the following two chapters, we will discuss transparency from the perspective of homo economicus, the rational creature from economic theory who uses the market to satisfy his private interests, and by doing so accidentally maximises social welfare. In this chapter, we will work from the assumption that the market is the best means for allocating goods that is available to us. The limitations and failures of the market, and the extent to which government can act to resolve those, will be addressed in the next chapter. This approach helps us in the analysis of the large number of transparency obligations in economic law: one category of obligations is inspired by the idea that a lack of transparency harms the market, reduces efficiency, and lowers overall welfare. The second category is inspired by the idea that the market is not all that perfect, and transparency can aid in improving on its outcome. Admittedly, the distinction between transparency obligations that have to be observed to prevent interfering with the market on the one hand and those that have to be observed in cases of justified market interferences on the other is somewhat artificial. Some obligations, in particular the requirement to set clear rules, apply when establishing the market as well as when interfering with it. Arguably, such obligations could be discussed in both chapters, but most of them are included here to avoid having to duplicate information about how they function.

So for now, we will assume that governments should refrain from interfering with the functioning of the market, a conclusion that is defendable even if we acknowledge that markets are not perfect. As we shall see, EU law to a large extent adheres to this strategy of non-intervention, especially where the member states are concerned. To prevent interventions in the market as much as possible, the European legislator has attributed a number of free movement rights to homo economicus that aim to guarantee his ability to participate in the common market without national governments hindering him. The same idea is reflected in the prohibition of state aid. Although in both cases there are exceptions, the general rule is that member states should refrain from interfering in the market. On the other hand, public authorities are free to make use of markets: they too can enter the market to procure goods and services, and by doing so they maximise their utility. This is not problematic in itself, but it does carry a risk. When public authorities enter the market, their behaviour might be distortive, either intentionally or not. Yet at the same time, governments are the ones that enable markets to function, because without a set of rules that have to be observed by everyone, markets cannot be established. In all these instances, transparency is important. Markets will function only if rules are knowable, and they will benefit from clear, comprehensible rules. Opacity can hamper trade, and thus is an interference with the rights of homo economicus. Lastly, transparent behaviour is necessary to prevent market distortions from occurring when public authorities use the market.

We will see below that many transparency obligations in EU law aim to further the interests of homo economicus. Not because these interests in themselves are worthy of

protection by the government,[504] but because the choices of all individuals together determine social outcomes. By protecting homo economicus, the market will do its beneficial work uninterrupted, and theoretically, by improving the quality of individual choices, overall welfare will increase. Thus, this chapter deals with transparency as a tool to enhance market efficiency, by making life easier for homo economicus.

In paragraph 4.2 we will discuss who homo economicus is, under what conditions he prospers, and how transparency relates to that. We will discover that homo economicus is best left to his own devices, and that any government-created opacity detracts from his capacity to further his interests. In paragraph 4.3 we will discuss the status of homo economicus under EU law, and how his interests receive considerable amounts of protection. We will see that EU law recognises the link between transparency and the proper functioning of the market, and we will see some of the transparency obligations can be derived from the Treaty freedoms. In paragraph 4.4 we will look at the detailed rules that have been developed for government procurement: a situation where public authorities enter the market themselves. In paragraph 4.5 we will analyse and summarise our results.

4.2 Homo economicus

Transparency obligations in economic law tend to target homo economicus. In this paragraph we will discuss homo economicus, his motivations and his behaviour, and how he benefits from transparency. We will discover how his selfish behaviour supposedly leads to an outcome that is beneficial to society as a whole. To understand how homo economicus unwittingly contributes to the greater good, we will have to delve into market economics. In paragraph 4.2.1 we will discuss homo economicus and his most important characteristics. In paragraph 4.2.2 we will focus on what sort of actions homo economicus undertakes, and we will discuss the role played by the market in fulfilling homo economicus' desires. In paragraph 4.2.3 we will see how transparency benefits the market, homo economicus, and therefore society as a whole. In paragraph 4.2.4 we will discuss how the government should or should not interact with the market.

4.2.1 Who is homo economicus?

Unlike the citoyen we encountered in chapter 3, homo economicus is a product of economic rather than political or philosophical thought. According to one definition, economics is the science which studies human behaviour as a relationship between ends and scarce means which have alternative uses.[505] Homo economicus is the model that represents how individuals behave under such circumstances. Hence, the tragedy of

[504] We will discuss those interests that are in the next chapter. Although the Treaty freedoms have been awarded the status of fundamental rights, these rights are fundamental to realising the purposes of the EU, not to protect human dignity, and they must not be confused with the fundamental human rights that are the subject of chapter 5.
[505] Robbins 1945, p.16.

homo economicus is that he always wants more than he can afford: he has limited time and money with which to realise his wishes, what economists call a feasibility constraint.[506] Fortunately though, homo economicus is quite a cunning chap. He knows exactly what he wants: he is able to determine in what different ways he can use his resources, and to determine which alternative best fulfils his needs. For all the things he can buy, he knows exactly how much he values them, and with that information, he can calculate what choices will provide him with the greatest utility. Homo economicus is assumed to be rational, and this means he [507]will maximise his utility.[508] Thus, he will select the alternative that gives him the most bang for his buck.

Homo economicus is not limited to a particular sphere of life, but rather is a way of understanding human behaviour that can be applied to people acting in a multitude of circumstances. As long as he has limited resources available to accomplish a given end, one can make an economic analysis of his behaviour. Indeed, he does not even have to represent a single individual; he can also be a group, like a firm.[509] As long as he has limited resources and is trying to maximise the proceeds he gets from employing these resources, economists can model his behaviour. Thus, unlike the citoyen,[510] homo economicus can be either an individual or an undertaking.[511] Like individuals, undertakings use their resources in a manner that maximises their utility, which means in their case that they maximise their profit. Because homo economicus engages both in production and consumption, he encapsulates customers as well as employees, and producers as well as investors. However, neither the EU institutions nor the public authorities in the member states interact with homo economicus as a consumer that often, and therefore there are few transparency obligations incumbent on them that target consumers. Nevertheless, we will see that consumers can gain from general measures that aim to increase the overall transparency of the market as well. As we shall see, economic law has embraced the view of human beings as utility maximisers. The ECJ introduced homo economicus in EU law in Van Gend & Loos and Costa.[512] Within EU law, the defining characteristic of homo economicus is the fact that he exercises his free movement rights:[513] rights that have been attributed to him to ensure the completion of the common market.

[506] Cooter & Ulen 2012, p. 13.
[507] His preferences are complete. To be considered rational, preferences must also be transitive and reflexive. Preferences are transitive if when a consumer prefers A to B, and B to C, he also prefers A to C. Reflexivity is trivial, it requires that an option A is at least as good as itself. See Cooter & Ulen 2012, p. 19.
[508] Cooter & Ulen 2012, p. 12.
[509] Cooter & Ulen 2012, p. 11.
[510] Citoyens can be modeled as rational individuals as well, but they are not characterised by being rational. They are characterised by their membership in a political community.
[511] Eijsbouts 2011, p. 14.
[512] Eijsbouts 2011, p. 14.
[513] Eijsbouts 2011, p. 14.

4.2.2 What homo economicus does

Homo economicus is characterised by the fact that he engages in market behaviour. He enters the market to trade his resources for the things he wants or needs by engaging in mutually beneficial exchanges. On these markets, the individual choices of homo economicus add up to determine social outcomes. Homo economicus is the quintessential decision-maker. Every time he uses his resources, he does so in a way that brings him the greatest benefit possible. He is always maximising his own welfare, always considering what the best option is among the many alternatives available to him. We already saw in the previous chapters that transparency is important when making decisions. It is fairly clear then that homo economicus will profit from transparency, too. The importance of transparency transcends its usefulness to the individual though. Because homo economicus is characterised by the fact that he operates on markets, to fully grasp the importance of transparency we must turn to market analysis. Indeed, the market provides us with a strong argument why governments should respect the interests of homo economicus. Although homo economicus cares only about fulfilling his own desires, he unwittingly contributes to the greater good on his quest for utility maximisation. This happens because markets allocate resources efficiently, that is, where they produce the most utility for society as a whole. By leaving homo economicus to pursue his interests unfettered, overall welfare will increase. Hence, it is not homo economicus as such who deserves protection,[514] but the market, which does its beneficial work by coordinating the behaviour of all homines economici. It does so better (more efficiently) when there is transparency. Economic actors need information to engage in mutually beneficial exchanges. If information is hard to come by, they will forgo exchanges that they would otherwise carry through, and they will miss out on an opportunity to increase their combined welfare. In addition, it will increase the price of all goods, as the cost of information that is difficult to come by has to be taken into account.

4.2.2.1 The market

Because transparency for homo economicus is first and foremost important because it improves the functioning of the market, I will now give a short overview of how the market works, and why it is the best manner available to us to allocate scarce resources. Economic theory is complex and extensive, and it is impossible to discuss it in all its finesses here. Still, to understand how transparency affects homo economicus, and through him the functioning of the market, we must first understand the basic ideas underlying free market theory, and the assumptions that economic analysts make when they develop their models. Below, I will discuss how a perfect free market would work. The imperfections that real markets suffer from will be addressed in the next chapter.

Traditional economic analyses are made for market economies. In a market economy, prices are determined by the interplay of supply and demand, rather than by some alternative mechanism such as the government setting prices for products. This is important, because it means the price can function as a signal that communicates to pro-

[514] Although individuals do of course have a right to be left alone by the government, unless there are convincing reasons to decide otherwise. Such rights will be discussed in chapter 5 though.

ducers how much value consumers attach to a certain good, and hence how much they should produce of it.[515] In that way, for each good, the optimal amount is produced.

In the short run, if supply and demand do not match, prices will change. If the demand for a good is higher than its supply, prices will rise until they reach the same level. In other words: a shortage in oil supply will lead to higher prices at the filling station. The other way around, if the supply is higher than the demand, prices will fall.[516] This means that markets will always clear: there can be no long-term surplus of a certain good.[517] It also means that if there is under-production, the goods that actually are produced will end up with those who value them the most, that is, those who are willing to pay the highest price.[518] In the long run though, if there is a supply-shortage, and prices are high, the profit that can be earned by producing more of the good will attract new producers to the market, and so the supply will increase.[519] Because suppliers want to earn money, they will only increase the supply of a good as long as its price does not fall below the cost of producing it. On the other hand, as long as producing more goods means more earnings, they will keep increasing production. This means that production will settle at a level where the cost of producing another unit is equal to the price it will fetch, in other words, when marginal costs equal marginal benefits.[520] This is a desirable outcome, because the price a consumer is willing to pay supposedly reflects the value he attaches to the product, so that if the value the consumer attaches to a good is less than the costs for producing it, production will stop and resources can be spend on creating other goods, that are valued higher. Just by letting markets set the price for goods, we can ensure that producers produce the goods that consumers actually value most. A free market economy, when not interfered with, will lead to the most welfare for society as a whole, at least in theory.[521]

These analyses are based on a number of assumptions. First, there should be full competition. This requires that the market is open, and that there are no barriers to entry or exit.[522] Second, all parties have complete information.[523] Third, all market players act as rational utility maximisers, using their resources in a way that allows them to get the most bang for their buck.[524] These assumptions make the theory extremely vulnerable to criticism, and indeed, most economists do not believe all the assumptions underlying free market theory are true.[525] This is not necessarily a problem though. For some time,

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[515] Stiglitz 2009, p. 3.
[516] Cooter & Ulen 2012, p. 29.
[517] Stiglitz 2009, p. 3.
[518] Using willingness to pay as an indication of how much someone values a good is curious choice. It tends to be defended with the argument that we lack a better method. See Hayek 1944, p. 42-43. Cooter & Ulen 2012, p. 19.
[519] Cooter & Ulen 2012, p. 28.
[520] Cooter & Ulen 2012, p. 26.
[521] Cooter & Ulen 2003, p. 38; note though that they state that it is unlikely that the conditions for this Utopian outcome will ever be met in the real world.
[522] Khan 2008.
[523] Stiglitz 2009, p. 55.
[524] Blume & Easley 2008.
[525] Stiglitz 2009, p. 55.

economists felt that a slight deviation from those assumptions would not mean their models did not hold anymore.[526] As we will see in the next chapter, they were a bit over-optimistic. In practice, markets are not perfect. There will always be market failures, cases where the market is not able to achieve efficiency.

However, even though this is the case, and market failures can have quite severe consequences, we may not have a better alternative. Theoretically, it might be possible to improve the outcome created by the market, but in practice this requires economic analysis of a level and detail as to make it practically impossible.[527] Some scepticism about the ability of governments to achieve a rational outcome is warranted. Although we will find in the next chapter that EU law is not blind to market failures, the idea that the market should be able to do its work is justifiable as a starting point, and can indeed be found in the law.

4.2.3 Transparency for homo economicus

Information plays an important role in market theory. One of the assumptions underlying most analyses of the market is that information is complete and available to all parties. This is because information is more than just another good. It plays a role in all transactions, and its availability will affect how and even whether a transaction will take place. Information is needed to achieve equilibrium, the state where resources are allocated in an efficient way, and utility is maximised.

We have seen that economists assume that people act as utility maximisers. This presupposes that consumers know what they like and dislike, and that they are able to rank alternatives according to their ability to satisfy their preferences.[528] This requires them to have information about the alternatives they have at their disposal. One cannot determine the value of a good one knows nothing about. Practically speaking, a consumer will be willing to pay more for a car without defects, with low maintenance costs.

Producers also need information. They are profit maximisers, meaning they should be able to rank alternatives (not goods in this case, but behaviours) according to their ability to generate profit. Again, they need information for this, for example about the preferences of their customers, or the yield of different methods of production.

4.2.3.1 Information as a transaction cost

Of course, the assumption that information is complete does not correspond to markets in the real world. We will see in the next chapter that this is problematic for several reasons, but for now, we will focus on the ability of the market to deal with this problem.

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[526] Stiglitz 2009, p. 55.
[527] Krugman 1987, p. 143; the argument can be traced back to Mill 1859, p. 149-150.
[528] Cooter & Ulen 2012, p. 18-19.

When one or more parties lack information, they can often choose to gather it. They will do so if they by searching for the information, they gain some benefit. For example, when I plan to buy a new computer, I will do some research to find out where I can get one that meets my requirements at the lowest price. Although the research carries a cost in time, this is off-set by the lower price for my computer. Usually, finding the information we need to make decisions will require us to invest time and resources. This affects the outcome of the market process. For consumers, information costs counts as an additional expense that adds to the price of a product. For producers, they are an extra cost of production. That means that at a given price there will be less of both demand and supply than there would be if there were no information gathering costs. To stick with the example of my computer: say I am willing to spend 600 Euros worth of time and money on buying it. If information is complete, I will buy the computer if its price is anywhere under those 600 Euros. But because I have to search for a good deal, and this has already cost me, I will only buy it if its price falls below 600 Euros minus my search costs. Hence, if information is hard to come by, the market will produce fewer goods, and overall welfare will decrease. The increased costs of searching for the information do not represent any added value.

Costs that people incur when searching information are transaction costs. They represent real costs and thus do not in themselves challenge the assumption that the market is the best means available of allocating resources. Homo economicus will not spend resources on information gathering if they could buy him more utility when used in another way. Considering information as a transaction cost does provide us with an important insight about government behaviour. Because transaction costs lower welfare, if governments increase them, they can be said to be interfering with the market. Therefore, they should not create opacity.

4.2.4 Government & the market

Because free markets are the best means we have available for allocating scarce resources, governments would be well-advised to adopt a laissez-faire policy. Nevertheless, they do interact with the market in a number of ways. First, they are important in establishing the market. Second, they might be unhappy with the outcome produced by the market and thus may try to interfere with it, no matter how ill-advised some economists might think such actions to be. Third, they can engage in market behaviour themselves, for example when buying office supplies. In the first and last case, transparency is part of the proper way in which to undertake such activities. In the second case, there is no proper way to undertake the activity. Transparency is one of the means to prevent governments from interfering in the market.

4.2.4.1 Establishing the market

Markets can only function when governments provide their presuppositions. The market will not emerge on its own. Institutions, usually in the form of legal rules and pro-

cedures, are necessary for this to happen.[529] Mock has noted that economic growth requires a set of stable, predictable 'rules of the game', because such rules will make it possible to make sound investment decisions and will promote investor confidence.[530] According to Lane, "Markets need the state. Markets can accomplish many things, but they cannot deliver their own presupposition, which is contractual validity. Exchange is the key medium of interaction in markets, and exchange is only possible given an institutional system which transparently clarifies what can be exchanged – rights – and what exchange entails in the form of the enforcement of agreements, including the settlement of disputes."[531] His argument shows that already when government is setting the basic rules for the functioning of the market, transparency is required. Based on economic theory, the transparency requirement is easy to understand. Complicated, unclear, or hard to find rules will increase transaction costs, and lower the overall productivity of the market. It follows that governments should strive to make all market regulation transparent.

4.2.4.2 Leaving the market alone

Governments can never allocate resources better than the market can. Interfering in the market will therefore lead to a decrease in overall welfare. By allowing the market to do its work, maximum efficiency will be achieved. So ideally, governments do not interfere with the market.[532] If the state wants to accomplish other goals besides efficiency, its actions might distort the market. As a consequence, measures taken to promote social equality, to stimulate the development of backwards regions, or to achieve a multitude of other goals, no matter how justified and desirable they are, risk diminishing efficiency in a society, and thereby threaten to impoverish it. Although this is by no means a conclusive argument for a laissez-faire policy, a government that has maximum efficiency as its goal should refrain from interfering with the market.

Generally, not interfering with the market does not require a lot of detailed rules about how public authorities should act, since they should refrain from acting. Interferences can be fairly subtle, though. As we have seen, government-created opacity constitutes a market interference all by itself. It increases transaction costs, and therefore decreases overall welfare. In addition, a lack of transparency will tend to be more disadvantageous for foreign undertakings. Many governments will be tempted to favour their own national firms, and making it difficult for foreign firms to figure out how to best conduct their business is one way to do that. Because transparency is required for the equal treatment of national and foreign undertakings, and because unequal treatment is a market interference, a lack of transparency constitutes an indirect interference with the market as well.

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[529] Mock 1999, p. 1096b.
[530] Mock 1999, p. 1096b.
[531] Lane 2005, p. 84.
[532] E.g. Jackson 1998, p. 12.

4.2.4.3 Using the market

Governments can engage in market behaviour. They can buy goods and services, and like all consumers, they will profit from the market's ability to deliver these goods at the lowest price possible. To be successful in this endeavour, government will have to be transparent towards homo economicus, so that he is aware of the money-making opportunity, and to allow him to estimate whether it is a wise investment decision to allocate resources to winning a tender or a concession or to taking part in an auction. This will guarantee that only candidates who have a shot at success will participate in the proceedings, which will prevent investments that are wasted, and will increase the quality of their proposals.[533] The theory of how markets can benefit governments, and of how transparency aids in this, is of course most influential in public procurement, which deals with the buying of goods and services by public authorities. First, transparency as such contributes to efficient procurement. Second, it helps to ensure equal treatment of potential suppliers, which also leads to more efficient procurement.

As we saw in paragraph 4.2.3, a transparent environment lowers transaction costs.[534] If information about government contracts is easily available, this saves potential tenderers search costs, and thus allows them to offer their product for a lower price. If tenderers indeed act like homo economicus, increasing transparency is not necessarily beneficial to public authorities though. The gains from lower transaction costs might well result in a higher profit margin for suppliers, instead of lower prices for the procuring authority, which also faces costs for making the information available. Competition might prevent the benefit from flowing to the suppliers and ensure that it ends up in the public coffers instead: as tenderers will compete with each other by sacrificing some of the extra profit to ensure that they will be the one getting the contract, their profit margin will fall back to the level where they get only a reasonable return on their investments. This also means that in situations where there is no competition, transparency makes less sense. Government is lowering the transaction costs of market players at its own expense, for nothing in return. Being overly transparent in situations where there is no scarcity is bad business.

We have also seen in paragraph 4.2.3.1 that because gathering information has a cost (and producing transparency is no different), there is an optimum amount of information or transparency. Under perfect market conditions, this optimum amount is gathered automatically. But if public authorities take it upon themselves to produce and disseminate information to potential suppliers to lower their transaction costs, there is an optimal amount of transparency as well. It does not make sense to have excessive transparency about a contract opportunity if all you want to buy is a ballpoint pen.

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[533] Arrowmith 2003, p. 169-171.

[534] A potential point of criticism is that a procuring system where PAs have one standard supplier has low transaction costs as well, as the PA does not have any search costs and both parties know what to expect from one another. Indeed, the EU procurement directives are sometimes challenged because they prevent PAs from building up a stable relationship with their suppliers. Theoretically, the benefits from competition will more than make up for the increase in transaction costs faced by the PA. This problem is somewhat alleviated by the possibility of concluding framework agreements, which lower the transaction costs for subsequent contracts.

Even if it means you get the cheapest pen, the difference in price will not compensate for the costs of even the tiniest add in the local newspaper. The optimal amount of transparency is the one where the costs of providing it are cancelled by the benefits it brings. Unfortunately, although markets are theoretically able to arrive at such optimums automatically, for public authorities the right amount of transparency is hard to determine. Generally though, transparency will further efficiency. This may benefit public authorities, but if competition is lacking it will benefit their suppliers instead. From an efficiency perspective, there is an optimum amount of transparency. It is hard to determine for public authorities what that will be, though.

Transparency will also prevent discrimination of tenderers. The importance of that is obvious: if you refuse to deal with a potential supplier who is able to deliver you goods or services cheaper merely because he is a non-national, you lose. Because less efficient producers remain in business, the market loses as well. Discriminatory behaviour in procurement also carries the risk that other governments will retaliate.[535] Because their nationals are discriminated against, they in turn will refuse to do business with firms based in the former country. It is a scenario where everyone loses. Discrimination of foreign suppliers does not necessarily take the form of buy national policies are other easy to detect methods of discrimination. It can also be the result of a lack of transparency. We already saw that opacity is indirectly discriminatory.[536] The increase in costs for gathering information that is not made readily available by public authorities will be higher for foreign undertakings. They may not know about contract opportunities outside of their own borders, or if they do know, the costs of figuring out the specifics of the contract and the manner in which to design their tender may be prohibitive. Even if they are not, the price of their tender will be higher than it would be under conditions of complete information, because they have to earn back their information processing costs somehow.

The relation between transparency, non-discrimination and efficiency is somewhat confusing. Because transparency is a condition for equal treatment as well as for monitoring whether an equal treatment requirement has been complied with, it is easy to overlook the fact that transparency can have beneficial effects in and of itself as well. It is important to realise that public procurement can be transparent without being non-discriminatory, as is shown by Evenett & Hoekman.[537] If we place transparency on one axis and discrimination on the other, we can discern four different types of procurement systems, combining low degrees of transparency with low degrees of discrimination as well as high degrees of discrimination, and of systems combining high degrees of transparency with low degrees of discrimination as well as high degrees.

	Not transparent	Transparent
Discriminatory	(type A)	(type B)
Not discriminatory	(type C)	(type D)

[535] Krugman 1987, p. 141.
[536] Prechal & De Leeuw 2008, p. 58.
[537] Evenett & Hoekman 2005.

Type A systems are discriminatory and not transparent. This might be a situation where procurement is not regulated at all, and public officials award contracts to their relations.

Type B systems are discriminatory, and proudly so. Examples of these are the buy-national procurement regulations that used to be in place in many states of the US. As we have seen, the current efforts of the WTO to conclude a new agreement on public procurement aim at transparent procedures without requiring non-discrimination as well. The benefits of transparency are seen to be valuable enough by themselves to warrant a new agreement.

Type C systems are transparent, but not discriminatory either, at least not to a greater degree than caused by their lack of transparency. In this system procurement officials diligently follow fair rules and procedures, but they do it behind closed doors. The actual existence of type C systems in the real world is debatable, but they are a theoretical possibility.[538]

Type D systems are not discriminatory, and proudly so. Everyone can compete for government contracts, and everyone knows how to go about this, and how the authorities go about it. The European public procurement regulation tries to achieve this.

The diagram shows that it is important not to equate non-discrimination and transparency. Even though they are discriminatory, type B systems are expected to be more efficient than type A systems. Transaction costs are lower, and companies will not waste resources trying to haul in an order they have no chance of winning.

Public authorities can also use markets to allocate other rights. When dividing scarce resources, public authorities might use efficiency as a criterion. To divide scarce resources efficiently, they should be given to those who make the best use of them. In other words: those who make the most money out of them. After all, people's willingness to pay is an indicator for how much they value the services or goods provided to them, and therefore the profit one is able to make indicates how much value one has produced. Governments are generally not in the position to be able to determine with any accuracy which company can create the highest added value. The producers themselves are much more suitable candidates. Luckily, governments can find out which providers expect to be most successful by determining how much the resource is worth to them, or how much they are willing to pay for it. Concessions and auctions do this; set prices for licenses do not.[539]

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[538] Such arrangements are not appreciated within the EU. See Case C-470/99 *Universale Bau* [2002] ECR I-11617, where the criteria for judging tenders were established in advance, but not announced. This case illustrates once again that transparency is valuable in itself.

[539] Van Ommeren 2011, p. 254. Again, success is dependent on the proper design and execution of such procedures.

Although public authorities could elect to use such methods if they want to ensure that those rights end up with those parties that value them the most, the practical execution is difficult.[540] The conditions on these government-created markets will differ quite extremely from the assumptions of the model discussed in paragraph 4.2.2. To start with, if governments allocate rights, they are usually the monopoly supplier, and often the parties on the demand side will be limited in number as well. This has consequences for how easy it is to achieve efficiency using this method, and we will discuss this problem in the next chapter, where we deal with market failures.

4.2.4.3.1 The importance of review

Governments may not distort the market. They have to observe this requirement both in general and when they enter that market. Although non-interference is a condition for efficiency, and few governments will be opposed to that, there are a number of reasons why they would be tempted to deviate from this policy. We have seen in chapter 2 that within government there are a lot of agency problems. Individual officials and agencies can have incentives to act in a way that is detrimental to the interest of their principal: the general public. Even if the official policy is to maximise efficiency and to refrain from interfering in the market, not all agencies and civil servants will adhere to that policy. Corruption in public procurement is particularly harmful. Public officials who place their own interests before the public interest do not only lack integrity, the consequences of their behaviour are staggering as well. The price of the projects that are realised will rise, as the successful company will have to take the costs of bribes and pampering public officials into account when determining the price they have to charge. Essentially, the public officials collect rent – money that does not represent any added economic value – at the expense of the public coffers. In addition, research shows that when procurement is not regulated, authorities spend relatively large amounts of money on projects that offer opportunities for bribery, like construction projects, and less on things like health care and education, which are not as lucrative for public officials but might serve the public interest better.[541] Corruption is an extreme example of an agency problem, but laziness or a stubborn faith in inefficient but well-established methods may produce adverse effects as well. This means that checks and balances should be in place to ensure that public authorities and individual officials will act in accordance with the norms that apply to them. The task of controlling public authorities and officials can be attributed to any number of institutions, including (at least partly) interested private parties. For these controlling institutions to perform their task, they need information about the behaviour of the public authorities concerned.

Agency problems are not the only thing that can cause a deviation from the proper policy though. A commitment to a laissez-faire policy becomes more difficult when we take into account that markets are international, or in our case European, and that governments represent the interest of only part of that market. Friederiszick explains the mechanism in the context of state aid measures. Such measures can have negative ex-

[540] See Maasland 2012.
[541] Mauro 1998, p. 277-278.

ternalities: costs arising from the measure which are not born by the beneficiary of the aid, the government, or indeed any of its constituents. Rather, those costs are born by foreign undertakings. It makes sense for a national government to support its own industry, furthering social welfare in their own country, at the expense of their neighbours, the so called beggar-thy-neighbour approach. Unfortunately, this makes sense for those neighbours as well, and there is a risk of a cascade of state aid measures with costs exceeding benefits that make sense from an individual point of view but leave everybody worse off in the end.[542] An external authority that prevents such measures from being taken can help solve this prisoner's dilemma.[543] Efficiency considerations left aside, they will sometimes be tempted to secure a larger part of the pie for themselves, at the expense of those market actors in other member states. This is not the best of ideas, but just like individuals, states can make choices that are rational from an individual point of view, but that lead to outcomes that are disadvantageous to all. It actually makes sense for a state to favour its domestic industry at the expense of foreign undertakings. If they are the only state that does so, it will benefit their domestic industry. If they do not, but other states will, they will suffer a considerable welfare loss. To ameliorate it, they should start to favour their own undertakings as well. However, if all states do that, they are worse off than when no one does it. Hence, they are confronted with a coordination problem: even if they agree to act in their mutual benefit and refrain from supporting their domestic industries, there is always an incentive to be the first, and hopefully the only one, to break the agreement. To prevent this from happening, a neutral third party should oversee their behaviour. As we have seen, this requires transparency from the public authorities involved towards this outsider.

When governments use the market, the opportunities for distortion increase. They can have civil servants who buy everything from businesses run by their extended family, public authorities can refuse to do business with foreign undertakings, or they can pay excessive sums for goods and services delivered to them with the purpose of giving their suppliers a competitive edge. This is not allowed and contrary to the public interest, and public authorities themselves have an incentive to refrain from such behaviour, because they themselves will profit from letting it do its work uninterrupted. Nevertheless, the temptations to act in a distortive manner are again clearly present. Public authorities may not act on those impulses, but must instead act in conformity with market theory: like rational maximisers of the public interest. This requires some form of supervision of public officials and authorities to counter agency problems, and supervision by a neutral third party to prevent public authorities from using otherwise legitimate market transactions to favour their own nationals. Again, this requires transparency from the supervisee to the supervisor.

Public procurement can also be used to help a state's economy at the expense of foreign undertakings.[544] Governments elect to take the beggar-thy-neighbour approach, acting in a way that is beneficial to their own constituents, but that harms overall welfare when taking all countries into account, just like when they give state aid to their own

[542] Haucap & Schwalbe 2011, p. 4-5.
[543] Haucap & Schwalbe 2011, p. 5.
[544] Arrowsmith 2002, p. 8.

industries at the expense of foreign undertakings. The manner in which public procurement is executed can turn it into a source of trade barriers caused by discriminatory spending behaviour.[545] If all states engage in such behaviour, they might eventually all suffer adverse effects in the form of increased prices. Procurement rules aim to prevent this kind of behaviour and are supposed to help achieve liberalization and expansion of trade. Just as with state aid regulation, reciprocity is key. Giving equal chances to foreign tenderers in public procurement procedures might improve overall welfare, but unless foreign governments do the same, it will only hurt national industries and rob the government of yet another tool to execute its national equity policies. Review by a third party is preferable.

4.2.5 The functions of transparency

In this paragraph we saw that economic theory predicts that the actions of homo economicus on the market will lead to the most efficient allocation of resources we can hope to arrive at. For this to happen, there must be a market. This can only happen if governments provide clear rules to play by. Beyond that, governments should in principle not interfere with the market. Government-created opacity is one such forbidden interference, as it increases the transaction costs that homo economicus has to deal with. It is thus highly undesirable from an economic perspective. The discrimination of foreign undertakings is similarly undesirable, and since transparency is necessary to prevent such discrimination, the basic principle that the market should be left alone provides us with two arguments for transparency. We have also seen that when public authorities enter the market, there is a risk that they will behave in a manner that distorts that market. To prevent this, they must act in a non-discriminatory, transparent way. How does all this tie in with the two functions of transparency we distinguished in paragraph 2.3.3? We discovered there that transparency, first, facilitates decision-making and, second, enables outsiders to see what is going on inside transparent organisations.

We can now determine how because of these two functions transparency helps homo economicus to maximise his welfare, and how because of that, it improves overall welfare in society. The first function of transparency is of particular importance in this respect. As we have seen, a transparent environment facilitates decision-making. Government plays a role in this in several ways. First, it must set the rules of the economic game for the market to emerge. These rules must be clear and easy to understand, to limit transaction costs. Second, it should not interfere in the market, and therefore should refrain from creating opacity, as this increases transaction costs for all actors, but more so for foreigners. Third, when operating on the market, governments should take care not to distort markets. This will allow them to maximise their utility, just like it does for other market actors. By being transparent, they will be able to select the best deal, and they will prevent unnecessary costs for their (potential) trading partners.

[545] Gordon et al. 1998, p. 159.

We saw in chapter 2 that transparency has a second function. It allows third parties to see what a transparent organisation is doing, and thus is a precondition for controlling its behaviour. Transparency is therefore necessary to ensure the compliance of public authorities with economic law and policy. This is necessary for two reasons. First, national governments face coordination problems: they have an incentive to favour their domestic industry over foreign undertakings. This has serious negative consequences, as the protection of national undertakings negates the advantages of free trade. Because interfering in the market in this way is actually a rational choice, supervision is more important than usual. Second, there are agency problems: individual public authorities or officials can have incentives to act contrary to the public interest, either maliciously, because they are bribed, or simply out of laziness, because they want to avoid search costs. Again, supervision is necessary.

Although transparency serves both functions in economic law, the relative importance of the first function is larger. The citoyen acts through representatives, even through chains of representatives, and accountability is of primary importance. Homo economicus on the other hand engages in action himself. He makes decisions all the time, and thus gains a lot from transparency to help him make those decisions. Seeing and controlling the behaviour of public authorities can sometimes be beneficial to him, but it is certainly not a task he would want to engage in often. We can therefore expect to see more ex ante publicity requirements in economic law, which facilitate decision-making rather than accountability.

4.3 Transparency for homo economicus in the EU

In paragraph 4.2 we discovered homo economicus. Economic theory, which deals with the trials and tribulations of homo economicus, provides us with a number of arguments for transparency. That does not in itself mean those arguments have legal force. In the following paragraph we will see to what extent the ideas about homo economicus that have been developed in economic theory are reflected in European law. In this paragraph we will discuss how EU law protects the interests of homo economicus, and to what extent it recognises the role of transparency in enabling homo economicus to achieve maximum utility, and the market to achieve maximum welfare. In paragraph 4.3.1 we will discuss the principle of legal certainty, and how this well-established principle becomes even more appealing when viewed from the perspective of homo economicus. Although transparency and legal certainty are closely related, we will discern the two concepts, and discuss what additional value the principle of transparency can have. In paragraph 4.3.2 we will turn to the Treaty freedoms and their role in ensuring the proper functioning of the market. We will see that the Treaty freedoms reflect the principle that the market is best left to its own devices. In paragraph 4.3.3 we discuss why transparency is an important element of the observance of the Treaty freedoms, both because opacity in itself is a barrier to the common market and because opacity is a form of discrimination, which is very much prohibited. In addition, transparency makes it possible to review whether the Treaty freedoms have been complied with. The idea that it is better not to interfere in the market is also reflected in the prohibition of state aid, which forbids many direct interferences in the market. We will see

that an otherwise innocent measure might be assumed to distort the market, and be caught under the prohibition to give state aid, based on the fact that it lacks transparency. In paragraph 4.3.4 we will discuss what happens when public authorities take on the role of market players. In principle this is to be encouraged, but there is always a risk that they act out of motives that are not purely economic, with market distortion as a consequence.

4.3.1 Legal certainty for homo economicus

We have seen that governments are needed to establish the rules that govern markets. These rules should be transparent. In EU law, this idea corresponds most closely to the principle of legal certainty. This is a well-established principle of law, also in the member states. An economic perspective of the law offers new insights in this old principle though, and will not only emphasise its (economic) importance in some situations, but also help to clarify the difference between the principles of legal certainty and transparency.

According to Tridimas, 'the principle of legal certainty expresses the fundamental premise that those subject to the law must know what the law is so as to be able to plan their actions accordingly.'[546] Subjects must be able to know in advance what legal consequences their actions will have. We can see the rational decision-maker from economic theory here, who will take the best action available to him taking into account all available information. Indeed, Tridimas emphasises the importance of legal certainty in economic law: 'Economic and commercial life is based on advance planning so that clear and precise legal provisions reduce transaction costs and promote efficient business. Legal certainty may thus be seen as contributing to the production of economically consistent results.'[547] This means that the benefit of legal certainty is larger for the parties that take those economic decisions, but also for society as a whole. The added weight attributed to legal certainty in those circumstances is not due to economic actors having more of a right to legal certainty, but to the fact that the market profits from transparency, which is beneficial to all of us. After all, it is hard to see why one would have more of a right to legal certainty when one is an investment banker than when one is, for example, a father determining whether to acknowledge a child as his own.

It is good to note that legal certainty is a state of mind of legal subjects rather than a prescription of how legislators and public authorities should act. However, to bring about this state of mind, they are required to act in a certain way, that is, transparently. The effects of European legislation must be clear and predictable,[548] and obligations imposed on individuals must be clear and understandable.[549] There are also some obli-

[546] Tridimas 2007, p. 242.
[547] Tridimas 2007, p. 242.
[548] Joined cases 212 to 217/80 *Salumi* [1981] 2735, Tridimas 2007 p. 244.
[549] Case 169/80 Administration des douanes v Société anonyme Gondrand Frères and Société anonyme Garancini [1981] ECR 1931, Tridimas 2007, p. 244.

gations derived from the principle of legal certainty that are more difficult to relate to the aim of enabling homo economicus to take appropriate decisions. Member states must state rights flowing from directives they implement unequivocally.[550] Here, the goal of the obligation is the full enforcement of European law, which is to be realised in part by ensuring that national courts are able to uphold rights and obligations derived from EU law.[551] Likewise, the principle of legal certainty was ruled to prohibit national courts from declaring EU law invalid because divergence between national courts as to the validity of EU law would pose a threat to legal certainty.[552] Finally, the principle of legal certainty is used as a justification for time limits, to prevent the validity of decisions to be questioned ad infinitum.[553]

It is clear that there is a relation between legal certainty and transparency. This is also evident in the case law of the Courts, where the principles of legal certainty and transparency are sometimes mentioned in the same breath. In the following paragraphs, I will discuss transparency obligations in state aid law and the telecom directives that aim to establish legal certainty, or that, perhaps, aim to do a little more. We will see how transparency and legal certainty differ, and what transparency can contribute to the doctrine of legal certainty.

4.3.1.1 Transparency and legal certainty in state aid

The principle of transparency as a corollary of legal certainty is most developed in the field of state aid.[554] Although state aid measures themselves will usually aim to correct market failures and limitations, and will therefore be discussed in the next chapter, the regulation of state aid is a matter of setting the rules by which the market must function, and an example of how transparent rules are needed to establish a market that will run smoothly. The principle of legal certainty requires that the rules about state aid control are transparent. National governments, like any other constituent, should be able to foresee the legal consequences of their behaviour, as should the recipients of state aid. A lack of clarity will increase transaction costs, because it takes more time to comprehend the rules, and because the risk of costly mistakes increases.

It is important to note that although there are provisions on state aid in primary EU law, there is relatively little additional secondary legislation. Although there are a number Regulations that exclude aid from the prior notification duty,[555] most aid must be notified and will subsequently be reviewed by the Commission for its compatibility with

[550] Tridimas 2007, p. 246.
[551] Tridimas 2007, p. 246.
[552] Tridimas 2007, p. 248.
[553] Tridimas 2007, p. 249.
[554] Prechal 2007, p. 53.
[555] Like Regulation 1998/2006 of 15 December 2006 on the application of articles 87 and 88 of the Treaty to de minimis aid, OJ L 379, 28.12.2006, and Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Article 87 and 88 of the Treaty (General block exemption Regulation), better known as the BER, and some sector-specific regulation.

the common market. The criteria which the Commission uses in this process are not recorded in legislation, but are laid down in policy rules. These policy rules can take the form of frameworks, interpretations, codices, or guidelines, the status of which is not entirely clear. Because the ECJ awards a wide scope of discretion to the Commission, policy rules are more important than usual. They are an important source of – tentative – legal certainty, and an important means to ensure the transparency of state aid regulation.[556]

The secondary regulation that does exist aims to increase the transparency of state aid control as well. According to Haucab and Schwalbe, "Block exemption regulations can make a major contribution to the simplification of procedures. They can only serve this purpose if the exemption conditions are formulated clearly and its implementation is straightforward."[557] The connection between block exemption and legal certainty and transparency is also acknowledged by the Council, who in 1998 adopted Regulation No 994/98/EC of 7 May 1998, OJ L 142/1 14.5.1998. In it, the Council delegates its power to enact regulation about group exemptions. According to recital 5 of the preamble, this is in part because 'group exemption regulations will increase transparency and legal certainty.' The new block exemption Regulation is an example of the Commission trying to achieve a more transparent state aid control regime. It consolidates the earlier block exemptions (with the exception of the de minimis exception). The BER identifies a number of categories of aid which are eligible for automatic approval: aid to SMEs, social, regional, and environmental aid, aid for women entrepreneurship, and R&D aid.[558] Hessel points at the multitude of definitions in article 2 of the Regulation, and the fact that transparency-wise, this is progress from the old situation, where definitions were scattered over a variety of regulations, and weren't always consistent.[559] In addition, the block exemption Regulation embodies the economic approach the Commission announces in the SAAP,[560] and makes it possible for public authorities that are less skilled in economic analysis to comply with this new approach without having to engage in complicated analyses.[561] The costs for complying with the state aid regime are lowered as it becomes easier for them to evaluate whether there aid measures are permitted. It likewise lightens the load on the Courts that have to review Commission decisions. If they can review against the block exemption Regulation, they face a much easier task than when they have to review complicated economic evaluations in each case.

The AGs have been particularly aware of how the adoption of additional Regulations and guidelines increases legal certainty. AG Jacobs reminds us that the Council adopted Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty in order to codify and reinforce the previous practice of the Com-

[556] Heidenhain 2010, p. 154, although he is very critical about the success of this method.
[557] Haucap & Schwalbe 2011, p. 39.
[558] For a detailed overview of aid that is allowed under the block exemption, see Hessel 2009.
[559] Hessel 2009, p. 61.
[560] In its 2010 State Aid Action Plan, the Commission resolved to make state aid control more transparent.
[561] Hessel 2009, p. 63.

mission and to increase transparency and legal certainty.[562] Even guidelines, although they lack the force of the block exemption regulations, can have beneficial effects, because they make the behaviour of the Commission more predictable. This has also led to the conclusion that if the Commission issues Guidelines on the application of the state aid articles, these will be binding upon it. According to AG Alber, who tackles the issue in relation to the de minimis rule, this rule was published 'both to simplify administration and to ensure transparency and legal certainty.'[563] This objective is achieved only if the Commission itself is bound by the rule.[564] I would argue this contributes more to transparency than to legal certainty though, because the Courts are not bound by such guidelines.[565] That means that all lofty aspirations aside, they do not in fact provide legal certainty. People cannot be sure of the consequences the law will have for them, or of their own rights and obligations, because it is the Court that has the final say on that. Guidelines will increase transparency though: there will be information available that can help them to plan a particular course of action, which is better than no information at all, but full legal certainty is not provided.[566]

Transparency requires more than just the adoption of Regulations or guidelines though. They will have to meet a quality standard as well. The adoption of Commission Regulation 2204/2002 of 5 December 2002 on the application of Articles 87 and 88 of the EC Treaty to State aid for employment, led Belgium to bring an action for annulment before the Court, which resulted in an illuminating opinion of AG Ruiz-Jarabo Colomer.[567] In this case, Belgium argued that Regulation 2204/2002/EC lacked clarity both with regard to its content and with regard to its legal context. As it was based upon Regulation 994/98/EC, the Commission had infringed the requirements of legal certainty and transparency which are contained in the preamble of that Regulation. The AG starts out by point to the flaws in that argumentation. The preamble of the Regulation isn't binding upon the Commission, and therefore a discrepancy between its contents and subsequent legislation based upon that Regulation cannot lead to its annulment. However, Ruiz-Jarabo Colomer than continues to state that 'both the principle of transparency and that of legal certainty must be respected by the legislature as sources of Community law'.[568] Therefore, an infringement of those principles could lead to the annulment of the contested decision. Apparently, there is no doubt in the mind of the AG that there actually is a general principle of transparency. He attempts to make a clear distinction between the principle of transparency and the principle of legal certainty. The former 'is concerned with the quality of being clear, obvious and under-

[562] Case C-99/98 *Austria v. Commission* [2001] ECR I-01101.
[563] Opinion AG Alber on C-409/00 *Spain v. Commission* [2003] ECR I-1487, paragraph 83.
[564] Opinion AG Alber, paragraph 83. See also Case C-313/90 *CIRFS* [1993] ECR I-1125.
[565] Case C-310/99 *Italy v. Commission* [2002] ECR I-2289. See also Case C-272/09 P *KME v. Commission* [2011] ECR 0000 on competition law, paragraphs 6 and 126, in which the adoption of guidelines in competition law is said to increase the transparency and the impartiality of Commission decisions. As is the case with guidelines on the use of discretionary competences in state aid law, these guidelines are binding on the Commission, but not on the courts.
[566] One is reminded of the criticism of Heidenhain 2010 that the guidelines not a very appropriate instrument to increase legal certainty at all.
[567] Case C-110/03 *Belgium v. Commission* [2005] ECR I-2801.
[568] Belgium v. Commission, paragraph 36.

standable without doubt or ambiguity',[569] whereas the latter is said to require that 'the Member States are made aware of the requirements for the exemption from the obligation of prior notification of proposed State aid.'[570] So, any further elaboration on what conditions must be met could be regarded as an improvement in legal certainty, whereas transparency is concerned with the quality of the information communicated. The AG is not inclined to accept a breach of the principle of transparency easily though. He states that '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.'[571] He does not accept Belgium's argument that the principle of transparency has been infringed. Where Belgium complains that the scope of the Regulation overlaps with that of previous regulations and policy rules, he argues that only provisions of equal rank can conflict, and even then, 'the situation can usually be resolved by looking to general principles relating to the application of laws over time, their specificity in terms of subject-matter and other relevant principles in the event that both sets of rules apply to any particular case.' According to the AG Belgium's alleged confusion was not due to a lack of transparency, but to its failure to understand the rules of precedence.[572] Nevertheless, his argument shows there is a difference between legal certainty and transparency, where transparency is a quality of legislation (or other government acts) and legal certainty is a state of mind that should be achieved in, in this case, the member states. The aspirational status that the AG gives to transparency is also noteworthy: one should not be less transparent than necessary, but some lack of clarity is unavoidable.

4.3.1.1.1 Conclusions on legal certainty, transparency and state aid

To conclude, the principle of transparency requires, first, that regulations are clear, obvious and understandable without doubt or ambiguity, and second that the Commission abides by its own guidelines and communications. Transparency is also furthered by the adoption of such guidelines, and some authors have argued that observance of the principle of transparency requires them to be adopted, because the treaty provisions alone do not provide legal certainty or transparency.[573] I will return to this argument shortly.

With regard to the distinction between the principle of legal certainty and transparency, we can say the following. Transparency overlaps with legal certainty, since legal certainty requires transparency. Legal certainty requires that constituents are aware of their legal rights and duties, and know what legal consequences their acts will have. We saw above that Tridimas concludes that legal certainty requires legislation to be clear

[569] Belgium v. Commission, paragraph 44.
[570] Belgium v. Commission, paragraph 60.
[571] Belgium v. Commission, paragraph 44.
[572] The ECJ does not follow the AG. It merely discusses the potential breach of legal certainty, which includes transparency requirements (thought the term isn't used). After discussing the ambiguities Belgium had proposed and giving the appropriate interpretation of the contested provisions, the Court concludes that that principle has not been infringed.
[573] Prechal & De Leeuw 2007, p. 55-56.

and unambiguous, and obligations imposed on individuals to be clear and understandable. In other words: legal certainty requires transparency. Legal certainty focuses on legal subjects, whereas transparency is a quality of the behaviour and communication of the EU (public) institutions. Legal certainty will then require transparency, but they are not quite the same thing. It does not follow that if there is transparency, there is legal certainty, and it also does not follow that if transparency does not lead to legal certainty, it is not required. The example of the adoption of guidelines that are not binding on the Courts is illuminating in this regard. A guideline does not actually provide full legal certainty, but because it does make it easier to anticipate the actions of the Commission, such an obligation serves the same purpose as legal certainty: it aids constituents in decision-making. This is because it is essentially a transparency requirement. It is instrumental in facilitating decision-making. Transparency is also the quality that can bring about legal certainty: to make people aware of their rights and obligations, these must be clear, understandable, and free of ambiguities.

Armed with that information, we are now better able to assess whether the principle of transparency indeed includes an obligation to adopt policy rules. Although this conclusion is hard to support by reference to the principle of legal certainty alone, it can be defended with a slightly more elaborate argument. The principle of transparency requires that governments act transparently to ensure legal certainty. An obligation to publish non-binding policy rules would create greater transparency, but would not result in legal certainty. However, one of the aims of the principle of legal certainty is that legal subjects will be better able to make decisions. This argument carries additional force in economic law, because here, good decisions profit the functioning of the market and society as a whole. Transparency, even when it does not result in legal certainty, has this effect too. In fact, legal certainty has this effect precisely because it requires transparency. The protection of the market is a higher-order principle in the sense discussed in chapter 2, one that gives weight to the principle of legal certainty. This is supported by the fact that the weight of the principle increases in economic law. In the same way, it can give weight to the principle of transparency. Thus, we can argue that because the proper functioning of the market benefits from the adoption of policy rules, the principle of transparency, requiring a measure of transparency that will ensure the proper functioning of the market, includes an obligation to adopt policy rules. Evidently, such rules must also be published.

4.3.1.2 Transparency and legal certainty in the telecom directives

The same issue that rules governing the market should be transparent plays a role in the regulation of the telecom markets. The powers of the member states to regulate the telecom market are delineated in a set of directives collectively known as the 2002 Regulatory package.[574] The Framework Directive[575] defines a number of important

[574] The Access Directive and the Authorisation Directive have been amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 (the Better Regulation Directive), and the Universal service Directive and the Data Protection Directive have been amended by Directive 2009/136/EC of the European Parliament and of the Council of 25th November 2009 (the Citizens' Rights Directive). The Better Regulation Directive limits the number of

concepts, like significant market power, and what markets must be regulated. It also contains some general provisions on the National Regulatory Authorities (NRAs) and the way they must exercise their powers. The Authorisation Directive[576] is based on the idea that Member States should create as few barriers to access the electronic communications markets as possible. It contains a prohibition to require licenses to enter such markets, and instead proposes a system of general authorisation. It also contains rules on the division of limited resources, like radio spectrum and phone numbers. The Access Directive[577] emphasises the importance of the interconnection of networks, and tries to solve the problem that network operators have the ultimate power to decide which service providers they give access to their networks. The Universal Service Directive[578] is based on the idea that access to electronic communications networks and services is essential for everyone: without access to a phone, and even internet, it is difficult to function in modern society. The Universal Service Directive therefore sets a flexible minimum level of services that should be available to everyone for a reasonable price, if necessary below the market price that would naturally come about. These directives collectively aim to make the electronic communications markets more competitive, and to ensure cheap and high quality access to electronic communication for citizens and companies in the EU.

In the literature in this field, there has been a fair amount of attention for the question of how transparency and legal certainty relate. In addition to transparency obligation that clearly contribute to legal certainty, the telecom directives contain other ex ante transparency obligations, that do not contribute to legal certainty as such, but that do allow economic actors to make better informed decisions. Thus, the principle of transparency in market regulation applies to the legislator, and has been said to require legislation to be accessible.[579] Addressees must be made aware of their obligations and given time to comply by the enforcing authorities, requirements that are traditionally based on the principle of legal certainty. Legislation that entrusts certain tasks to an authority must also contain a clear formulation of the authority's powers and their relation to the purposes of the law. When responsibilities are shared between authorities or between the executive and an authority, the legislation should also clearly indicate who is responsible for what.[580] According to Lavrijssen, this aspect of the principle of trans-

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markets that are eligible for ex ante regulation and increases the threshold for significant market power, whereas the Citizens' Rights Directive introduces special rights for vulnerable and disabled users of communication services, and contains some provisions about the European alarm number. The new Directives had to be implemented by the Member States before May 25th 2011. References are to the consolidated versions of the Directives.

[575] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, OJ L 108/33.

[576] Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services, OJ L 108/21.

[577] Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities, OJ L 108/7.

[578] Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services.

[579] Hancher et al 2003, p. 4; Lavrijssen 2006, p. 19-20.

[580] Hancher et al 2003, p. 4; Lavrijssen 2006, p. 19-20.

parency is a new interpretation of the principle of legal certainty, which requires that citizens should at all times be able to determine their legal position. It is of particular importance in network sectors, because market players will only make the long term investments necessary for a functioning sector if they can plan such investments, and have the faith that they can earn those investments back.[581] Here, we see once more the idea that legal certainty gains importance in economic law because the transparent regulation it requires facilitates decision-making.

But is there more to transparency in the telecom directives than is to be expected based on what we know about the principle of legal certainty? The answer is yes. We see this in Hancher's assertion that prior to decision-making, the rules governing the decision-making process must be open and publicised, and the agenda must be known.[582] The latter obligation, to make the decision-making agenda known, contributes little to legal certainty, but certainly is a transparency obligation that facilitates decision-making. Similar to the reasoning in 3.1.1.1 above, this obligation could be derived from the obligation to be transparent to ensure the proper functioning of the market.

When we look at the text of the actual telecom directives, we encounter a number of transparency obligations that are related to legal certainty. Article 3(3) of the framework directive contains a general obligation for NRAs to exercise their powers in a transparent way. This is an obligation incumbent on the legislators of the Member States to lay down an appropriate legal framework within which the NRAs exercise their powers, as well as an obligation incumbent on the NRAs to exercise their powers in a transparent manner. This general obligation is specified in many places in the directives.

Again, transparency requires more than simply making market parties aware of the law. Ensuring that the rules governing the market remain as simple and predictable as possible is another method to create transparency. Article 8(3)d of the Framework Directive contains an obligation for NRAs to cooperate in a transparent manner, to ensure the development of a consistent regulatory practice as well as a consistent application.

4.3.1.3 Conclusion on legal certainty and transparency

Now that we have discussed the principle of legal certainty, the fact that one of its functions is to facilitate decision-making by economic actors on the market, and the transparency obligations that share this function, we can draw some preliminary conclusions. We have seen that transparency as a quality of rules that govern the market is most developed in state aid law, probably due to the lack of transparency caused by the fact that the Treaty provisions on state aid are devilishly hard to apply. The admittedly somewhat meagre findings in telecom law support the conclusions on transparency in state aid law. Especially the literature on the importance of ex ante transparency in

[581] Lavrijssen 2006, p. 20.
[582] Hancher et al 2003, p. 3.

telecom law reflects the idea that transparent rules facilitate the proper functioning of the market.

It is clear then that transparency and legal certainty are not the same thing. Transparency is a quality of government (action), whereas legal certainty is a mental state of legal subjects. Transparency leads to legal certainty. Both transparency and legal certainty facilitate decision-making, and are deemed more important in situations where it is essential to the functioning of the market that economic actors can make the proper decisions. Yet, transparency goes further than legal certainty. Legal certainty requires that legal subjects are aware of their rights and obligations. Transparency occurs if laws and decisions are published, and their contents are clear and unambiguous. Transparency is also increased if legislation is simple, as this reduces the costs associated with understanding and applying it, and when public authorities adopt policy rules about how they are going to use discretionary powers attributed to them. Of course, it is possible to extend the scope of legal certainty to include such information duties, but that would be inaccurate. Simplicity is not really necessary to ensure that legal subjects are aware of their rights and obligations, although it does make it easier for them. It certainly increases transparency though, and makes it easier – and therefore cheaper – for homo economicus to take into account the consequences of legislation in his decision-making process. Likewise, policy rules that do not bind the courts are an indication of people's rights and obligations, but do not really lead to legal certainty. They do however increase transparency, and aid homo economicus in decision making.

4.3.2 The Treaty freedoms – protecting homo economicus

Where the principle of legal certainty can be said to be the legal translation of the economic idea that governments must be transparent when establishing the market, the Treaty freedoms reflect the idea that homo economicus should in principle be left to his own devices to allow the market to do its beneficial work. The Treaty freedoms guarantee the free movement of goods, workers, services and capital, as well as the freedom of establishment. But although the Treaty freedoms attribute rights to individuals and undertakings, they do not exclusively aim to protect the interests of homo economicus. Instead, they aim to banish all discrimination between economic actors based on nationality, to further the completion of the internal market, and to ensure economic growth and prosperity. By allowing all economic actors to operate everywhere in the EU, and to offer their goods and services to all residents of the Union, goods and services will be produced by the most efficient producers, at the most efficient plants, and in the most efficient ways. That way, resources will be allocated where they purchase the most output, and overall welfare will be maximised.[583] It is important to stress that the free movement rules do not only prohibit discrimination against non-nationals. Any impediment to access the national market is in principle prohibited and any measure that makes cross-border trade less attractive is caught by the Treaty freedoms.[584]

[583] Craig & De Burca 2003, p. 581.
[584] Drijber & Cadenau 2011, p. 63-64.

The scope of the transparency obligations that can be derived from the free movement rules is necessarily limited to the scope of those rules. This means they apply only to economic activities,[585] and that in general they do not apply to purely internal situations.[586] The courts are quick to assume there is a cross-border interest though.[587]

After the previous paragraphs it will come as no surprise that transparency can help to further the goals that the free movement rules aim to promote. As we have seen, transparency contributes to the functioning of the market, contributes to equality among national and foreign economic actors, and will limit the adverse effects of market interference.

4.3.3 The Treaty freedoms and transparency

4.3.3.1 Why a lack of transparency is an interference with the Treaty freedoms

The Treaty freedoms do not only forbid discrimination, they also prohibit non-discriminatory measures that hamper trade within the EU. Therefore, a lack of transparency infringes the Treaty freedoms in two ways. First, because even without being discriminatory a lack of transparency can be a barrier to trade, opacity in itself can be said to constitute a breach of the free movement rules. This argument is not articulated particularly well in EU law,[588] but it is clearly present in international law. International treaties that are to promote international trade and stimulate global welfare require market access for foreign companies and try to reduce the transaction costs associated with international trade, which will often be higher than those for national trade. States can artificially increase transaction costs to discourage foreign companies from operating on their national markets. But even if there is no intent to hamper international trade, companies will face additional costs when they operate in another country, because they have to familiarise themselves with the applicable rules and regulations, customs in the country, and economic circumstances. If rules and regulations, customs and economic circumstances are complicated or otherwise difficult to gauge, transaction costs faced by undertakings operating on foreign markets are high, maybe even

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[585] Case 196/87 *Steymann v. Staatssecretaris van Justitie* [1989] ECR 6159, para 14; Case 13/*76 Donà v. Mantero* [1976] ECR 1333, para 12; Case C-415/93 *Union royale belge des sociétés de football association ASBL v. Bosman, Royal club liégeois SA v. Bosman and others and Union des associations européennes de football (UEFA) v. Bosman* [1995] ECR I-4921.

[586] Groussot 2005, p. 387-388.

[587] Hatzopoulos 2007, p. 3-7. The existence of a virtual interest is enough, see Case C-384/93 *Alpine Investments*, [1995] ECR I-1141, and Case C-60/00 *Carpenter* [2002] ECR I-6279. For some services, the existence of cross border interest is a given, see Case C-405/98 *Gourmet* [2001] ECR I-1795; Case C-17/00 *De Coster*, [2001] ECR I-9445. If there is secondary EU legislation, the free movement rules are applied regardless of the existence of cross-border interest in a concrete case, see Case C-144/04 *Mangold v. Helm* [2005] ECR I-9981.

[588] But see the transparency obligation that is derived from the principle of proportionality when interfering with free movement under the Treaty exceptions or the rule of reason that will be discussed in the next chapter that has a similar rationale.

prohibitive. Opaque regulation can diminish or prevent the influx of foreign goods and services. Therefore, a lack of transparency by itself can be seen as a barrier as well.[589]

Because of this, a lack of legal certainty at the level of the member states can also be construed as a breach of the Treaty freedoms. The costs incurred by the lack of clarity about the rights and obligations one has when trading with another country will lessen the volume of trade within Europe. After all, the production costs for foreign producers are increased, the price of the foreign products will increase as well, and production of goods will fall. The relationship between legal certainty and the observance of the Treaty freedoms can be seen most clearly in Natural Health Alliance.[590] In this case the applicants argued that a lack of transparency in the text of the Directive 2002/46/ EC resulted in a heavy financial and administrative burden on them that violated article 34 TFEU (then art 28 EC).[591] The Court examined this case by reference to the principle of legal certainty. It argued that the provisions of the Directive had to comply with the principles of legal certainty and sound administration and proceeded to examine whether they do. When it concluded there are no problems in this regard, the Court concluded that articles 34 and 36 TFEU (then articles 28 and 30 EC) had not been infringed.[592] The relation between legal certainty, transparency, and the Treaty freedoms is also clarified in Meroni and subsequent case law, where the court held that if the EU legislature delegates its power, it must ensure that that power is clearly defined and that the exercise of the power is subject to strict review in the light of objective criteria. If it fails to do so, the delegate will have an amount of discretion that threatens to impede, excessively and without transparency, the free movement of the goods in question.[593] Hence, if the transparency of the legislative process is reduced, this will result in a lack of legal certainty and a possible infringement of the free movement rules.

The obligation to adopt policy rules we discussed above also surfaces in Natural Health Alliance. The procedure for the approval of food additives that was at stake in this case included a consultation stage. The Court held that it was the responsibility of the Commission to adopt and make accessible to interested parties, in accordance with the principle of sound administration, the measures necessary to ensure generally that the consultation stage with the European Food Safety Authority is carried out transparently and within a reasonable time.[594] Because the failure of the Commission to do so was not a defect in the Directive itself, the validity of which was challenged by the applicant, the ECJ did not attach consequences to the Commission's failure to observe this responsibility.

Indeed, the argument that opacity is an infringement of the Treaty freedoms is the mirror image of the argument that legal certainty requires transparency. Economic theory

[589] Zoellner 2006, p. 589.
[590] Joined cases C-154/04 and C-155/04 *Natural Health Alliance* [2005] ECR I-6451.
[591] Natural Health Alliance, paragraph 71.
[592] Natural Health Alliance, paragraph 93.
[593] Case 9/56 *Meroni* v *High Authority* [1958] ECR 133, at p. 152. Natural Health Alliance, paragraph 90.
[594] Natural Health Alliance, paragraph 82.

suggests it is wise to be as transparent as possible when enacting the rules by which the markets function, so that people will be aware of their rights and obligations under the law. This is reflected in the principle of legal certainty. It also suggests the usefulness of a negative obligation to refrain from creating opacity where this is unnecessary, because this would affect the ability of firms to trade on the common market. This is reflected in the Treaty freedoms.

4.3.3.2 Transparency as a requirement of equal treatment

A lack of transparency can theoretically constitute an interference with the Treaty freedoms, because opacity increases transaction costs, and interferes with international trade. But perhaps more important is the fact that a lack of transparency tends to result in discrimination of foreign undertakings. As we will see in paragraph 4.4, the concepts of equality and transparency are thoroughly intertwined in EU law. However, observing the requirement of equal treatment is fairly easy when one is not interfering: after all, everybody is left to his own devices. Even so, a breach of the principle of legal certainty could harm foreign undertakings more than nationals. Therefore, a lack of transparency that leads to an infringement of the principle of legal certainty could theoretically also lead to an infringement of the Treaty freedoms because it leads to inequality between nationals and non-nationals. The latter approach is not taken in EU law though.

4.3.4 Using the market

Public authorities are free to use the market. This is not problematic in principle. Markets are the best means of resource allocation available to us. Therefore, the use of the market by public authorities should be encouraged. When using the market, public authorities are still bound by the free movement rules. This means that they should not discriminate, and may not create obstacles to trade. The observance of this obligation is more difficult than when public authorities are simply not interfering in the market, and are not engaged with it beyond setting the rules by which they function. By actually interacting with the market, the risk that government behaviour is distorting the market increases. Transparency is very important to prevent this from happening, and we will see that there are many transparency obligations that can be derived from the Treaty freedoms when public authorities use the market. Public authorities most often use the market when they want to buy stuff. Procurement law has developed to ensure that they do so properly, and transparency obligation that aim to ensure that public authorities do not disturb the market when they use it have been developed in great detail in public procurement law. Indeed, they warrant their own paragraph. After summing up the conclusions about the previous paragraphs, we will proceed in paragraph 4.4 to discuss public procurement and the role of transparency. In chapter 5 we will see to what extent these obligations are relevant outside of the scope of procurement law as well.

4.3.5 Conclusions

We have seen in paragraph 4.2 that homo economicus and the market benefit from transparency in three ways. First, when the rules that allow the market to function are

created, they should be transparent. This will guarantee a better functioning market. Second, governments should refrain from interfering in the market, and therefore they should not be unnecessarily opaque, because this increases transaction costs and hampers the markets ability to create efficiency and maximise welfare. Third, when governments use the market, transparency will help prevent that this perfectly legitimate activity turns into a market distortion.

In this paragraph we saw several ways in which EU law protects the interests of homo economicus and the functioning of the market. First, member states' and their public authorities must respect the principle of legal certainty. This enables legal subjects to determine what their rights and obligations are, and to take the legal consequences of their actions into account when deciding which course of action will be most profitable to them. Second, the interests of homo economicus are protected in the Treaty freedoms, which demand equal treatment and forbid opacity. Third, we have touched shortly upon the issue of state aid. State aid is usually prohibited in EU law, because it is a market interference by its very nature.

The obligations that flow from the principle of legal certainty and from the Treaty freedoms that we have seen up till now can easily be conflated. A violation of the principle of legal certainty can be seen as a violation of the Treaty freedoms as well. Observance of the principle of legal certainty requires transparency. Legislation must be published, clear, understandable and free of ambiguities, so that legal subjects are aware of their rights and obligations. We have seen that although legal certainty and transparency are related, they are not the same. When we consider the rationale underlying EU law, and in particular the Treaty freedoms, we can argue that the principle of transparency requires more than just legal certainty. Transparency obligations that contribute to homo economicus' ability to take decisions that maximise his utility but do not create legal certainty as such are at least valued positively, and are sometimes required. Examples include the obligation to issue policy rules in state aid law, and the obligation to coordinate national law in the telecom directives.

4.4 Using the market: transparency in public procurement law

In this paragraph we will take a closer look at the principle of transparency as it has been developed in public procurement law. Although this is the area of law where the principle has reached maturity, it is best to view the transparency obligations in public procurement as a special case of the more general obligations that can be derived from the Treaty freedoms. Public authorities need to observe the rules discussed in paragraphs 4.3.2 and 4.3.3 as well, since the procurement rules are essentially an elaboration of primary EU law. The justification for the duty to observe the principle of transparency is ultimately found in the Treaty freedoms, in public procurement as well as outside. In paragraph 4.4.1 below, we will see to what extent European procurement law tries to protect the interests of the common market by promoting that governments use the market in the proper way, that is, by selecting the best supplier they can, irrespective of his nationality, and by providing a proper level of transparency. We will start with discussing the importance of public procurement for the functioning of the

common market, and will summarise how transparency contributes to the proper functioning of that market before continuing to examine the general content and the goals of procurement regulation in EU law. In paragraph 4.4.2 we will discuss how procurement procedures should be conducted to avoid infringing the Treaty. In paragraph 4.4.3 we will discuss what obligations are derived from the principle of transparency in procurement law. In paragraph 4.4.4 we will discuss the extent to which the procurement rules allow for exceptions to the principle of transparency.

4.4.1 Public procurement in Europe

Public procurement is concerned with the acquisition of goods, services and works by public authorities.[595] The primary purpose of this activity is of course to acquire said things, preferably of good quality and for a reasonable price. Using the market is a good way to realise that goal. There are also many secondary goals to public procurement, and attempts to realise those can be highly distortive. In particular the tendency to favour national firms can be harmful. Public procurement involves large sums of money: on a global scale, public procurement is estimated to account for as much as 10-30% of GNPs.[596] In the European Union, public procurement amounts to 13.5% of the EU GDP and trillions of Euros each year.[597] Discriminatory behaviour of procuring authorities can thus lead to significant market distortions and will harm both the firms they discriminate against and their own nationals. On the other hand, public authorities themselves have a lot to gain from efficient procurement procedures. Public procurement regulations can improve their efficiency by promoting equal treatment and transparency. This allows governments to procure goods and services at the desired level of quality for the lowest price, in part by preventing public officials from collecting rents that drive up prices, and in part by making it more attractive to participate in tenders.

As a reminder, the relation between transparency and the proper functioning of the market is visualised in the figure below. Transparency lowers transaction costs, and thus directly contributes to a properly functioning market. A transparent environment also provides tenderers with equal access to information. This provides them with a level playing field which stimulates competition, which is another condition for a market to function well. Finally, transparency makes it possible to see whether public authorities have observed the principles of equal treatment and non-discrimination, and stimulates compliance with those principles. This again leads to improvements in how the market functions.

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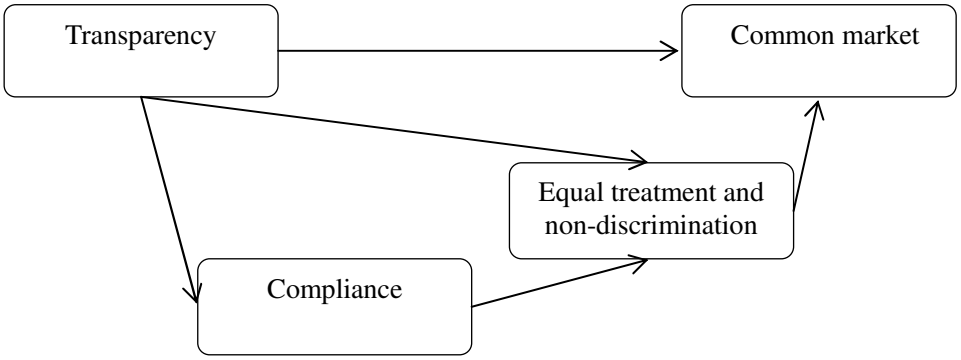
[595] Bovis 2005, p. 14 defines public procurement "as the supply chain system for the acquisition of all necessary goods, works and services by the state and its organs when acting in pursuit of public interest," and Arrowsmith 2005, p. 1, as "the function of purchasing goods or services from an outside body."
[596] Callendar & Matthews 2000.
[597] Bovis 2007, p. viii.



4.4.1.1 The regulation of public procurement by the EU legislator

Public procurement is regulated at the EU level by a number of Directives. Not all procurement contracts will fall under the scope of the Directives, and for those contracts only primary EU law applies. At the moment, public procurement is regulated by the public sector directive[598] and the utilities directive.[599] The utilities sector is assumed to need less regulation because procuring entities are thought to be led by economic motives, at least more so than those in the government proper.[600] Hence, the obligations in the main directive are more instructive. In addition there are the remedies directives which impose an obligation on the member states to provide for independent review of procurement decisions.[601]

The public sector directive offers six different methods for awarding procurement contracts: the open procedure, the restricted procedure, the negotiated procedure with prior

[598] Directive 2004/18/EC of the European Parliament and the Council 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).

[599] Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal service sectors (the utilities directive).

[600] The provisions of the second directive are generally less far-reaching. We can find the explanation for this with Bovis. Originally, it was harder to reach consensus about the regulation of utilities. One of the reasons for that was the variety in regimes applicable to the utilities sector in the Member States. But the utilities sector was also a tempting target for protectionist measures, as the use of home-made high tech equipment offered possibilities to sustain strategic sectors and to protect infant high tech industries. Although regulation was difficult to achieve, it would have been quite useful. Things have changed since then. The utilities sectors have been privatized to a significant degree. This lessens the risk that procuring authorities will be led by other than economic motives when procuring goods, services and works, and this development has led to the idea that the utilities sector does not need 'rigorous and detailed regulation of their procurement.' Some regulation is still required though, because national authorities can still exert influence on the purchasing behaviour of entities on the utilities market, and because often utilities markets are closed markets. Bovis 2007, p. 29, 51. Although in itself, this is not a case for less transparency, it is a case for less regulation, and therefore, the transparency obligations in the main directive are likely to be more instructive.

[601] Directives 89/665/EEC and 92/13/EC, as amended by Directive 2007/66/EC.

notice, the negotiated procedure without prior notice, the competitive dialogue and the design contest. The first three can sometimes be combined with an electronic auction, which is not a separate award procedure as such, but an automatic system to evaluate tenders which gives tenderers the option to adjust their tenders downwards. Authorities are not free to select a procedure. The open and restricted procedure must be used, unless there are specific circumstances that warrant the use of another procedure. The award procedures differ in how transparent they are, and will be discussed in greater depth in paragraph 4.4.4.

Governments can conclude contracts about the supply of goods or services and the execution of works. In addition, they can conclude framework agreements and set up dynamic purchasing systems. The latter two options are included to facilitate repeat purchases. A framework agreement is an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.[602] A dynamic purchasing system is a completely electronic process for making commonly used purchases, the characteristics of which, as generally available on the market, meet the requirements of the contracting authority. It is set up for a duration and must be open throughout its validity to any economic operator which satisfies the selection criteria and has submitted an indicative tender that complies with the specification.[603]

4.4.1.2 The aims of European procurement law

The public sector directive aims to give effect to the free movement rules in the context of public procurement. Governments are always bound by the Treaty freedoms, which already prohibit discriminatory and distortive procurement practices. The procurement directives merely implement this basic idea in greater detail.[604] According to the recital of the procurement directive:

"The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving there from, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition. These coordinating provisions

[602] Article 15 Directive 2004/18/EC.
[603] Article 16 Directive 2004/18/EC.
[604] See also Drijber & Stergiou 2009.

should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty."[605]

According to the Court, the purpose of coordinating at EU level the procedures for the award of public contracts is to eliminate barriers to the freedom to provide services and goods and therefore to protect the interests of traders established in a Member State who wish to offer goods or services to contracting authorities in another Member State."[606]

In practice, EU public procurement law focuses on two things: improving transparency and eliminating arbitrariness and discrimination.[607] These two things are supposed to improve market access, increase welfare and lessen the opportunities for corruption. Thus, all procedures must be conducted in conformity with the principles of non-discrimination, equal treatment, and transparency.

4.4.1.2 Procurement policy as a potential infringement of the Treaty

We saw that public procurement can also be used as a policy tool, but that there is a risk this will result in an efficiency loss. Are public authorities allowed to use procurement as a policy tool? The answer is not unequivocal.

The case is fairly simple for policies that aim to stimulate or favour domestic companies. Public procurement cannot be used in this way. There are possibilities to use it as a tool to accomplish other policy goals, though. One can award a contract for sustainable goods for example, although such demands have to comply with the principle of proportionality and must be objective, transparent and non-discriminatory.[608] A demand for environmentally-friendly goods can be a legitimate need that a consumer tries to meet on a market. Public authorities are no different in this respect, and the market is capable of dealing with such desires efficiently. By including the demands in the tender and observing the requirements of a transparent tendering procedure public authorities will still be able to select the supplier who can meet this requirement in the most effective way, irrespective of whether the public authority wants to acquire office supplies or some social good. Public procurement that aims to realise policy goals in a transparent manner therefore does not need to be distortive. By being upfront about their intentions, potential suppliers do not need to waste resources on acquiring orders they have no chance of winning. E.g., a transport company unable to meet emission criteria announced in advance will not spend resources on drawing up a proposal, because it will know this is money down the drain.

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[605] Paragraph 2 of the recital to Directive 2004/18/EC.
[606] Case C-380/98 *University of Cambridge* [2000] ECR I-8035, paragraph 16, Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraph 32
[607] Arrowsmith 2002, p. 5.
[608] Under the Dutch BAO (Besluit aanbestedingsregels voor overheidsopdrachten; Besluit van 16 juli 2005, houdende regels betreffende de procedures voor het gunnen van overheidsopdrachten voor werken, leveringen en diensten), they are suspected of being disproportionate if there are too few participants in the tender procedure to guarantee competition.

Contract performance conditions are also allowed, as long as they are not discriminatory. Examples include requirements to provide on-site vocational training, or to employ people from vulnerable groups, like long-term job-seekers or disabled people.[609] It is more difficult to make demands of the supplier that are not related to the good, service or work that is being bought, like a general obligation to employ a number of people from vulnerable groups instead of an obligation to employ them in the execution of the work or service that is being awarded, or to make a contribution to an environmental fund when winning the contract. Some selection criteria are allowed, to guarantee the reliability of tenderers and their ability to actually perform a contract, but those are included in articles 45 to 52 of the Directive.[610] The exact details are not really relevant for the application of the principle of transparency, although of course, transparency does make it possible to review whether procuring authorities are respecting those rules. According to Arrowsmith, transparency helps ensure that decisions in government procurement are taken for the right reasons, and that only those factors that are of legitimate interest are considered.[611] This need not concern non-discrimination. In public procurement regulation that was aimed exclusively at ensuring certain social or environmental goals, transparency would allow courts or other interested parties to see whether it is indeed those considerations that a decision is based on. The boundary between transparency and accountability is unclear here, but one would be justified to say that transparency is a necessary condition for accountability rather than for equal treatment, value for money, or the protection of social interests.

4.4.2 The approach to transparency in EU procurement law

European procurement law tries to guarantee the proper functioning of the market by ensuring that procuring authorities respect the Treaty freedoms and by preventing distortive and discriminatory procurement practices. To what extent and in what manner does procurement law use transparency to realise those goals? Before turning to the detailed transparency obligations, we will first examine the general manner in which transparency is regarded in procurement law. We will see that there is some confusion over the transparency standard that is required: should there be enough transparency to ensure equal treatment, or has transparency separate value for the common market? We will contrast this with the approach in international economic law. Lastly, we will discuss what general obligations can be distinguished.

The principle of transparency may have been discovered by the ECJ and have come to full fruition in its case law, its seeds were sown by the EU legislator. The ECJ has distilled the principle of transparency from the procurement directives, to wit in Commission v. Belgium where the ECJ first discovered the principle of transparency in Directive 90/531/EEC.[612] The principle of transparency as such was not mentioned in the directive. Rather, the ECJ derived its existence from the concrete transparency obliga-

[609] Article 26 Directive 2004/18/EC, recital 33.
[610] These grounds are limitative, Arrowsmith 2008, p. 271.
[611] Arrowsmith 2008, p. 257.
[612] Case C-87/94 *Commission v. Belgium* [1996] ECR I-2043.

tions that were contained in the directive. Thus, its importance was already recognised in the legislation before it was explicitly recognised as a principle by the Courts.

At the moment, public procurement is regulated by directive 2004/18/EC of the European Parliament and the Council 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) and directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal service sectors (the utilities directive). Apart from those there are the remedies directives, 89/665/EEC and 92/13/EC, as amended by Directive 2007/66/EC.

Article 2 of Directive 2004/18/EC announces the principles for awarding contracts. It codifies the principles of non-discrimination and transparency. Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.[613] The preamble to the Directive further emphasises the importance of transparency in relation to the Treaty freedoms: "The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving there from, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency."

There is some confusion over the purpose of transparency in procurement law,[614] yet all manners in which transparency contributes to procurement that is in line with the Treaty freedoms and promotes the common European market do occur in the Courts' case law at some point or other, and appear to influence what obligations they derive from the principle of transparency. The question of whether transparency has independent value, or is only required to ensure the equal treatment of tenders is quite relevant, as the answer affects the degree of transparency that is required. A degree of transparency that ensures equal treatment of tenderers is different from a degree of transparency that ensures the proper functioning of the common market, when we assume the market functions properly if it allocates resources in the most efficient way. A level playing field is guaranteed best when there is full transparency, as this ensures that any disadvantage suffered by non-nationals due to the fact they have a harder time comprehending ambiguous information and filling in information gaps disappears. Such perfection is also unachievable though. Efficiency on the other hand would suggest there is an optimal amount of transparency that procuring authorities should provide. When creating additional transparency carries more costs than the reduction of transaction costs yields in benefits, it is time to stop.

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[613] This shows that transparency is one of the core principles in the procurement directive. It is designated as a 'principle of awarding contracts' though, not as a general principle of EU law.
[614] Prechal & De Leeuw 2008, p.230; Drijber & Stergiou 2009, p. 818.

4.4.2.1 Transparency as an auxiliary of equal treatment[615]

European law is quite clear on the fact that transparency is necessary to prevent discriminatory treatment of tenderers. Therefore, there is an obligation of transparency inherent in the principle of equal treatment. Observance of the principle of equal treatment requires transparency for two reasons.[616] First, because it creates equality of opportunity between tenderers. By being transparent, public authorities ensure that all tenders have the same opportunities when formulating their tenders.[617] A lack of transparency results in indirect indiscrimination and is prohibited by articles 43 and 49 EC.[618] Second, transparency makes it possible to review whether the principle of equal treatment has been complied with.[619] The Courts (and the AGs) keep finding reasons to stress the importance of transparency in ensuring equal treatment.

In the opinion of AG Sharpston in Commission v. Finland[620] and in the ECJ's judgment in Medipac[621] the obligation of transparency is said to arise out of the principle of equal treatment. In his opinion in Audiencia Nacional,[622] AG Bot argued that compliance with the principles of equal treatment and non-discrimination required the observance of the principle of transparency. The CFI, in Evropaïki Dynamiki,[623] presented transparency as the corollary of the principle of equal treatment. The purpose of the latter is to promote the development of healthy and effective competition between undertakings taking part in a public procurement procedure. The principle of transparency contributed to this by 'precluding any risk of favouritism or arbitrariness on the part of the contracting authority.' Again, in Secap SpA and Santorso,[624] AG Ruiz-Jarabo Colomer once more argued that the prohibition of discrimination entails a duty of transparency, and the ECJ confirmed his views. In Michaniki,[625] the ECJ again held that the principle of equal treatment implied the principle of transparency. These principles together constitute the basis of the EU directives on the award of public contracts.

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[615] The case law and literature that are referred to in this paragraph do not exclusively deal with transparency under the procurement directives, but also with the adjacent fields that the ECJ has widened the scope of the principle to. To assess how the Court views the instrumental function of transparency this does not really matter. The differences between the principle of transparency in procurement law proper and in adjacent fields of law will be discussed in chapter 5.

[616] Prechal & De Leeuw 2008, p. 230.

[617] Also explicitly in recital 46 to directive 2004/18/EC.

[618] Coname.

[619] Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph. 49; Case C-324/98 *Telaustria* [2000] ECR I-745, paragraph. 61.

[620] C-195/04 *Commission v. Finland*, [2007] ECR I-3351.

[621] Case C-6/05 *Medipac* [2007] ECR I-4557.

[622] Case C-220/06 *Audiencia Nacional – Spain* [2007] ECR I-12175.

[623] Case T-345/03 *Evropaïki Dynamiki* [2008] ECR II-341.

[624] Joined cases C-147/06 and C-148/*06 SECAP SpA and Santorso* [2008] ECR I-3565.

[625] Case C-213/07 Michaniki AE v Ethniko Sumvoulio Radiotileorasis and Ypourgos Epikrateias [2008] ECR I-9999.

4.4.2.2 Transparency for transparency's sake

The Courts recognise that transparency is necessary to provide a level playing field for tenderers. But does it also recognise a more independent role for transparency? As we have seen, this could easily be justified, as a mere lack of transparency can theoretically be an interference with the Treaty freedoms. Prechal & De Leeuw have suggested some arguments for considering the principle of transparency as separate from the principle of equal treatment.[626] First, they argue that the fact that transparency is necessary to review compliance with the principle of equal treatment means that it precedes the latter. This may be true, but it hardly suggests independent value for the principle of transparency, but risks conflating it with the duty to give reasons, the rights of defence, and effective judicial protection. Second, they argue that since transparency is intended to preclude any risk of favouritism or arbitrariness as the court rules in Succhi di Frutta,[627] it does not only prevent discrimination on grounds of nationality. Drijber & Stergiou are sceptical. They point out that the ECJ has never recognised the principle of transparency as free standing in a procurement case.[628] That may be so, but when we take a closer look at the case law we see that the courts have used standards of transparency that are different from the one discussed in paragraph 4.4.2.1, and that do not seek to ensure equal treatment. The ECJ has also found breaches of the procurement rules where a lack of transparency is obvious, but where it is quite difficult to see how this would have led to a disadvantage for foreign tenderers.

A breach of the principle of transparency on some occasions led to a direct violation of articles 43 and 49, without the intercession of the principle of equality. This was the case in Commission v. Italy, where the court held that Italy had failed to fulfil its obligation "under articles 43 and 49 EC and, in particular, infringed the general principle of transparency and the obligation to ensure a sufficient degree of advertising."[629] The ECJ also regularly juxtaposes the principles of equal treatment and transparency without indicating any kind of hierarchy between them, like in EVN AG and in Parking Brixen.[630] In February 2008, the ECJ decided Commission v. Italy.[631] In this case, the Commission argued that both the principle of equal treatment and the principle of transparency are the corollaries of the Treaty freedoms encased in articles 43 and 49. The ECJ confirmed that obligations of equal treatment and transparency arise out of primary law. One month later, AG Kokott delivered her opinion in Pressetext Nachrichtenagentur.[632] She placed transparency and non-discrimination on an equal footing: both are required to achieve the free movement of services and the opening-up to competition that is as undistorted and as comprehensive as possible.

The effects the Court attributes to transparency also suggest that it does not only ensure equal treatment. In Universale Bau, the ECJ held that the clarity required of the condi-

[626] Prechal & De Leeuw 2008, p. 231.
[627] Case C-496/99 P *Commission v. CAS Succhi di Frutta SpA* [2004] ECR I-3801, paragraph 111.
[628] Drijber & Stergiou 2009, p. 818.
[629] Case C-260/04 *Commission v. Italy* [2007] ECR I-7083,
[630] Case C-448/01 *EVN AG* [2003] ECR I-14527, paragraph 56.
[631] Case C-412/04 *Commission v. Italy* [2008] ECR I-619.
[632] Case C-454/06 *Pressetext Nachrichtenagentur* [2008] ECR I-4401.

tions and rules governing the award procedure served to enable tenderers to adapt their tender to them, which suggests that the Court is quite aware of how transparency facilitates decision-making for homo economicus.[633] In Telaustria, the ECJ held that the degree of advertising required had to be sufficient to enable the market to be opened up to competition and the impartiality of procurement procedures to be reviewed. The Court distinguishes two criteria here. Transparency has to open up the market for competition, and it has to enable review. The former criterion is not met automatically when tenderers are afforded equal opportunity. If everybody is hampered in the same way, competition will suffer too.

In Succhi di Frutta the ECJ did describe the principle of transparency as the corollary of the principle of equal treatment. "It implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents 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." The ECJ's emphasis on the link between transparency and equal treatment in this case becomes surprising when one regards the issue at stake: the conditions of the tender had been altered after the contract had been awarded. This was not allowed, and was held to be a violation of the principle of transparency. Transparent procedures in this sense allow tenderers to modify their behaviour in light of the relevant conditions. As the ECJ itself remarked: clarity about the conditions of the tender would have enabled tenderers to submit a significantly different proposal. Again though, this held for all tenderers. Even the successful tenderer might have drawn up a different proposal if he had known about the changed condition in advance. The requirement that conditions have to be made public in advance and cannot be altered afterwards has less to do with equal treatment than with allowing tenderers to modify their behaviour in the way that is most economically efficient to them, and that is what is essentially at stake here.

4.4.2.3 Intermezzo: transparency in international economic law

Government procurement is not only regulated on the European level, but also within the WTO. The developments in international law form a nice contrast with the apparent confusion that exists in the EU. Up till now, international procurement rules take the form of an optional, multilateral agreement. In 1979, a number of WTO Members, including the EC and its Member States, concluded the optional GATT Agreement on Government Procurement, which entered into force on 1 January 1981. The Agreement was replaced by the 1993 GPA, which entered into force on 1 January 1996, once again with few states being party to the agreement. The obligations in those agreements are very similar to those under EU law, which will be discussed in greater detail below. However, in that same year, the Ministerial Conference at Singapore set up a Working Group on Transparency in Government Procurement. Its mandate was to conduct a

[633] Arrowsmith 2008 also accepts this obligation as being derived from the principle of transparency sec, p. 267.

study on transparency in government procurement practices and, on the basis of this study, to develop elements for inclusion in an appropriate plurilateral agreement. Non-discrimination was not to be included. The prohibition on favourable treatment of national products was perceived to be one of the reasons for the limited membership of the GPA, and the improvement of the transparency of government procurement now became the prime goal. In 2006 the efforts of the Working Group resulted in the Provisional GPA Agreement.

The emphasis placed on transparency within WTO public procurement law is telling: some authors argue that it is of the same significance as the principles of national treatment and most-favoured nation. It's not just an auxiliary to equal treatment, which prevents indirect discrimination and enables compliance with the principle of non-discrimination to be monitored. It is worth striving for for other reasons.

4.4.2.4 Equal treatment versus transparency

We saw that when public authorities enter the market, transparency is important for several reasons. One of those reasons is that transparency is a necessary requirement for equal treatment. Opacity will harm foreign undertakings more than nationals, and in addition, a lack of transparency would mean that public authorities could 'get away' with ignoring the principle of equal treatment. We also saw that transparency has a more independent effect. Regardless of who gets harmed the most by a lack of transparency, it will harm European trade and make life more difficult for homo economicus.
The European Courts recognise the strong connection that exists between transparency on the one hand and equal treatment and non-discrimination on the other. However, they do not restrict themselves to the view of transparency as a catalyst for equal treatment. The obligations that are to be derived from the principle of transparency must be determined taking into account their effects on the realisation of the principles of equal treatment and non-discrimination as well as their effects on homo economicus' right to avail himself of his Treaty rights and the functioning of the internal market.

4.4.2.5 Transparency as a requirement for review and monitoring

Finally, transparency allows review of whether the principles of equal treatment and non-discrimination have been observed. We already saw that one of the reasons that observance of the principle of equal treatment requires transparency, is that the latter makes it possible to review whether the former has been complied with. However, transparency also allows for review of compliance with other obligations, for example with the obligation to use objective criteria. This last justification for transparency is perhaps the one that EU law is most comfortable with. Ensuring compliance with the principle of equal treatment is the one justification for the application of the principle of transparency that has been recognised by the ECJ consistently. According to the ECJ: "The principles of equal treatment and non-discrimination on grounds of nationality imply, in particular, a duty of transparency which enables the contracting authority

to verify that those principles are complied with."[634] In Unitron, the ECJ held that the principle of non-discrimination entailed an obligation of transparency 'in order to enable the contracting authority to satisfy itself that it's been complied with.' In Telaustria, the Court held that the transparency obligation allows for the impartiality of procurement procedures to be reviewed.[635]

Transparency is always required to monitor the compliance with legal norms, regardless of whether this legal norm is the principle of equal treatment or a random article from the Regulation on the automatic exchange of flight data. The fact that many other functions served by transparency in public procurement law are more closely connected to equal treatment should not obscure this fact. Indeed, the fact that the law suspects that public authorities might not respect the principle of equal treatment signifies a coordination problem, or an agency problem, where the procuring authority is the agent who might have an interest in acting against the wishes of his principal which have been laid down in the procurement directives, and the transparency obligations allow monitoring of the agent's behaviour.

4.4.2.6 General overview of transparency obligations

We have seen how the court views the principle of transparency, but we do not know yet what is required to make public procurement transparent. The first step is to have clear rules according to which award procedures are awarded.[636] Second, economic operators must be informed about individual award procedures.[637] According to Arrowsmith, the public procurement principle of transparency is comprised of four elements. First, there has to be publicity for contract opportunities. Second, there has to be publicity for the rules governing each award procedure, such as the contract award criteria. Third, transparency requires rule-based decision making that limits discretion, which is particularly relevant in preventing concealed discrimination. Three more specific points can be derived from this: the obligation to use open or restricted rather than negotiated procedures, the limitations on the criteria and evidence that procuring authorities may use for excluding tenderers and awarding contracts, and again, the obligation to publish award criteria. Fourth, transparency requires that there are opportunities for verification and enforcement, reflected in, for example, the requirement to give reasons for decisions and the requirement to have supplier remedies.[638]

Arrowsmith's list offers a fairly broad spectrum of obligations. These obligations create transparency, promote equal treatment, and allow for review of public authorities' compliance with procurement rules. They are still fairly general though, and since the actual obligations that apply vary from case to case, it is difficult to derive exact re-

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[634] Case C-220/06 *Associación Profesional de Empresas de Reparto y Manipulado de Correspondencia v. Administración General del Estado (*Correos) [2007] ECR I-12175, para 75.
[635] Telaustria, paragraph. 62.
[636] Arrowsmith 2002, p. 5.
[637] Arrowsmith 2002, p. 5.
[638] Arrowsmith 2002, p. 5.

quirements from her overview. For a more detailed overview of the transparency obligations we must turn to the directives themselves.

4.4.3 Transparency obligations in EU procurement law

Many of the transparency obligations that are derived from the principle of transparency in European procurement law originate from the older procurement directives. Others, which were derived from the principle of transparency by the Courts, have also made their way into Directive 2004/18/EC. Article 42 of the Directive contains a number of general provisions on communication that are valid throughout all procedures. The means for communication are selected by the authority, but they must be generally available so that access to the procedure is not restricted and potential tenderers or candidates are not discriminated against. There is a separate provision saying that tools used for electronic communication must be non-discriminatory, generally available and interoperable with the information and communication technology in general use. Requests to participate may be made by telephone or fax, but a written confirmation of the request is (for phone) or may be (for fax) required. Finally, contracting authorities must make sure that the integrity of data and the confidentiality of tenders and requests to participate are preserved, and they may not examine the content of tenders and requests to participate before the time limit for submissions has expired.

Apart from these general rules, there are many specific rules throughout the procedure about what information should be communicated, and to whom. Below, we will consider these obligations sorted by when they apply: before, during or after the procurement procedure. The moment at which transparency is provided is relevant to its function. Ex post transparency allows review, but does not assist in decision-making. Ex ante transparency on the other hand does. Ex durante transparency mostly aims to guarantee the integrity of the procedures. Theoretically, it would also allow interested parties to try to determine the outcome of the procedure, but this is explicitly not intended in procurement law.

4.4.3.1 Ex ante obligations: before starting a procedure

4.4.3.1.1 The prior information notice

Before starting a procurement procedure, public authorities must give publicity to it. But their transparency obligations start earlier. Each year, as soon as possible after the beginning of the budgetary year, contracting authorities must publish a prior information notice (PIN), which contains information about their procurement intentions in the next 12 months. It must contain the estimated total value of supply contract or framework agreements by product area which the authorities intend to award over the following 12 months, the estimated total value of service contracts or framework agreements in each of the categories of services listed in Annex II A which they intend to award over the following 12 months, and where works are concerned, the essential characteristics of the contracts or the framework agreement which they intend to

award. This obligation only exists if the value of these contracts exceeds a certain threshold.[639]

The authorities are not bound by the PIN: they are only required to give estimates. They merely give information about their intentions, prior to any decisions being taken. However, these intentions must be fairly concrete, given the provision they are only to be published as soon as possible after the decision approving the planning of the works contracts or the framework agreements that the contracting authorities intend to award. The information is made public to everyone. It must either be published on the buyer profile of the contracting authority, or it can be sent to the Commission which will subsequently publish it. However, contracting authorities who publish the information themselves are bound to send a notice of the publication to the Commission. The information duty towards the Commission is a stronger one than that to the general public. Anyone who is interested in the information can find it either on the contracting authority's buyer profile or on the Commission's page, but only the Commission gets the information served on a platter.

Although the text of Article 35(1) about the publications of PIN's uses strong language – 'the information 'shall' be published' – the remainder of the paragraph sheds doubt on the binding nature of this decision: 'Publication of the notices referred to in subparagraphs a, b and c shall be compulsory only where the contracting authorities take the option of shortening the time limits for the receipt of tenders as laid down in Article 38(4).' The obligation also does not apply to negotiated procedures without the prior publication of a contract notice, which makes sense because those procedures are a means of last resort rather than a planned occurrence.

4.4.3.1.2 The contract notice

In the PIN, procuring authorities make their intentions known. In the contact notice, they announce the award of an individual contract. In almost all cases, the contracting authority should make public its intent to award a contract, a framework agreement or a works concession, or its intent to set up a dynamic purchasing system in advance. It also has to communicate the award criteria it will use to select a proposal, and the selection criteria it will use to determine suitable candidates. The information has to be communicated to a general audience: it must be sent to the Commission which will publish it in the Official Journal, in which case the latter will bear the costs for publication, or the contracting authority can publish the information on its own buyer profile. In that case it must sent notice to the Commission before it is allowed to publish the notice on its own page. Public authorities and can make additional publications in national media, but they may not do so before they have been sent the notice to the Commission or have been published on the buyer profile. Communications on the national level may not include any information that was not in the notice sent to the

[639] The combined value of contracts or framework agreements for goods and services must exceed 750 000 euros, whereas any works contracts that exceeds the threshold value should be included.

Commission. The only exception to the obligation to give prior notice is when the aptly named negotiated procedure without prior notice is used.

The contract notice should at least contain the information described in Annex VII A to the Directive, as well as any other information deemed useful by the contracting authority. The Commission has adopted standard forms for the provision of this information, and the use of this format is compulsory. Among the requirements in the Annex is the obligation to record the deadline for the submission of tenders or requests to participate in the contract notice. The ECJ has held that this obligation was derived from the principle of transparency in Commission v. Belgium.[640] The contract notice should also contain the minimum levels of ability required for the contracts and which references indicating the technical and/or professional ability of the tenderer or candidate the contracting authority wishes to receive.[641] When restricted procedures, negotiated procedure with publication of a contract notice, competitive dialogues or design contests are used, and the number of participants is limited, the prior notice must contain the criteria for the selection of participants. The award criteria can also be in the prior notice, including the relative weight the contracting authority will give to those criteria. If indicating the weight of the criteria is not possible, the notice must place the criteria in descending order of importance. This obligation used to be facultative under Directive 93/37/EC,[642] but the importance of this requirement and its origin in the principle of transparency were already recognised back then. If the award criteria are not included in the contract notice, they must be in the contract documents. The ECJ confirmed that the obligation to publish the award criteria in advance flows from the principle of transparency in Commission v. Belgium. In SIAC and Wienstrom the Court held that the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way.[643] Award criteria which grant the contracting authorities unlimited discretion in their decision to award the contract are always contrary to the Directive.[644]

Contracting authorities are allowed to include additional information that they feel might be useful. It is possible to do this in the contract notice, but not compulsory. Additional information can also be supplied in supplementary documents. In the case of open procedures, these have to be available to everyone, either electronically, at an address specified in the contract notice, or upon request. If the information can be accessed electronically, the time limit for the receipt of tenders may be shortened. If the information has to be requested, article 39 sets deadlines before which the information has to be sent to the applicant. If the contracting authority fails to supply the information in good time, or if tenders can be made only after a visit to the site or after an on-the-spot inspection of the documents supporting the contract document, the time

[640] Case C-87/94 *Commission v. Belgium* [1996] ECR I-2043.
[641] The option to ask for such proof is awarded to contracting authorities in paragraph 2 of Article 48.
[642] AG Alber in Universale Bau & CFI in Case T-183/00 *Strabag Benelux NV* v *Council of the European Union* [2003] ECR II-135.
[643]Siac, paragraph 42.
[644] Case 31/87, *Gebroeders Beentjes BV v Netherlands* [1998] ECR 4635, paragraph 26.

limits for the receipt of tenders has to be extended 'so that all economic operators may be aware of all the information needed to produce tenders.' These obligations ensure that all tenders have the time necessary to gather and process the relevant information.

Although information has to be equally available to all tenderers, procuring authorities are allowed to ask for payment for contract documents and additional documents in the case of open procedures.[645]

4.4.3.1.2.1 Contract notices on works concessions and optional contract notices

The directive does not prescribe specific award procedures for concessions, but it does impose publicity requirements. Before an authority awards a concession, it must publish a contract notice, containing the information referred to in Annex VII C and any other information deemed useful by the contracting authority. The Commission has adopted standard forms for the provision of this information. If applicable, the contract notice must also contain the minimum percentage of the work that must be subcontracted. The contract notice must be published in accordance with article 36(2) to (8), so the information is accessible to everyone who knows where to look.

4.4.3.1.3 Two-step procedures

In the open procedure, which is the default method for awarding contracts, the procuring authority will publish a contract notice, wait for tenders, and then select the best offer. In restricted procedures, competitive dialogues and negotiated procedures, there is a two-step procedure. The contracting authority will publish a contract notice which includes criteria for making a first selection among potential suppliers. Successful candidates will receive invitations to submit a tender, or to participate in the dialogue or negotiations. This means the contracting authority has fewer proposals to shift through, and candidates who drop out in the first stage are saved the trouble of drawing up a complete proposal.

The invitation to participate must either contain the specifications for the contract or a reference to accessing the specifications and the other documents indicated, if they are made directly available by electronic means in accordance with article 38(6). When an entity other than the contracting authority responsible for the award procedure has the specifications, the descriptive document and/or any supporting documents, the invitation shall state the address from which those specifications, that descriptive document and those documents may be requested and, if appropriate, the deadline for requesting such documents, and the sum payable for obtaining them and any payment procedures.[646] The competent department shall send that documentation to the economic operator without delay upon receipt of a request. The invitation must also contain a reference to the contract notice published, the deadline for receipt of the tenders, the

[645] Contract notices, point 11(c), annex VIIA. For other procedures, this option is included in article 40(3) of the directive itself.
[646] Article 40(3) Directive 2004/18/EC.

address to which the tenders must be sent, and the language or languages in which the tenders must be drawn up (in competitive dialogues this information must be in the contract notice) as well as the date and the address set for the start of consultation and the language or languages used for competitive dialogues. Next, the invitation must contain a reference to any possible adjusting documents to be submitted, either in support of verifiable declarations by the tenderer in accordance with article 44, or to supplement the information referred to in that article, and under the conditions laid down in Articles 47 and 48. Finally, the invitation must contain the relative weighing of criteria for the award of the contract, or, where appropriate, the descending order of importance for such criteria, if they are not given in the contract notice, the specifications or the descriptive document.

4.4.3.1.3.1 Simplified contract notices

A dynamic purchasing system is another way of a two-step procedure. Here, the contracting authority concludes a framework agreement with one or more suppliers. After that, it can conclude individual contracts with those suppliers under the terms of the framework agreement. If a contracting authority has set up a dynamic purchasing system, it can suffice with the publication of a simplified contract notice for the award of individual contracts. These simplified notices are to be published in accordance with article 36(2), but do not need to contain additional information apart from the intention to award the contract, as the conditions for the conclusion of the contract have already been established when the dynamic purchasing system was set up.

4.4.3.1.4 Information about electronic auctions

Sometimes it is possible to use an electronic auction when awarding contracts. This is not a separate award mechanism, but a method for evaluating tenderers that is fully automated. The use of an electronic auction must be announced in the contract notice. When the contracting authorities organise an electronic auction, they must clearly communicate the rules under which the procedure will take place, including the criteria for evaluation, their importance, and the mathematical formula used for the evaluation of new offers. All technical and practical information necessary to take part in the auction, such as the date, time and duration of the auction as well as the software required to take part must be supplied as well.[647]

[647] Article 54(3): The specifications shall include the features, the values for which will be the subject of the electronic auction, provided that such features are quantifiable and can be expressed in figures or percentages; any limits on the values which may be submitted, as they result from the specifications relating to the subject of the contract; the information which will be made available to tenderers in the course of the electronic auction and, where appropriate, when it will be made available to them; the relevant information concerning the electronic auction process; the conditions under which the tenderers will be able to bid and, in particular, the minimum differences which will, where appropriate, be required when bidding; the relevant information concerning the electronic equipment used and the arrangements and technical specifications for connection.

According to paragraph 14 of the Preamble to the directive, the use of electronic auctions is limited by the principle of transparency: "In order to guarantee compliance with the principle of transparency, only the elements suitable for automatic evaluation by electronic means, without any intervention and/or appreciation by the contracting authority, may be the object of electronic auctions, that is, only elements which are quantifiable so they can be expressed in figures or percentages. On the other hand, those aspects of the tenders which imply an appreciation of non-quantifiable elements should not be the object of electronic auctions. Consequently, certain works contracts and certain service contracts having as their subject-matter intellectual performances, such as the design of works, should not be the object of electronic auctions."

4.4.3.1.5 Evaluation

The rules about what information should be communicated are fairly detailed. They do not only regulate the availability of information, but also aim to improve its clarity by using standard formats. Basically, the rules aim to guarantee that all information relevant to candidates to assess the importance of the contract is communicated, as well as all information relevant to assess what the contract requires of them and to allow them to draw up their tender.

There are some other notable points though. First, there is the possibility of communicating in several stadia. The contract notice must be made available to everyone, but does not need to contain all relevant information. It is allowed to reserve some of it for the contract documents and make additional information available only on request. Detailed information will only reach interested parties in this manner. Second, the directive offers the option to share the costs for providing transparency. The Commission is willing to bear some of the costs of communicating the information to the general public, whereas the option to ask candidates to pay for additional information puts some of the burden of creating transparency on the parties who actually have an interest in it. The directive gives no rules about what sort of payment can be requested, but it will have to be proportionate and probably it can only cover the costs of dissemination.

4.4.3.2 Ex durante obligations: during a procedure

After the tenders have been submitted, the contracting authority has to decide on whether to award the contract, and to whom. *During* the decision-making process, they are not obliged to be very transparent at all. Indeed, they are not allowed to communicate with candidates about the content of their proposals. After a public authority has received a tender, it cannot ask for specifications or additional information.[648] It also cannot adjust the criteria downwards if none of the proposals it has received meet the minimum standard.

[648] Commission v. Belgium, paragraph 60.

That does not mean that the principle of transparency does not play a role during the procedure. In fact, these obligations were derived from the principle of transparency, which requires that the contracting authority interprets the award criteria in a consistent manner during the award procedure, and that it applies them in an objective and uniform way.[649] Although what these obligations actually require is consistency, if a contracting authority would breach them it would mean that in hindsight it has not been transparent about the criteria it was going to apply at all.

More specifically, there are transparency obligations during an auction. During the auction, the contracting authorities shall instantaneously communicate to all tenderers at least sufficient information to enable them to ascertain their relative rankings at any moment. They may also communicate other information concerning prices or values submitted, provided that is stated in the specifications. They may also at any time announce the number of participants in that phase of the auction. In no case, however, may they disclose the identities of the tenderers during any phase of an electronic auction. These specific obligations aim to guarantee tenderers ability to participate in the auction. Because the auction is characterised by the fact that candidates make decisions throughout the process instead of only (or at least mainly) when drawing up and submitting their tender, it makes sense that transparency play a more important part here.

4.4.3.2.1 Evaluation

The transparency obligations that have to be observed during the procedure mostly aim to safeguard the integrity of the procedure. Indeed, a lack of transparency during the actual decision-making process is mandatory. The obligations that have been derived from the principle of transparency appear to see more to consistency than actual transparency. The link with the principle made by the courts is understandable, though. The transparency obligations that have been observed so carefully would be rendered ineffectual if public authorities could freely deviate from the information they gave earlier. The carefully calculated decisions of homo economicus would turn out to have been based on false information and the perceived transparency would turn out to be illusory. The ex durante obligations are also quite important in preventing favouritism, as they prevent a reinterpretation of the award criteria to favour a certain (national) party. Communication during the procedure is usually not required, or even allowed, but if it happens, it must target all relevant parties.

During the electronic auction, transparency during the procedure is more important, and actually does require information to be communicated to participants. Because the process requires actual decision-making on the part of the participants rather than the contracting authority, this makes sense.

So, the general assessment that transparency is required before, during and after the procurement procedure needs to be adjusted slightly. There are obligations before,

[649] SIAC Wienstrom, paragraph 44.

during and after the procedure that flow from the principle of transparency, but transparency during the process is usually not required.

4.4.3.3 Ex post obligations: after or at the time an award decision has been taken

4.4.3.3.1 Decisions rendered

The importance of transparency increases again after a decision has been taken. The contracting authorities should inform tenderers or participants about all the decisions it takes. Of course, this applies to the decision to award a contract, conclude a framework agreement or set up a dynamic purchasing system. It also applies to the decision to not do any of those things, even though there has been a call for competition, and to the decision to recommence the procedure. The fact that tenderers and participants should also be informed about the decision not to award a contract was introduced by the ECJ.[650] The obligation to inform tenderers and participants about decisions is an active information duty, but on request, unsuccessful candidates can get further information. Again, the specifics are reserved for interested parties, where it is left to the tenderers themselves to decide whether they are interested. After such a request has been made, the contracting authority has to inform any unsuccessful candidate as quickly as possible, but under all circumstances within 15 days, about the reasons for the rejection of his tender, including, if applicable, about the reasons for its decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements. In addition, any tenderer who has made an admissible tender must be informed, upon his request, of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement. Likewise, potential candidates should also be informed about the rejection of their application, and, upon request, about the reasons for that rejection of his application. This obligation is not absolute. Contracting authorities may decide to withhold certain information regarding the contract award, the conclusion of framework agreements or admittance to a dynamic purchasing system where the release of such information would impede law enforcement, would otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of economic operators, whether public or private, or might prejudice fair competition between them.[651]

4.4.3.3.2 Contract notices

Contracting authorities should also make their final decision available to the general public by publishing them in accordance with article 36(2). Here, the room for exceptions grows. In the case of public contracts for services listed in Annex II B, the contracting authorities can indicate in the notice whether they agree to its publication. There is still some publicity about these contracts though, because they must be includ-

[650] Case C-92/00 *Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI)/Stadt Wien* [2002] ECR I-5553.
[651] Article 35(4) Directive 2004/18/EC.

ed in the statistical reports discussed below. Again, sensitive information in the sense of article 35(4) can be withheld.

4.4.3.3.3 Contract reports

Finally, the contracting authorities are obliged to draw up a report for every contract, framework agreement, and dynamic purchasing system that sees the light. These reports must be sent to the Commission if it so requests. Article 43 gives detailed results about the contents of those contract reports, and the exception for sensitive information does not apply, as this sees only to publication of the information.[652] The Commission thus has a privileged position.

4.4.3.3.4 Statistical reports

At the end of the budgetary year, there is a reporting duty for the Member States. They have to write up a statistical report separately addressing public supply, services and works contracts awarded by contracting authorities during the preceding year. The information in the report has to be fairly detailed. Article 76 lists the information that has to be provided.[653] The statistical reports are sent to the Commission, which once again is served the information on a platter. This should enable it to assess the results of applying the Directive. Thus, sending the information to the Commission enables it to review the public procurement legislation and policies. The Directive itself does not

[652] The report must contain the name and address of the contracting authority, the subject-matter and value of the contract, framework agreement or dynamic purchasing system; the names of the successful candidates or tenderers and the reasons for their selection; the name of the candidates or tenderers rejected and the reasons for their rejection; the reasons for the rejection of tenders found to be abnormally low; the name of the successful tenderer and the reasons why his tender was selected and, if known, the share of the contract of framework agreement which the successful tenderer intends to subcontract to third parties; for negotiated procedures, the circumstances referred to in articles 30 and 31 which justify the use of these procedures; as far as the competitive dialogue is concerned, the circumstances as laid down in Article 29 justifying the use of this procedure; if necessary, the reason why the contracting authority has decided not to award a contract of framework agreement or to establish a dynamic purchasing system.

[653] The number and value of awarded contracts covered by the directive; the number and total value of contracts awarded pursuant to derogations to the Agreement; if possible the data on the number and value of awarded contracts covered by the directive shall be broken down by: the contract award procedures used; for each of these procedures, works as given in Annex I and products and services as given in Annex II identified by category of the CPV nomenclature; the nationality of the economic operator to which the contract was awarded. When contracts have been awarded according to the negotiated procedure: the data shall be broken down according to the circumstances referred to in Articles 30 and 31 and shall specify the number and value of contracts awarded, by Member State and third country of the successful contractor. For contracting authorities which are not listed in Annex IV the report must contain the number and value of the contracts awarded, broken down by: the contract award procedures used; for each of these procedures, works as given in Annex I and products and services as given in Annex II identified by category of the CPV nomenclature; the nationality of the economic operator to which the contract was awarded. The total value of contracts awarded pursuant to derogations to the Agreement. Any other statistical information which is required under the Agreement.

require the reports to be made public by either the Commission or the Member States, so the general rules of access to government-held information apply to everyone else who might be interested.

4.4.3.3.5 Ex post consistency obligations

Finally, the ECJ has decided that the principle of transparency also requires that the terms of the contract cannot be changed even after the contract has been awarded.[654] This requirement can indeed be related to the duty to provide reliable information. It is the risk of the contracting authority if in hindsight the terms of the contracts do not fulfil the needs of the contracting authority. It had to provide all potential tenderers with correct information about the contract as to enable them to decide whether they wanted to submit a tender, and how that tender should look. Had they known the terms of the contract would change, they may have acted differently. The contracting authority should offer them that opportunity by starting a new procedure to award the contract. Similar to the obligations discussed in paragraph 4.4.3.2, this is really a consistency requirement. But again, if contracting authorities would be allowed to change the terms of a contract, it would be mean that in hindsight they have not been transparent about what the contract implied. There may of course be justifications for the fact that a contract is not fully complied with by either party, since not everything can be foreseen. That justification cannot be used to deviate from the principle of transparency though.

4.4.3.3.6 Evaluation

We see a multitude of transparency obligations that apply after the decision-making process. Most of these serve to make review possible. Only the consistency requirement the ECJ introduced in Succhi di Frutta aims to ensure that the principle of transparency works effectively, and improves the decision-making capacity of tenderers. We can observe that the obligations that see to enabling review have a number of different targets. First, procurement decisions should be made available to the general public. Second, they should be made available to those who have participated in the tender procedure. Third, they should be sent to the Commission. The latter can also request contract reports, and receives statistical reports.

We see that the Commission has an important role in monitoring the behaviour of the procuring authorities as well as the functioning of the procurement rules in general, and the member states are required to send them the information they require for this task. In addition, the participants in the tendering procedure receive the decision, and are entitled to receive additional information upon request. They too can review the behaviour of the procuring authority, and can determine whether their rights have been respected. Finally, the decision is made available to the general public. They have no special position with regard to any additional information, and general rules for determining whether they have access to it apply if they would request it.

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[654] Case C-496/99 P *Commission v. CAS Succhi di Frutta SpA* [2004] ECR I-3801.

The ECJ appears to accept that these obligations are derived from the principle of transparency. However, it is important to note that the fact that these obligations exist does not follow from transparency as such, but depends on certain choices that have been made about how compliance with the procurement rules should be ensures, or that are prescribed by other legal norms. Thus, the Commission receives information because it has to monitor the compliance with and functionality of the procurement rules. Unsuccessful candidates receive information because they are entitled to challenge decisions. These choices can be different in other fields, and in those cases, transparency obligations will differ as well.

4.4.4 Turning the principle of transparency around: obligations and exceptions

We have seen that the principle of transparency must be observed before, during and after procurement decisions are made, and we have seen what obligations follow from that. The European system of procurement is fairly flexible though, and even under the scope of the directives, there is hardly a single obligation that has to be observed all the time. In addition, there are procurement procedures where for some reason the directive does not apply, and although this does not always mean that the principle of transparency does not have to be observed, it will definitely have consequences for its interpretation.

4.4.4.1 The directive does not apply

Not all procurement contracts are covered by the directive. Contracts below a certain value are excluded in article 7. Article 14 provides an exception for secret contracts. Article 17 excludes the award of service concessions, but article 3, which contains the ex ante obligation to publish a contract notice, is applicable. Service contracts awarded on the basis of an exclusive right are excluded in article 18. Discussion of these contracts will be postponed to the next chapter, since they constitute a severe market interference.[655]

4.4.4.1.1 Contracts below the threshold

The procurement directive only applies to contracts above a certain value, which differs between contracts for goods, works, and services. Article 7 sets the thresholds below which the directive does not apply. Of course, primary EU law does apply, and this includes the principle of transparency, which is derived directly from articles 43 and 49 EC. The ECJ has ruled consistently that the principle of transparency also applied to the award of contracts under the thresholds.[656] According to the ECJ, "that

[655] In addition, contracts in the utility sector are excluded in article 12, but are covered by a separate directive where the principle of transparency plays an identical role. Contracts awarded pursuant to international rules are excluded from the scope of the directive in article 15. Article 16 contains a number of specific exclusions, mostly for very specific services.

[656] Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraphs 60 and 61; order in

obligation of transparency which is imposed on the contracting authority consists in 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."[657] What this degree of advertising is, is not entirely clear, since the Court left it up to the national judge to determine whether that obligation had been complied with. As we have seen, the Directive provides the possibility to just send the notice to the Commission, and have it published in the Official Journal. This would be sufficient as a medium, but it is not a necessity: the ECJ leaves a large margin of appreciation to the national courts.

It makes sense to assume that the transparency requirement is considerably less stringent. As we have seen in paragraph 4.2.4.3, the costs of providing transparency are not compensated by a lower price for the procuring authority if the worth of a contract is low. Indeed, providing too much transparency is inefficient and thus hampers the market instead of helping it. Because the ideal amount of transparency is all but impossible to determine, the margin of appreciation left to the national court is to be applauded, but the criterion causes a lot of puzzlement and will be hard to apply for many procuring entities.[658] Regulation on the national level could remedy that. Drijber & Stergiou suggest the existence of cross-border interest is the relevant criterion.[659] Although they are correct in principle, the problem with that is that public authorities cannot determine who is interested, only interested parties will know that. We already know that the contracting authority is not allowed to communicate the notice only to those parties that it believes have an interest in the contract, not even when it is convinced that all suitable candidates are informed in this way.[660] Drahmann's suggestion to give wide publicity to the fact there is a contract opportunity and to provide the details on request appears to make sense.[661] This solution allows the costs of transparency to be transferred to the interested party, a possibility that the Directive suggests is allowed. This will help to prevent inefficient spending on transparency, since parties will only request the additional information if they expect to gain from it.

4.4.4.1.2 Secret contracts

According to article 14, the directive does not apply to public contracts that are declared to be secret, when their performance must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned, or when the protection of the essential interests of that Member State so requires. Because in this case the need for secrecy is the reason for the exclusion from the scope of the Directive, there will not be many transparency

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Case C-59/00 *Vestergaard* [2001] ECR I-9505*,* paragraphs 20 and 21; Case C-231/03 *Coname* [2005] ECR I-7287, paragraphs 16 and 17, and Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraphs 46 to 48). Case C-6/05 *Medipac* [2007] ECR I-4557, paragraph 33.

[657] Telaustria, paragraph 62.

[658] Drahmann 2011, p. 280, Buijze & Widdershoven 2010.

[659] Drijber & Stergiou 2009.

[660] OJ C 2006, 179/02.

[661] Drahmann 2011, p. 270.

obligations applying to such contracts. Of course, once the need for secrecy no longer exists, documents pertaining to such procedures could be accessible under national access to information laws.

4.4.4.2 The confidentiality clause

Even in those cases that are covered by the Directive, certain information is covered by the confidentiality clause of article 6, which reads "without prejudice to the provisions of this Directive, in particular those concerning the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 35(4) and 41, and in accordance with the national law to which the contracting authority is subject, the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential; such information includes, in particular, technical or trade secrets and the confidential aspects of tenders." The scope of the confidentiality obligation has already been expanded in the case law beyond its original reach. In Varec, the ECJ ruled on the regime applicable to confidential information under the remedies directive. Because the remedy directive itself does not contain a confidentiality clause, the ECJ referred to the confidentiality requirement in article 15 of Directive 93/36.[662] The court held that "The principal objective of the Community rules in that field is the opening-up of public procurement to undistorted competition in all the Member States (see, to that effect, Case C-26/03 Stadt Halle and RPL Lo-chau [2005] ECR I-1, paragraph 44). In order to attain that objective, it is important that the contracting authorities do not release information relating to contract award procedures which could be used to distort competition, whether in an ongoing procurement procedure or in subsequent procedures."[663]

Even though the confidentiality requirement in the directive is only applicable to the procuring authority, the effectiveness of the confidentiality regime would be undermined if the information would be released in subsequent review procedures. The ECJ recognises that if this was different, that might lead undertakings to start proceedings against a procurement decision only to gain access to sensitive information originating from their competitors, which would be particularly problematic because the source of the information would generally not be involved in such proceedings, and would thus be unable to defend his rights. The responsibility to respect the confidentiality of information is therefore transferred to the review body, which thus has the power to refuse certain information to the parties.

4.4.4.3 Differences between procedures

The directive does not prescribe one uniform procurement procedure. Rather, it provides a multifunctional tool kit to procuring authorities, who can select the procedure that best suits their needs. These procedures have slightly different transparency re-

[662] Case C-450/06 *Varec* ECR [2008] I-581. A similar obligation is now contained in article 6 of Directive 2004/18.
[663] Varec, paragraphs 34-35.

quirements. Arrowsmith designates the obligation to use the open or restricted procedure as a transparency obligation. Indeed, these procedures are more transparent than either the negotiated procedure, the design context, or the competitive dialogue. The circumstances that warrant the use of one of those special procedures thus warrant a lower level of transparency.

We already saw that there is a difference between the open procedure, which has only one step, and the other procedures, where there is a selection stage as well as an award stage. In the latter procedures, a lot of the information required needs to be communicated only to the candidates who made it through the first stage. Contracting authorities are free to use either the open or restricted procedure, so in this regard they are free to choose the method that suits their needs best.

A more extreme case is the negotiated procedure without prior notice. If this procedure is used, there is no need to publish a contract notice in advance, and only candidates invited to tender get any ex ante information. This procedure is a bit of a last resort though, and its use is very restricted.[664] It is allowed when practical considerations preclude the use of a more competitive procedure, but also when supplies are quoted and purchased on a commodity market, or when they can be bought on particularly advantageous terms, for example in a liquidation. These last two exceptions are interesting. Commodity markets are considered to be close to perfectly competitive. Elaborate purchasing procedures and transparency requirements would not result in a better deal. This is also true for supplies bought in a liquidation. The fact that the contracting entity can get a good deal is decisive here, although in the case of commodities, suppliers are not hurt by discriminatory purchasing behaviour either, provided the procuring

[664] Article 31 of the Directive gives a detailed description of the conditions under which its use is allowed. The negotiated procedure without prior notice can be used when no tenders, or no suitable tenders, have been received in response to an open or restricted procedure, when for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract may only be awarded to a particular economic operator, or in cases of extreme urgency, when the time limits for the open, restricted, or negotiated procedure with publication of a contract notice cannot be complied with. In the latter case, the reasons for the urgency must be unforeseeable, and may in no case be attributable to the contracting authority.
Public supply contracts may be awarded by the negotiated procedure without prior notice also when the products involved are manufactured purely for the purpose of research, experimentation, study or development; when they concern additional deliveries by the original supplier which are intended either as a partial replacement of normal supplies or installations, or as the extension of existing supplies or installations where a change of supplier would result in the acquisition of materials with different technical specifications which would result in incompatibility or technical difficulties in operation and maintenance; when supplies are quoted and purchased on a commodity market; and when supplies can be bought on particularly advantageous terms, for example in a liquidation.
Public works contracts and public service contracts may be awarded by the negotiated procedure without prior notice when additional works or services unexpectedly turn out to be necessary for the completion of a project, provided that they cannot be technically or economically separated from the original contract, or are strictly necessary for the completion of the original contract; when new works or services consist in the repetition of similar works or services, if such works or services are in conformity with a basic project for which the original contract was awarded according to the open or restricted procedure, provided that the possible use of this procedure was announced in the contract notice during the open or restricted procedure.

authority pays the listed price and is not subsidising its supplier.[665] The negotiated procedure without prior notice can also be used when an earlier open or restricted procedure failed to result in suitable tenders. In such cases, there is no competition for the contract, and using transparency to ensure one gets the most out of competition or does not discriminate against some interested parties is not particularly useful.

Although in principle, the contracting authority should make award criteria known in advance, and these criteria must be sufficiently clear to allow all tenderers to interpret them in the same way, the EU legislator has recognised that such clarity is not always an option. Sometimes, procuring authorities will not be able to state clearly what their exact needs are, because they lack technical knowledge for example. Also, sometimes tenderers will be unable to draw up a proposal with great precision, and if tenderers cannot provide clarity, it will be hard for contracting authorities to state rock hard criteria for judging their tenders. Finally, subjective criteria might play a role in the award of contracts. The procurement directives take into account the fact that sometimes, the possibilities for public authorities to provide ex ante transparency are limited. In such cases, they can use negotiated procedures, design contests, or competitive dialogues. These procedures have been designed to allow more flexibility to public authorities where necessary, but this need is still balanced against the interest in effective public procurement. These rules thus balance the need for flexibility against the interest in transparency, non-discrimination and the proper functioning of the market. If similar circumstances arise outside the scope of the procurement directives, similar compromises to transparency are warranted. In particular, it may not be possible to determine precise award criteria in advance, or to specify the exact requirements a competitor has to meet. Under the same conditions as described in the directives, this should be acceptable.

The competitive dialogue is designed for complex contracts, where contracting authorities consider that the use of the open or restricted procedure will not allow the award of the contract.[666] The competitive dialogue is used when the contracting authority knows what it needs, but does not have a clear idea of what means are suitable to fulfil that need. To start a competitive dialogue, the contracting authority first publishes a contract notice, inviting economic operators to take part in the dialogue. When the requests to participate have been received, the contracting authority must select the candidates who will actually participate in the procedure, in the same way as when the restricted procedure is used: their suitability must be reviewed, and if there is a maximum number of participants, the authorities must apply previously announced, objective criteria to reduce the number of participants to the desired level. The contracting authority can now discuss all aspects of the contract with each of the candidates. The dialogue continues until the authorities have identified the solution or solutions which are capable of meeting their needs. They must then ask the participants to submit their final tenders based on the selected solutions. The contracting authority then proceeds to select the

[665] In a perfectly competitive market, a single buyer cannot distort the market by his buying choices. Cooter & Ulen 2012; Robinson 1934, p. 104
[666] Article 29 Directive 2004/18/EC.

most economically advantageous offer. Because not all aspects of the contract that will be awarded at the end of the procedure are known at the start of the competitive dialogue, public authorities naturally do not have to publish them in advance.

The design contest is a method to award contracts where the contracting authority leaves the actual ranking of the proposals it receives to an independent jury, because the criteria for the award cannot be objective, or because it lacks the expertise to judge the quality of proposals. When launching a design contest, the contracting authority first publishes a contest notice. If the number of participants is limited, the participants in the contest may be limited, provided they are selected according to objective criteria to be announced in the contest notice. An independent jury will examine the plans and projects submitted by the candidates and rank them according to the criteria announced in the contest notice. Finally, the best offer will be selected.

Finally, there is the negotiated procedure, which can be used if the nature of the works, supplies or services concerned does not permit prior overall pricing, or if the nature of a service is such that contract specifications cannot be established with sufficient precision to permit the award of the contract by selection of the best tender according to the rules governing open or restricted procedures.[667] It can also be used after an open or restricted procedure which resulted in irregular tenders or tenders which are unacceptable under national provisions, under the condition that the terms of the original contract notice are not substantially changed, and in respect of public works contracts for works which are performed solely for purposes of research, testing or development and not with the aim of ensuring profitability or recovering research and development cost. The first step in the negotiated procedure with prior notice is the publication of a notice, in which economic operators are invited to submit a tender. The authorities can then negotiate with the candidates about their offers, to adapt them to the requirements which have been set in the contract notice. When the negotiations are completed, the best offer is selected. Again, when this is procedure is used transparency requirements are more relaxed: it is quite impossible to offer tenderers the same certainty about how their offers will be judged and hence about their chances of success as when the open or restricted procedure are used.

4.4.4.4 Summary

Although the directive is based in part on the principle of transparency, the EU legislator recognises that exceptions to transparency are sometimes necessary. There are less stringent transparency requirements for contracts under the threshold. There can be an interest in secrecy that justifies either exclusion from the scope of the directive, or merely exclusion from the scope of the transparency obligations contained therein. For some contracts, providing clear, unambiguous information in advance is simply not possible. The procedures for the award of such contracts are different, and accept the fact that information that is not available cannot be disseminated.

[667] Article 30 Directive 2004/18/EC.

4.4.5 Conclusions on public procurement

In this paragraph we saw that transparency has gained prominence in public procurement law. In paragraph 4.2 we saw that use of the market theoretically yields optimal outcomes, but only if the rules of the market are accepted. If not, public authorities will pay prices that are too high, European trade is hampered, and the overall price level in the Union could rise. These considerations do to some extent seem to influence European procurement law. The procurement rules, and transparency in particular, aim to open up the market and prevent discrimination of non-nationals, as well as other forms of arbitrary behaviour. Although the idea that transparency prevents discrimination is very prominent, the issue of whether procurement procedures are efficient clearly also plays a role in determining what obligations apply.

There are many obligations incumbent on public authorities to prevent their interaction with the market from turning into interference. They have to be as open as possible about their intentions with regard to the award of a contract, must apply and interpret criteria consistently throughout the procedure, and must be transparent to both the Commission, interested parties, and the general public about the procurement decisions they have made. They have to be transparent both before and after the actual decision-making stage, but not so much during the process. Even so, the principle of transparency does have to be observed during the decision-making as well, since it is the basis for the obligation of a consistent interpretation and application of the award criteria.

The procurement rules recognise both the need for occasional secrecy and the need for flexibility, and there are many circumstances that can justify a lack of transparency, or at least a lower level of it. If the benefits of transparency are small, the weight that is attributed to it falls. We can see this in the less stringent transparency obligations that apply below the threshold, and in the fact that ex ante transparency is not important when buying goods on commodity markets or in liquidations. Information that is not available does not need to be communicated, and authorities who are unsure about their needs do not need to communicate them before they are. Practical and technical considerations can justify a deviation from the principle of transparency. However, only ex ante transparency obligations can be derogated from in this way, which makes sense because otherwise they could easily be abused to justify illegitimate behaviour. Controlling procuring authorities and preventing arbitrariness and discrimination remain as important as ever, as evidenced by the obligation to include the reasons for the selection of a less transparent procedure in the contract notice sent to the Commission.

This is different for those cases where it is a need for secrecy that justifies a derogation from the principle of transparency. The public interest can justify secrecy, since the directives do not apply to those procedures that the legislators of the member states have declared secret. Commercial interests can likewise justify secrecy. Here, the obligation to respect the interest is included in the Directive itself, and is in fact the result of the same concern for the rights of homo economicus and the functioning of the common market that inspires the principle of transparency to begin with.

4.5 Conclusions

In this chapter we discussed transparency for homo economicus, under the assumption that the market is the best means to allocate resources efficiently and should thus be left alone. In paragraph 4.2, we saw that this theory suggests three things about the relationship between governments and the market, provided the government does in fact want to achieve an efficient allocation of resources. First, governments are indispensable to create a functioning market. They have to set clear rules for the market to play by. Second, they should not interfere with the market afterwards and should not favour their own nationals. Third, they are free to make use of the market, and will benefit from doing so, but must be careful not to distort it. Transparency is important for all three. In addition, because there are incentives to act contrary to these recommendations, there should be mechanisms in place to promote compliance. In paragraph 4.3 we saw that the principle of legal certainty corresponds to a large extent to the idea that governments have to set clear rules for the market to play by. We saw that legal certainty carries more weight in economic law, which suggests that the efficient market argument affects the interpretation of this principle, and indeed, the fact that legal certainty contributes to the ability of legal subjects to take decisions that incorporate the legal consequences of their behaviour is one of the reasons the literature acknowledges as being the basis for the principle of legal certainty. We saw that transparency is a quality of government behaviour, and is the method which leads to legal certainty, a state of mind in legal subjects. But we also saw that transparency does not necessarily lead to legal certainty, even though it will improve people's ability to make adequate decisions. Transparency about the decision-making agenda in market regulation and the adoption of policy guidelines that do not bind the courts are examples of this. Finally, we saw that 'full' transparency is impossible and that we can only require that legislation is not unnecessarily vague or ambiguous.

We also saw that the Treaty freedoms endorse the view that homo economicus should be left alone, and that this is beneficial for the functioning of the common market. Both a lack of transparency and discrimination can infringe the Treaty freedoms. However, when public authorities are not interacting with the market, it is fairly easy to observe those norms, and the obligations derived on this point conflate with those derived from the principle of legal certainty.

When public authorities actually use the market, the possibilities and temptation to distort the market grow. Discrimination is especially problematic. We have seen that the procurement directive gives detailed rules that public authorities should follow to prevent this from happening. The principle of transparency requires them to give ample publicity to their procurement plans as well as individual contract opportunities. The amount of transparency can vary though, and the costs can be shared with both the Commission and interested parties. During the actual decision-making stage, authorities do not have to be transparent, although even during this stage, the principle of transparency has to be observed and requires them to apply and interpret selection and award criteria consistently. After the decision has been made, they have to provide information to the general public, the participants in the procedure, and the Commis-

sion, enough to allow each of them to execute the control task that has been assigned to him.

Although the principle of transparency must always be observed, there are several reasons why specific transparency obligations may not apply. We saw in paragraph 4.4.4 that in public procurement law, where the principle of transparency has been developed the furthest, there are a variety of reasons why the 'standard' transparency obligations do not apply. First, they may not, under specific circumstances, contribute to the realisation of the goal underlying the principle of transparency – in this case the proper functioning of the common market as protected by the Treaty freedoms and the principle of legal certainty, or, arguably, the lowering of transaction costs or guaranteeing a procuring authority the best deal. Second, they may be practically impossible or nigh impossible to comply with. Third, there can be competing interests which plead for secrecy. The public interest can justify an exception to transparency obligations in procurement law (and indeed, to the other obligations in the directive as well), but national legislators will have to provide for this explicitly. Business confidentiality limits transparency as well, but since a breach of confidentiality is thought to affect the common market negatively, this is a borderline case: one could also argue that transparency does not contribute to the purpose it is intended to protect in this case, or at least not as much as it usually does.

I do not claim that procurement will be optimally efficient if public authorities follow the European rules, or that observance of the principle of transparency will lead to the optimal allocation of resources. The gap between market theory and reality is quite large, especially taken into consideration that we made a bit of a caricature out of economic science in this chapter. We can say though that these simple economic notions have had significant repercussions on European law. The idea that transparency stimulates efficiency, that opacity is a form of indirect discrimination that is not only harmful to its victims, but to all of us, and that coordination problems require third party supervision are all reflected in European law. They affect the interpretation of the principle of transparency, the principle of legal certainty, and the Treaty freedoms. This does not make the principle of transparency easy to apply. The instrumental effects of transparency on the market are hard to estimate, and public authorities will have a hard time determining the optimal standard of transparency. When we take into account that the market is not quite as elegant an instrument as we have made it out to be, as we will do in the next chapter, these issues become even more prominent.

5. TRANSPARENCY FOR THE AILING MARKET

5.1 Outline

In the previous chapter, we worked from the assumption that the market is the best means available to allocate resources. Markets will create optimal efficiency by ensuring that resources are put to use where they create the most value. Even though this is a simplification, the argument for letting the market run its course does not need to be abandoned if that market is imperfect, since we have no way to achieve a more efficient outcome by other means. Thus, governments should leave homo economicus to his own devices, and allow him to pursue his interests on the market to the best of his ability. These assumptions are vulnerable to criticism though, and in this chapter we will address some of the weaknesses of the market, and see whether and how governments can correct those.

There are essentially two problems with letting the market run its course. First, markets are limited in that they cannot create distributive justice. Second, markets do not always succeed in creating efficient outcomes. They are prone to a number of market failures. Because these failures result in a less than efficient outcome, the outcome provided by the market can theoretically be improved upon. We will see how transparency plays a role in creating distributive justice and resolving market failures in two ways. First, it can limit the efficiency loss that inevitably occurs when interfering in the market for reasons of equity or efficiency. Second, it might actually help to resolve some market failures. This is most obvious in the case of those failures that are related to information. However, transparency can play a role in the resolution of other market failures as well.

We have seen that EU law values the common market, and in principle requires that the member states let it run its course. Yet, EU law is not blind to the fact that markets are imperfect, and that some issues cannot be resolved by the market, at least not without firm guidance from the outside. Market interferences are therefore sometimes allowed and occasionally even required, although they must meet strict criteria to prevent member states from taking measures that – intentionally or not – harm the market more than necessary. We will see that a variety of provisions in EU law allow market interferences for many different reasons, but that all have in common that such measures must be transparent. Whether these measures are actually taken is usually left to the member states to decide, and thus the auxiliary transparency obligations only occur when the member state elects to take such a measure, and the exact transparency obligations that need to be observed will depend on the design of the measure as well as on the goals the member state hopes to achieve with it. This obligation can be derived from the adagium that governments should not disturb the market, or more specifically, that they should not disturb it any more than necessary. In addition to preventing unnecessary efficiency losses, economic theory shows that transparency can sometimes do more than just limit or prevent damage to the market. Occasionally, government-

produced transparency can help resolve market failures. Even so, member states are usually not required to use it this way.

In paragraph 5.2, we will discuss the limitations and failures of the market. We will see what measures governments can take to resolve these problems, and will focus on the contribution transparency can make to a better functioning market. In paragraph 5.3, we will discuss the extent to which EU law takes these arguments from economic theory into account. We will address the exceptions to the free movement rules and we will look in some detail at the state aid rules, which deal with market interferences by their very nature. We will also take a closer look at the telecom directives, which aim to regulate a very imperfect market. Although these fields are quite different, we will discover a number of recurrent themes with regard to transparency. In paragraph 5.4, I will present my conclusions.

5.2 Market failures and limitations

We have seen that the basic assumption underlying market theory is that markets are a highly effective tool in allocating resources in the most efficient way. But however useful they may be, they are far from perfect. First, markets are infamously blind to matters of justice. Second, they will fail to produce optimal efficiency for a number of reasons. Below, we will discuss how markets fail, and to what extent governments can resolve market failures. Needless to say, we will focus on the role of transparency.

5.2.1 The limits of the market: distributive justice

Markets are a means to achieve efficiency. They cannot achieve justice, because for the market the value a good has to someone is determined solely through his willingness to pay.[668] Scarce goods and resources will end up with those who are willing to pay the most for them, and this will not necessarily correspond to who needs or deserves them the most. Thus, markets will deliver chemo therapy for pets whose owners can afford it, while failing to produce mosquito nets to prevent malaria among the destitute. To remedy this, governments can interfere in the market.[669] However, when governments take equity measures that interfere in the functioning of the market, they compromise on efficiency. Producing mosquito nets is simply not that profitable, and if a government directs resources to their production that could have been used in other, more profitable ways, the country as a whole will make less money. Likewise, by supporting local businesses, or those owned by vulnerable groups, governments will keep less

[668] See e.g. Sen 2000, p. 945-946; Sunstein 2000, p. 1088; Richardson 2000, p. 973; Cooter & Ulen 2012, p. 19.

[669] The problem with this approach is that it is hard to determine what justice does require. Although I can to some extent appreciate the argument that governments are equally unable to determine who objectively derives the most value from a good, and that they are not necessarily capable of arriving at a more just distribution of goods than the market, I will accept that in a democracy, people can through public deliberation determine that some perceived injustice must be remedied.

efficient producers in the market. That is not to say such measures should not be taken: efficiency should not be the end-all value in determining public policy.

Measures that governments take to promote justice are concerned with dividing the cake rather than enlarging it. People can disagree about how the cake should be divided, but they will tend to agree that this should be done as efficiently as possible. Although redistribution always carries a cost, the costs should be kept as low as possible. Because market distortions are costly, redistributive measures should not distort the market more than necessary. This is where transparency comes in. One of the conditions a measure should meet to have as little distorting effect as possible, is that it must be transparent.[670] We already saw in the previous chapter that a lack of transparency will have a negative effect on the market in and of itself, and so opaque redistributive measures will hurt the market twice. Transparent measures ensure that the rules of the game are clear to homo economicus, so that he can take the existence of the interferences into account, treat them as a given, and maximise his welfare for the situation where the interfering measures are in place.

In addition, transparency will improve the effectiveness of equity measures.[671] The success of such measures will depend on their ability to create a particular behaviour in its addressees. To do this, a measure will need to be transparent. Subsidising the production of mosquito nets will not work unless producers are aware of the subsidy.

5.2.2 Market failures

Markets do not achieve justice, nor do they claim to. They are supposed to achieve efficiency, but even here they fall short of expectations. Although the idea that a laissez faire policy automatically produces the most efficient outcomes and that a benign invisible hand is guiding the economy to achieve maximum welfare is an appealing one, it did not remain unchallenged for long. Simple observation showed that in the real world, markets did not function as smoothly as theory predicted: some markets simply did not exist, like the market for some sorts of insurance.[672] Others, like the labour market, did not clear, confronting societies with persistent unemployment.[673] Some goods are under-produced if their production is left to the market, like clean air, because they provide benefits for society as a whole that a single consumer of the good naturally does not want to pay for in full. Others, like tropical hardwoods, are over-produced, because their producers can reap profits without paying all the costs associated with their production.[674]

These market failures can be divided in two categories: first, there are market failures that can be explained within the paradigm of traditional economic theories, like those

[670] Mock 1999b, p. 1092.
[671] Islam 2003.
[672] Stiglitz 2009, p. 65.
[673] Shapiro & Stiglitz 1984.
[674] Laffont 2008.

resulting from external costs and benefits.[675] Second, there are market failures that occur because the assumptions underlying the classic model are not true, and unlike economists hoped, a small deviation from those conditions could have a large effect on how markets functioned in practice.[676] New branches of economy developed to deal with these phenomena: Monopoly theory developed to deal with those situations where there was hardly any competition, allowing producers to reap large profits even though society would be better off if production would be increased and prices would fall. Behavioural economics focused on the sometimes irrational behaviour of economic actors, and how it affects the functioning of the economy. Most importantly, for the purpose of this thesis at least, information economics dealt with the role of information in the functioning of markets, and with the effects of issues like information asymmetries, the costs of gathering information, and the unavailability of information.[677] The latter school of thought is of course intimately related to transparency, and therefore deserves a closer look.

The recognition of market failures led to the conclusion that government interference in the economy was sometimes desirable after all. If there is a market failure, government interferences can actually lead to an increase in efficiency and can be justified in that way.[678] Measures like these aim to increase the size of the pie. However, interferences are only justifiable if governments do a better job than the market. Thus, the cost of the measures they take must be smaller than the benefit their tinkering brings.[679]

5.2.2.1 Externalities and the underproduction of public goods

The classic model we discussed in chapter 4 assumes that consumers get all the utility from the goods and services they buy, and therefore, that producers will get reimbursed for all the value they produce. This assumption does not hold true for all goods. Sometimes the production or consumption of a good has effects for third parties: externalities. These can be negative, as in the case of pollution or clothing produced under atrocious labour conditions, or positive, like for education and sustainable energy. Negative externalities allow the producer of a good to charge a lower price than would be the case if the costs related to the externalities were born by him. Goods that have negative externalities will therefore be overproduced. If there are positive externalities, the reverse is true. Because consumers do not reap all the benefits when they purchase a good with positive externalities, the demand will be lower than it otherwise would be. Although such externalities can be made the subject of negotiations that will theoretically lead to optimal outcomes, this will only happen if transaction costs are low enough,[680] and they often are not. An important failure related to externalities is the consistent under-production of public goods.[681] Public goods are goods that have two

[675] Cooter & Ulen 2012, p. 39.
[676] Stiglitz 2009, p. 287.
[677] Stiglitz 2009, p. 19-22.
[678] Jackson 1998, p. 12.
[679] Posner 2003, p. 50.
[680] Coase 1960., p. 15-19
[681] Cooter & Ulen 2012, p. 40.

characteristics that make it less attractive to produce them. They are non-excludable and non-rival.[682] If a good is non-rival this means that if I consume the good, that does not stop someone else from consuming it as well. An example would be a beautiful view: even if I enjoy it all day, you can still enjoy it too. Non-excludable means that it is impossible, or at least very hard, to stop someone from consuming the good once it is there.[683] Clean air is a nice example: when the air is clean, it is impossible to forbid others to use it, even if it were your personal efforts that made it so. Non-excludability opens the door for free riders. Even if someone contributes nothing to clean air personally, he still benefits from the efforts others put in. Homo economicus, being the rational opportunist that he is, will realise he can get clean air for free, and will not contribute anything himself. If everyone takes this approach, the air will stay as polluted as ever, even though we would be willing to pay for clean air if we could ensure that everybody else would too.

Classic solutions for the problem of the under-production of public goods are subsidizing the production of the good, or having the state produce the good.[684] In the former case, subsidies must be transparent to prevent market distortions, and to allow supervision of whether the subsidy is actually given and used for its proper purpose. In the latter, the production of the good might not be efficient. The state can also impose a duty to produce a public good, such as information, on certain parties.

5.2.2.1.1 Transparency as a semi-public good

Information resembles a public good, and since transparency is characterised by the easy availability of clear, easy to understand information, we can consider the latter a (semi-)public good as well. Although information does not have all the features of classic public goods, it does share many of their characteristics, and its production is fraught with many of the same problems.[685] Indeed, its resemblance to a true public good is growing with every advance in information technology. Its consumption is non-rival. If I read a newspaper, someone else can read it after me. The good is not used up. And although information is not non-excludable per se, it appears to be evolving in that direction, as the costs of copying information are becoming ever more negligible when compared to the costs of producing the information in the first place.[686] This means that once a first copy is produced and paid for, additional copies can be distributed at almost no cost. As a consequence, nobody will be willing to pay for the first copy, preferring to free-ride, and procure a copy later at almost no cost. (Few people are willing to buy a cd when they can get a copy from a friend at the cost of an empty disc, or a usb-stick.) As a consequence, it becomes unprofitable to produce the information, and the market will be unable to meet the demand for information. Again, an example can clarify this. Let's say that the production of a CD costs € 100.000,-, plus € 0,50 per addi-

[682] Cooter & Ulen 2012, p. 40.
[683] Cooter & Ulen 2012, p. 40.
[684] Cooter & Ulen 2012, p 41; Mock 1999b, p. 1087.
[685] Mock 1999b, p. 1084.
[686] Mock 1999b, p. 1086.

tional copy. If 5.000 people buy the CD, they all pay € 100.000,- divided by 5.000, plus 50 cents, for a total of € 20,50, a price they think the CD is well worth. However, some of those people will be tempted to just get an illegal copy of the CD, for a mere 50 cents, thus increasing the share of the initial production costs that the legal buyers have to pay. Some of those will think the legal copy is not worth the higher price, and will resort to piracy as well (or they might simply refrain from buying the CD), until nobody is willing to buy a legal copy anymore. The end-result is that the CD will not be produced, even though its value (the enjoyment the potential buyers would get from it, reflected in their willingness to pay the € 20,50 (unless there is an easy way to free ride), is larger than the costs for producing it. This is undesirable, because an opportunity to increase overall welfare is missed.

The other side of the coin is that gathering, producing, and disseminating information may have social benefits beyond the benefits the individual customer or company who (first) gathered the information will enjoy. This customer or company will not include these benefits in his decision on whether to gather the information or not, and therefore, he will gather less information than would be desirable if we want to achieve maximum welfare.[687]

The fact that information resembles a public good could be given as a reason for the government to gather and distribute information because it increases overall welfare.[688] In other words: by producing transparency, governments increase the size of the cake. Producing and disseminating information only makes sense if it can be done at a cost that is lower than the benefits that result from collecting the information. As we saw in chapter 4, there is an optimal amount of information that should be gathered. When collecting the information becomes more expensive than is justified by the returns, one should stop. This holds true for governments as well. Unfortunately, it is difficult to determine when this optimum occurs and governments have no way of knowing what the optimum amount of transparency is. There are alternative options as well. Governments can subsidise the production of information, or they can impose an obligation on certain market actors to produce and disseminate information. Again, even though it is clear that stimulating the production of information will increase efficiency, governments will have no way of knowing what amount of stimulation will yield the most efficient outcome.

Thus, governments can produce transparency, in particular information, as a public good. Theoretically, this will lead to an increase in efficiency: information will be underproduced because the initial producer cannot capture the gains of its production. Using public means, government can improve overall welfare by producing an optimal amount of information and making it available to all economic actors. Homo economicus can profit from this information when making decisions, and thus he will be better able to maximise his own welfare.

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[687] Posner 1974; Lane 2005, p. 87, designates this as another transaction cost problem. Theoretically, if all the beneficiaries of the information could negotiate with the information-producer, they could reach a mutually beneficial arrangement, but transaction costs prohibit this.
[688] Mock 1999b, p. 1087.

5.2.2.2 Information asymmetries

As we saw in paragraph 5.2.2.1, information is at risk of being underproduced. But that is not the only problem information poses for the market. Information asymmetries, where one party possesses more information than the other, can have far-reaching consequences. Even small information imperfections can lead to an outcome that is significantly different from equilibrium.[689] Incomplete information is not a problem per se. Imagine a given car is 90% likely to be of good quality. The buyer and the seller can agree to a transaction at the price of 0.9 times the price of a good car plus 0.1 times the price of a bad car, as long as they both do not know in which category a particular car falls.[690] If one of the parties knows more than the other, things become problematic. Such a situation is a bit like a game of poker, where one of the players can see the other's cards in a mirror. Clearly, the better-informed player will walk away a richer man at the end of the evening, unless his advantage becomes known, in which case the game will most likely come to an early end.[691]

Sellers often know more about a product than buyers, which puts them in a better position. Thus, consumers tend to be harmed by information asymmetries in the market. They know less about the service they are consuming than the provider. Opaque markets increase transaction costs and create the possibility for the better- informed party to take advantage of its transaction partner.[692] The problem of information asymmetries is intertwined with the externalities associated with the production of information. Although an active consumer might gather information to reduce information asymmetries, this is a time-consuming and therefore costly pursuit. As with all information-gathering, the costs for gathering this information for an individual consumer do not match the advantage it will bring him, and he will not take the benefits to other consumers into account when deciding whether to gather the information. Like a true homo economicus, the consumer will refrain from gathering information when this activity is socially desirable but unprofitable to him personally. Hence, consumers will keep their information disadvantage. Sometimes this is not a problem: there may be incentives for a voluntary exchange of information, for instance through the seller giving a guarantee, which basically is him saying 'this product is a good buy, and I'm willing to bet the majority of my customers won't even need this guarantee.' Branding is also an option, where a producer can rely on a reputation for quality that was build up over a long stretch of time. Employees also have an incentive to disclose their ability to potential employers, especially if they are highly skilled, so they will be rewarded accordingly.[693] If customers are looking for reliable information about a product they are planning to buy, a seller can profit from voluntary information release at the expense of his competitors.[694] Such mechanisms are not always sufficient. Sometimes, the information

[689] Stiglitz 2009, p. 55.
[690] Akerlof 1970, p. 492
[691] Akerlof 1970, p. 490-491.
[692] Zoellner 2006, p. 588.
[693] Stiglitz 2009, p. 68-69.
[694] Stiglitz 2009, p. 68

imbalance is so large that markets are disrupted in a way that prevents a social optimum from being reached through voluntary exchange. Akerlof has shown how the mechanism works for used cars,[695] but the same problem occurs in respect of loans and insurances.[696] Borrowers tend to be better informed about their chances of success than lenders, leading to a malfunctioning capital market for in particular small enterprises, which will not be able to get loans at reasonable interest rates even in those cases where the investment would yield a good return.[697] Information asymmetries may even be the cause of persistent unemployment.[698]

If markets do not succeed in solving the problems posed by information asymmetries, there is room for government interference, in particular in the shape of obligations to exchange information.[699] One possibility is to create transparency obligations incumbent on producers – although this will only work if consumers actually process and act upon the information. Alternatively, governments can choose to collect the information themselves, and then disseminate it to consumers. In addition, governments must take care that they do not create information asymmetries, because if they did they would favour one market player over the others. When the availability of information differs between different market players, so will their ability to make the decisions that are best suited to maximise their welfare.

Information asymmetries are harmful. They can allow the better informed party to take advantage of his transaction partner, or can even make markets disappear altogether. Although information asymmetries can be fought with transparency, this is by no means the only way in which governments can try to limit their adverse consequence. The interests of the weaker party can be protected in other ways as well. This is best illustrated with some examples. Information asymmetries make it difficult for small companies to acquire loans on the market. Rather than trying to make the market more transparent, governments might offer loans at a reduced interest rate to small companies. Likewise, governments can choose to oblige producers to provide their customers with information about their products, but they can also protect consumers by setting quality standards that products have to comply with.

5.2.2.3 Lack of competition

Traditional market analysis assumes there is full competition. There are no barriers to enter a market – everyone can start producing a particular good. So normally, if there is insufficient competition in a market, and prices are too high, the problem will resolve itself. New producers will be attracted by the opportunity to make money, the supply of the good will increase, and the price will fall until it equals the marginal costs of pro-

[695] Akerlof 1970.
[696] Stiglitz 2009, p. 65, 70; Friederiszick 2006.
[697] Stiglitz 2008, 325; Friederiszick 2006.
[698] Shapiro & Stiglitz 1984.
[699] Cooter & Ulen 2012, p. 41-42; Lane 2005, p. 85, also argues that information asymmetries can justify market interventions.

duction.[700] If there are barriers that prevent newcomers from entering the market, this will not happen. This is nice for the suppliers that are already on the market, and they might create or promote such barriers so that they can keep charging the higher price. In other words, they collect rent, a premium on market inefficiencies that does not represent any added value.[701] Consumers keep paying the higher price, and might have to deal with sub-par service. Solutions include setting a maximum price, or increasing competition in the market. State aid for example might be a solution when a producer has a large amount of market power, like in a monopoly market. By providing aid to new market entrants who would otherwise be unable to enter the market, a government can reduce the market power of existing companies, and hence improve social welfare. Governments will only want to compensate for the barriers to entry, so they will want to select an otherwise efficient producer, who will eventually be able to challenge the monopolist on his own. The selection of such producers can be facilitated by having candidates compete for the subsidy, which requires transparency to be successful.

The best solution for a monopoly situation is to bring in competitors. But sometimes creating competition is difficult or impossible, as in the case of natural monopolies. A natural monopoly exists if it is most efficient for all units of a good to be produced by the same firm. This will usually be the case if the production of the good requires large capital investments.[702] Notorious examples are public utilities. The supply of water and gas for instance requires an expensive network of pipes to transport the goods to consumers. It makes sense to have only one such network, so the costs of the network have to be paid only once. That means that the supplier of the good is fairly safe from competition, and can charge a relatively high price for his goods. Under conditions of perfect competition, a firm can make no profit on the long term. In a natural monopoly, there are no competitors who can step in and offer the goods for lower prices, unless the profit the producer charges is so high that it would pay off to build another network.[703] Natural monopolies therefore allow producers to collect rent to an even greater extent than normal monopolies. They are a means of redistributing capital from consumers to the monopolist, who does not need to deliver anything in exchange. In addition, the natural monopolist can get away with providing bad service. The monopolist gets free stuff, merely because he was the first on the market. The EU policy is that this is not a good thing, and therefore, natural monopolies need to be controlled, or, where possible, must be de-monopolised.[704]

There are a number of solutions for natural monopolies.[705] First, there can be public ownership, where the state provides natural monopoly goods.[706] Because the state does

[700] Cooter & Ulen 2012.
[701] See Krueger 1974, p. 301-303 and Tullock 2008.
[702] Cooter & Ulen 2012, p. 39.
[703] Joskow 2007, p.1247-1248.
[704] Telecom directives; regulation of energy markets; see also the standing case law that exclusive rights interfere with the economic freedoms of Europeans. N.T. Nikolinakos, *EU competition law and regulation in the converging telecommunications, media and IT sectors*, Kluwer Law International, 2006.
[705] Joskow 2007, p. 1265-1272.
[706] Joskow 2007, p. 1265.

not seek profit, it will not charge the higher monopoly price. There are some downsides to this approach. Because there is still no competition, there is no incentive to produce as efficiently as possible. A public monopoly can therefore lead to inefficiencies. In addition, the state can choose to charge a monopoly price anyway and use its monopoly to acquire money for other purposes. Of course, one can argue about whether this is a disadvantage or not, but it does lead big consumers of the monopoly good to pay a larger share of public costs than might be the case if these other state activities were paid for through taxes. Another option is to control the monopolist.[707] In this case, the state – or an independent regulator – sets limits on what a monopolist can and cannot do, e.g. limit their profits to a 'reasonable return on investments'. This requires the monopolist to be transparent to the regulator, so he can establish whether the monopolist is abusing his position and abiding by the rules.[708] It also requires the regulator to be transparent to the monopolist, so he knows what to expect and by what rules he has to abide.[709] The last option is to induce competition.[710] A government can either create competition for the market (concessions), or within the market (carrier obligations). Both these solutions require transparency to work, because they depend on market mechanics to deliver better services and goods to consumers at the proper price. As we have seen, full information is one of the conditions for markets to function properly, so transparency is a condition for these solutions to work.[711] In addition, if interventions are not transparent, they will create high transaction costs for market players who have to deal with them.[712]

Natural monopolies are characterised by the fact that it is not profitable to have two sets of tools of production. Matters do not need to be that black and white though. In the field of telecommunications regulation, one of the causes of limited competition is the fact that certain resources required to offer those services are scarce, so the number of service providers is limited. This is an advantage for the service providers that manage to acquire those resources, because they do not have to fear new entrants into the market. Although they still have to deal with existing competitors, they will be able to make a larger profit than they would in a market with perfect competition.[713] Again, this extra profit is rent, since it does not represent any increase in production, and does not profit society as a whole, but only the service providers lucky enough to be in the market. In such a situation governments can still correct the market. By auctioning of the scarce resource they can select the parties that will put them to the best use, while capturing part of the rent for themselves.[714] Again, solutions that rely on artificially created competition require transparency to function, because even a market with competition does not function optimally under conditions of incomplete information.

[707] Joskow 2007, p. 1270.
[708] Joskow 2007, p. 1270, 1273.
[709] Joskow 2007, p. 1301.
[710] Joskow 2007, p. 1267.
[711] Joskow 2007, p. 1329-1338.
[712] Mock 1999a, p. 302.
[713] Joskow 2007, p. 1246.
[714] Joskow 2007, p. 1268. See extensively Maasland 2012.

5.2.2.4 Using the market revisited

We have seen that EU law prefers public authorities to abstain from interfering with the market. This requires them to be transparent, because opacity in and of itself can constitute a market interference. However, sometimes there are good reasons to deviate from this starting point, and to interfere anyway, either to correct some market failure, like a lack of competition, or the under-production of a public good, or to achieve some form of distributive justice. In those cases, one should be transparent to prevent unnecessary distortions. Public authorities are generally free to use the market to fulfil their own needs. They should be transparent when doing this to prevent distortions and to improve efficiency. They will benefit from this themselves, because lower transaction costs will result in lower prices and higher quality goods and services for procuring authorities themselves, provided the market is competitive. A specific category of market interferences fall somewhat between the two latter situations. When public authorities interfere in the market, but at the same time rely on market mechanisms to achieve the goal that underlies that particular measure, they are consciously interfering with and using the market at the same time. So what does that mean for transparency? Basically, we can discern two rationales for transparency in such situations. First, the principle that the market should not be distorted more than necessary to realise the measure's goal is still valid. This requires transparency. Second, transparency may contribute to markets being better able to realise that goal. After all, transparent markets function better, and this is still true when governments use them to try to realise their policy goals. More in general homo economicus will be unable to adapt his behaviour to a measure he is unaware of.

Governments will often rely to some extent on the market to realise policy goals, both when they are correcting market failures and when they take distributive measures. When ensuring the production of a public good, they can use the market to select the most efficient producer: the one that can produce the good at the lowest cost, even when he is reimbursed from the public coffers rather than by consumers of the good. When dividing a scarce resource, such as a license for an activity that has negative externalities and should therefore be limited, governments can rely on the market select the most efficient user of that resource: the one that will use it to create the greatest added value. When awarding a concession for a market that is a natural monopoly, governments can use the market to select the best candidate. Such measures rely on competition as a means to select an efficient supplier, and depend on homo economicus' predictability to work. Hence, they must be transparent to resort full effect. Subsidies for environmental measures for example that are to be allocated so that they ensure the greatest reduction in pollution should be allocated to companies that are able to realise the greatest reduction for the smallest amount of money. This requires transparency because companies should know about the subsidy, and should be able to estimate whether they have a chance when they apply for the subsidy. To divide scarce resources efficiently, they should be given to those who make the best use of them. In other words: those who make the most money out of them. After all, people's willingness to pay is an indicator for how much they value the services or goods provided to them. Governments are generally not in the position to be able to determine with any accuracy which company can create the highest added value. The producers themselves are

much more suitable candidates. Luckily, governments can find out which providers expect to be most successful by determining how much the resource is worth to them, or how much they are willing to pay for it. Concessions and auctions do this, set prices for licenses do not.[715] The latter are therefore not really desirable from an economic perspective. In addition, such procedures allow the government to capture some of the rent resulting from limited competition for itself, and it will be able to use it to further public interests. To be successful in that endeavour, the government will have to be transparent towards homo economicus, so that he is aware of the money-making opportunity, and to allow him to estimate whether it is a wise investment decision to allocate resources to winning a concession or taking part in an auction. In that way, all potential service providers can participate and will have the same opportunities to gain access to the desired resource, and will be able to determine accurately what the appropriate course of action for them is. This will guarantee that only candidates who have a shot at success will participate in the proceedings, which will prevent investments that are wasted.

However, the fact that markets are not quite perfect should somewhat temper our enthusiasm about its ability to help realise policy goals. In particular where there is a lack of competition, transparency will not necessarily benefit public authorities, or help them to achieve their policy goals. In such situations, the creation of transparency imposes a cost on them, and they will not be able to compensate by getting a better deal. Instead, the market actors will profit from lower transaction costs, and rather than making a better offer to the public authority, they will see their profit increase. Although auctions and the like can be used to select the best candidate for a job or the most worthy recipient of a resource, the manner in which to do this is highly depended on specific circumstances. Indeed, the time and amount of transparency that must be communicated to optimally contribute to realising the underlying policy goals will vary with exactly what a public authority wants to accomplish as well as with the circumstances in the market.[716] Thus, a transparency norm that imposes an obligation to be transparent to maximise efficiency, although theoretically possible, would be difficult to apply in practice.

5.2.3 Ensuring compliance

We saw in the previous chapter that governments have incentives to interfere in the market for the wrong reasons. There is always a risk that they yield to this temptation, and justified market interferences can provide them with a cover. Thus, some sort of control is necessary to ascertain that interferences occur for the right reasons, and are not discriminatory measures in disguise. Again, transparency is a necessary condition for such control. Governments do not need to have bad intentions though. Interfering in the market to create greater efficiency is quite difficult, and accountability can help improve the effectiveness of measures the public authorities stake by providing them with learning opportunities.

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[715] Van Ommeren 2011, p. 254.
[716] Maasland 2012; Joskow 2007 p. 1268; Klemperer 2002.

5.2.3.1 Regulators and the need to be transparent to the market

Market actors are no more likely than government agencies to comply with the rules. Thus, some sort of supervision is needed. To make this work, the supervisees should be transparent towards the supervisor. Because this implies a transparency obligation incumbent on private parties, it falls outside of the scope of this thesis. However, supervision can also be facilitated if supervisors themselves are transparent. Sometimes supervisors will lack the information they need to ensure that regulated market actors comply with the rules. Regulators are likely to know less about the market than the market parties themselves.[717] By being transparent it allows itself to be informed by stakeholders, who can fill the gaps of knowledge they observe. The stakeholders are likely to give a distorted picture though, and the supervisor should take into account that scattered interests will not be represented in such processes. Competitors will protest against state aid measures that harm their own interests, but that might be able to further overall social welfare, like when state aid is provided to break a monopoly. Consumers, who may profit from such a measure, will not lobby with the supervisor, because they are less organised than industry.[718]

Although transparency of the supervisor towards the market can sometimes contribute to compliance with EU law, because it helps the regulator to exercise its tasks, there are disadvantages to this method that need to be taken into account, and one should be cautious to make a general recommendation on all supervisors to be transparent for this reason, even though there are other reasons to be transparent.

5.2.4 Transparency for the ailing market

Government interference in the economy can sometimes be justified. Markets are prone to failure, and even if they were not, they are blind to ethical considerations and will rarely achieve a division of wealth that we experience as just. Theoretically, government interference can solve these problems. When trying to resolve market failures, governments try to increase the efficiency of the overall economy. When taking equity measures, their aim is different, but efficiency loss should still be limited. If governments decide to take measures that interfere with the market, transparency can play a role in several ways.

- The production of transparency as such might be a response to a market failure. Because transparency is a public good, it will be underproduced if the market is left alone. Alternatively, governments can subsidise the production of transparency, or they can impose obligations on other parties to create transparency.

[717] Ottow 2006, p. 77.
[718] Friederiszick 2006, p. 643.

- Transparency can help remedy information asymmetries. Again, governments can either create transparency so that less informed parties benefit directly, or they can impose an obligation on the better informed party to share its information.

- Transparency can limit the negative effect of market interferences on efficiency by allowing economic actors to adapt to the changed circumstances.

- Transparency is required to make government policies work that rely on the market, or more generally on homo economicus.

- Transparency contributes to compliance by enabling supervision and monitoring.

5.3 Transparency for the ailing market in the EU

We saw in the previous paragraph that transparency can play a role in correcting market failures. In this paragraph, we will discuss to what extent EU law allows or obliges governments to use transparency as a tool when correcting the failures of the market. We will see that although there are some obligations to create transparency and to alleviate information asymmetries where the market fails to do so, transparency is most important as a safeguard against justified market interferences doing more damage than they would necessarily have to.

5.3.1 Information as a semi-public good

Economic theory shows that information is likely to be underproduced. Because transparency is characterised by the easy availability of clear and comprehensible information, transparency too is a public good. Thus, governments can improve efficiency by producing transparency themselves, by subsidising the production of information, or by compelling private parties to produce information. The easy availability of information will contribute to a smoothly functioning market. It lowers the transaction costs associated with gathering information, saving both consumers and producers money, and facilitates those transactions that would otherwise not take place because the transaction costs would be prohibitive. However, there is no way to determine what amount of information governments should produce to create maximum efficiency, and overproduction would be just as harmful as underproduction. By creating more than the optimal amount of transparency, governments will prevent the resources used in this endeavour from being put to better use. Thus, economic theory offers a rather weak argument to compel governments to take measures to create transparency for this reason.

In EU law, we see no general obligation to create transparency based on the argument that it is a public good, and therefore underproduced. However, we do encounter more

specific obligations in the telecom directives. In addition, the BER allows member states to subsidise the production of information.

5.3.1.1 The telecom directives

The market for electronic communication services is heavily regulated. One of the objects of regulation is to make the market more transparent. Apparently, when left alone, the market will not produce the information required to allow it to function smoothly by itself. Thus, the public authorities in the member states are charged with the task of creating transparency instead. The authorisation directive recognises the importance of the overall transparency of the market, which is furthered by the easy availability of information:

> *"The objective of transparency requires that service providers, consumers and other interested parties have easy access to any information regarding rights, conditions, procedures, charges, fees and decisions concerning the provision of electronic communications services, rights of use of radio frequencies and numbers, rights to install facilities, national frequency usage plans and national numbering plans. The NRAs have an important task in providing such information and keeping it up to date. Where such rights are administered by other levels of government the national regulatory authorities should endeavour to create a user-friendly instrument for access to information regarding such rights."* [719]

This does not only pertain to information about government activities, but also to information that is held by market actors themselves that they may be reluctant to share. It goes considerably further than an obligation for public authorities to be transparent about what they do to prevent interference in the market. The access directive also promotes the general availability of information and thus contains obligations to make information publicly available incumbent on the Member States,[720] as well as on the Commission, to "ensure that the pan-European electronic communications market is effective and efficient."[721] Again, this goes further than just allowing access to information that public authorities hold anyway. Some of the information referred to is held by suppliers rather than public authorities, and the information must be collected and presented in a particular way.

When we look in more detail at the telecom directives, we encounter a multitude of obligations aimed at increasing the transparency of the market. A general obligation can be found in article 5(4) of the Framework Directive, which obliges Member States to ensure that NRAs will publish 'such information as would contribute to an open and competitive market.' This is a very general obligation, which is furthermore subject to EU and national rules on business confidentiality, but the Directives contain a number

[719] Recital 34 Authorisation Directive.
[720] Recital 22 Authorisation Directive
[721] Recital 23 Authorisation Directive.

of provisions that specify what information should be made public, like article 5(5) of the Framework Directive, which requires NRAs to publish the terms of public access to information, including the procedures for obtaining such access. Often though, these specific obligations have another goal in addition to simply improving transparency.

The clearest example of an obligation to create transparency for the reason the market fails to produce enough of it can be found in article 15 of the Authorisation Directive. This article obliges Member States to ensure that all relevant information on rights, conditions, procedures, charges, fees and decisions concerning general authorizations and rights of use is published and kept up to date in an appropriate manner so as to provide easy access to that information for all interested parties. This is an interesting obligation because it does not merely require the information to be public: access to the information must actually be made easy. Paragraph 2 goes one step further: If the information is held at different levels of government, the NRA shall make all reasonable efforts, bearing in mind the costs involved, to create a user-friendly overview of all such information, including information on the relevant levels of government and the responsible authorities, in order to facilitate applications for rights to install facilities. What we see here, is an obligation to collect and manage the information. The NRA has to make an active effort to collect all information and present it in a clear, understandable way. However, the provision is sensitive to the fact that overproducing information is inefficient. The costs associated with collecting the information need to be taken into account when deciding how much effort the NRA has to put in.

5.3.1.2 State aid

To what extent can governments subsidise the creation of information or transparency? We know that state aid is in principle suspect. It will tend to interfere with the market, and as we have seen, this is usually not a good thing. However, state aid that is compatible with the common market that is notified to the Commission will be approved.[722] One would imagine that state aid measures that aim to resolve a market failure would be caught by this exception,[723] and that subsidising the creation of transparency is acceptable.

State aid can contribute to resolving the problem of goods that have positive externalities, where the producer of the good is unable to cash in on all the social benefits associated with it, because consumers are unwilling to pay for positive externalities, and will prefer to free ride in the case of public goods. Governments can elect to subsidise private producers, or to compensate them in full for the production of such goods.[724] Producers are reimbursed from the public coffers for the value they create, so that indirectly, everyone will contribute to the production of the public good. Information can be produced like this, too. An example would be subsidies for fundamental research. It is hard to capture the returns on investments in this kind of research, even though it can

[722] Article 107(2) and (3) TFEU.
[723] Friederiszick et al. 2006, p. 626.
[724] Friederiszick 2006, p. 633.

be profitable in the future, so there will be less of it than is desirable.[725] As we saw in chapter 4, the BER declares a number of categories of aid to be compatible with the market. These are subject to less intense scrutiny by the Commission, and do not require its prior approval. In addition to aid to SMEs, social, regional, and environmental aid, aid for women entrepreneurship, the BER applies to R&D aid.[726] This suggests EU law is indeed sensitive to the fact that information is underproduced when the market is left to its own devices. Of course, to be compatible with the common market, such aid must be transparent. Yet, the exemption of R&D aid merely gives member states an option to tackle the problem; there is no obligation to resolve this market failure.

5.3.1.3 Conclusion

The insights provided by economic theory in public goods provide an argument for governments to produce, or to stimulate the production of, transparency. What amount of information governments should produce is difficult to determine though. EU law leaves it mostly up to the member states to decide whether they want to create transparency to compensate for its underproduction. In the telecom directives we do encounter an obligation to create transparency, although the NRAs in the member states get to make the final decision on how much transparency they produce: when the costs become too high (in relation to the benefits achieved by creating more transparency one imagines) they do not need to continue producing more transparency. Even this limited obligation is clearly a choice made by the EU legislator to solve a problem in a particular, severely flawed, market. One cannot draw conclusions about a general obligation to produce transparency, and in a market that does function reasonably well, the risk that producing additional transparency detracts from efficiency rather than adds to it is considerable. Governments can also elect to subsidise the production of information instead of doing it themselves. Again, this is allowed to some extent, but there is no obligation to do so.

Thus, EU law leaves it mostly up to the member states to determine the extent to which they want to stimulate the production of transparency. We cannot derive an obligation to do so from the principle of transparency. When we recall that the obligations that are derived from the principle of transparency in any given situation are determined by the reasons and goals that principle refers to, the reason for this becomes obvious. Even if we accept that the principle of transparency derives its value from some higher order principle that requires governments to contribute to allocative efficiency or at least a market that functions properly,[727] we cannot with any certainty determine what public authorities should do; we cannot say with any certainty that when they take this or that measure intended to increase transparency in a particular market, that this will increase efficiency.

[725] Mock 1999b, p. 1087.
[726] For a detailed overview of aid that is allowed under the block exemption, see Hessel 2009.
[727] The existence of which is not self-evident.

To conclude, we cannot derive a general obligation from the principle of transparency to create transparency to compensate for the underproduction that occurs because of its resemblance to a public good. Nor do I believe it is a good idea to use the principle of transparency as a vehicle to move specific obligations that exist in secondary law to other fields. It is up to the legislator, either on the EU or the national level, to decide whether to create such an obligation and to delineate it. If they have done so, the previous paragraphs offer some pointers for its interpretation: the level of transparency that must be created is the one where the marginal benefits equal the marginal costs. In other words, if creating more transparency costs more than it yields, public authorities should stop creating it.

5.3.2 Resolving information asymmetries

We saw that information asymmetries can be problematic. They either allow the better informed party to collect rent, or prevent otherwise mutually beneficial exchanges from being realised. Governments can help to resolve these problems by either providing the weaker party with information, or by imposing an obligation upon the better-informed party to share its information with other actors. Obligations like these are fairly common in the telecom directives, which regulate a market where there are significant historically determined differences in market power between suppliers, as well as information asymmetries between customers and producers.

The differences in market power are addressed in the Access Directive, which aims to "harmonise the way in which Member States regulate access to, and interconnection of, electronic communications networks and associated facilities. The aim is to establish a regulatory framework, in accordance with internal market principles, for the relationships between suppliers of networks and services that will result in sustainable competition, interoperability of electronic communications services, and consumer benefits."[728] To ensure the proper functioning of telecommunications services, network service providers should have access to facilities and/or services for the purpose of providing electronic communications services. In principle, these are commercial negotiations, and under ideal circumstances, they can be left to the market. However, "in markets where there continue to be large differences in negotiating power between undertakings, and where some undertakings rely on infrastructure provided by others for delivery of their services, it is appropriate to establish a framework to ensure that the market functions effectively."[729] The levelling effects of transparency obligations are reflected in the fact that such obligations can be imposed in particular on undertakings with significant market power. Imposing transparency of terms and conditions for access and interconnection, including prices, serves to speed-up negotiation, avoids disputes and gives confidence to market players that a service is not being provided on discriminatory terms.[730] Openness and transparency of technical interfaces can be particularly important in ensuring interoperability. Thus, transparency lowers transaction

[728] Article 1 Access Directive.
[729] Recital 6 Access Directive.
[730] Recital 16 Access Directive.

costs and increases the efficiency of the market in addition to preventing SMP undertakings from collecting rent. The NRA can determine how certain information should be made public, in terms of the medium used, and whether charges may be levied. The latter option allows the costs for creating transparency to be shared between its beneficiaries.

Article 9 of the Access Directive is titled obligations of transparency, and is specifically concerned with transparency obligations that NRAs can impose on undertakings with significant market power. It regulates the conditions and manner in which NRAs can impose such obligations on operators. Paragraph 9(2) confirms the close relation that exists between non-discrimination and transparency, as it holds that transparency obligations are particularly suitable for companies that have obligations of non-discrimination. The NRA can determine the specific information that must be made available, and the manner in which it must be made available. However, for a specific category of operators,[731] certain minimum requirements are set in Annex II to the Access Directive. Similarly, article 11 of the Access Directive gives NRAs the power to impose accounting obligations on operators: "(…) In particular, an NRA may require a vertically integrated company to make transparent its wholesale prices and its internal transfer prices inter alia to ensure compliance where there is a requirement for non-discrimination under article 10 or, where necessary, to prevent unfair cross-subsidy. NRAs may specify the format and accounting methodology to be used." If an NRA decides to impose accounting obligations on an SMP undertaking, article 13(4) of the access directive requires it to ensure that a description of the cost accounting system is made publicly available. The article places demands on the quality of this information as well: it must show at least the main categories under which costs are grouped and the rules used for the allocation of costs. In addition, after a qualified independent body has verified compliance with the cost accounting system, the NRA must annually publish a statement concerning compliance. These measures will allow potential clients of such an undertaking to better evaluate whether and under what conditions to engage in commercial exchanges. When third parties negotiate with SMP undertakings about access to their network, they are at a disadvantage. Transparency allows them to ensure that they are not being overcharged.

Similar obligations that relate to the communication of information to consumers can be found in the universal service directive.[732] The preamble of the USD stresses the importance of providing consumers with information. Indeed, one can deduce from this paragraph that obligations imposed on service providers to make certain information public serve the aim. They empower consumers, who armed with the right information can make proper choices, defend their interests, and control their expenditure.[733] Ac-

[731] Those who have obligations concerning unbundled access to the twisted metallic pair local loop.
[732] See also consumer law, where information duties incumbent on suppliers aim to reduce the power differences between suppliers and consumers. However, the USD imposes obligations on public authorities that have the same goal.
[733] Recital 15. This is confirmed again in paragraph 30 of the preamble which ends with the assertion that "The measures to ensure transparency on prices, tariffs, terms and conditions will increase the ability of consumers to optimise their choices and thus to benefit fully from competition."

cording to article 21, Member States must ensure that transparent and up-to-date information on applicable prices and tariffs, and on standard terms and conditions, in respect of access to and use of publicly available telephone services is available to end-users and consumers. In other words: consumers must be informed about what is a normal price for a particular service, and under what conditions that service is usually offered. This allows them to better evaluate whether a particular offer from a service provider is reasonable, and whether they should accept it. This is confirmed in paragraph 2 of said article, which requires NRAs to encourage the provision of information to enable end-users and consumers to make an independent evaluation of the cost of alternative usage patterns, by means of, for instance, interactive guides. Annex II provides more detailed rules on what is required. A more specific obligation can be found in article 27(1) of the Access Directive: end-users of publicly available telephone services must be fully informed of special arrangements for making calls between adjacent locations across borders between member states.

We can find several transparency obligations in the telecom Directives that aim to correct information asymmetries. Such obligations are only encountered in secondary law, and again, it is difficult to derive them directly from the principle of transparency. There is no general obligation to resolve information asymmetries. After all, it is primarily up to people themselves to gather the information they need. Arguably, when left to their own devices they do not gather enough information, because they do not take the benefits the information can have to others into account. Also, they might be at a disadvantage compared to powerful market parties. These two things can have severe negative effects on a market, but they do not always have to. Even if information asymmetries seriously hamper the market, governments that want to resolve the problem have a multitude of options, and increasing transparency is only one of them. This is illustrated by the USD, which aims to ensure that all consumers have access to certain communication services at a reasonable price, but which offers NRAs several options to achieve this, and acknowledges that sometimes, markets will take care of problems themselves. In addition, if governments decide to correct information asymmetries, they still have different options as to how to do this. They can either collect and disseminate information themselves, or can impose obligations on market actors. Both options are feasible under the telecom directives.

Thus, even if we accept a higher order principle that says that governments should promote efficiency that can aid in the interpretation of the principle of transparency, there is no way to derive the concrete transparency obligations from it that are necessary to realise that goal. The optional character of this category of transparency obligations is reflected in the telecom directives: it is up to the NRAs in the member state to determine whether they will impose a transparency obligation. Likewise, they enjoy discretion with regard to the information that they themselves provide to consumers. There is no obligation to provide transparency to resolve information asymmetries. Instead, public authorities can choose whether they want to use this tool. If they do, concrete obligations can be justified to the extent they can reasonably be assumed to contribute to the resolution of the problems caused by the information asymmetries. Such obligations should benefit the weaker market parties, and provide them with the

information they need to make economically sound decisions when interacting with more powerful actors. To be effective, information should be made available proactively, and must be easy to process.

However, such obligations must not be transferred to other fields with an appeal to the universal applicability of the principle of transparency, not in the least because they harm the interests of the market actors that are perceived as more powerful. So only if information problems actually do cause a problem in a specific market, and only if transparency has a fair chance of contributing to the resolution of those problems is the imposition of transparency obligations justifiable. Moreover, it is for the legislator to determine whether the problems in a given market are important enough to warrant interference.

5.3.3 Transparency as a condition for justified market interferences

We saw in the previous chapter that opacity hinders the ability of homo economicus to make the right decisions, or in other words, to maximise his utility. Thus, opacity in itself can constitute a market interference. Other market interferences have more severe effects if they lack transparency, because in addition to their necessary cost, they make it difficult and more costly for market actors to adapt to the new circumstances.[734] Transparency can help to limit the negative effects of market interferences on the functioning of the market. Since EU law adheres to the idea that one should in principle not interfere with the market, it is to be expected that non-transparent interferences are frowned upon, even if they are perfectly justifiable otherwise. As we will see, transparency is a condition for all sorts of market interferences in EU law.

5.3.3.1 The Treaty freedoms

We already saw a lack of transparency as such is problematic in the light of the free movement rules. But the fact that the Treaty freedoms require transparency from governments is articulated even more clearly in the case of otherwise justified interferences with those freedoms. Restrictions on free movement are acceptable if they are justified on grounds of one of the exceptions mentioned in the treaty,[735] or with the rule of reason.[736] Such measures may not constitute a means of arbitrary discrimination or a disguised trade restriction though, and they must pass a proportionality test. This means the restrictions must be both suitable and necessary to achieve their aim.[737] The Court has consistently held that to meet the proportionality requirement, restrictions must comply with a number of procedural requirements.[738] Amongst other things, this means that any limitation to the rights enshrined in those provisions should be transparent. This obligation has traditionally been inferred from the principle of proportionality

[734] Mock 1999a, p 296, 302.
[735] Article 36, 45(3), 52 jo. 62, 65 TFEU.
[736] Case 8/74 *Dassonville* [1974] ECR 837, paragraph 6.
[737] See e.g. .Möller 2012, p. 711; Jans et al. 2007, p. 148.
[738] Prechal 2008b, p. 208.

though, and the principle of transparency is usually not referred to. A lot of the case law in fact predates the introduction of the principle by the Courts. It is not that far-fetched to incorporate a transparency obligation into a proportionality requirement. After all, the principle of proportionality includes a necessity requirement, which demands that an interference goes no further than strictly necessary to achieve its goal. Because a transparent measure is less of an interference and is generally speaking no less suitable to achieve its goal than an opaque one, the conclusion that transparency is necessary to comply with the principle of proportionality is evident. Below, we will discuss the transparency obligations that need to be met to comply with the Treaty freedoms.

The contours of the transparency obligations inherent in the Treaty freedoms can already be discerned in the early case law on the free movement of goods. In 1962, the court held in Commission v. Luxembourg and Belgium that the exceptions to the prohibition on charges with equivalent effect are permissible only if they are clearly stipulated.[739] This basic idea has since been applied to all of the Treaty freedoms.[740] The principle of proportionality also requires that the "relevant rules and conditions must be set out clearly and made known in advance," and that "decisions must be backed by a statement of reasons."[741] A lack of transparency can lead to the conclusion that a measure fails to meet the proportionality requirement, much like it can be at odds with the principles of legal certainty[742] and sound administration.[743] Prechal suggests that the ECJ brought these obligations under the header of the principle of proportionality because more appropriate procedural principles had not yet been developed.[744] It would be wise to categorise them differently now, so that the obligations that are actually at the core of the principle of proportionality are not obfuscated. For those obligations discussed above, the principle of transparency is the most likely candidate.[745]

The case law on the free movement of services is the most explicit when it comes to the relationship between transparency and free movement.[746] The ECJ held that legislation which resulted in a limitation to the freedom to provide services was allowed, provided that is not disproportionate in relation to its objective, which requires that the manner in which it is applied must be subject to a transparent procedure based on objective non-discriminatory criteria known in advance. Service providers must be able to determine in advance the nature and the scope of the precise conditions to be satisfied.

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[739] Joined Cases 2 and 3/62 Commission v. Luxembourg and Belgium [1962] ECR 869.

[740] See on the freedom of workers Case C-138/02 *Collins v Secretat 3" of State for Work and Pensions* [2004] ECR I-2703. The court confirmed its ruling in Case C-158/07 *Jacqueline Förster* [2008] ECR I-8507. See on the free movement of capital Case C-483/99 *Commission v. France* [2002] ECR I-4781 and joined cases C-282/04 and C-283/04 *Commission v. The Netherlands* [2006] ECR I-9141. The freedom of services will be discussed in more detail below.

[741] Prechal 2008b, p. 208.

[742] Case C-24/00 *Commission v. France* [2004] ECR I-2777.

[743] Joined cases C-154/04 and C-155/04 *Natural Health Alliance* [2005] ECR I-6451.

[744] Prechal 2008b, p. 213.

[745] Prechal 2008b, p. 215.

[746] Case C-250/06 *United Pan-Europe Communications Belgium SA and Others v État Belge* [2007] ECR I-11135; Case C-8/02 *Leichtle* [2004] ECR I-2641, paragraph 48.

The mere declaration of principles and policy objectives is not sufficient.[747] This obligation does not only serve the legal certainty of service providers though, it also prevents arbitrariness in the exercise of discretionary powers.[748] The ECJ usually leaves it to the national court to determine whether these criteria are met.[749] In Smits & Peerbooms though, the ECJ held that the criterion used for determining whether medical treatment would be reimbursed was unacceptable on account of its ambiguity:

> *In the Smits & Peerbooms case, the ECJ was confronted with the question of whether the criteria for the authorisation of medical treatment were a violation of article 59 EC (now article 66 TFEU). The Netherlands had adopted a general rule under which the costs of medical treatment will be assumed, provided that the treatment is 'normal in the professional circles concerned.' The actual decision of whether this criterion had been met was left to the sickness insurance funds, acting where necessary under the supervision of the Ziekenfondsraad and the courts.*
>
> *The Court pointed out that it was clear that "the expression 'normal in the professional circles concerned' is open to a number of interpretations, depending, in particular, on whether it is considered that regard should be had to what is considered normal only in Netherlands medical circles, which, to judge by the order for reference, seems to be the interpretation favoured by the national court (see paragraph 23 above) or, on the other hand, to what is considered normal according to the state of international medical science and medical standards generally accepted at international level."[750] This is not acceptable to the Court, which elaborates that it is the application of the criterion by the ziekenfondsen and its ambiguity that make it untenable, not the criterion as such.[751]*

5.3.3.2 The services directive

For many services, the case law of the Court has been codified in the Services Directive, and the directive also contains provisions on the transparency of interferences with the freedom to provide services. Article 7 of the services directive grants a right to information about inter alia the requirements that are applicable to service providers in the territory of a member state, the means of redress that are available in the event of a dispute between the competent authorities and service providers or recipients, and the contact details of authorities and organisations that can provide them with further information. This information should be provided through a single contact point, which lowers the costs associated with gathering information significantly, and article 7(2) requires that the competent authorities assist service providers and recipients with in-

[747] United Pan-Europe, paragraph 46.
[748] Case C-157/99 *Smits & Peerbooms* [2001] ECR I-5473.
[749] United Pan-Europe, paragraph 50.
[750] Smits & Peerbooms, paragraph 91-94.
[751] Smits & Peerbooms, paragraph 97.

formation on the way in which the requirements on service providers are generally interpreted. The latter obligation saves them the troublesome task of digging through policy guidelines and case law themselves, and once more reduces the costs of gathering the information. Although imposing requirements on service providers is an interference with their right to provide services, the adverse effects of the interference is being limited by making it as easy as possible for them to enter the market despite having to comply with the rules. Making information available is not enough, though. Article 5 of the services directives requires member states to examine the procedures and formalities applicable to access a service activity, and when they are not sufficiently simple, they must simplify them. An important way to guarantee the simplicity of procedure is to provide a single contact point, where service providers can complete all procedures and formalities needed for access to their service activities, as required in article 6. Service providers should be able to complete formalities electronically, unless premises or equipment need to be inspected.[752]

More specifically, article 10(2) gives the conditions that authorisation schemes should meet. They must be based on criteria that are non-discriminatory; justified by an overriding reason relating to the public interest; proportionate to that public interest objective; clear and unambiguous; objective; made public in advance; and transparent and accessible. Not only the decision-making criteria have to be transparent, the conduct of the procedures themselves must also be transparent. Although the case law of the ECJ is not altogether clear on what this requires exactly, the services directive clarifies what requirements flow from the principle of transparency in this respect. These rules we discussed above can also help to interpret the principle of transparency in those cases that fall outside the scope of the directive.[753] Article 13(3-7) of the services directive makes demands on the provision of information during authorisation procedures. Authorities conducting such a procedure are required to send a confirmation of receipt, to provide information about the subsequent conduct of the procedure, on the time frame for dealing with the application, and on the consequences of failure on the part of the authority to comply with time limits. In addition, the authorities should inform the applicant about any shortcoming in his application, so that he can supply the missing information.[754] Not only should the authorities provide the relevant information, they must also ensure that authorisation procedures and formalities must be clear, made public in advance, and provide a guarantee that applications are dealt with objectively and impartially.[755]

5.3.3.3 The telecom directives

The obligation that interferences in the market should be transparent that we see in the services directive has a more specific counterpart in the telecom directives. Transpar-

[752] Article 8. Inspections are only allowed if no less restrictive measures are available.
[753] Buijze & Widdershoven 2010, p. 601-602; Buijze 2011.
[754] Although they probably should not allow substantial changes to an application if only a limited number of authorisations is available.
[755] Article 13(1) Services Directive.

ency can limit the distortive effects of measures that interfere with the functioning of the market. It is therefore logical that it plays an important role in the authorisation directive, which regulates the condition and the manner in which member states can limit access to their markets, and is confirmed in the competition directive. The general idea of the Authorisation Directive is that market access should be as easy as possible. This means that Member States should not place unnecessary demands on undertakings entering the market for electronic communications. All barriers to access the market are an interference with their freedom to provide services, and are therefore undesirable from a market perspective, even though they can be justified on other grounds. The removal of such barriers will "stimulate the development of new electronic communications services and pan-European communications networks and services" and "allow service providers and consumers to benefit from the economies of scale of the single market."[756] Again, measures that benefit national service providers are out of the question. Authorisation procedures should comply with the principle of non-discrimination as well as with the principle of transparency, and all demands placed on service providers and network operators must be transparent.

Article 6(1) of the authorisation directive determines that all requirements imposed on service providers who want access to the market should be transparent. In addition, the obligation to provide the market with information that allows economic operators to adapt their behaviour when faced with interferences has an additional aspect that we do not see in the Services Directive: Article 6 of the Framework Directive also implies an obligation to communicate draft measures that have a significant impact on the relevant market to interested parties, so as to enable them to comment on these measures. Even a decision not to impose ex ante regulation requires compliance with the consultation procedure.[757] This obligation enables participation, but as we have seen, even if interested parties are not able to convince the regulator of their point of view, they will at least be able to adapt to the measure in advance. This procedure is also applicable when NRAs use their powers to force operators to provide access to their networks, or to interconnect them, as per Article 5 of the Access Directive, and when an NRA wants to withdraw such conditions with respect to operators that no longer have SMP.[758] When the decision to withdraw such obligations is actually taken, the NRA must give an appropriate period of notice to parties affected by such amendments or withdrawal of conditions (parties that have benefited from the undertaking with SMP's obligation to allow them access). Likewise, Article 14 of the Authorisation Directive determines that any intention to make an amendment to existing rights and obligations must be notified in advance, and interested parties must be given the opportunity to comment on them. Interestingly, the Directive continues to give a broad definition of those interested parties: they include 'users and consumers', meaning that the duty to notify the amendment also has a wide scope. Notifying only the addressee of the decision is clearly not sufficient. Article 12 of the Authorization Directive requires charges for the management, control and enforcement of the general authorization scheme and of rights of use and of specific obligations to be imposed in an objective, transparent and proportionate

[756] Recital 7 to the Authorisation Directive.
[757] Case C-424/07 *Commission v. Germany* [2009] ECR I-11431.
[758] Article 6(3) Access Directive.

manner which minimises additional administrative costs and attendant charges. With regard to fees for rights of use and rights to install facilities, these may only be imposed if they are objectively justified, transparent, non-discriminatory and proportionate in relation to their intended purpose. Again, the objectives from Article 8 of the Framework Directive must be taken into account.

The Universal Service Directive also gives NRAs the option to impose obligations on economic operators that interfere with their freedom to provide services. Article 15(1) USD requires Member States to ensure that any specific obligations imposed on undertakings under the access directive are published. They shall ensure that up-to-date information is made publicly available in a manner that guarantees all interested parties easy access to that information. The obligation is not absolute, though: there is an exception for information that is confidential or that comprises business secrets. Likewise, obligations imposed under Article 9 of the Universal Service Directive to provide special tariff options, common tariffs, or to comply with price caps, must have fully transparent conditions, and must be applied in accordance with the principle of non-discrimination. If there is a sharing mechanism for the net costs of the provision of universal services, such a system must respect the principles of transparency, least market distortion, non-discrimination, and proportionality.[759]

Obligations imposed under the Access Directive interfere with the rights of service providers as well, and should therefore also be transparent. Article 31(1) of the Access Directive requires any 'must carry' obligations imposed to be transparent. If remuneration for such obligations is provided for, Member States must ensure that it is applied in a proportionate and transparent manner. (Article 31(2)). Article 9(5) of the Access directive requires that obligations to provide special tariff options, common tariffs, or to comply with price caps are published. If there is a mechanism for sharing the net cost of universal service obligations, article 14 of the Access Directive requires that NRAs make the principles for cost sharing, and details of the mechanism used, publicly available. They must also ensure that an annual report is published, giving the calculated cost of universal service obligations, identifying the contributions made by all the undertakings involved, and identifying any market benefits that may have accrued to the undertaking(s) designated to provide universal services.[760] The Access Directive gives NRAs the power to force operators to provide access to their networks, or to interconnect them. According to Article 5(3) of the Access Directive, such obligations and related conditions shall be objective, transparent, proportionate and non-discriminatory. They must also be implemented in accordance with the procedures referred to in articles 6 and 7 of the Framework Directive, meaning the consultation procedure must be followed.

Finally, article 2(4) of the Competition Directive requires Member States to ensure that a general authorization granted to an undertaking to provide electronic communications

[759] See also article 6(1) of the Competition Directive, which requires such schemes to be based on objective, transparent and non-discriminatory criteria, and to be consistent with the principles of proportionality and leas market distortion.
[760] Article 14(2) Universal Service Directive

services or to establish and/or provide electronic communications networks, as well as the conditions attached thereto, shall be based on objective, proportionate and transparent criteria.

5.3.3.4 Exemptions to the prohibition of state aid

We see a similar obligation for state aid measures. State aid measures can either aim to correct market failures or they can have an equity rationale. Either way, state aid measures that can be justified in one of those ways will have to comply with the principle of transparency, to prevent them from having unnecessary adverse effects on the market. Transparency in this context means that state aid is allocated according to fixed rules which have been set in advance.[761] The arguments for transparent trade barriers versus non-transparent trade barriers hold in this case as well. Non-transparent measures lead to higher transaction costs. In this case there are costs for (potentially unsuccessful) aid applications, costs for consultation about procedures, and maybe costs for litigation when it is unclear whether a given aid measure complies with the applicable regulations.[762] In addition transparency makes stakeholders aware that the market is being distorted, and allows them to oppose state aid measures, or, if that fails, to adjust their own behaviour to the changed conditions. Therefore, transparent aid measures will benefit society, competitors and consumers.

Conveniently, the BER actually defines what transparent aid is in art 2(6): 'transparent aid' means aid in respect of which it is possible to calculate precisely the gross grant equivalent *ex ante* without need to undertake a risk assessment. Ergo, it must be clear in advance what amount of state aid will be given. Article 5(1) determines a number of categories of aid which are transparent, whereas article 5(2) identifies aid that is not transparent. When there are doubts about the method for calculating the exact amount of aid, the aid will be deemed transparent when the method used has been approved in EC Regulations.[763] The effects of state aid must not only be knowable in advance though, information about aid measures taken under the block exemption regulation must actively be made public. Article 9(2) requires aid measures to be published online, and article 11 requires the same for the annual report on the application of the Regulation.

Measures that do not fall under the BER (or other exemptions) must be notified ex ante to the Commission for approval, as per article 108 TFEU, which will then review their compatibility with the common market. This notification obligation is clearly more intrusive than the one in the block exemption regulation. Still, one might expect that transparent measures have a better chance of being declared compatible. Indeed, aid measures that are not covered by a regulation must also be transparent.[764] As early as 1982, the Commission held that "any aid permitted should be structured so that (its

[761] Haucap & Schwalbe 2011, p. 25.
[762] There are always transaction costs involved in state aid. See Haucap & Schwalbe 2011, p. 13.
[763] Article 5(1)c BER.
[764] Pentony 2010, p. 32.

effects) are transparent."[765] Aid that is not transparent will be in breach of the principle of proportionality.[766]

Again, we see that interferences in the market must be transparent to limit their negative effect on competition.

5.3.4 Monopoly situations

We saw that transparency can make a modest contribution to stimulating competition and to preventing monopolists from collecting rent. Because the telecom directives deal with a market where competition is traditionally limited, we must turn to them to see whether EU law recognises an obligation to be transparent in this context. The telecom directives show that EU law is sensitive to the need to regulate monopolies and to induce competition in a market where this does not occur naturally. Until the early eighties, the market for electronic communications was characterised by the existence of exclusive rights for national telecommunication organizations in almost all EU Member States, who enjoyed a legally protected monopoly position – a situation that could lead to a lack of efficiency and overpriced services, but that also prevented private actors from using a natural monopoly to capture rents for themselves. This approach did not sit well with the European goals of market integration and the creation of the internal market. Ordinary competition law would not be sufficient to solve this problem: the prevalence of national monopolies required compensatory measures.[767] One of the initial goals of regulation was to abolish these legally protected monopolies and to introduce competition in the market.[768] In the next couple of decades there has been a steady development towards increased competition, resulting in the full liberalization of telecommunication networks and services with effect from 1 January 1998.[769] The 1998 directives are still much affected by the situation that existed earlier, giving powers of ex ante regulation to the national regulatory authorities (NRAs) that encroach deeply on the management of undertakings with significant market power. In part this is because of the nature of the market for telecommunication services, which can be characterised as a natural monopoly:[770] The costs for entry are extremely high, due to the necessity of expensive infrastructure, and existing players are protected from competition to a very large degree. Even without their exclusive rights, existing undertakings had a very strong position. They owned the infrastructure necessary for the provision of electronic communications. It was hard for newcomers to enter the market: creating a parallel infrastructure for their own services was both expensive and inefficient, and they were dependent on the existing players to get access to existing networks. The directives therefore provided for possibilities to force undertakings with significant market power to grant access to their networks, and offered a

[765] European Commission*, Annual Competition Report 1981,* Brussels 1982, p. 180.
[766] Pentony 2010, p. 32.
[767] Scherer 2005, p. 2 and further.
[768] Commission Green Paper 1987 on the development of the common market for telecommunication services and equipment.
[769] Scherer 2005.
[770] Joskow 2007, p. 1332, 1336.

host of other obligations that could be imposed on them. As we have seen, any measures should be transparent, like all market interferences. Transparency obligations that specifically aim to deal with the consequences of a lack of competition are rare, although the obligations that increase overall transparency we discussed in paragraph 5.3.1 and 5.3.2 reduce the power of the former monopolists.

Not all communication services resemble a natural monopoly. Where they do not, a monopoly would only result from historical exclusive rights, and there would be no reason why there could be no competition. Sometimes the number of market players will still be limited even if there is no natural monopoly, because the resources that are needed to provide communication services, like frequencies, are scarce. Thus, the directives also give guidance on how to deal with this issue, and the answer is, of course, transparently. Because such procedures fall somewhere in between using the market and interfering with the market, this issue is addressed in the next paragraph.

5.3.5 Using the market revisited

Governments will often rely in one way or the other on the working of the market, even when they take measures that interfere with that very market. Naturally, the obligation not to cause any unnecessary distortions still holds, and they should be transparent when they do this. However, we saw that there are additional arguments for transparency when public authorities use markets: it might help them to better achieve their policy goals, although the exact requirements will be difficult to determine as well as highly specific to the situation at hand. To what extent is this reflected in EU law? We already saw that when it comes to the Treaty freedoms and the state aid provisions, the emphasis lies on transparency as a means to limit the efficiency loss associated with market distortions by allowing economic actors to take optimal decisions under the changed circumstances that are the result from measures that public authorities take.
Although the transparency requirement from public procurement law also flows from the Treaty freedoms, here, the emphasis is more on the positive effects of transparency: it facilitates equal treatment and competition, and benefits procuring authorities by ensuring they can get a better deal. Thus, the principle of transparency comes at intervening authorities who rely on markets from two directions.

5.3.5.1 The widening scope of the public procurement principle of transparency

We saw that the Court first derived the principle of transparency from the procurement directives. By relying on articles 49 and 56 TFEU (then articles 43 and 49 EC) and the principle of equal treatment as the basis for the transparency obligations it introduced, the Court could expand its scope beyond the procurement directives.[771] We already saw that the award of contracts below the threshold has to comply with the principle of transparency. The Courts expanded the scope of the principle of transparency further to cover concessions,[772] and more recently to exclusive licenses for economic activities.[773]

[771] See e.g. Case C-91/08 *Wall* [2010] ECR 2815.
[772] Case C-260/04 *Commission v. Italy* [2007] ECR I-7083.

The latter has become standing case law fast, and has been confirmed several times by now.[774] There is ample reason to suspect that the victory march of the principle of transparency will continue. As AG Bot wrote in his opinion on Betfair/Ladbrokes, the transparency obligation 'appears to be a mandatory prior condition of the right of a Member state to award to one or more private operators the exclusive right to carry on an economic activity, irrespective of the method of selecting the operator or operators.'[775] I am inclined to agree, since exclusive rights are by their very nature limitations of the Treaty freedoms, and as we have seen, any such limitations should be transparent. The fact that the procedure for allocating exclusive rights has to comply with the principle of transparency says little about the obligations that can be derived from that principle though, as again, we should refer to the values underlying the principle of transparency to determine those. We saw that generally, the transparency requirement inherent in the Treaty freedoms aims to prevent unnecessary interference with those rights as well as with the workings of the market. In public procurement, there is greater emphasis on equal treatment, and additionally, transparency contributes positively to efficiency gains which can be captured by the procuring authority.

We already saw in chapter 4 that the latter argument is situation specific, and that the procurement directives allow ample of room to compromise on transparency when it is unlikely to contribute to an efficient outcome, or even to make it more unlikely. And although it makes sense that a public authority tries to profit from competition after having decided on what purpose it wants to make, outside of procurement law efficiency considerations will not always play the same role. Thus, if public authorities allocate scarce resources, whether they are licenses, concessions, state aid, or radio frequencies, the procedures for doing so will have to comply with the principle of transparency, but we will have to look closely at the effects of specific transparency obligations to see which ones should apply.

Having said that, the starting points are clear. Authorities should make it known in advance that a right is being allocated, and what procedure will be used, and afterwards, they will have to provide enough transparency to make it possible to review their decision. The public procurement directives provide detailed rules for what transparency obligations are required under what circumstances. Outside their scope, such detailed rules are lacking. Although we find ample of examples in secondary EU law that reassert the importance of transparency in dividing resources, they appear to leave a lot of discretion to the member states. Nevertheless, we will see in paragraph 5.3.5.5 that we can both determine with some certainty the ideal level of transparency the law aims to realise, as well as the opposing interests that can justify deviating from this optimal level.

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[773] Joined cases C-203/08 and C-258/08 *Betfair and Ladbrokes* [2010] ECR I-4695.
[774] Joined cases C-72/10 and C-77/10 *Costa and Cifone* [2012] ECR I-0000, paragraph 54; Opinion AG Jääslomem. Case C-138/11 *Compass-Datenbank GmbH v. Austria* [2012] ECR I-0000.
[775] Opinion AG Bot, joined cases C-203/08 and C-258/08 *Betfair and Ladbrokes* [2010] ECR I-4695, paragraph 154.

5.3.5.2 Scarcity under the services directive

Under the services directive, interferences with the freedom to provide services should be avoided. When they are allowed, they should be transparent. We already saw that an authorisation or licensing requirement is an interference in the market, and that it should therefore be transparent to limit its negative effect. When for whatever reason a limited number of licenses are available, the interference should still be transparent. Indeed, there are additional transparency requirements that only apply to the allocation of a limited number of rights, although those obligations remain fairly general. Article 12 of the services directive gives the rules for when the number of authorisations available for an activity is limited. In these cases, the selection procedure to determine which candidates will receive the authorisation must provide full guarantees of impartiality and transparency, including, in particular, adequate publicity about the launch, conduct and completion of the procedure. How 'full guarantees of impartiality' and 'adequate publicity' must be interpreted is not self-evident. It is not unlikely that in the interpretation of this provision the public procurement rules for publicity about procurement procedures will play an important role. This would mean that the measure of transparency required would be such as to allow interested parties to participate in the proceedings and to open up the market for competition. Drahmann proposes that the announcement of the launch of a procedure must comprise a short description of the available authorisation, the selection procedure that will be used, and the contact details of the authority that conducts the procedure.[776]

One can pose questions about the desirability of transferring the obligations derived from the principle of transparency as developed in procurement law to the selection of a limited number of candidates who will get an authorisation. It is clear that the two situations have something in common – in both cases the public authority has to award a right that several parties may be interested in, and in both cases the risk that they breach the principle of equal treatment and therefore the free movement rules is considerable. But there are differences as well. Market failures may be abundant, and especially when there is limited competition for the rights to be awarded, the efficiency gains associated with transparency in public procurement may not occur. In addition, efficiency might not be an important goal if the number of authorisations is limited for reasons of equity – such measures must not detract from the proper functioning of the market, but there is no general obligation to fix it when the market is broken. There is nothing in the services directive that says that it should be. There is no provision that says that licenses should be given to whoever can make the most money out of them. As long as the criteria for deciding are not arbitrary, discriminatory or whatever, that is fine under the services directive. There is an obligation not to impair the market unnecessarily, but there is no obligation to make it function more smoothly than it would without government interference.

Thus, the details of allocation procedures under the services directive should be determined while taking into account:

[776] Drahmann 2011, p. 271.

- The reason for the limitation of the number of authorisations available.
- Whether there is an interest in making sure the authorisations are allocated to the most efficient user.
- *If* furthering efficiency is a goal, or one of the goals, of the procedure, whether and how transparency contributes to that.

However, public authorities should always guarantee a minimum level of transparency to ensure that all interested parties have equal chances. Thus, all information should be available to all interested parties. The amount of information that is provided proactively beyond the announcement of the opportunity, the moment at which information is communicated, and the effort made to provide information that is easy to process are subject to discretion though, as is the division of the costs for providing additional transparency. The best way to consider the open norm in the Services Directive is to assume that the EU legislator has deliberately left the choice of procedure and its exact details to the member states. A margin of appreciation is nice, because that way the procedure can be tailored to maximise the effectiveness of the allocation procedure, to ensure the policy goals that inspired the limited number of authorisations to be available is actually achieved. In addition, the member states will better be able to appreciate the intricacies of their local markets, and to evaluate in what manner government-created transparency will affect that market. Transparency obligations should be tailored to achieve the relevant goals as well as to prevent arbitrariness and unnecessary market distortions, while ensuring there is enough transparency to enable review.

5.3.5.3 Division of scarce resources under the telecom directives

Again, we already saw that transparency must be observed when interfering in the market under the telecom directives as well. In situations of scarcity, there is extra emphasis on transparency. We find this mostly in the Authorisation Directive, but also in the USD and the framework directive.

Article 9(1) of the Framework Directive requires that the allocation and assignment of radio frequencies for electronic communication services are based on objective, transparent, non-discriminatory and proportionate criteria. The details are not expanded upon in the directive, but the Court of justice determined that this requirement is not met when a national system fails to award frequencies to an operator that does have a broadcasting license, while it does attribute frequencies to operators that lack such a license, in Centro Europa.[777] The Court emphasised that although this obligation was derived from the directives, it is ultimately based in article 49 of the Treaty, so this obligation has the same roots as the public procurement principle of transparency. Likewise, article 5(2) of the Authorization Directive requires that rights of use of radio frequencies to providers of radio or television broadcast content services shall be granted through open, transparent, and non-discriminatory procedures. If the number of rights of use to be granted for radio frequencies is limited, again these rights should be

[777] Case C-380/05 *Centro Europa* [2008] ECR I-349.

granted on the basis of selection criteria which must be objective, transparent, non-discriminatory and proportionate.[778] They must also take into account the achievement of the objectives mentioned in article 8 of the Framework Directive, i.e.: promoting competition in the provision of electronic communications networks, electronic communications services and associated facilities and services; contributing to the development of the internal market; and promoting the interests of the citizens of the EU. Here, unlike under the Services Directive, we see an explicit demand that member states take into account the interest of creating a competitive market that meets citizens' needs.

If the Member States decide to impose universal service obligations as per the Universal Service Directive, the addressee of the obligations must be assessed in an open, transparent and non-discriminatory procedure. An auction would be a possibility.[779] This obligation is commemorative of the principle of transparency as it has been developed in public procurement law. When a member state decides to designate one or more individual undertakings as universal service providers, transparent selection procedures can help it select those undertakings that are best equipped to do the job, which will limit the costs associated with the provision of universal services.

5.3.5.4 Division of state aid

We already saw that state aid must be transparent to be compatible with the common market, and that it should be allocated in a transparent way. A clarification of what that means is lacking up till now, but the Commission has opened the doors for further developments in the allocation of state aid, as it advocated objective, transparent, and non-discriminatory allocation procedures in its state aid action plan. According to the literature, procedures should be open and non-discriminatory, and tenders are the preferred mode of action.

A more economic approach to state aid as advocated by the Commission implies that transparent allocation procedures should allow for competition between potential recipients of state aid, and would benefit the efficacy of the state aid policy, because state aid would be given to those undertakings that can use it most efficiently to accomplish those policy goals. Transparent procedures to allocate state aid will help to ensure that the aid is given to those undertakings that will make the best use of it, much like transparent procurement procedures ensure that a tender will be won by the most efficient company. Like in public procurement, a tender procedure can be used to help identify the company that will use state aid the most efficiently, so that the goals of the state aid measure will be accomplished at the lowest possible cost. If so, transparency will be an important requirement.

[778] See also Article 4(2) of the Competition Directive, which requires such decision to be based on objective, transparent, non-discriminatory and proportionate criteria.
[779] Hancher & Larouche 2010, p. 9.

The procedure for allocating state aid must already be transparent to prevent any additional market distortions. In the future, such procedures might also have to take the positive effects of transparency on the smooth functioning of the market into account. Right now, this is not the case. The block exemption regulation contains no rules for the allocation of aid. Thus, aid that is exempt from the notification duty under this directive can be allocated in pretty much any way the member state sees fit. The preference for transparent allocation procedures expressed in the SAAP and suggested by economic analyses has not found its way into this regulation yet. Nevertheless, opaque allocation procedures are not allowed under current law either, even though public authorities might be able to get away with them.

5.3.5.5 Transparency in situations of scarcity

In situations of scarcity, public authorities must observe the general obligations inherent in the principle of transparency. They should be transparent to prevent unnecessary market distortions. This means they must communicate in advance what they are going to do, and may not deviate from it later. They should also respect the principle of equal treatment, and they must communicate through a channel that will reach all potentially interested parties. They should not assume too easily that there is no cross-border interest. If efficient allocation of the scarce right is a goal, this goal might benefit from extra transparency, although the exact obligations that contribute to this can vary. However, efficiency will not always be the goal of the interference, for example when public authorities limit the number of parking licenses available for the city centre. In such cases, transparency carries less weight. In all cases, there may be opposing interests that justify deviations from these obligations. We discussed in chapter 4 that the transparency obligations in the procurement directives are far from absolute, and there is no reason why there should be less flexibility outside of their scope.

All procedures to allocate scarce resources should respect the principles of equal treatment and transparency. This means that at a minimum, opportunities to acquire such a resource must be communicated proactively. Additional information should be available to everyone who expresses an interest, and the manner in which this information can be accessed must be communicated together with the contract opportunity. The information that should be supplied upon request includes information about the procedure, and about the criteria for dividing the resources. The initial announcement must reach all interested actors and should be published either in the EU's official journal, on a dedicated website, or on another platform that interested actors know how to find. Moreover, the information should be correct. This means that public authorities must determine the specific of the procedure and their criteria for deciding on applications in advance, and cannot change them afterwards. As we have seen, ex durante transparency is not required. Transparency during the procedure might allow interested parties to try to affect the outcome of the procedure, but this is neither required nor desirable from the perspective of equal treatment.

Information about decisions should be communicated to all parties who have expressed their interest in acquiring a scarce right. The quality of the information should be suffi-

cient for them to ensure that the decision complies with the relevant rules, and to determine whether they want to challenge it. All this should be done timely, because the consequences of errors are serious. Secrecy at an early stage of a procedure cannot be compensated for by providing information at a later point, because such delays will inevitably harm the rights of interested actors. Usually, a flawed decision can be corrected afterwards, but in the case of scarce rights, such corrections harm the interests of other parties.[780]

These obligations are not without exceptions. When we look at the public procurement rules, we can get an idea about what sort of exceptions are acceptable. We saw in paragraph 4.4.4.2 that public authorities should respect the confidentiality of information that third parties supplied to them. Outside the scope of the procurement directives, this obligation will likewise have to be taken into account. We saw in paragraph 4.4.4.3 that practical reasons may be taken into account as well. If it is impossible to define clear criteria for the allocation of a right in advance, there is no obligation to do so. If public authorities face excessive time pressure, they can compromise on transparency to speed up the proceedings. If an earlier award procedure has shown there are no parties interested in a right, a subsequent procedure can compromise on transparency, since there is no risk of discrimination in such cases – but only if the award criteria remain the same and the second procedure is organised shortly after the first. Finally, secret contracts are not covered by the procurement directives. The circumstances that justify these exceptions must be taken into account in the allocation of all scarce resources.

The above considerations apply to the allocation of all scarce resources, regardless of the intentions of the authority that allocates them. If market efficiency is an additional goal, either based on EU law (like in the case of the electronic communications market), or based on national policy, there should be additional transparency, and the weight attributed to transparency increases. What transparency obligations do contribute to efficiency will vary somewhat depending on the conditions in the specific market, but the obligations that do must in principle be observed. If public authorities have the opportunity to reap the benefits of additional transparency, they have an interest in selecting the most efficient candidate, and are well-advised to invest resources in attracting them. Thus, more information should be provided proactively, and the quality of the information should be higher. If the public authorities cannot reap the benefits of a better functioning market, the costs for information gathering and processing can be borne by the beneficiaries instead.

If market efficiency is a goal, it becomes more difficult to justify exceptions to the obligations discussed above. Although the exceptions are still applicable, the weight attributed to transparency increases, because it does not only contribute to equal treatment, but also to the realisation of this policy goal. There is one exception to this: we saw that business confidentiality can justify exceptions to obligations derived from the principle of transparency, even though this might detract from equal treatment. In this case, the weight attributed to the principle of transparency does not increase if efficien-

[780] Van Rijn van Alkemade 2012; Buijze & Widdershoven 2011.

cy is a goal of the allocation procedure. This is because transparency about confidential information supplied by economic actors is thought to detract from overall efficiency rather than to contribute to it.

In addition, there appear to be some exceptions in the public procurement directives where a strict observance of the rules would not contribute to efficiency. We have seen the directives do not apply to contracts below the threshold, where investments in complicated tender procedures cannot be justified by efficiency gains. A similar argument can be made for the allocation of any scarce right: if its value is low, an expensive procedure cannot be justified, and the minimum transparency obligations sketched above are sufficient. We also saw that if a tender procedure failed to show a sufficient number of interested parties, a subsequent procedure can be significantly less transparent. In such cases, transparency will not result in efficiency gains through better competition, because there is no one to compete.

5.3.6 Ensuring compliance

We already saw that transparency is of great value in ensuring compliance with other norms, because it exposes any breaches and allows both addressees and accountability forums, like courts or administrative supervisors, to review decisions. When interfering with the market, the risk that public authorities distort the market, deliberately or not, is very real, especially when we take into account that national governments always have an incentive to break the rules, in addition to having to deal with agency problems regarding the behaviour of their public authorities and public servants. I would expect rigorous transparency obligations to be in place to prevent this kind of behaviour, similar to the ones found in public procurement law, where the close interaction with the market also lead to a high risk of illegal behaviour.

5.3.6.1 Beyond public procurement

The principle of transparency as developed in public procurement applies to issuing concessions, licenses and other exclusive rights as well. Regardless, the ex post transparency obligations outside the scope of the directives are significantly less stringent. There is no obligation to report to the Commission, to create reports on all individual procedures, or to create annual reports or statistical analyses. Nevertheless, transparency does also serve the purpose of enabling review, and the standard is used in the case law. In Telaustria for example, the court required a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of the procedure to be reviewed. Again, there is no explicit guidance on what this requires. The obligation overlaps with those flowing from the principles of effective judicial protection and the rights of defence, which we will address at greater length in chapter 6.

5.3.6.2 Treaty freedoms

We already saw that in the context of the Treaty freedoms, transparency serves to make effective judicial review of measures that interfere with those freedoms possible.[781] In particular, decisions must be backed by a statement of reasons.[782] Other than that, obligations are not really distinguished according to whether they contribute to effective review or to other goals like ensuring the equal treatment of economic operators. However, we find more specific transparency obligations in the services directive.

5.3.6.3 Services Directive

The Services Directive attributes the task of monitoring the implementation of the directive to the Commission. In addition, the Commission must be notified of new measures a member state wants to take, so violations of the Directive will be caught in this manner – provided of course that the notification duty is being complied with. Article 15(7) contains a notification duty for new measures that fall in a number of defined categories that limit access to the national market. These measures are in principle prohibited in article 15(6), but may be justified if they comply with the requirements set out in article 15(3). This notice must be sent to the Commission, who will communicate it to the other member states. The Commission will investigate the measure for compatibility with the market within 3 months, and can then request the member state to refrain from adopting it, or to abolish it.

More in general, article 39 contains a reporting obligation relating to the information specified in articles 9(2) (which authorisation schemes there are and why they are in compliance with the Directive), 15(5) (requirements on service providers the member state intends to maintain, and why it considers them to be acceptable, as well as any changes to existing requirements that have been made in order to comply with the directive), 25(3) (on requirements which oblige them to exercise a given specific activity exclusively or which restrict the exercise jointly or in partnership of different activities, which are usually prohibited but can sometimes be justified under article 25(1) and (2), and why they consider them compatible with those provisions). This must be send to the Commission, who will sent it to the other mms, and consult other interested parties. The report and the comments will be sent to the Committee established pursuant to article 40(1), which will also provide its observations. The Commission will then draw up a summary report to be sent to the EP, after which additional initiatives will be considered.

Member states must draw up a separate report on article 16(1) and (3), which prohibits member states from interfering with the right to provide cross-border services, unless the measures they take comply with the requirements set out in that article. After the initial report, which was due in 2009, any changes or new obligations must be notified to the Commission. The Commission shall communicate the transmitted information to

[781] Joined cases C-282/04 and C-283/04 *Commission v. The Netherlands* [2006] ECR I-9141 and, Case C-24/00 *Commission v. France* [2004] ECR I-27777.
[782] Prechal 2008b, p. 208.

the other Member States. Such transmission shall not prevent the adoption by Member States of the provisions in question. The Commission shall on an annual basis thereafter provide analyses and orientations on the application of these provisions in the context of this Directive. Although this obligation does not see on enforcement as such, the information provided to the Commission could of course be a cause to start an infringement procedure.

5.3.6.4 The telecom directives

The telecom directives also impose a monitoring task on the Commission, and it is also entitled to preferential treatment as regards transparency. Article 5(2) of the Framework Directive obliges Member States to ensure that NRAs will provide the Commission with the information it needs to carry out the tasks it has under the Treaty. The information required must be proportionate to the fulfilment of this task. This is an open catch-all norm, but more specific obligations exist as well. Article 17(3) of the Access Directive requires NRAs to submit, on request, information to the Commission concerning the retail controls based on that directive and, where appropriate, the cost accounting systems used by the undertakings concerned. In the same vein article 7(3) of the Framework Directive obliges NRAs to make draft measures that are subject to the consultation procedure available to the Commission at the same time, together with the reasoning on which the measure is based. Other NRAs and the Commission may comment on the draft measure as well. Article 8(5) of the Access Directive requires NRAs to notify decisions to impose, amend or withdraw obligations on market players to the Commission.

A copy of information on the obligations imposed under the USD must be sent to the Commission, and so must all decisions about which operators are deemed to have significant market power and about the obligations imposed upon them. Article 17 USD gives the Commission the power to ask for additional information if this is needed for the fulfilment of its tasks.

The Commission is not the only party who gets preferential treatment. The network operators and service providers that are supervised by the NRAs get additional information as well, which aims to guarantee their rights versus a regulator that has the power to impose all sorts of obligations on them. These parties are required to provide the NRAs with all sorts of information, pursuant to article 5(1) of the Framework Directive, which obliges Member States to provide for an obligation incumbent on network operators and service providers to provide information to the NRAs. This applies to all information that is necessary for the NRAs to ensure conformity with the provisions of the Framework Directive and the Specific Directives, and with decision made in accordance with those Directives. However, article 11(2) of the Authorisation Directive obliges NRAs to inform service providers and network operators of the specific purpose for which the information the NRA requires of them is requested. This is of course a specification of the duty to give reasons, specified with regard as to what information should be given in the motivation. This obligation allows service providers and network operators to review whether these requests for information are justified,

just like the duty to give reasons in general allows addressees to review whether a decision is legitimate and whether they should fight it. This obligation allows them to defend their own rights and, somewhat indirectly, is another mechanism to ensure that public authorities comply with the legal norms incumbent on them.

The transparency obligations we discussed above that NRAs have to observe when imposing obligations on undertakings likewise help in safeguarding their rights. Although this information need not be secret to the general public, except to the extent that it contains business secrets or is otherwise covered by one of the exemptions to the right to access documents, it is actively provided to the addressee. After all, he has a clear interest in seeing/reviewing for himself whether the NRA has respected his rights and complied with the appropriate regulation.

5.3.6.5 State aid

As we saw in chapter 4, the member states face a collective action problem when it comes to state aid. Although it is better if all member states refrain from illegitimate state aid, from the perspective of one of the member states it is best if all others comply with the European state aid legislation, but the member state itself can give state aid whenever it desires to do so. In other words, the member states as agents who have to execute the EU's state aid policy have different interests than their principal. This means that the prohibition on state aid will require significant enforcement and supervision to be effective. Given that some state aid measures are allowed, the need to supervise the member states becomes even larger, because these measures may be used to circumvent the general prohibition on state aid by member states giving aid that is illegal while claiming it comes under one of the exceptions. Friederiszick et al. argue that state aid measures that are not transparent can be designed to support specific firms, e.g. national champions.[783] Because of the interests of the member states, it makes sense to give a big role to the European institutions in monitoring compliance of the member states with the state aid rules. The state aid block exemption regulation attributes this role to the Commission. Although the member states have to comply with general rules to ensure accountability and compliance with the law when they take state aid measures, there are additional transparency obligations towards the Commission to allow it to supervise its potentially unwilling agents. Articles 9-11 contain detailed rules about what information should be transferred to the Commission, in what manner, and at what moment.

Although the full text of aid measures should also be made available on the internet, and the summary provided to the Commission will be published in the *Official Journal of the European Union* and on the internet, the Commission has a privileged position, because it receives the information it requires through its own IT-application, in a format it designed itself.[784] In addition, the member states should keep a detailed record about all state aid measures, which they have to send to the Commission upon re-

[783] Friederiszick et al., p. 46.
[784] Article 9 BER.

quest.[785] Although the regulation allows business secrets to be deleted from the full text of a decision to give ad hoc aid that is to be published on the internet, there is no such exemption for the detailed record that has to be sent to the Commission. Finally, the member states have to send annual reports to the Commission.[786] These reports should also be published online. All these obligations are ex post transparency obligations: the decision-making process has ended, and the results must be made public.

For those cases where a proposed state aid measure does not fall under the BER and is not qualified as de minimis aid, the procedure is different. Any new aid or alterations in existing aid must be notified to the Commission pursuant to article 108(3) TFEU, which can then review their compatibility with the common market. If aid is found to be incompatible, the Commission must initiate the procedure under article 108(2), giving the parties concerned the opportunity to submit their comments and subsequently taking the final decision on whether to allow the aid. In such cases, the Commission is no longer merely the supervisor, but the actual decision-maker.

As regards transparency towards addressees, this is resolved in relation to the duty to give reasons. The standard case law of the Courts is that it is not necessary to address all relevant points of law and fact, but that the reasoning required depends on the context of the decision and all the legal rules governing the measure in question.[787] When confronted with the question of whether the motivation for a decision not to start the procedure under 108(2) TFEU, the AG argued that the reasoning of the Commission ought to be tested against the requirements of transparency for the persons concerned as regards the grounds justifying the decisions and reviewability by the EU judicature.[788] That means that if during the administrative procedure '*the party concerned was closely involved in the process by which the contested decision came about and is therefore aware of the reasons for which the administration considered that the request could not be granted, the scope of the obligation to state reasons will be defined by the context thus created by the party's involvement in that process*'.[789] Transparency might be argued to be a tool for the interpretation of the duty to give reasons. Where the reasons for the decision are clear and understandable for the concerned parties, that duty has been met.

5.4 Conclusions

We saw that transparency can play a role in resolving a number of market failures. However, transparency is most important as a condition for justified market interferences, a safeguard against discrimination, and as a tool to ensure the efficiency of measures that rely on the market to work.

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[785] Article 10 BER.
[786] Article 11 BER.
[787] e.g. AG Geelhoed in joined case C-280/99 P to C-282/99 P *Moccia Irme SpA*, ECR 2001 P I-4717, paragraph 16.
[788] Id. paragraph 117.
[789] Case T-301/01 *Alitalia v. Commission* [2008] ECR II-1753, paragraph 57.

First and foremost, public authorities should be transparent when they interfere with the market. This requires them to announce their actions in advance, in sufficient detail, to all relevant parties. Ex post transparency is not helpful in realising this goal. The information should enable the market actors to assess the consequences of the interference and to decide on the best course of action for them to take given the existence of the interference. A lack of transparency can be justified in principle by the same reasons the treaty interference itself can be justified, but justifying it will be much more difficult, both because the negative effects of being obliged to be transparent are likely to be much smaller than the negative effects of being forced to fully comply with the Treaty, and because a lack of transparency can have serious additional distortive effects. Second, when public authorities interfere with the market, they should be transparent to allow supervision. This requires ex post transparency to a degree that allows third parties to ensure EU law has been complied with. The target of these obligations can vary dependent on who has been chosen to ensure compliance, but all actors whose rights are inferred with should be targeted. This obligation overlaps with those derived from the right to effective judicial protection and the principle of respect for the rights of defence, which will be discussed at greater length in the next chapter.

In situations of scarcity, transparency becomes more important. This is especially true when public authorities want to allocate scarce resources in an efficient way, but even if they do not, transparency becomes more important if only a limited number of rights are available. If scarcity is artificial, this is an interference with the Treaty freedoms. To be justified, such interferences must be transparent. If scarcity is natural, the scarcity as such is not an interference, but an opaque allocation procedure will be, because such procedures violate the principles of equal treatment and non-discrimination. Thus, all procedures to allocate scarce resources should respect the principles of equal treatment and transparency. This means that at a minimum, opportunities to acquire such a resource must be communicated proactively. Additional information should be available to everyone who expresses an interest. Moreover, the information should be correct. This means that public authorities must determine the specifics of the procedure and their criteria for deciding on applications in advance, and cannot change them afterwards. All parties who have expressed their interest in acquiring a scarce resource should be informed about the outcome of the procedure. All this should be done timely, because the consequences of errors are serious. Practical considerations, confidentiality, and the public interest can all justify exceptions to these obligations.

If market efficiency is an additional goal, the weight attributed to transparency increases. What transparency obligations do contribute to efficiency will vary somewhat depending on the conditions in the specific market, but the obligations that do must in principle be observed. More information should be provided proactively, and the quality of the information should be higher. Exceptions to transparency obligations become harder to justify, except in those cases where transparency does not contribute to efficiency, or even detracts from it.

Finally, government-created transparency can play a role in countering the effects of information asymmetries and the underproduction of information. Whether public au-

thorities are obliged to create transparency for those reasons is a policy decision. We cannot derive a general obligation from the principle of transparency to create transparency to compensate for the underproduction that occurs because of its resemblance to a public good. If there is a specific obligation to produce transparency to counter its underproduction, the level of transparency that must be created is the one where the marginal benefits equal the marginal costs. Such specific obligations cannot be transferred to other fields of EU law with the argument that the principle of transparency is a general principle of EU law. The same is true for transparency obligations that aim to counter the negative effects of information asymmetries. There is no obligation to provide transparency to resolve information asymmetries. If public authorities do decide to use this tool, concrete obligations can be justified to the extent they can reasonably be assumed to contribute to the resolution of the problems caused by the information asymmetries. Such obligations should benefit the weaker market parties, and provide them with the information they need to make economically sound decisions when interacting with more powerful actors. To be effective, information should be made available proactively, and must be easy to process. Again, such obligations must not be transferred to other fields with an appeal to the universal applicability of the principle of transparency.

6. LIBERTÉ, ÉGALITÉ, TRANSPARENCE!

6.1 Outline

In this chapter we will discuss transparency from the perspective of homo dignus, the human being that we encounter in the preambles to human rights treaties, who has intrinsic worth. Different from the citoyen, he lives in the private sphere and has only limited contact with public authorities.[790] Homo dignus, as an autonomous individual, profits greatly from transparency: autonomous decision-making is informed decision-making, and without information people cannot make meaningful choices about their lives. However, there is no reason why there should be a general obligation on public authorities to assist homo dignus in decision-making. Since his decisions concern his private life, the most important obligation for public authorities is to leave him to it. The obligation to actively assist homo dignus is the exception rather than the rule, although we will see that the exception is not that uncommon. In addition, transparency can help homo dignus to safeguard his rights from public authorities that try to interfere with them.[791]

In paragraph 6.2 we will discuss who homo dignus is, what he does, and how he benefits from transparency. We will also examine the arguments for an obligation incumbent on public authorities to provide homo dignus with transparency, either in general or only under specific circumstances or on specific topics. After this theoretical exposé we will turn to the actual law. In paragraph 6.3 we will return to the ECHR. The Convention aims to guarantee both the rights of the citoyen we encountered in chapter 3 and of those of homo dignus that are the subject of this chapter. Like the citoyen, homo dignus is not guaranteed an explicit right to information or transparency in the Convention, but again, this right is implicit in other provisions. The most important among these is article 8, which protects the right to private life and is sometimes assumed to contain a more general obligation to respect people's autonomy. However, people can also benefit from transparency when they are trying to realise their Convention rights themselves, and the ECtHR has acknowledged information rights in articles 2 and 6 as well. In paragraph 6.4 we will turn to EU law. We will discover the extent to which EU law recognises an individual right to information of homo dignus. Such a right does exist, but it is fragmented and may be hard to make use of. We will see that the principle of transparency plays a small but significant role in the reasoning of the Court, but that there is room for improvement with regard to its application.

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[790] Although the view of human beings as homines digni also is the basis for the argument for democracy, it is nevertheless useful to discern humans as they act in the public sphere from humans as they act in the private sphere.

[791] One could make largely the same argument we saw in chapter 4: leaving aside any positive obligation to create transparency, any government-created opacity is potentially an interference with people's fundamental rights, as it hampers their ability to make decisions about their private life. However, this line of argument is not supported by the existing literature, or by the case law of the ECHR.

6.2 Homo dignus

In this chapter, we focus on the role of government-created transparency for homo dignus. The information that should be provided does not pertain primarily to the relation between homo dignus and the government, because homo dignus is characterised by his existence in the private sphere, far away – ideally – from government interference. The obligation to supply transparency to homo dignus serves no other purpose than to respect his dignity.

6.2.1 Who is homo dignus?

Homo dignus is the 'worthy human', or better, the human being possessed of intrinsic worth.[792] He is the antipode of homo economicus, who is not valued for himself but for the positive consequences of his otherwise not very admirable actions, and the more reclusive counterpart of the citoyen: where the latter exists only in the public sphere, homo dignus exists in the private sphere. Although he can interact with public authorities, he is not defined by his relation with them, and indeed exists primarily outside of that relation. In the terminology of Eijsbouts, he is the citoyen libérateur, whose rights are acknowledged by the ECJ in cases like Hauer and Kadi, and in the charter of fundamental rights of the EU.[793] More generally, homo dignus is the human being we find in the human rights treaties, the carrier of human dignity and the heir of a long tradition of thought on the intrinsic worth of human beings, the roots of which are traced back to the middle ages[794] or even to the thought of the stoics.[795] Unsurprisingly, the distinguishing characteristic of homo dignus is his dignity, the possession of which entitles him to certain rights. Dignity is the mysterious quality that sets humans apart from everything else, but although people agree on the fact that people possess dignity,[796] and that this entitles them to certain rights,[797] it is possible to entertain widely divergent views on what dignity is.[798] Nevertheless, the concept plays an important role in human rights theory. It is used to interpret existing rights and inspires new rights that are necessary to respect, protect, or promote human dignity.[799] We can argue that if respect for

[792] The term is rather uncommon, but not unheard of. See Gregg 2003, p. 30; Steyn et al 1986, p. 128-129.
[793] Eijsbouts, p. 15.
[794] Griffins 2001 p. 2, Eijsbouts 2011, p. 15.
[795] Arieli 2003, p. 14.
[796] McCrudden 2008, p. 679.
[797] E.g. Schachter 1983, with an overview of the human rights instruments that recognise dignity as the foundation of human rights, p. 848. He also explains that in a philosophical sense, all human rights and fundamental freedoms derive from the inherent dignity of the human person, p. 853. See also Griffins 2001, and McCrudden 2008, p. 679, who argues that one of the few points about dignity on which there is consensus is that it requires certain forms of treatment of individuals, and prohibits others.
[798] McCrudden 2008.
[799] Schachter 1983, p. 853: "drawing upon the conception of human dignity and the intrinsic worth of every person, we can extend and strengthen human rights by formulating new rights or construing existing rights to apply to new situations." See also McCrudden 2008.

human dignity requires a right to transparency, such a right should exist.[800] To make such an argument, we need to have a clearer picture of what dignity is.

Defining dignity is not simple. According to McCrudden, the concept of human dignity was intentionally left vague. When the UDHR was drafted, the first international human rights instrument to incorporate human dignity, it was possible to reach consensus on a catalogue of human rights, but it was much more difficult to reach consensus on the source of these rights. Thus, human dignity functioned as a placeholder to allow everyone to insert his own theory on what it means to be human as a justification for the rights contained in the UDHR.[801] But although there are different theories about human dignity,[802] there are a number of elements that in practice affect the interpretation of human rights law by national, regional, and international courts, and that occur to varying degrees in each of those theories. Dignity is associated with individual autonomy, freedom from humiliation, protection from severe physical or mental torment inflicted by the authorities, and freedom from discrimination.[803] Although McCrudden puts a lot of emphasis on the conflicts that can arise between more individualistic and more communitarian conceptions of dignity, in most cases there will be no conflict between these values.[804] I do not propose to resolve the debate on what the best conception of human dignity is here, but will stick with the observation that all these theories will impact the interpretation of human rights by the courts. For our present purpose, we will focus on autonomy as an important component of human dignity, because the relation between autonomy and transparency is by far the strongest.[805]

The idea of human dignity as autonomy has strong philosophical roots. Medieval humanist and religious thought saw dignity as God-given, a consequence of the fact that man was created in the image of God, and of his unique place in creation. The ability to make one's own choices is an important aspect of this. Man is invested with reason,

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[800] New human rights instruments should be 'of fundamental character and derive from the inherent dignity and worth of the human person,' according to the UN General Assembly. GA Res. 41/120, 4 December 1986. See McCrudden 2008, p. 669-670 for a more extensive treatment of how dignity provides the foundation for a variety of human rights instruments.

[801] McCrudden 2008, p. 678.

[802] McCrudden 2008, p. 699 emphasises the difference between an individualistic approach centred on autonomy and a more communitarian approach. This more communitarian approach of human dignity surfaced in 19th and 20th century catholic philosophy as a response to socialist rejection of the autonomy doctrine, and 'emphasised the limits of rights in being able to capture the full range of what was necessary to human well-being, the dangers of a conflictual politics, and the need for solidarity between the different interests in society.' McCrudden 2008, p. 662. According to Schachter human dignity includes recognition of a distinct personal identity, reflecting individual autonomy and responsibility, but also embraces a recognition that the individual self is a part of larger collectivities. He fuses the communitarian and individualistic accounts of human dignity without much trouble. Schachter 1983, p. 851.

[803] McCrudden 2008, p. 685-686.

[804] McCrudden 2008 p. 711 recognises this himself, when he says that he focused on hard cases, where a lack of consensus is more likely to begin with. Even communitarian courts will acknowledge that autonomy should be protected, even though it is not unlimited. McCrudden, p. 700.

[805] Although as we will see later, a lack of information could result in something akin to mental torment. See the Roche case of the ECHR that we will discuss below.

and possessed of free will.[806] He had the capacity to be 'the lord of his fate and the shaper of his future.'[807] In secular thought, Kant has been the designated champion of autonomy.[808] From him, we inherited the concept of dignity as autonomy: the idea that to treat people with dignity is to treat them as autonomous individuals able to choose their destiny.[809] Alternatively, we should treat every human being as an end, not a means,[810] which Schachter argues implies that a high priority should be given to individual choice in matters such as beliefs, way of life, attitudes, and the conduct of public affairs.[811]

More recently, the importance of autonomy for homo dignus has been articulated strongly by Griffin, who argues that the best philosophical account of human rights regards them as protection of the value we attach to human agency.[812] According to him, "an agent is someone who chooses goals and is then free to pursue them"[813] and therefore, "autonomy and liberty are of special value to us, and attract the special protection of rights."[814] To be autonomous, we should be able to take our own decisions, without being dominated or controlled by someone else. According to Griffin, there should be a large range of human rights protecting our autonomy.[815] In particular, our decisions must be informed, and thus we need access to information.[816]

6.2.2 What homo dignus does

The actions of homo dignus are difficult to delineate. As we have seen, it is essential to homo dignus that he is able to make his own choices, free from outside influence, and can then pursue his goals. Effectively, almost any action can be attributed to homo dignus. Yet it is possible to make a meaningful distinction between homo dignus, homo economicus, and the citoyen. The rights attributed to the citoyen are essentially derived from the same ideas on human dignity and autonomy, but they apply only to the public sphere. Thus, the citoyen is not so different from homo dignus: when a human being possessed of intrinsic worth enters the public sphere, homo dignus turns into the citoyen.

The actions of homo dignus overlap with those of homo economicus. Homo economicus provides us with a framework to view individual actions, and homo dignus provides us with an alternative framework to view the same actions. Thus, a decision to

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[806] Arieli 2003, p. 9-10.
[807] Pico della Mirandola, quoted in McCrudden 2008, p. 659.
[808] Although there are many different conceptions of autonomy. See for an overview: Lapidot 1994; Rouvroy & Poullet 2009, p. 55. They recognise that the definition most often used in legal writing derives from Kant though.
[809] McCrudden 2008, p. 659.
[810] Schachter 1983, p. 849.
[811] Schachter 1983, p. 849.
[812] Griffin 2001, p. 1.
[813] Griffin 2001, p. 4.
[814] Griffin 2001, p. 5.
[815] Griffin 2001, p. 7.
[816] Griffin 2001, p. 7.

buy a house is a decision made by homo economicus. We can assume he calculated the costs and benefits of that action and has decided that buying the house is the best way to maximise his utility. We can also regard it as an informed, autonomous decision, free from outside interference that concerns a fundamental aspect of the life of homo dignus. The manner in which we evaluate the actions of homo dignus and homo economicus – or actions that affect them – differ. Homo economicus is a utility maximiser, a model to understand human behaviour. As such, there are no normative commandments about how he should be treated. Any value we attribute to him or to his actions is not derived from his status as homo economicus, but to the positive effects his behaviour has on societal outcomes. Homo dignus is different. He is a black box, a mystery that borders on the sacred: we do not care so much about what he does, or why he does it, we just respect his right to do so. Naturally, the law approaches autonomous individuals very differently than it approaches homo economicus. The two are of course united in the same actual individuals, and norms that target homo economicus target the same people as norms that target autonomous individuals. The rationale for the two sets of norms differs considerably though.

6.2.3 Transparency for homo dignus

We have seen that homo dignus is characterised by his intrinsic worth as a human being. Homo dignus has agency: he is capable of making his own decisions, and of acting upon those decisions. It is not difficult to see that homo dignus benefits from transparency. We have defined a transparent environment as one in which people can easily ascertain and understand conditions, and can predict how their own actions will affect that world. Such an environment is conducive to homo dignus exercising his agency: he will be better at making informed decisions and better able to realise his goals once he has decided upon them.

The assertion that homo dignus profits from transparency is once more confirmed by rational choice theory. We already saw that rational choice theory predicts that better availability of and access to information help people to take better decisions, that is, decisions that are more likely to contribute to the realisation of their goals. Thus, the way in which transparency contributes to the realisation of individual rights is not so different to the way in which it contributes to the realisation of democracy, or to the proper functioning of the market. In all three cases, information is needed to facilitate decision-making, either by people as a collective or by individuals. But there are important differences as well. The realisation of democracy requires that people have access to information about matters of public interest, and to information about the government that will enable them to judge its performance. The proper functioning of the market requires people to have access to information to the extent it improves the efficiency of the market. The realisation of the rights of homo dignus benefits from access to a broader category of information, not all of which will be held by the government, and transparency serves no other purpose than realising those rights.

Although homo dignus will usually not engage with public authorities, he can still benefit from the fact that transparency allows him to see what is going on inside gov-

ernment. Because public authorities have the potential to violate homo dignus' rights, they can come into conflict with one another. Transparency will allow homo dignus to better defend his rights vis à vis public authorities, either by trying to affect the outcome of a procedure, or by seeking judicial review of unwelcome decisions. Since the empowerment of individuals is one of the obligations arising from respect for dignity,[817] this kind of transparency is clearly beneficial to homo dignus as well. Indeed, according to Schachter there is a "procedural implication" since every individual should be recognised as having the capacity to assert claims to protect their essential dignity.[818]

We saw in the previous chapter that the usefulness of transparency to homo economicus did not provide a normative argument for a legal obligation to be transparent. For homo dignus, matters are more complicated. His raison d'être is to provide a normative foundation for human rights. Thus, if transparency is necessary to respect dignity, that would provide us with a strong normative argument for transparency obligations. As we shall see, dignity can be used both to interpret existing rights and to argue for new rights to add to the human rights catalogue.

Let us return to the concept of autonomy. We saw that autonomy tends to be defined as the capacity to make one's own reasoned and informed decisions, without undue outside influences. Clearly, people are not born as fully autonomous beings, but rather grow up to be autonomous. It is impossible for a state to bestow this quality on its subjects, and other authors have pointed out that the state can never grant someone autonomy,[819] but can at most respect it. This means that governments should not raise any barriers to people exercising their autonomy. In addition, they may have to create circumstances conducive to people developing and exercising their autonomy. Although initially the state was expected to merely respect people's rights, meaning it could not actively interfere in people's enjoyment of those rights, the insight that mere non-interference was not enough to ensure people's dignity started to grow and resulted in the doctrine of positive obligations.[820] Hence, the state was expected to create the circumstances in which people could effectively enjoy their rights, and exercise their autonomy.[821]

Being well-informed is conducive to exercising one's autonomy. Interfering with people's autonomy, by actively diminishing transparency, should be frowned upon. When we consider whether governments should actively create transparency, matters become more complicated. If the law does not only require the state to respect autonomy but also to promote it through active measures, the supply of information becomes necessary, provided the information cannot easily be procured elsewhere. Such an approach opens the door to an unlimited right for individuals to access information, which may or may not be in the possession of public authorities to begin with. That seems a bit

[817] McCrudden 2008, p. 691.
[818] Schachter 1983, p. 851.
[819] Rouvroy & Poullet 2008, p. 59.
[820] *Airey v Ireland* (App no. 6289/73) (1978) Series A No 32, paragraph 32.
[821] Rouvroy & Poullet 2008, p. 60.

drastic to me, and indeed, the argument is dependent on the assumption that new rights can be derived from the principle of human dignity without legislative texts or case law supporting the existence of such rights. This assumption is not commonly shared.[822] We have an alternative option though when we use the concept of dignity to interpret rights rather than to discover, or create, new rights. Rouvroy and Poullet speak of 'the right of individuals to make certain kinds of fundamental choices (…),'[823] choices that can only be made if they have the required information at their disposal) or a 'right to autonomous and informed decision-making in existential matters.'[824] These statements do of course provoke the question what constitutes an existential matter or a fundamental choice, and what is an existential matter. In the end, this is a subjective matter because homo dignus should be free to decide what is of existential importance to him individually, but in the objectified legal reality, the ECtHR has interpreted it as encompassing all the domains in which individuals are confronted with the need to make fundamental choices in their life, including their sexual life and sexual preferences, their personal and social life, their relationships with other human beings, and their choice of residence.[825] The quintessential example is of course the right to choose one's residence in full knowledge of the environment.[826] Thus, we do not necessarily need to recognise an unconditional right to informed decision making that can only be realised if information is made available and accessible, but can instead limit ourselves to a right to information necessary for decision-making in existential matters. Such an approach falls short of recognising a new right, but could be helpful in interpreting existing rights. A right to information based on other, codified, rights opens the door to a limited right to information: only the information that will help people further the interests that are actually protected by the Treaty would fall under the scope of the right to information. We will see below that especially the right to private and family life, to physical integrity, to life, the right to a fair trial and the right to an effective remedy are relevant.

6.2.4 Homo dignus and privacy

As an autonomous creature, homo dignus is entitled to certain information. However, the relation between autonomy and information is two-faced. We already saw that people need information to make autonomous decisions. Respect for their autonomy may require giving them access to certain information. On the other hand, autonomy requires privacy. Individuals need an inviolable domain in which they may freely develop their personality.[827] This recognises that people are not born autonomous, but rather have the capacity for developing autonomy.[828] Although developing one's personality

[822] McCrudden 2008, p. 722.
[823] Rouvroy & Poullet 2008, p. 65.
[824] Rouvroy & Poullet 2008, p. 67.
[825] Rouvroy & Poullet 2008, p. 66.
[826] *Guerra and others v. Italy* (App no. 14967/89) ECHR 1998-I 64.
[827] Jacoby 2006, p. 22.
[828] And hence it allows for protective measures that prevent people from harming their own privacy as a means of fostering their future autonomy, like in those cases where the DPD allows for the possibility to make it impossible for people to consent to the processing of sensitive data.

might sometimes require information,[829] the right to privacy will usually be an argument against releasing information, and forms the justification for data protection laws. Privacy helps to ensure that people are not subjected to outside pressure when making decisions, which is another essential element of autonomy.[830] More in general, respect for people's autonomy and privacy can require exceptions to otherwise justifiable rights to access information, regardless of what interest access to information serves. We will address this issue at greater length in paragraph 6.4.3 below.

Likewise, respect for privacy might mean that an active obligation to supply individuals with information that is relevant to them personally is unfeasible. Such an obligation would require the government to know who will benefit from information, and to put that knowledge to use. The collection and use of such knowledge could raise privacy issues for the entire population, not just for those who would benefit from the information.[831] Providing information upon request allows public authorities to avoid this issue.

In short, respect for homo dignus as an autonomous creature requires access to information, but it also requires respect for his privacy. Dignity can be an argument in favour of transparency as well as against it.

6.3 Transparency for autonomous individuals under the ECHR

Theoretically, homo dignus would have a right to at least some information. Depending on whether one believes the respect for human dignity should be a basis for the creation of new rights, or merely provide guidance for the interpretation of other rights, this right can encompass all or some information. But does this private right to information exist outside of the realm of theoretical speculation? As we shall see, it does. The ECtHR has derived information rights from several articles of the Convention. We will discuss information rights based on articles 8, 2 and 6 ECHR.[832] But first, we will see whether the account of homo dignus given above is reflected in the ECHR and the case law of the Strasbourg court.

6.3.1 The Convention's approach of homo dignus

We argued above that information is necessary for self-determination, and that autonomous decision-making benefits from easy access to information. Indeed, the idea of human dignity requiring respect for human beings as autonomous individuals would be the ultimate justification for allowing people a right to access information. But does the ECHR recognise the autonomy of homo dignus as the source of the rights contained in

[829] *Gaskin v. the UK* (App no. 10454/83) (1989) Series A no. 160.
[830] Rouvroy & Poullet 2008, p. 47.
[831] Van Ooijen & Nouwt 2009, p. 84..
[832] Information rights similar to those derived from article 6 ECHR can be derived from article 13 ECHR. The latter are more limited in scope, but do not differ much in substance. They are not treated separately in this thesis.

it? The preamble of the ECHR, unlike that of many other human rights instruments, does not mention the intrinsic worth or dignity of human beings, and neither does it refer to autonomy. Instead, it refers to the common history and culture of the signatory states to justify human rights. Unlike in the UDHR, there is no right to dignity in the Convention either. That does not mean that the ideas of dignity and autonomy play no role in the interpretation of the Convention. The ECtHR has used dignity as an interpretative concept in cases concerning articles 3,[833] 6,[834] and 8.[835] Indeed, the Court recognises dignity as underpinning all the rights in the Convention, as it held in Pretty that the very essence of the Convention is respect for human dignity and human freedom.[836] More specifically, article 8 ECHR is sometimes taken to include a 'right to autonomy', and for those who support this vision, it should come as no surprise that the Court has interpreted it as including a right to access specific information in many cases. This 'right to autonomy' is most clearly recognised in Pretty, where the Court held that: 'Article 8 also protects a right to personal development (…) Though no previous case law has established any right to self-determination as being contained in article 8 of the Convention as such, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantee.' Van Dijk & Van Hoof also conclude that article 8 in fact contains a right to autonomy.[837] This right to autonomy is best understood in the sense proposed by Rouvroy and Poullet: as a right to informed decision-making in existential matters, rather than a right to informed decision making as such. The autonomy approach is also apparent in the Guerra Case, where the Court recognised under Article 8 the right to determine one's life, which includes an accompanying individual right to be informed about potential threats and environmental hazards.[838]

6.3.2 Article 8

The ECtHR has most commonly based a right to information on article 8 ECHR. Such information can either be about the applicant himself, his family, or – in the broad sense of the word – his environment.

6.3.2.1 Access to personal information

The landmark case in which the Court recognised an obligation to allow an individual access to certain information on the basis of article 8 was Gaskin v. the UK.[839]

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[833] *Tyrer v. UK* (App no 5856/72) (1977) Series A no 26.
[834] *Bock v. Germany* (App no 11118/84) (1989) Series A no 150, where the right to a fair hearing was said to protect human dignity. The recognition of the procedural rights of article 6 being derived from human dignity confirms the theoretical argument that respecting people's dignity means that people should be allowed to defend their rights.
[835] *Goodwin v. the UK* (App no 28957/95) ECHR 2002-VI.
[836] *Pretty v. the* UK (App no 2346/02) ECHR 2002-III, paragraph 65; see McCrudden 2008, p. 683.
[837] Van Dijk & Van Hoof, p. 689.
[838] Van Dijk & Van Hoof, p. 689.
[839] *Gaskin v. the UK* (App no. 10454/83) (1989) Series A no. 160.

Gaskin had applied to the UK authorities for information about the foster homes he had lived in during the majority of his childhood. According to Gaskin, he was ill-treated during this period and he wished to obtain details of where he was kept and by whom and in what conditions in order to be able to help him to overcome his problems and learn about his past. He also needed the information to bring liability proceedings against the local authorities which had been responsible for his care. The authorities refused this information, on the ground that disclosure and production would be contrary to the public interest. If discovery were ordered, the public interest in the proper operation of the child-care service would be jeopardised since the contributors to the records would be reluctant to be frank in their reports in the future.'[840] Some of the information was provided at a later point, subject to the condition that the parties where the information came from gave their permission to make it public. Most of them refused; only 65 out of 352 documents were released.
The ECtHR held that the records contained 'information containing highly personal aspects of the applicant's childhood, development and history.' Therefore, the refusal of access to those records could raise issues under article 8 ECHR. The interests in keeping the records confidential which the UK authorities had based their refusal on were indeed of importance, and they had to be balanced against Gaskin's interest in accessing them. The UK had failed to respect Gaskin's rights under the convention, because the balancing of interests had not taken place. Rather, the refusal to waiver confidentiality had been respected without further consideration, and the authorities had automatically given preference to the interests of the contributors and the public interest they perceived to be served by respecting their wishes.[841]

The Gaskin case shows that the Court recognises a right to access certain personal information under article 8 ECHR. Although this right is not absolute, there should at least be a system in place to balance the rights of the individual to this information against the public interest in keeping it secret.

A very similar case, M.G. v. the UK, ECtHR 24 September 2002, was also concerned with information of a very intimate nature. The applicant sought access to social service records held by a local authority. He hoped to learn from them about his early childhood, as he held a sincere belief that he had been physically abused when he was a child by his father and he wanted to come to terms with the emotional and psychological impact of such abuse and to understand his own subsequent and related behaviour. He was given limited access to these records. He had no statutory right of access to those records and no clear indication by way of a binding circular or legislation of the grounds upon which he could request access or challenge a denial of access. There was no possibility to appeal to an independent body. The Court again concluded that there

[840] Gaskin, paragraph 15.
[841] The ECtHR did not find a violation of article 10, although Gaskin had also argued that there was a public interest in the availability of the records: this would allow the public to exercise some control over the child care regime established by the authorities. However, these interests need not be balanced under article 10, because – as the Court had decided in Leander – that article does not embody an obligation on the State to impart information to an individual.

had been a breach of article 8.[842] The case is similar to Gaskin's, where the Court also ruled that the lack of an independent review mechanism resulted in a violation of article 8 ECHR.

Although the Court attaches great importance to the right to know about ones origin, even this right is not absolute.

> *In the Odièvre case, a child was looking for the identity of her mother. The woman had given birth anonymously. The child had the option to ask about the identity of her mother at the National council on Access to Information about Personal Origins. This organization would ask the mother for permission to disclose the information, and if this permission was given, it would disclose the information. Unlike in Gaskin, this system was held to be in line with the Convention: in this case, there was a means to balance the competing interests of mother and child.*[843]

The Odièvre case shows that even if an interest in access to certain information exists, those interests can and should be balanced against those of people who have an interest in its secrecy.

Another example is the Klass case, where the German legislation authorizing letter-opening and wire-tapping was at stake. This legislation aimed to protect the free democratic constitutional order and national security, and allowed for tapping and letter-opening without advance notification of the person concerned. However, the subject of the surveillance measures had to be notified afterwards, if this could be done without jeopardizing the goal of the surveillance. Although the fact that there was no requirement to notify the measures beforehand did raise an issue under Article 8, the Court concluded that the German legislature could in reasonableness take the view that the measures were necessary for the protection of national security and the constitutional order of Germany.[844] This shows that it is possible for the legislator to make a general assessment of an individual's right to be informed. However, after the need for secrecy was no longer evident, i.e. after the surveillance had ended, the competing interests had to be balanced again and if possible, the information had to be communicated.

These cases together show that it is unacceptable for there to be no legal regime to determine whether individuals can access information of a personal nature. However, if such a system is in place, interests should be balanced in the usual way. The right to access information is not limited to data that concerns oneself. Access to information about next of kin can also be required. In a number of cases about family law, the Court

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[842] *M.G. v. the UK* (App no. 39393/98) ECHR 24 September 2002.
[843] *Odièvre v. France* (App no. 42326/98) ECHR 2003-II. The court had to balance 'the right to know one's origins and the child's vital interest in its personal developments, and, on the other, a woman's interest in remaining anonymous in order to protect her health by giving birth in appropriate medical conditions. Apparently, the fear that women would refrain from looking for appropriate help when giving birth to an unwanted child also inspired this decision.
[844] *Klass and others v. Germany* (App no 5029/71) (1977) Series A No 28, paragraph 48.

has consistently held that interested parties must get all relevant information if their rights under article 8 are to be respected. This means that all files should be disclosed to them. In McMichael the Court established there had been a breach of article 8 because the applicants had not been given access to some relevant documents in care proceedings concerning their child.[845] In Buchberger article 8 was violated when a child was taken into care after new evidence was not disclosed to its parents.[846]

6.3.2.2 Access to information about one's environment

In the cases discussed above, the information the applicants sought was either about them or their next of kin. The Court has also recognised a right to access information that was not about the applicant, but about his environment. Information about one's environment is a broader concept than 'environmental information' in the sense of the Aarhus Convention as discussed in chapter 3. It includes all information that does not regard homo dignus himself, but rather the world in which he lives. Some of this information can be relevant for the realisation of his human rights.

In the Guerra case, the applicants were looking for information that was less clearly linked to their privacy and family life: they demanded access to information about the environmental risks posed by a chemical factory near Manfredonia, their hometown, and to emergency plans that the company was required to draw up and submit to the municipality. The factory has been classified as high risk in 1988, and accidents had already occurred in the past, resulting in the hospitalisation of one hundred and fifty people with arsenic poisoning. The Court examined whether the national authorities had taken the necessary steps to ensure effective protection of the applicants' right to respect for their private and family life. It observed that the applicants had waited in vain for information that would have enabled them to assess the risks they and their families might run if they continued to live at Manfredonia. Not only did the Court recognise that the applicants had the right to make an informed decision about the place they were living, which required access to the information they had requested, the Court also held that the municipality was obliged to collect the information, and could not justify a refusal to supply it to the applicants with the argument that the factory had never submitted any emergency plans. [847]

Even if applicants have a way to acquire information, such procedures might not be sufficiently effective to prevent a Treaty violation. The ECHR case which best illustrates the problem that the lack of a general framework for deciding whether an individual is entitled to information presents is Roche v. the UK.

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[845] *McMichael v. the UK* (App no 16424/90) (1995) Series A no. 307B.

[846] Buchberger. V. Austria (App no 32899/96) ECHR 20 December 2001. These cases shed a refreshing light on the article 6 case law and the EU case law on the rights of defence and effective judicial protection. Sometimes, a violation of the rights of defence/effective judicial protection will *also* violate a more substantive right.

[847] *Guerra and others v. Italy* (App no 14967/89) ECHR 1998-I 64.

In this case, Roche, the applicant, argued that the UK government had an obligation to allow him easy access to information about medical experiments he had taken part in at Porton Down during his time in the army. Roche feared that these experiments, which had involved his exposure to mustard gas and nerve gas, had harmed his health, leading to severe lung problems, hypertension, and a nasty skin condition. As early as 1987 he sought access to his personal test results, but also to more general information about the findings of the research conducted at Porton Down, and to information about possible follow-up investigations about the health of participants in those experiments – information that was important to him, but that was not about him. Although in the end the relevant information was released, this was only after he had initiated proceedings to get a military pension. To make the decision whether he qualified for such a pension, the Pensions Appeal Tribunal needed the information the applicant had been seeking for several years. Within the context of the pension procedure, the so-called Rule 6 procedure had been established, which allowed ex-military involved in the pension procedure access to this information, at least to the extent that the chair of the PAT deemed it relevant to the decision about the pension.

However, Roche had been looking for the information long before he initiated any administrative or legal proceeding, both through his physician and by political means. He even went so far as to initiate a hunger-strike. He argued that the UK government had a free-standing obligation to give him access to the information he sought, because his fear about the experiments affected his private life as protected by article 8 ECHR. According to Roche, this 'was a free-standing obligation (unattached to any judicial or other process)' (par. 141).

The UK government did not deny that Roche had a right to the information under article 8, but argued that he had been able to attain this information during the 'Rule 6 procedure' – the one that was part of Roche's request for a military pension – and that therefore he couldn't argue that a failure to provide him with this information had breached his rights under article 8 of the Convention.

The ECHR decided the point in favour of Roche. Article 8 contains 'an obligation of disclosure not requiring the individual to litigate to obtain it.'[848]

Why is this case important? In Roche, the UK government saw itself confronted with a request for information that the applicant made because he wanted to assuage his own fears: a very private interest indeed. According to the ECtHR, it was this private inter-

[848] *Roche v. the UK* (App no. 32555/96) ECHR 2005-X, paragraph 165. The Court distinguished Roche from the earlier Egan and McGinley case, because there the applicants had only sought the information in the context of their pension proceedings, and had been able to use the Rule 6 procedure. However, already in that case judge Pekkanen presented a dissenting opinion stating that the UK's obligation under article 8 went further than that, because the applicants' right of access should not be contingent upon the pension procedure. Rule 6 requires that the applicant convinces the president of the PAT that the information he seeks is 'likely to be relevant to any issue determined on the appeal.' (Egan & McGinley II, par. 16) If it is not relevant to the outcome of the pension procedure, the information won't be communicated.

est which should have led the UK to disclose the information to him. The fact that Roche eventually could acquire the information in a procedure before the Pensions Appeal Tribunal was irrelevant. He had no interest in the information because he wanted to use it in pension proceedings, and he could not be required to engage in such proceedings simply to get access to the information he sought. The obligation to provide Roche with the information was free-standing, independent of any administrative or legal procedure, and therefore the rights of defence or the right to effective judicial protection could not function as a safeguard.

In general, the Court performs the following review in article 8 cases where the applicant wishes access to certain information: First, the lack of information must have an effect on private or family life. The Court appears to be fairly generous in its determination of whether such an effect exists. In Guerra the applicants needed the information so they could assess the risk that they and their families were running because of their proximity to a chemical factory. In Roche, the applicant needed the information to alleviate his fears about the damage to his health that might have been caused by his participation in weapon tests. In Gaskin, the applicant sought information about his childhood. In McGinley and Egan, the applicants needed the information in the course of their pension procedure.
The ECtHR then proceeds to remind that article 8 does not only require the state to refrain from interfering with private and family life, but that positive obligations may arise from the article as well. Next, it reviews whether the state has taken the necessary steps to protect the applicants' rights. In all these cases, a total failure to communicate the information results in a violation of article 8. In Roche the Court ruled that the fact that it took very long to acquire the information the applicant desired, and the fact that he had to litigate about a marginally related issue to get even that, were a violation of his right to private life. In McEgan and Ginley v. the UK, the Court did not find a violation, because there was a procedure that the applicants could have followed to get access to the information. Although there was no absolute guarantee that they would eventually be able to acquire it that way, the existence of the procedure, in which their personal interest in acquiring the information was taken into account, was enough for the UK to fulfil its obligations under article 8. Again, the existence of a system to balance the individual interest in the information against the public interest in keeping it secret is of the essence.

6.3.3 Article 2

The ECHR has also based information rights on different Convention articles. Article 2 protects the right to life. This provision contains no exception clause, and the right to life is non-derogable, even to the extent that positive obligations are derived from it.[849]
In the Court's case law on article 2, we must discern two strands. The first is concerned with the state's duty to protect life in general. The second is concerned with the state's special responsibility for the safety of people in state custody – an issue that is similar-

[849] Callewaert 1998, p. 8-9; Haeck 2011, p. 22-23. Articles 3 and 4 are similarly non-derogable, Haeck 2011, p. 19.

ly relevant under article 3. This latter point has already been discussed in Chapter 3, since this responsibility entails a duty to communicate the results of investigations into violations of articles 2 and 3 to the general public.

Article 2, unlike most of the convention articles, explicitly contains positive obligations for the member states: everyone's right to life shall be protected by law. This is essentially an assignment for the legislator: 'shall be protected by law.' However, because the law must also be implemented, article 2 does not only address the legislator, 'but refers to a general obligation of the authorities to take appropriate measures for the protection of life.'[850] Thus, the authorities must protect the lives of individual citizens, but only if this does not jeopardise their obligations towards other citizens.[851] However, it is easy to see that when the authorities can protect people's lives simply by providing them with certain information, this will rarely jeopardise their obligations towards other citizens. We can expect to find that if the provision of information can save lives, authorities will be obliged to provide this information. Indeed, a refusal to provide access to potentially lifesaving information is an affront to justice.

That does not mean that a violation of article 2 is easily found. In LCB v. the UK, the failure to provide information did not result in a violation of article 2, because the lack of information did not bear a causal relation to the leukaemia of the applicant.[852] The Court did not believe that the release of the information would have actually contributed to saving the life of the patient.

> *The question at hand in LCB v. the UK was whether the UK authorities had done everything to prevent the applicant's life from being avoidably put at risk. She was the daughter of a soldier who had been on Christmas Island during the UK's nuclear tests, and she suffered from leukaemia. She argued inter alia that the State's failure to warn her parents of the possible risk to her health caused by her father's participation in the nuclear tests gave rise to a violation of Article 2 of the Convention. The Court did not think that the causal link between her father's exposure at Christmas Island and her leukaemia was proven, nor did it believe that monitoring of her health would have led to an earlier discovery of her illness and medical intervention such as to diminish the severity of her disease. Warning her parents would not have contributed to protecting her life, so the lack of warning could not be a violation of article 2.*

Although in this case the failure to communicate the information that had been requested did not result in a breach of article 2, the Court's treatment of the matter does suggest that if the release of the information had contributed to the protection of her life, the warning would have been required based on article 2.

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[850] Van Dijk & Van Hoof, p. 353.
[851] Van Dijk & Van Hoof, p. 353.
[852] *L.C.B. v. the UK* (App no. 23413/94) ECHR 1998-III 76.

In Osman too the causal relationship between the lack of information and the subsequent murder of a young man was unclear. The Court did acknowledge that article 2 may imply an obligation to take preventive measures to protect an individual whose life is at risk from the acts of another individual. However, for a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers, which, judged reasonably, might have been expected to avoid that risk. Although in Osman it was uncertain whether the provision of information by the authorities would have solved anything, the Court does seem to indicate that if the authorities have life-saving information available, they should communicate it.[853]

This is confirmed in the infamous Öneryildiz case in which the Court extended the scope of the right of information that it had recognised earlier in relation to article 8 of the Convention to article 2.[854]

> *In the Öneryildiz case, the inhabitants of a slum were surprised by the explosion of a nearby waste dump. The Court, referring to Osman, pointed out that 'the positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life.'[855] The Court then continued to emphasise the importance of informing people about potential dangers: "Among these preventive measures, particular emphasis should be placed on the public's right to information, as established in the case-law of the Convention institutions. The Grand Chamber agrees with the Chamber[856] that "this right, which has already been recognised under Article 8 (...), may also, in principle, be relied on for the protection of the right to life, particularly as this interpretation is supported by current developments in European standards."[857]*
>
> *The Court concludes that the authorities have failed to take the relevant measures to protect human life, even though they knew, or should have known, that lives were at risk.[858] The Court concludes that the authorities could and should have taken measures that would have prevented the explosion altogether. Informing the populace would not have been enough to avert a breach of article 2. Yet, the failure to provide the appropriate information was in itself a violation of their rights: The government has failed to provide the inhabitant of the slums with information enabling them to assess the risks*

[853] *Osman v. the UK* (App no 23452/94) ECHR 1998-VIII 95.
[854] Van Dijk & Van Hoof, p. 363, *Öneryildiz v. Turkey* (App no. 48939/99) ECHR 2004-XII.
[855] Öneryildiz, paragraph 89.
[856] See paragraph 84 of the Chamber judgment.
[857] Öneryildiz, paragraph 90.
[858] Öneryilidz, paragraph 101.

they might run as a result of the choices they had made.[859] *Those choices, based on clearly insufficient information, cannot be considered autonomous in the sense described above.*

The Öneryildiz case shows that article 2 can give rise to an obligation to inform people about life-threatening situations, although this might not be enough to fully respect their right under article 2. Although the Court speaks about the public's access to information in this case, the right to information recognised by the Court in Öneryildiz is by no means the same as the public right to access information that is recognised in FOIAs. In the latter case, the information is provided so that people can exercise their rights as citizens living in a democratic society. However, although environmental information can be supplied to stimulate democratic decision-making about such matters, this was not the goal underlying the information obligation in Öneryildiz. The information had to be supplied to protect people's right to life – not so much a public interest as a private interest that is shared by all members of the public.

The Court confirmed its ruling in Öneryildiz in Budayeva. In this case the applicants argued that the Russian authorities would have been able to save the lives of a number of villagers who had fallen victim to a mud stream by providing them with proper information about the risk they were taking when going back to their village. Earlier, they had fled the town because of such an impending mud stream. When they thought the danger had passed, a number of the villagers returned. However, to the authorities the risk of another, potentially deadly mud stream was clear. According to the applicants, the authorities had failed to do anything to inform them about this: there were no warning signs in the village or on the road leading towards it, and although the government claimed it had sent cars with speakers to spread the message, the applicants held they had never heard any warning. Again, the Court found a violation of article 2 although like in Öneryildiz, the lack of information was not the only failure on the part of the government.

6.3.4 Article 6

That people sometimes need information to secure their rights for themselves, is also apparent from the case law on article 6 ECHR. The procedural demands that flow from this article are not only applicable to procedures about fundamental rights, but rather to all procedures involving criminal charges or to establish people's civil rights. Regardless of whether a fundamental right is at stake, providing people with the ability to defend their rights can be seen as a way of showing respect for their dignity. Empowered, autonomous individuals should be respected in their capacity to secure their own rights. This also means that the rights that are derived from article 6, although procedural, are not instrumental, at least not primarily so.[860] People can only acquire information under article 6 if they have a legally recognised interest, and if they are involved in a legal procedure to secure this interest. The general public cannot acquire

[859] Öneryilidz, paragraph 108.
[860] Rights derived from article 6 are not primarily instrumental. Barbier de la Serre 2006, p. 228

the information, so the information rights inherent in article 6 are by their nature individual rights to access information.

So how does transparency feature in article 6? Article 6 guarantees the access to court, and provides everyone with the right to a fair hearing. Access to a court requires that parties have access to the judgment,[861] and requires that the addressee of a decision is made aware of it, so that he can challenge it before a court. The latter requirement is not absolute. In Klass, the applicant challenged legislation which permitted interference with correspondence and wire-tapping for security reasons, without the knowledge of the person concerned. The Court held that such legislation could be justified, but only as long as the measures were still applied. After that, there is no longer a ground for secrecy, and the person who was under surveillance should be notified of this fact. The right to a fair hearing requires observance of the principle of equality of arms. This entails that the parties must have the same access to the records and other documents pertaining to the case, at least insofar as they may play a part in the formation of the court's opinion.[862] Thus, documents that are irrelevant to the decision do not need to be included in the file. However, public authorities cannot unilaterally decide that a document is irrelevant. The ECtHR ruled that "it is immaterial whether the documents or observations at issue are important for the outcome of the proceedings,"[863] "whether the omission to communicate the document has caused any prejudice,"[864] "or whether the observations present any fact or argument which already appeared in the impugned decision. It is a matter for the parties to assess whether a submission deserves a reaction."[865] On the other hand, the ECtHR does accept that the national court assesses whether a document is relevant to the defence. In Fitt, the Court accepted the non-disclosure of information that the national court had assessed to be irrelevant to the defence. The national court's assessment was acceptable because it was well aware of all the details of the case, and was actually able to make this judgment.[866] Article 6 does not place strict demands on the way in which information is communicated, as long as there are no insurmountable obstacles which in fact amount to withholding information.

The instrumental nature of transparency in court proceedings is emphasised in Feldbrugge and Hentrich, where the ECtHR reminded of the fact that applicants have to be given the opportunity to act on the information they have received.[867] It is also evident in Van Mechelen and Others, where the Court held that if a restriction to the rule that all material evidence should be disclosed causes any difficulties to the defence, these must be sufficiently counterbalanced.[868] Transparency is not the goal, respecting the

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[861] Van Dijk & Van Hoof, p. 563.
[862] *Ernst and others v. Belgium* (App no. 33400/96) ECHR 5 July 2003, paragraphs 60-61
[863] *Kerojärvi v. Finland* (App no 17506/90) (1995) Series A 322, paragraphs 39-42.
[864] *Walston v. Norway* (App no 37372/97) ECHR 3 June 2003
[865] *Nideröst-Huber v Switzerland* (App no 18990/91) ECHR 1997-1 29, paragraph 29; Van Dijk & Van Hoof, p. 585.
[866] *Fitt v. the UK* (App no 29777/96) ECR 2000-II.
[867] *Feldbrugge v. The Netherlands* (App no 8562/79) (1984) Series A 009; *Hentrich v. France* (App no 13616/88) (1993) Series A 296 A.
[868] *Van Mechelen and Others v. The Netherlands* (App no 21363/93) ECHR 1997-III 36.

rights of defence is, and that goal might be reached in other ways as well. Article 6 is not instrumental though: the goal of the transparency obligations is respecting the rights of defence, not upholding the right that is the subject of the procedure in the context of which those rights are used. Thus, although compromises to transparency are possible, this must not rob people of the right to defend their rights. Thus, the right to access information under article 6 ECHR is not absolute. National security, the need to protect witnesses or to keep police methods of investigations secret might justify secrecy.[869] These interests must be balanced against the right to fair trial, and only restrictions that are strictly necessary are allowed.[870]

There are several ways in which authorities can try to reconcile the interests of the defence with the need for secrecy. Anonymous witnesses are acceptable if the defence can question them and there is an investigative judge who examines them and is aware of their identity.[871] It is also acceptable to provide parties with a non-confidential summary of information, as long as it allows the applicant to contest the information contained in it.[872] The Court indicated in Chahal v. the United Kingdom that the use of special advocates who act on behalf of the party to which certain information is not disclosed and who can examine and comment on this information can compensate for non-disclosure of information to the parties.[873] However, the acceptability of such arrangements will depend on the details of the procedure and the case. In A and others v the UK, the court ruled on the acceptability of special advocates, and concluded that it would depend on the specifics of the case. 'The special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to give effective instructions to the special advocate.'[874]

6.3.5 Other ECHR articles

An interesting case from the point of view of individual access to information that arose under article 3 was the Öcalan case,[875] where incorrect information was provided. In this Öcalan case the court held that 'to impose a death sentence on a person after an unfair trial is to subject that person wrongfully to the fear that he will be executed (…) the imposition of a capital sentence after an unfair trial must be considered, in itself, to amount to a form of inhuman treatment.' Although the relation with the principle of transparency is marginal, it does show that providing a person with incorrect information might actually constitute a breach of article 3.

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[869] *Doorson v. the Netherlands* (App no 20524/92) ECHR 1996-II 6, paragraph 70.
[870] *Van Mechelen and Others v. The Netherlands* (App no 21363/93) ECHR 1997-III 36.
[871] *Doorson v. the Netherlands* (App no 20524/92) ECHR 1996-II 6.
[872] *Fitt v. the UK* (App no 29777/96) ECHR 2000-II.
[873] *Chahal v. the UK* (App no 22414/93) *ECHR* 1996-V 22.
[874] *A and others v. the UK* (App no 3455/05) ECHR 19 February 2009, paragraph 220.
[875] *Öcalan v. Turkey* (App no. 46221/99) 2005-IV.

This is not the only time the Court has held that lying authorities violated the ECHR. In Conka,[876] the authorities had lied to the applicants, who were asylum-seekers from Slovakia. They were summoned to the Ghent police station, where their presence was allegedly required to 'enable the files concerning their applications for asylum to be completed.' Upon arrival, they were arrested in view of their deportation to Slovakia. The Court held this to be a violation of article 5 ECHR: 'Misleading the individuals concerned about the purpose of the notice so as to make it easier to deprive them of their liberty is not compatible with article 5.'

6.3.6 Conclusions

The ECtHR has recognised an individual right to information based on various provisions of the ECHR. Such a right exists when homo dignus needs the information to secure his fundamental rights for himself, or when the information is essential to his personal identity. The specifics of the obligation will depend on the right at stake. In the case of article 6, public authorities are generally well positioned to determine which information people will need, and there is in principle an active obligation to provide them with it. In the case of article 8, the obligation will tend to be passive, because people themselves are better suited to determine what information they need, and because public authorities trying to find out what information people require might actually violate their privacy. These rights are not absolute, but must be balanced against competing interests.

As regards the non-derogable rights enshrined in articles 2 and 3 ECHR, if the availability of information is necessary to protect those rights, exceptions should not be possible. However, if there are alternative measures that can achieve the same result as releasing information, exceptions to the right to access information might be acceptable. Such arrangements must remain exceptions to the general rule though, because respect for the autonomy of homo dignus requires that he is allowed to defend his rights himself. Even if these arrangements do not detract from the substance of the non-derogable rights, they do interfere with the procedural rights that homo dignus is entitled to.

6.4 Transparency for autonomous individuals under EU law

To the extent that EU law recognises a human right to access information, this is usually interpreted to mean there is a public right to access information. Yet, the references in EU law to transparency and access to information are very general. In the policy papers that accompanied the introduction of transparency in the EU, the Commission in particular emphasised that the origins of many of the transparency obligations that existed in the member states could be found in the desire to protect individual rights.[877] In this paragraph we will examine to what extent EU law recognises that homo dignus

[876] *Conka v. Belgium* (App no. 51564/99) 2002-I.
[877] Commission Communication 93/C 156/05 of 5 May 1993, OJ 1993, C156/5. See also Vesterdorf 1998.

has a right to transparency. Below, we will first discuss whether EU law recognises the existence of homo dignus. After that, we will discuss the various methods homo dignus has at his disposal to satisfy his information needs.

6.4.1 The EU's approach to homo dignus

We saw in chapter 3 how the ECHR and the rights contained therein affect EU law. Thus, the presence of homo dignus in the ECHR means he is present in EU law as well. However, more explicit references to homo dignus are not hard to find. Unlike the ECHR, the Charter of Fundamental Rights of the EU is explicit about the foundation of the rights contained in it. "Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice."[878] Article 1 emphasises the importance of human dignity, which must be both respected and protected. In addition, the Charter contains rights that correspond to the ones discussed in the previous paragraph, which are not only rooted in human dignity, but also require transparency: article 2 guarantees the right to life, article 7 the respect for private and family life, and article 47 the right to a fair trial. In addition, article 8 guarantees the protection of personal data, and includes a right to access those data. Article 41 guarantees the right to good administration and includes the right to access one's file and the duty to give reasons, and article 48 guarantees the rights of defence in criminal matters. Since the Charter became binding in 2009, the number of references made to it in the case law of the Court has been increasing.[879] Thus, the Charter offers a clear opportunity to further develop an approach of transparency as a human right founded in human dignity. The ECJ has already acknowledged human dignity as a general principle of law in the Omega case, where it held that "the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law."[880]

6.4.2 Regulation 1049/2001 as a tool for homo dignus

The most prominent instrument that people can use to get access to information is Regulation 1049/2001. As we have seen, this regulation targets the citoyen. But although the regulation is clearly not designed to ensure the rights of homo dignus, there is nothing that prevents him from using it to that effect: Regulation 1049/2001 bestows a right to documents held by the EU institutions upon all EU citizens. Applicants do not have to give reasons for wanting to access a particular document, and this allows people to use the Regulation both for its original purpose, which is to increase the democracy of the EU and the accountability of its institutions, but also for any number of personal reasons. If there are no opposing interests, homo dignus will be given access

[878] Preamble to the Charter of fundamental rights of the European Union, 2000/C 364/01.
[879] Pahladsingh & Van Roosmalen 2012, p. 56.
[880] Case C-36/02, *Omega Spielhallen und Automatenaufstellungs- GmbH v. Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609, paragraph 34.

to the information he is after, and the regulation is sufficient to guarantee his rights, even if that was never its aim. Matters become more complicated when the exceptions from article 4 come into play. The exceptions in article 4(1) are absolute, but if one of the exceptions from article 4(2) or 4(3) occurs, the information should still be released if there is an overriding public interest in its disclosure. In other words, the interests in openness should be balanced against those in secrecy in every individual case. However, private interests in the disclosure of the documents cannot be taken into account in this balancing exercise. Whether a document is released is determined exclusively by reference to its importance for the democratic process and the realisation of other public interests. Whether homo dignus is entitled to the information is irrelevant.

The disregard of the interests of homo dignus is not a characteristic of the principle of transparency, but a consequence of the focus on the democratic process in Regulation 1049/2001. This is shown by the early case law of the ECJ, where it ruled that if different interests had to be balanced to make a decision on the disclosure of a particular document, the interests of the applicant had to be taken into account as well.[881] That it is no longer possible under Regulation 1049/2001 to take personal interests into account is not necessarily a problem, because as we have seen in the case law of the ECHR, it is possible to have separate regimes for public access to information and private access to information. Indeed, there is a convincing rationale not to take the identity of the applicant into account. In Sweden, if a request for access to an official document is made, the public authorities are not allowed to ask for the identity of the person making the request. If he wants to, he can remain anonymous. '*The purpose of the Swedish law in this respect is to prevent the public authorities from in any way registering or even harassing and thereby punishing those who want to exercise their right to see official documents*.'[882] Although such harassment might not appear to be a real risk in 'modern, democratic societies', an investigation from the Open Society Justice Initiative showed that the information requests from members of vulnerable groups, i.e. racial, ethnic, and religious minorities, as well as those of socio-economically less privileged persons who identified themselves as such were ignored twice as often as often as those of other applicants.[883] Regardless of the defensibility of the approach taken in the Regulation, it is a fact that homo dignus is entitled to specific categories of information under the ECHR. It is quite possible that this includes information that can justifiably be denied to the citoyen. It is not necessary to provide access to homo dignus in the framework of Regulation 1049/2001, but the interests of homo dignus must be taken into account in one way or the other when deciding on requests for information, at least when he himself desires so.

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[881] Driessen 2005, p. 690.
[882] Österdahl 1998, p. 339.
[883] http://www.justiceinitiative.org/db/resource2?res_id=103818 and http://www2.ohchr.org/english/issues/development/governance/docs/Coliver.pdf; Kierkegaard 2009, p. 6.

6.4.3 The DPD

One of the options homo dignus has to acquire information that is especially relevant to him is provided in the Data Protection Directive (DPD). The DPD, according to its preamble, aims to give effect to the case law of the Strasbourg Court on Article 8 ECHR. It now also effectuates article 8 of the Charter, which gives everyone the right to the protection of personal data concerning him or her, and, in paragraph 2, the right to access data which has been collected concerning him or her. Still, homo economicus is right around the corner: the DPD aims to ensure the free flow of data through the Union, while at the same time granting a high level of protection. The Directive sees no contradiction between those goals: "Data-processing systems are designed to serve man; they must, whatever the nationality of residence of natural persons, respect their fundamental rights and freedoms, notably the right to privacy, and contribute to economic and social progress, trade expansion, and the well-being of individuals."[884]

The scope of the information that is regulated under the DPD is limited: it only concerns personal data. Article 2 sub (a) DPD defines personal data as any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, psychological, mental, economic, cultural or social identity. As we have seen this covers some of the cases in which the Strasbourg Court acknowledged a right to information,[885] but not all.[886] Information about the environment in which people function is not included, even though the availability of such information can be essential to their well-being.

The DPD sets conditions for the processing of data, and limitations to the circumstances where data processing is allowed. The idea of homo dignus as an autonomous agent is clearly reflected in the manner in which the DPD tries to achieve its aims. It does this by giving a measure of control over data processing to the data subject, and thus requires said data subject to be informed about how his personal information will be used. Article 12 of the Directive gives people a right to access their personal data. Every data subject has the right to obtain from the controller confirmation as to whether or not data relating to him are being processed. In addition he has the right to information concerning the purpose of the processing, the categories of data concerned, and the recipients or categories of recipients to whom the data are disclosed. Communication to him must be in an intelligible form, and must contain details of the data undergoing processing and of any available information as to their source. Lastly, data subjects have the right to acquire knowledge of the logic involved in any automatic processing of data concerning them at least in the case of the automated decisions referred to in article 15(1). Because processing includes storing, this means data subjects have a right to access all information held about them by the data controller. The information

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[884] Reictal 2 DPD.

[885] *Gaskin v. the UK* (App no. 10454/83) (1989) Series A no. 160; *M.G. v. the UK* (App no. 39393/98) ECHR 24 September 2002.

[886] *Guerra and others v. Italy* (App no. 14967/89) ECHR 1998-I 64; *McMichael v. the UK* (App no. 16424/90) (1995) Series A no. 307B; *Roche v. the UK* (App no. 32555/96) ECHR 2005-X.

should be communicated without constraint, at reasonable intervals, and without excessive delay or expense. Note that the communication of the data themselves should be in an intelligible form, so that there is an obligation to provide information that meets a certain quality standard.

In addition to a right to access their personal data, data subjects also have a right to be informed about how their data are processed. This information allows them a measure of control over how their data are used, and to control their informational identity. Article 10 DPD places an obligation on the Member States to ensure that controllers inform data subjects about the identity of the controller and his potential representatives as well as the purposes of the processing for which the data are intended. Additional information that should be communicated includes but is not limited to: the recipients or categories of recipients of the data; whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply; and the existence of the right of access to and the right to rectify the data concerning him, at the time the data are being collected. In those cases where the data were acquired from another source than the data subject him- or herself, article 11 applies. Again, the data controller is required to inform the data subject of his own accord, no later than the time when the data are first disclosed, of the identity of the above-mentioned issues. Based on article 14, people also have the right to be informed before data are disclosed for the first time to third parties – or used on their behalf – for the purposes of direct marketing, and to be expressly offered the right to object to such disclosure or usage.

Although there is a clear intrinsic value in providing information about personal data and their processing, because people feel that they own such data, there is another purpose as well. Being informed about the whereabouts of one's personal data is a precondition for exercising control over them, and the DPD does indeed award data subjects a measure of control over their own data. According to Hansen, the provisions that require data controllers to inform data subjects about the processing of their data flow from the principle of transparent data processing, which serves to move some of the power residing with data controllers back to the data subjects. Yet, although transparency can contribute to this goal, it is not sufficient.[887] Indeed, the Directive goes further than mere transparency obligations where data subjects' permission is required for the processing of their data (most of the time, article 7), and where they are allotted the right to object to data processing (article 14), and the right to correct incorrect and incomplete data (article 12 sub b). These provisions confirm that the conception of homo dignus as an autonomous individual has inspired the obligations in the DPD.

6.4.4 Transparency and gender equality

One of the fields where the ECJ acknowledged the importance of transparency relatively early is that of gender equality. The right to equal pay and equal treatment is enshrined in art. 157 TFEU, and has been further regulated in the equal treatment and equal pay directives.[888] The ECJ has been using the notion of transparency as an

[887] Hansen 2008, p. 207.
[888] Council directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal

interpretive tool in cases concerning these directives since 1985. The first time this happens is in *Commission v. Germany*. In this case, the Court ruled that Germany had failed to transpose the directive correctly. The Commission argued that Germany had failed to correctly transpose the equal pay and equal treatment directives, because it had not adopted the necessary measures to create even a minimum of transparency with regard to the application of the Directive. By doing so, Germany had prevented the Commission from exercising effective supervision and had made it more difficult for any person wronged by discriminatory measures to defend their rights.[889] In a similar ruling the Court held that the recruitment for police corpses in France lacked transparency, and therefore violated the equal treatment directive.[890] In both these cases the Court derived the transparency obligation from the provisions of the equal treatment directive. The ECJ clarified the relationship between transparency and the general principles of EU law a year later, in its Danfoss ruling.[891] Danfoss paid all its employees the same basic salary, plus a supplement based on a number of factors, including seniority, training and mobility. The employees didn't know how these factors influenced their wages; they only knew the total amount of their supplemental pay. That meant, according to the Court, that those who are in a particular wage group are unable to compare the various components of their pay with those of their colleagues who are in the same wage group. The Union had established, though, that over a period of 4 years female employees were paid 6.85% less than their male co-workers. The ECJ ruled that under those circumstances it is up to the employer to prove that his practice is not discriminatory. If it were otherwise, employees would be deprived of any effective means of enforcing the principle of equal pay before the national courts.[892] Such a state of affairs would violate the principle of effective judicial protection, which, as the ECJ had ruled earlier, article 6 of the directive implemented.[893] Moreover, the reversal of the burden of proof was necessary for the effective implementation of the principle of equality.[894] Thus, transparency is necessary to comply with both the principle of equality and the principle of effective judicial protection. The importance of transparency for effective judicial review is confirmed again in *Barber,*[895] where the ECJ relates transparency directly to both the principle of effective judicial review and article 157 TFEU. Indeed, the phrase 'genuine transparency, permitting an effective review' has become one of the Court's

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treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, *OJ L 039, 14/02/1976, p. 40-42*, amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions *OJ L 269, 5.10.2002, p. 15–20;* and Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, *OJ L 45, 19.2.1975, p. 19–20.*

[889] Case 248/83, *Commission v. Germany* [1985] ECR 1459, paragraph 39.

[890] Case C-318/86, *Commission v. France* [1988] *ECR* 3559, paragraph 25.

[891] Case C-109/88, *Danfoss* [1989] ECR 3199.

[892] Danfoss, paragraph 13.

[893] Case 222/84, *Johnston* [1986] ECR 1651.

[894] Danfoss, paragraph 14.

[895] Case C-262/88, *Barber* [1990] ECR I-1889.

staples.[896] Thus, the Court's case law on transparency in the context of the gender directives shows its importance in ensuring compliance with EU legislation guaranteeing fundamental rights. Transparency is required for effective judicial review as well as for supervision by the Commission. And although the ECJ has never spoken of 'the principle of transparency' in these cases, the parties before it have,[897] as have several legal scholars.[898]

6.4.5 Other legislation targeting homo dignus

The DPD is not the only piece of legislation that provides a right to transparency to homo dignus. The telecom directives that we encountered in the previous chapter contain a number of obligations to inform homo dignus rather than homo economicus. On such obligation can be found in Article 26 of the Universal Service Directive, in which paragraph 4 determines that Member States shall ensure that citizens are adequately informed about the existence and use of the single European emergency call number '112.' This obligation has nothing to do with homo economicus and his contributions to the market, but instead aims to ensure that homo dignus is capable of taking action when he or his fellow man face a life threatening situation. Another example can be found in the Aarhus convention and the legislation that implements it. The Regulation's preamble does recognise that it is indebted to the Strasbourg Court's case law on article 8 ECHR, but most of the transparency obligations focus on public access to information. The implementing legislation also grants a public right to access information, and it aims to further awareness of environmental matters, as well as a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment. Like with the FOIAs, anyone can request information, also legal persons, and nobody has to state an interest in the information they request.[899] Yet, not everyone has equal information rights under Aarhus: article 7(4) obliges Member States to take the necessary measures to ensure that, in the event of an imminent threat to human health or to the environment, whether caused by human activities or natural causes, all information held by or for public authorities which could enable the public likely to be affected to take measures to prevent or mitigate harm arising from the threat is disseminated, immediately and without delay. In this case, only 'the public likely to be effected' needs to be informed. This obligation reflects the ECtHR's judgments in Öneryildiz and Budayeva, and forces the public authorities to take the fundamental interests of people likely to be affected by a particular hazard into account, but the obligation is fairly narrow. It only applies to the active provision of information, not to information supplied upon request. The obligation in Aarhus is of course commendable, but it is likely that the people who are best suited to determine whether they need information to realise their fundamental rights, are the people who need the information, not the public authorities that hold the information. Taking into consideration the case law of the ECtHR, it is strange that their arguments

[896] See Cases C-226/98; C-243/59; C-285/02; C-300/06 (AG); C-381/99.
[897] Opinion of AG Jacobs in Case C-236/98, *Jämställdhetsombudsmannen v. Örebro läns landsting* [2000] ECR I-2189, paragraph 26.
[898] Freedland 1993, p. 498-500; McCrudden 1993, p. 349.
[899] Article 3(1) Aarhus Convention.

cannot be taken into account by public authorities who decide upon requests to access information.

No doubt there are other isolated duties to inform homo dignus scattered throughout EU legislation. It goes beyond the scope of this research to give a comprehensive overview of all those obligations. However, the existence of such obligations does not change the fact that there is no general framework that allows the interests of homo dignus to be taken into account when deciding whether to make information available to him. We will see in the next paragraphs that there are indications that despite the existence of more specific provisions, this does pose a problem.

6.4.6 Access based on legal principles

Homo dignus is not limited to legislation to realise his rights. There are a number of legal principles that guarantee the rights of homo dignus, many of which have now been codified in the Charter. In paragraph 4.3.1 we encountered the principle of legal certainty, which requires that those subject to the law know what the law is, to enable them to plan their actions accordingly. This benefits homo dignus the same way it benefits homo economicus, and breaches of the principle of legal certainty violate the interests of homo dignus every bit as much as those of homo economicus. An extensive discussion of legal certainty from the perspective of homo dignus will not add much to the discussion in chapter 4 though. In this chapter, I would like to focus on a number of different principles: the right to good administration, which has been codified in article 41 of the Charter[900] and contains a right to be heard and a right to have access to one's file, as well as a right to communicate with the EU institutions in any of the languages of the Treaty and an obligation incumbent on the institutions to give reasons for their decisions; the right to an effective remedy and a fair trial, which has been codified in article 47; and the rights of defence in criminal matters which has been guaranteed in article 48.

A quick note: the procedures in which these principles are applied do not need to be concerned with dignus rights per se. They apply just as well to a procedure about a refusal to grant a subsidy for solar panels, which is not a fundamental right. Nevertheless, it is the respect for homo dignus as an autonomous individual, capable of making his own decisions and fighting for his own rights, that requires the observance of those principles, even in those kinds of procedures.[901]

[900] Article 41 is not applicable to the member states, but the general principles it codifies still apply. Case C-482/10 *Cicala* [2011] ECR 0000.

[901] See Barbier de la Serre 2006, p. 240, who observes that "in many instances, moral harm will trigger the exercise of the rights of the defence, whereas concrete economic loss, however considerable, will not."

6.4.6.1 The rights of defence

The principle of the rights of defence is applicable in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person[902] and includes a right to be informed.[903] Compliance with this principle requires that the party concerned is informed of the evidence adduced against it to justify the proposed administrative sanction[904] and that he is afforded the opportunity to effectively make his views on that evidence known.[905] Observance of the rights of defence requires that future addressees of a decision are given access to the administrative file before the decision is taken, when their input can still avert a negative outcome. It is essentially a participation right in the sense that it allows people to try to affect the outcome of an ongoing procedure, but one that targets homo dignus rather than the citoyen, because it only allows for the defence of individual rights.[906] By now, these rights have been codified in article 41 of the Charter, which includes the right of every person to be heard before any individual measure which would affect him or her adversely is taken, and the right to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy. Again, we see that the right to be informed serves a higher purpose, i.e. allowing the person involved in the proceedings to defend his rights to the best of his ability. This should not be confused with what is traditionally seen as the instrumental function of the principle: the rights of defence aim to improve the quality of administrative decision making. Yet they have a more intrinsic function, 'akin to a human right' as well.[907] The importance of transparency to the realisation of the latter function is clear when we consider the nature of homo dignus: as an autonomous being, he should be given the opportunity to defend his rights as a matter of respect for his capacity to do so. The relevant information must be communicated before the adverse decision is made, to allow the affected party to prevent any negative consequences of the decision in advance. That means that usually, an affected party must be informed that proceedings against him have been initiated, and of the reasons for the decision to initiate them.[908] Although originally affected parties only had access to a summary provided by the Commission, in the 1980s the Commission proved willing to allow them full access to the file.[909] That meant it was now up to the defendant to decide which information was relevant to the case, and no longer to the Commission, which must grant access to all documents that are relevant to the defence, both incriminating and exculpatory.[910]

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[902] Case C-234/84 *Belgium v. Commission* [1986] ECR 2263, paragraph 27; Case C-135/92 *Fiskano v. Commission* [1994] ECR I-28885, paragraph 29; Case C-32/95 P *Lisrestal* [1996] ECR 5373.
[903] Jans et al. 2011; article 41 CFREU.
[904] Joined cases C-48/90 and C-66/90 *Netherlands v. Commission* [1992] ECR I-565, paragraph 45.
[905] *Netherlands v. Commission,* paragraph 46.
[906] Although the right to be heard may also apply in procedures that are not initiated against a person, for the right to be heard to apply a decision must affect his interests. Tridimas 2006, p. 378-379. Case C-315/99 P *Ismeri* [2001] ECR I-5281.
[907] Tridimas 2006, p. 371. See also Case C-349/07 *Sopropé* [2008] ECR I-10369, paragraph 49.
[908] Case 102/77 *Hoffmann-La Roche* [1978] ECR 1139, paragraph 9-11.
[909] White 2009, p. 60.
[910] Joined cases C-203, 2-4, 211, 217 and 219/00 P *Aalborg Portland* [2004] ECR I-123, paragraph 68.

The transparency obligations derived from the principle of the rights of defence are not absolute. They can be restricted if 'the restrictions correspond to objectives of a general interest pursued by the measure in question.'[911] Such restrictions must be proportionate with regard to the objective pursued, and 'an intolerable interference which infringes upon the very substance of the rights guaranteed' is not allowed.[912] Concerns about public health,[913] about the security of the EU or its member states, or their conduct of international relations[914] might justify making an exception. However, in such cases information should be granted at a later moment.[915] The right to confidentiality of business secrets and other confidential information might lead to certain information being removed from the file before it can be accessed.[916] However, such information cannot be relied upon to justify a decision that adversely affects the interests of the party.[917] In addition, exceptions are permitted when the purpose of the decision to be taken would or could be jeopardised if the right to be heard would be observed. Mere practical concerns are not enough to set the principle aside, though.[918] Finally, the right to access the file does not apply to confidential information and internal documents.[919] If the effectiveness of a measure depends on the element of surprise, prior notification of the decision is not required.[920] However, interested parties must be informed of the evidence adduced against them either concomitantly with or as soon as possible after the adoption of the initial decision.[921]

If documents in the file are confidential, public authorities can deal with this in a number of ways. They can decide not to rely on the information as evidence, and base their decision solely on non-confidential information. They can also choose to provide defendants with a non-confidential version or summary of the information. The evidential value of such documents may be diminished. It can also choose to provide a list of documents in the file. The parties concerned can then request access to specific documents that it believes will be relevant for its defence.[922]

6.4.6.2 Effective judicial protection and the obligation to state reasons

The right to effective judicial protection includes a right of access to the courts and a right to obtain effective judicial review before both the national and the EU courts,[923]

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[911] Case C-28/05 *Dokter* [2006] ECR I-5431.
[912] Case C-28/05 *Dokter* [2006] ECR I-5431.
[913] Case C-28/05 *Dokter* [2006] ECR I-5431.
[914]Case C-266/05 P *Sison* [2007] ECR I-1270; joined cases C-402/05 P and C-415/05 P, *Kadi* [2008] ECR I-6351.
[915] Case C-266/05 P *Sison* [2007] ECR I-1270.
[916] White 2009, p. 60; Case T-7/89 *Hercules* [1991] ECR II-1711, paragraph 53-53.
[917] White 2009, p. 61; Tridimas 2006, p. 386.
[918] Case C-32/95 P *Lisrestal* [1996] ECR I-5373, paragraph 21.
[919] Cases 43 and 63/82, *VBVB and VBBB v. Commission* [1985] ECR 19, paragraph 25.
[920] Joined cases C-402/05 P and C-415/05 P, *Kadi* [2008] ECR I-6351.
[921] Sison, paragraph 176.
[922] Case T-410/03 *Hoechst* [2008] ECR II-881, paragraph 154.
[923] Tridimas 2006, p. 443. Case C-279/09 *DEB* [2010] ECR I-13849.

and has been enshrined in article 47 of the Charter.[924] This right is closely linked with the duty to give reasons, since it requires national authorities to give reasons to justify decisions which affect EU rights adversely.[925] Reasoned decisions allow the European courts to exercise their powers of review and allow affected parties to defend their rights before the Courts. The obligation to state reasons requires an adequate statement of the reasons on which a decision is based:[926] all the legal and factual elements on which the decision is based must be mentioned as well as the considerations which have led to the adoption of the decision.[927] The purpose of this obligation is to allow the addressee to determine whether the decision complies with the law, and to decide whether he wants to initiate proceedings against it.[928] In addition, it enables the court to review the decision.[929] The reasons should be given at the same time the decision is issued; a delay is not acceptable because this hampers the addressee's ability to challenge the decision. If the addressee has not been heard the obligation to state reasons is even more important, because it provides the only opportunity to challenge the decision.[930] Again, overriding considerations concerning the security of the EU and its member states, or the conduct of their international relations, can set the obligation aside.[931] However, the reviewing court must get access to all documents.[932] Like the ECtHR, the European courts have ruled that the court can use techniques to compensate for non-disclosure.[933] It does not elaborate on the techniques, but only refers to the ECHR decision in Chahal.

People are not only entitled to effective judicial protection against administrative decisions that address them. Thus, reasoned decisions and access to the file are not always sufficient to ensure they have access to a court. Sometimes, to estimate whether they can bring a case before a court that has a reasonable chance of success, people need information about decisions that do not concern them. An example where an applicant sought access to government held files for the purpose of civil proceedings is Pfeiderer, a German case about access to documents provided in the course of a leniency procedure with the purpose of using them in liability proceedings. The ECJ ruled that "the provisions of EU law on cartels, and in particular Regulation 1/2003, must be interpreted as not precluding a person who has been adversely affected by an infringement of European Union competition law and is seeking to obtain damages from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement. It is, however, for the courts and tribunals of the Member States, on the

[924] The Court ruled explicitly that article 47 is a reaffirmation of the principle of effective judicial protection, Case C-221/09 *AJD Tuna* [2011] ECR I-0000, paragraph 54.
[925] Tridimas 2006, p. 445; Case C-340/89 *Vlassopoulou* [1991] ECR I-2357, paragraph 22.
[926] Tridimas 2006, p. 408.
[927] e.g. joined cases 240, 242, 261, 262, 268 and 269/82 *Stichting Sigarettenindustrie v. Commission* [1985] ECR 3831.
[928] Case 24/62 *Germany v. Commission* [1963] ECR 63, p. 69.
[929] Tridimas 2006, p. 409.
[930] Sison. See also Tridimas 2006, p. 409, who suggests that a lack of adequate reasoning can be compensated if information was already communicated in the course of the proceedings.
[931] Joined cases C-402/05 P and C-415/05 P, *Kadi* [2008] ECR I-6351.
[932] Case T-85/09 *Kadi II* [2010] ECR II-5177.
[933]Joined cases C-402/05 P and C-415/05 P, *Kadi* [2008] ECR I-6351, paragraph 344.

basis of their national law, to determine the conditions under which such access must be permitted or refused by weighing the interests protected by European Union law."[934] The Court's ruling shows that there was no obligation under EU law to give the information to the applicant. It was left up to the national court to take the final decision, although there is an obligation to take the aim of the cartel rules into account when deciding upon the request. Leaving the actual decision to the national court fits in well with the principle of procedural autonomy, and is an approach that is also reflected in Varec, where the Court left the decision of whether the confidentiality of business secrets should prevail over the right to a fair trial in a concrete case to the national court.[935] To ensure that the rights of the party who provided the information to the authorities are taken into account, the authorities must consult this party before releasing the information.[936]

6.5 Discrepancies between human rights theory and EU law

Based on human rights theory, homo dignus is entitled to certain information. Both the ECHR and EU law confirm this theory. Yet, there are some discrepancies. EU law does not always explicitly award an information right where the ECtHR has ruled that one exists, and a general mechanism that allows private interests to be taken into account when deciding on requests for information is lacking. On the other hand, the Charter of Fundamental Rights does explicitly recognise human dignity as the basis for the rights included in it, which means it is relatively easy to interpret these rights as requiring access to information.

The information rights inherent in article 6 ECHR correspond roughly to the rights of defence in the EU legal order. The precise relation between those rights is discussed extensively in other works.[937] Substantively, there are no real problems here: the information that should be available to parties in legal proceedings under article 6 ECHR will be available under EU law as well. EU law even provides wider protection for individuals because the rights of defence apply in purely administrative proceedings as well. The information rights in the DPD go some way in satisfying the requirements of article 8 ECHR, but exclude all information that is not personal data. Any rights to such information as well as the information rights derived from article 2 ECHR are not given effect in EU law in any comprehensive way. In principle, this right is covered by the Charter, but it is still unclear how EU law ensures that this right is given effect.

Even if there is a right to access information, the specifics of that right might mean it is not sufficient to meet the standard set by the ECtHR. This is illustrated by the numerous rulings in the Sison case, a tragedy in five acts that started on the 28th of October 2002, when the Council saw it fit to include Jose Maria Sison in a list adopted pursuant to Regulation 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism. The list was updated several

[934] Case C-360/09 Pfleiderer [2011] ECR 00000, paragraph 82.
[935] Case C-450/06 *Varec* ECR [2008] I-581.
[936] Varec, paragraph 54.
[937] Douglas-Scott 2006.

times, and each time Sison's name remained on there. Sison was never heard about the decision before it was taken, nor was he notified of it afterwards. He learned of his inclusion in the list only after he attempted to pay for his groceries, when his bank card was refused in the local super market. Sison made several requests for access to information pertaining to the case. The Council refused all requests and Sison appealed against those decisions to the CFI[938], and later to the ECJ.[939] As we shall see below, both courts upheld the refusal. However, Sison also applied to the CFI for the annulment of Council Decision 2002/974/EC of the 22nd of December 2002, the first decision which maintained him on the list after his initial inclusion therein. He argued that the Council had violated the principles of the rights of the defence and effective judicial protection, and the obligation to give reasons. This time, the CFI fully agreed, and it annulled the contested decision, essentially because Sison did not receive the information he was entitled to.[940] At the time the CFI decided the refusal to give access to the documents under Regulation 1049/2001 was justified, Sison had already started the proceedings to have the decision to put his name on the list annulled, so it was a given that he would eventually be entitled to access the information. The ECJ in particular seemed to recognise in its judgment that its hands were tied. It went to some length to emphasise that its scope for review was limited, and that the Council enjoyed a wide margin of discretion in the application of article 4(1) of the Regulation. Private interests cannot be considered in the contest of a request for information based on Regulation 1049/2001 to begin with, and even if they could, such interests could not lead to information harming the article 4(1) interests being made public. Sison tried to dissuade the Court with the argument that his rights under the ECHR were violated by the Council's refusal to allow him access to the information he has requested, but his argument that article 6 of the ECHR required him to have access to certain information was dismissed by the courts. They did not deny that he did indeed have a right to this information, but this matter was to be reserved for the proceedings about the decision to place him on the list. Regulation 1049/2001 did not leave any room to consider the private interest the applicant may have in release of the information he requested[941] and so 'even if such a right entailed access to documents held by the Council, it is (…) sufficient to point out that such a right could not be exercised (…) by having recourse to the mechanisms for public access to documents implemented by Regulation 1049/2001.'[942] The ECJ does not deny the possibility that Sison does have an individual right to the information he seeks. However, making a request for access to that information based on Regulation 1049/2001 is not the appropriate way to realise this right. For Sison, it turned out that there was another way to enforce his right, which the CFI did deem 'appropriate'.

[938] Joined cases T-110/03, T-150/03 and T-405/03, *Sison* [2005] ECR II-1429.
[939] Case C-266/05 P *Sison* [2007] ECR I-1270.
[940] Case T-47/03 *Sison* [2007] ECR II-73. In response, the Council took a new decision. Again, Sison's name remained on the list, this time with a much more extensive motivation. Sison appealed again.
[941] ECJ paragraph 45.
[942] ECJ paragraph 48, CFI paragraph 52-55.

In the case for annulment of Decision 2002/974, Sison argued that by not communicating the information he required, the Council had breached the principles of the rights of the defence and effective judicial protection, and the obligation to state reasons. The CFI finds an infringement of the principles of observance of the rights of the defence and the obligation to state reasons, despite the fact that here too, the Court recognises that the Council enjoys a broad discretion and the Court's review must be restricted to checking that the rules governing procedure and the statement of reasons have been complied with, that the facts are materially accurate, and that there has been no manifest error of assessment of the facts or misuse of power. The court holds that the evidence adduced against the party concerned should be notified to it, either concomitantly with or as soon as possible after the initial decision to freeze funds, unless this is precluded by overriding considerations concerning the security of the EU or its member states, or the conduct of international relations. Subsequent decision to freeze funds must be preceded by notification of any new incriminating evidence and a hearing.

This case shows that the outcome balancing exercise that is necessary when deciding upon a request for information can be different when individual interests are taken into account. The obligation to communicate information based on the rights of defence and the duty to give reasons is subject to the same reservations as the obligations under the principle of the rights of the defence: overriding considerations concerning the security of the EU and its member states, or the conduct of their international relations, can set it aside. Under Regulation 1049/2001, it is a foregone conclusion that these interests trump the right to access information. Yet, the principle of the rights of the defence required that the Council communicated information which it was allowed to keep secret under Regulation 1049/2001. The fact that the CFI eventually ruled that the information should be communicated is far from satisfactory though. The information should have been communicated to Sison far earlier than it was, and although he took legal steps to acquire the information at an earlier stage, his attempts were frustrated by the rigid framework of Regulation 1049/2001 which does not allow the Court (or the Council) to take individual interests into account.

The ECtHR ruling in Roche sheds similar doubts on the usefulness of using the principles of the rights of defence and effective judicial protection as a means to secure the information rights of homo dignus. The Court rejected the argument of the UK government that Roche could gain access to the information he sought in the context of his pension proceedings, and held that article 8 included a right to information for which the applicant should not have to litigate. Thus, even though the information that homo dignus is entitled to under article 8 may overlap with the information he is entitled to under the general principles of EU law, that is not sufficient to ensure compliance with article 8. This should not be surprising. The rights of defence and the principle of effective judicial protection allow individuals to defend their rights vis à vis the government: they help to hold public authorities accountable for unjustified infringements of the rights of homo dignus, and that affects the time at which the required information should be communicated: after the relevant decision has been taken.[943] Under article 8

[943] Either the decision that an individual can appeal or the decision to initiate proceedings that may result in adverse consequences for an individual.

on the other hand, people are entitled to information that they need to exercise their autonomy independently of their relation with public authorities. They need the information before they take autonomous decisions, not at some random moment determined by their potential engagement in administrative or legal proceedings.

6.5.1 The principle of transparency as a safety net

The lack of possibilities in EU law to take individual interests into account when deciding whether to communicate information to someone can prove problematic, but there is an obvious solution: we can turn to the principle of transparency. The principle of transparency requires that where the realisation of a legal value protected by EU law requires transparency, transparency is provided. Thus, when respect for homo dignus requires transparency, there is a legal obligation to provide transparency. The principle of transparency can be used as a safety net, where more specific rules to give effect to the rights of homo dignus are lacking.

One case that clearly shows that the principle of transparency can be used to solve the problems caused by a lack of a general framework to decide on requests for information that are primarily motivated by personal consideration is the Fisher case. In that case, the Fishers were looking for access to data in the course of administrative proceedings. Although there was no apparent legal basis to grant the information to the applicants, it was evident to both the AG and the ECJ that they should have had access.[944]

> *The Fishers had made a request for aid for which they had to provide certain information to the authorities. They did not have this information, although the authorities themselves did. The latter refused to provide the information to the Fishers, which resulted in an incorrect application for the aid, and they were later fined. They argued that the authorities should have provided them with the information needed to fill out the application form prior to their application. They were entitled to the information anyway, albeit at a later point in time, based on the principle of the rights of the defence, which came into play upon their being fined.*
> *AG Alber bases his analysis of the case on the principle of transparency. According to this principle, access to information can only be restricted if special grounds of justification are shown to exist. Such grounds can't be assumed to exist a priori. A detailed balancing of interests is required.*[945] *Alber executes this balancing test taking into regard the applicants' interests as they can be derived from the Regulation. So, despite his reliance on the principle of transparency, there is no general right of access to this information. Rather, the extent of this right is determined by the specific provisions of the Regulation, and the specific interests of the applicant.*

[944] Case C-369/98 *Queen v. Fisher* ECR 2000 Page I-06751.
[945] Fisher, paragraph 44.

The ECJ does not rely on the principle of transparency in its judgment, instead basing its arguments on the Regulation itself and its preamble. Employing a teleological interpretation – the purpose of the Regulation is best served by disclosing the information to the applicants – the Court concludes that the legitimate interests of the applicant must be balanced against those served by data protection. For the relevant criteria, the Court refers to the data protection directive, although this had not entered into force yet.

The Fisher case shows how the principle of transparency can evolve to fill the gap in the FOIAs, and serve as the legal basis to allow individuals access to information that is relevant to them personally.

Indeed, the application of the principle of transparency in cases concerning homo dignus is easier than in the cases discussed in the previous chapter. It is not that difficult to determine whether transparency contributes to autonomy, and it is clear that there should be a legal obligation to provide transparency where this is necessary to ensure that human dignity is respected. Unlike in economic law, where the principle of transparency does not unconditionally serve the interests of homo economicus, and the effects of providing transparency on the functioning of the market should be taken into account as well (a daunting task indeed), the consequences of providing transparency to homo dignus do not need to be considered, because doing so is proper in itself.

6.6 Evaluation and conclusions

Like the citoyen and homo economicus, homo dignus profits from transparency. Where the principle of transparency as a foundation of FOIAs allows people to develop in their capacity of citizen, and the principle of transparency as developed in economic law allows people to flourish as economic actors, the principle of transparency as it can be developed based on human rights law protects people in their capacity as free, dignified individuals. The normative argument for transparency is derived from the very concept of human dignity. Human beings are entitled to certain rights simply by virtue of being human. Homo dignus thus provides an important impetus for the transparency debate, because it reminds us that in the development of the principle of transparency, people are more than just their social roles as citizen, consumer, or producer.

Based on human rights theory, where homo dignus is often characterised by his capacity for autonomous decision-making, one can conclude that people have a right to the information they need for autonomous decision-making. Because autonomy, in a legal context, requires that people can make free and informed decisions in areas that are fundamentally important to the development of their personality, they should have a right to information required for this specific subset of decisions. The choices that are of fundamental importance can be derived from the case law of the ECHR and include at least choices about family life, intimate relationships, sexual identity, the home, and our immediate environment. In addition, a right to access information can sometimes

be derived from other rights, if such information empowers people to realise those rights for themselves or to defend them vis à vis an interfering government.

At the moment, EU law does not cater well to the information rights of homo dignus. Access to information for individual is not regulated in a comprehensive way. There is no general framework for balancing the interest that an individual has in acquiring information against the interest in keeping it secret. The interests of the applicant are of no consequence under Regulation 1049/2001, yet, if someone requests information without explicitly mentioning a legal base, his requests will be dealt with under that Regulation.[946] There is some regulation for specific cases, but the 'system' is altogether opaque and complex to use, and cases where people should be entitled to access certain information that is of particular relevance to them are at risk of slipping through.

As we have seen in the Sison case, some private interests might compel the authorities to communicate information to a specific person, even though there are interests that justify not disclosing the information to the general public. Also, as the ECtHR judgment in Roche shows, article 8 contains '*an obligation of disclosure not requiring the individual to litigate to obtain it,*'[947] and in cases like that, the rights of defence cannot function as a safety net against treaty violations.

Although the practical consequences are limited, because in the majority of cases people will be able to secure access to information under Regulation 1049/2001 or national access to information legislation, it is a bit worrisome that in EU law, people's information needs as consumers, citizens and litigants are taken into account, while their information needs as autonomous individuals get only hap snatch attention.[948] Of course, in many cases they will eventually be able to acquire the information they need on other grounds, especially if it is not sensitive. However, this will not always be the case, or may take unreasonable amounts of effort or time. Apart from the practical consequences though, this approach is undesirable because, as a matter of principle, people should not be reduced to their social roles, but instead should be treated as free, autonomous individuals. In several cases the ECtHR has ruled that it was the absence of a mechanism to weigh the applicants interests in accessing information that violated article 8, rather than whether the information was eventually given to him or not.

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[946] Case C-266/05 P *Sison* [2007] ECR I-1270.

[947] *Roche v. the UK* (App no. 32555/96) ECHR 2005-X, paragraph 165.

[948] The ECJ has characterised the Treaty freedoms as fundamental rights. Besselink 2001 makes a distinction between fundamental human rights and fundamental economic rights. Generally, the latter variety has proved to be the more consequential. However: "In *Schroeder* and *Sievers and Schrage* the Court now takes a very principled different stance: the fundamental human right to equal treatment of men and women takes precedence over the economic non-discrimination rights of business enterprise; and it does so, because of the very fact that equal treatment of men and women has been recognised as a fundamental right. In the wake of the EU Charter on fundamental rights, this is a very important statement. It is to be hoped that the Court will not be satisfied with making a merely ideological statement, but will take claims based on fundamental human rights seriously." He's sceptical about that really happening though: "The fact that in these very same cases the court dismissed serious claims based on the right to a fair hearing out of hand, may make one doubt."

Nevertheless, homo dignus' right to access information is arguably already part of EU law. It is human dignity that is the foundation of the rights included in the Charter of Fundamental Rights. That respect for human dignity requires access to information is made explicit in articles 8, 41, 47 and 48 of the Charter. In other Charter rights, like those set down in articles 2, 4 and 7, the right to information is implicit, but it can easily be derived from the Charter when we take the underlying value of human dignity and the case law of the ECtHR into account.

There are a number of ways in which the lack of a comprehensive approach to the realisation of these rights can be resolved. One option would be to arrange for separate access rules for cases where individual interests are at stake, similar to those that exist now that guarantee people access to their own records. Alternatively, Regulation 1049/2001 could be adapted so that individual interests in information can be taken into account. We have seen that there are arguments against this approach, because taking the person of the applicant into account can work two ways and might prove to be an incentive for secrecy rather than openness.

Another possibility would be that the principle of transparency will evolve to fill the gap. The Fisher judgment seems to indicate that this might be the direction in which the principle of transparency is evolving. If this approach is indeed adopted, what would the principle of transparency require? When we use human dignity as an interpretative concept to help understand existing rights, we can conclude that the principle of transparency, which requires that information is made available when this is necessary to realise a legally recognised goal, would impose an obligation to make information available to homo dignus where this is necessary for him to realise those rights. Such an approach pays proper respect to the concept of autonomy, and recognises the capacity of homo dignus to make his own choices, and to act to realise his personal goals how he wants. In particular, people should have a right to access information that allows them to:

- Protect their life, health and physical integrity
- Make informed choices about their personal life
- Defend their interests in administrative proceedings or before a court

In addition, they should have access to information that:

- Is about them, i.e. personal data.

These rights are not absolute, and the interests that can justify exceptions are the same as those that justify exceptions to the public right to access information. However, the outcome of the balancing exercise that is required when there are competing interests can be different. We saw that the rights of defence can oblige public authorities to grant access to information that is secret to the general public. This is not surprising. An important function of public access to information is to allow for public accountability. Ex post transparency is sufficient to ensure accountability, and although people are unable to participate in such cases, they can still hold public authorities accountable for

their actions if information is provided after the dangers caused by releasing it have passed. For homo dignus, matters are different: ex post transparency is of limited use. It will not enable people to take information into account when making decisions, and is not conducive to the informed decision-making that is the hallmark of homo dignus. Information should be provided at a moment homo dignus can still use it. If he needs the information to defend his interests before a court, the information should be given at a moment where he can still appeal against a decision or bring another legal action. This means that secrecy can be observed during decision-making procedures, but further delays in the provision of the information are not acceptable. Also, because homo dignus has a right to defend his interests in administrative proceedings as well, he has a separate interest in acquiring access to information during decision making procedures, although arguably this interest weighs less heavy.

Although the balancing of interests should be done in the context of a particular case - the ECtHR in its judgment in Gaskin reminded explicitly of the fact that it decided only the individual case – we can make a strong general statement about access to information that contributes to the protection of life. When homo dignus is entitled to information to protect his life or his physical integrity, there should be no balancing exercise. These rights are non-derogatory, even when positive obligations are derived from them.[949] Existing information should be provided, even if it is not currently held by public authorities. This obligation is limited in other ways though. If information cannot actually contribute to the protection of life, a refusal to communicate it cannot violate the rights of homo dignus, and the ECHR is not easily convinced that information would save lives.

In short, when balancing homo dignus' right to access information against interests in secrecy, we should take into account that:

- Homo dignus needs information now, even if the citoyen can still use it later
- Homo dignus' right to life and physical integrity is non-derogatory
- If transparency is provided because it contributes to the realisation of the rights of homo dignus through its second function, active transparency is the starting point
- If transparency is provided because it contributes to the realisation of the rights of homo dignus through its first function, passive transparency is the starting point
- Procedural transparency obligations should be given extra weight if the subject of a procedure is a dignus right
- Alternative ways to guarantee respect for substantive rights that do not rely on communicating information to homo dignus are unsatisfactory because they deny him the possibility to personally defend his rights that he is entitled to

[949] Callewaert 1998, p. 8-9.

If the principle of transparency is to provide a solution to the dignity-gap in the EU's access to information regime, it must be applied by all the EU institutions, not only by the Courts. After all, people should not need to resort to litigation to acquire access to information. Considering the precarious relation between the Commission and the Council and access to information, they will most likely need to be nudged in the right direction.

CHAPTER 7: ANALYSIS AND CONCLUSIONS

7.1 Introduction

In this thesis, we have set out to uncover the nature of the principle of transparency in EU law. Now it is time to evaluate whether we have succeeded in our quest. The principle of transparency piqued our interest for a number of reasons.[950] It emerged in different fields of EU law at the same time, and not all its incarnations reflected existing obligations in the member states. To the extent it included existing transparency obligations that were hitherto derived from different principles, it begged the question what the added value of the principle of transparency is, and why it emerged at all if it does not appear to bring anything new to the table. Its scope is widening fast, and the number of obligations that are derived from it is still growing. Finally, because transparency is generally accepted as one of the still somewhat enigmatic principles of good governance, a better understanding of the principle of transparency may be helpful in the development of that doctrine as well.

For those reasons, we set out to answer the question of how the goals served by the principle of transparency, the context in which it is applied, and the presence of conflicting interests affect the interpretation and application of the EU principle of transparency in a given situation. To find the answer to that question we have explored the concept of transparency, examined the nature of legal principles, and investigated the application the principle of transparency as well as transparency norms not explicitly based upon that principle in a number of fields of EU law.

It soon became clear that we faced some serious problems regarding the principle of transparency. The concept of transparency itself is so wide as to almost defy definition, and the principle of transparency shares this weakness. It is ubiquitous. From an obligation to allow the public the right to access documents held by the EU-institutions to a prohibition to change the terms of a contract concluded after a procurement procedure, it is all founded on the principle of transparency. In addition, we found that apart from the controversy surrounding principles as a subset of legal norms, the term legal principles has two distinct meanings. It can refer to a particular kind of legal norm, or it can refer to an explanatory principle: a 'law' that explains a collection of observed legal phenomena.

Throughout this thesis, it has become clear that none of these problems are insurmountable. The wide scope of the principle of transparency and its ubiquity are to be expected when we take into account the diffuse meaning of transparency, as well as the countless goals it contributes to. But because transparency always functions in the same two distinct ways to bring about its positive effects – it facilitates decision-making and allows outsiders to see what public authorities are doing – we are provided with a way to determine what concrete transparency obligations we can derive from the

[950] Paragraph 1.1.3.

principle of transparency, provided we know what effects the law requires us to achieve by its observance. It is our understanding of the very concept of transparency that allows us to determine legal obligations.

The fact that legal principles have two distinct meanings simply presents us with two different approaches to the principle of transparency. First, we can examine the exact obligations derived from the principle of transparency as a legal norm, and second, we can examine whether we can formulate an explanatory principle that provides us with an explanation of the observed legal phenomena that are related to transparency.

In paragraph 7.2 below we will recapitulate our general findings on legal principles and transparency, and sketch the general contours of the principle of transparency. In paragraph 7.3 we will recapitulate our findings on transparency as a legal principle in EU law. After observing our initial findings are consistent with the general contours sketched in paragraph 7.2, we will proceed to give an overview of the obligations that are derived from the principle of transparency as a legal norm in EU law in paragraph 7.4. In paragraph 7.5 we will determine whether the principle of transparency makes sense as an explanatory principle.

7.2 The general contours of the principle of transparency

In chapter 2 we have examined the concepts of transparency and legal principles and uncovered the general outline of the principle of transparency as a legal norm. Transparency is a diffuse concept, which seems to refer to the availability, accessibility and clarity of information. We have defined a transparent government as one that provides people with the information they need to ascertain and understand the state of the world and to predict how their own actions will affect that world, and one that does not unnecessarily complicate that world.[951] Even with this information, we are still faced with a number of questions about the target, the timing, and the reason for transparency, the acceptability of exceptions, and whether information should be provided proactively or on request.[952] Although one can make an argument for the intrinsic value of transparency,[953] transparency is best understood as an instrumental value. By being transparent, governments can promote democracy,[954] promote individual rights,[955] and improve economic performance.[956] In addition, transparency can contribute to the realisation of a number of less tangible values, like faith in public institutions[957] and the quality of governance.[958] The latter are indirect effects, and what we know about the manner in which transparency contributes to their realisation is hard to apply in legal reasoning. They have not been taken into account in this thesis.

[951] Paragraph 2.2.2.
[952] Paragraph 2.2.5.
[953] Paragraph 2.3.1.
[954] Paragraph 2.3.2.1.
[955] Paragraph 2.3.2.4.
[956] Paragraph 2.3.2.5.
[957] Paragraph 2.3.2.2.
[958] Paragraph 2.3.2.3.

These goals are realised by means of two related but distinct mechanics. First, transparency aids people in decision-making.[959] Second, it allows them to see what is going on inside government, and as such it is a precondition for any attempt to affect what is going on inside that government either through participating in ongoing processes or through holding public authorities accountable for their actions.[960]

Theories about the empirical qualities of transparency cannot provide us with normative legal arguments to assume there is a transparency obligation incumbent on public authorities. Whether there is an obligation to be transparent is determined by the normative framework that governs the relation between the government and its citizens. This framework differs depending on whether this relation is perceived as one involving the citoyen, homo economicus, or homo dignus.[961] For the citoyen, the overarching principle governing its relation with the government is democracy.[962] For homo economicus, the overarching principle is the promotion of the internal market and the Treaty freedoms.[963] For homo dignus, the overarching principle is the respect for human rights.[964]

We have seen that principles are descriptive norms that set out a state that the law aspires to achieve, but that do not prescribe a particular behaviour that ought to realise this state.[965] They can inspire lower order principles as well as rules. Rules will prescribe behaviour that will contribute to the realisation of the ideal state, whereas lower order principles do not prescribe a particular behaviour, but instead set out a state that is thought to be conducive to bringing about the state embodied in the higher order principle. The principle of transparency is such a subordinate principle. A transparent government is conducive to realising democracy, respect for individual rights, and a smoothly functioning internal market. When legal principles are applied in a concrete case, they have to be balanced. This requires their weight to be determined, which is done by taking into consideration the abstract weight of the principle as determined by the reasons and goals it refers to, the effects of a particular behaviour on the realisation, or non-realisation, of the principle, and the reliability of the empirical assumptions concerning what the measure in question means for the realisation, or non-realisation, of the principle.[966]

This means that the contents of the principle of transparency need to be determined by reference to the principle of democracy and the rights of the citoyen, the principles governing the way public authorities should approach the internal market and homo economicus, and the fundamental rights of homo dignus. Because the principle of transparency derives its weight from these higher order principles, we can only derive a

[959] Paragraph 2.3.3.1.
[960] Paragraph 2.3.3.2.
[961] Paragraph 1.2.3.1.
[962] Paragraph 3.2.
[963] Paragraph 4.3.
[964] Paragraph 6.2.
[965] Paragraph 2.4.1.
[966] Paragraph 2.4.1.

particular transparency obligation from it when that obligation does in fact contribute to the realisation of the state that is embodied in those higher order principles. Thus, if in a particular instance transparency does not contribute to either democracy, the internal market, or the realisation of fundamental rights, public authorities are not required to provide it – unless of course it contributes to some other higher order principle that falls outside the framework of this thesis. This is especially relevant because of the diffuseness of transparency as a concept. The target of a transparency obligation, whether it is ex post, ex ante, or ex durante transparency, whether it is active or passive transparency, and the quality of information provided all determine whether transparency has a positive impact on a given goal. In addition, these characteristics determine the seriousness of any interference with opposing interests caused by transparency.

Although legal principles can be defined as a specific kind of legal norm,[967] the term has another meaning as well. 'Legal principle' can also refer to a law according to which the legal system functions: an explanatory principle that offers a justification or explanation for a collection of legal phenomena we can observe.[968] Understood in this sense, 'the principle of transparency' refers to the general rule that explains the legal norms that are concerned with transparency that we observe in EU law. At the outset of this research, the principle of transparency clearly lacked explanatory value. We could observe a selection of legal phenomena associated with transparency, some of them explicitly derived from the principle of transparency, others not, which did not seem to show any consistency. Nevertheless, I hypothesised that under the surface, such consistency could be found.

It is now time to draw our conclusions: what does the principle of transparency look like as a legal norm in EU law, and is it possible to formulate a principle of transparency that can explain the multitude of transparency phenomena we observe?

7.3 The principle of transparency in EU law

The first thing that stands out when we look at the principle of transparency in EU law is its wide scope. It is applied in the context of access to documents, in public procurement law and other fields of economic regulation, and it is part of the principle of good administration. As such, it has been enshrined in article 15 TFEU and article 1 TEU, as well as in articles 41 and 42 of the Charter of Fundamental Rights of the EU. In addition, it is derived from other provisions and principles. Most prominent amongst these are article 56 TFEU and the principle of equal treatment, but the principle of transparency has also been derived from the principles of effective judicial protection and the rights of defence, and has been used in conjunction with the principles of legal certainty and sound administration. Countless directives and regulations refer to the principle of transparency, either in their preambles or in the actual provisions. This is consistent with our findings in chapter 2: transparency is a diffuse concept that can

[967] Paragraph 2.4.
[968] Paragraph 2.4.

serve a multitude of goals. It is unsurprising that one can relate many vastly different legal obligations to it.

We observed that the European courts initially derived the principle of transparency as it has become accepted in public procurement law from the text of early Directives. Later, they have ruled the principle is implicit in primary EU law, both in the principle of equal treatment in in the free movement rules, primarily in article 56 TFEU. This opened the door for the application of the principle of transparency outside the scope of the procurement directives, to the granting of concessions, contracts under the threshold provided in the directives, and to scarce licenses. A parallel development in EU legislation shows that the principle of transparency was declared to be applicable to the division of radio frequencies, numbering resources, and a number of other scarce rights and resources.

The emergence of the principle of transparency as a constitutional principle that requires, amongst other things, public access to information started with the adoption of Declaration 17 to the Treaty of Maastricht, which stressed the importance of transparency of the decision-making process. The principle of transparency inspired the adoption of internal guidelines and codes of conducts by the EU institutions. The Treaty of Amsterdam incorporated the principle of transparency in primary EU law, as article 1 TEU and article 255 EC required decisions to be taken as openly as possible and granted a right to public access to documents. The developments culminated in the adoption of Regulation 1049/2001/EC. The Courts started applying the principle of transparency in 1996, carefully at first, but soon became a driving force behind the development towards more transparency.

Finally, the courts started to mention the principle of transparency in relation to other, more well-established legal principles that aim to guarantee the rule of law, the rights of European citizens, and the effectiveness of the EU legal order, like the principles of legal certainty and sound administration.

Meanwhile, the ECtHR has taken a radically different approach to access to information. While reluctant to accept a public right to access information, it developed a line of case law in which the right to information is personal, dependent on the personal circumstances and characteristics of the applicant, and auxiliary to other rights that enjoy explicit protection in the ECHR. Since the ECHR is part of the EU legal order, and moreover impacts the interpretation of the EU Charter of Fundamental Rights, this line of case law has important consequences for EU law. The rights recognised by the ECtHR are granted in part in the Data Protection Directive, and in part overlap with principles of EU law, including the principle of transparency in combination with other principles as mentioned above.

The concurrent emergence of the principle of transparency in different fields of EU law is not due to one specific cause. There was outside pressure on the EU institutions to become more transparent, and at the same time the importance of transparency as a value already implicit in EU law became clearer. The importance of transparency for

the internal market and for the empowerment of citizens has become more obvious because of developments in economic theory and rational choice. The omnipresence of transparency in EU law is a clear indication of its acceptance as a value underlying the legal system. However, the scope of the principle of transparency in EU law is impressive indeed, and at first sight the obligations that can be derived from it seem to be so diverse that the usefulness of considering them to be the result of one and the same principle is far from obvious. Would it be wise to discern a number of separate principles of transparency, which have coincidentally emerged under the same name? It certainly is an option. However, we should not let the wide scope of the principle detract our attention from the similarities between the obligations that are derived from it. The underlying mechanic, that is the way in which transparency contributes to the realisation of these goals, is the same. Transparency contributes to the greater good because it facilitates decision-making, and because it allows outsiders to see what public authorities are doing. The exact obligations derived from the principle vary because whether enhanced decision-making and outside scrutiny are deemed necessary to realise the underlying goals varies, not because transparency somehow becomes a different concept from one situation to another.

In the abstract, we can say that the principle of transparency refers to an ideal state where public authorities are transparent when this contributes to the realisation of the rights of the citoyen, homo economicus, or homo dignus as protected in EU law. It is this principle that is subsequently balanced against other interests. This formulation of the principle of transparency is still highly abstract. We have looked at the manner and the circumstances under which transparency does promote these rights in greater detail, and can now derive a number of more concrete norms from it. In addition, we have determined a number of opposing interests that may be harmed by too much or the wrong kind of transparency, which can sometimes set these obligations aside.

In chapter 3, we examined transparency obligations that are derived from the principle of transparency that target the citoyen. In chapter 4 and 5, we examined the obligations that target homo economicus. In chapter 6, we examined the obligations that target homo dignus. In the following two paragraphs, we will discuss what these findings mean for the principle of transparency as a legal norm, and for the principle of transparency as an explanatory principle.

7.4 Transparency as a legal norm

The principle of transparency is a legal norm that is applied by the EU institutions. Both the legislator and the courts rely on it, and recognise it as the basis for a number of concrete rules. In the following paragraphs, I will give an overview of the obligations derived from the principle of transparency, organised according to the ultimate goal these obligations are to contribute to.

7.4.1 Transparency for the citoyen

Transparency for the citoyen aims to realise democracy by facilitating the process of will formation, and by allowing people to hold government accountable, and to participate in public affairs. The latter two mechanisms aim to ensure that public institutions are the best representatives of the public interest, or agents, that they can be. The citoyen has rights, which are derived from his status as an autonomous human being, that aim to guarantee his autonomy in public decision-making. These rights are public rights, in the sense that they aim to allow him to function in the public sphere, where he can use them to realise what he perceives to be the public interest.

Democracy requires the widest possible access to documents. Access should be given, unless there is a justification to the contrary, in which case the opposing interests should be balanced. This can be done either by the legislator, or left to the administration and ultimately the courts. The starting point that access is mandatory unless there is an opposing interest is correct when we focus on will-formation. All information that is held by the government is potentially relevant to the process of will-formation. The decision that it is not relevant is up to the public, not the EU institutions. When we focus on the second function of transparency, the picture changes. Accountability and participation aim to make public institutions and the EU government as a whole a better agent of the European citoyens. Transparency might be detrimental to this goal, and detract from the underlying value of public self-determination rather than contribute to it. However, this is a rare occasion, and there is little agreement on when this will occur. Even if we could be sure, it is not a decisive argument against transparency, as transparency still facilitates will formation. Even so, the decision of whether to strive for full transparency is a public choice, not a non-negotiable element of democracy. EU law caters to the eventuality of this concern for effective representation outweighing the interest in transparency by protecting internal decision-making, but the courts have not accepted a blanket exception to apply and in fact the burden of proof the institutions face is heavy. Transparency is assumed to contribute to democracy and public self-determination, and any argument to the contrary requires heavy justification. In addition, information should be made available when the danger of harm has disappeared.[969]

The weight attributed to transparency in a specific case or context can be greater than usual as well, if the benefits provided by transparency are particularly large. This is reflected in the idea of an overriding public interest in transparency. Such an interest can exist if information concerns the environment,[970] but also if it is particularly relevant to the democratic process. The case law of the ECtHR appears to indicate that there is additional weight if the government has a monopoly on the information the applicant is seeking,[971] and most certainly when it concerns investigations into the death of people in state custody or maltreatment by public officials that might violate article 3.[972]

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[969] Paragraph 3.4.3.
[970] Paragraph 3.5.1.
[971] Paragraph 3.5.1.2.
[972] Paragraph 3.4.1.

EU law has identified a limited number of opposing interests that can justify an exception to the principle that documents held by the EU institutions should be accessible. A number of these are absolute. Access to documents must be refused if their disclosure would undermine public security, defence or military matters, international relations, or the financial, monetary or economic policy of the EU or a member state. In addition, access must be refused if disclosure would undermine the privacy and integrity of an individual. These are legitimate choices as long as they do not make the exercise of public autonomy impossible, although people can of course have a preference for a different choice.[973] However, delayed transparency will often be unlikely to harm the protected interests, and access should be allowed as soon as possible. There is one possible exception. The rights contained in articles 2 and 3 ECHR are non-derogable, and the public right to access information that the ECtHR has derived from these provisions cannot be set aside easily. The results of the investigation of the deaths of people in state custody and of investigations into malconduct of state officials resulting in a violation of article 3 ECHR must be made public. Likewise, unacknowledged detentions are unacceptable under article 5. The ECtHR does not indicate there is room for exceptions here.[974]

The other exceptions in EU law are relative and require a balancing of interests. The legislator has only indicated what principles must be taken into account, and has not derived concrete rules from them itself. Interests must be balanced if disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property; court proceedings and legal advice; or the purpose of inspections, investigations and audits.

When balancing those interests, the EU institutions have to take into account both the adverse effect of transparency on the realisation of those interests if the principle of transparency is given precedence, and the adverse effect on the realisation of the goals underlying the principle of transparency if in a particular case the opposing interest is given precedence.

Not giving information on individual cases will often have a relatively small effect on people's ability to act in their capacity of citoyens. Giving information ex post or even with a delay will preclude people from using that information for will-formation and to try to manipulate public authorities, but it will not preclude them from holding public authorities accountable.

7.4.2 Transparency for homo economicus

Transparency for homo economicus aims to enhance the functioning of the internal market by facilitating effective decision-making by economic actors, and as a safeguard against undesirable market interferences by allowing homo economicus to de-

[973] Paragraph 3.4.1.
[974] Paragraph 3.5.2.2.

fend his rights and to ensure that public authorities act in accordance with the law. Homo economicus' rights are different from the rights of homo dignus. Homo economicus has been assigned rights in the EU Treaty, and observance of these rights requires transparency, much like the observance of the rights of homo dignus. However, the weight of these rights is derived at least in part from the fact that they help in realising the internal market, and not from the intrinsic worth of the individual.

The principle of transparency requires that legislation is clear, obvious and understandable, without room for ambiguities. Legislation that entrusts certain tasks to an authority must also contain a clear formulation of the authority's powers and their relation to the purposes of the law. It requires that the Commission adopts rules on the exercise of discretionary powers it has been given, and that it abides by these rules. Unnecessarily vague or ambiguous rules will violate the principle of transparency, and public authorities are forbidden from intentionally obfuscating things. It requires that national regulatory authorities coordinate their policies to improve consistency, and that the decision-making agenda is made known in advance. It requires public authorities to exercise their powers in a transparent way, and that rules governing the decision-making process are open and publicised.[975]

When interfering in the market, public authorities have to be transparent to minimise efficiency losses.[976] Theoretically, transparency can contribute to the resolution of market failures.[977] There is no general obligation to use transparency in this way, probably because it is difficult to determine how this should be done.[978]

When public authorities act as market players, either on the demand or the supply side, they are subject to far-reaching transparency obligations. They must make their intentions known in advance. In public procurement law, they are required to publish PINs.[979] Generally, it requires them to give publicity to contract opportunities beforehand.[980] Information about selection and award criteria as well as the precise nature of the contract opportunity must be available. The details of these obligations will vary dependent on their cost and the gains one can expect from them. Small contracts, contracts that are unlikely to attract a lot of competition, and contracts where the gain from competition is expected to be small are subject to less stringent obligations. In particular, public authorities are not required to bear the costs of transparency in such cases.[981]

Public authorities should be transparent to allow outsiders to ensure they are complying with the rules.[982] These obligations overlap to a significant extent with the duty to give reasons, the rights of defence, and the principle of effective judicial protection. How-

[975] Paragraph 4.3.1.
[976] Paragraphs 4.4 and 5.3.5.
[977] Paragraph 5.2.
[978] Paragraphs 5.3.1, 5.3.2, 5.3.4 and 5.4.
[979] Paragraph 4.4.3.1.1.
[980] Paragraphs 4.4.3.1.2 and 5.3.5.3.
[981] Paragraphs 4.4.4 and 5.3.5.5.
[982] Paragraphs 4.4.3.3 and 5.3.6.

ever, they are also obliged to be transparent to the Commission, especially when there is a clear incentive for member states to ignore the rules.[983]

There is a significant amount of rules that have already been derived from the principle of transparency. Where these rules are insufficient, we need to balance the principle of transparency against any interests opposing transparency. Of course, transparency can only be required if it does in fact contribute to equal treatment, or the functioning of the internal market. However, by enshrining the rights of homo economicus in the Treaty, and even attributing them the status of fundamental rights, the EU legislation has made it clear that it accepts the proposition that respect for the rights of homo economicus contributes to the internal market as a given. To the extent that respect for the rights of homo economicus requires transparency, its positive effects on the internal market require no further justification. Having said that, the weight attributed to the principle of transparency is affected positively by the positive impact of transparency on the functioning of the market. On the other hand, its weight is impacted negatively by uncertainty about the positive impact transparency will have on the functioning of the market, and by the chance that transparency might have a negative impact on the functioning of the market. Thus, in those cases where economic theory provides no clear answer about the impact of transparency on the market, its weight is diminished, and the obligations imposed by EU law are weak. If transparency does not lead to increased efficiency, the principle's weight diminishes as well, although it does not disappear because homo economicus' rights have been enshrined in the Treaty as fundamental values in themselves.

Opposing interests that can justify an exception to the principle of transparency are the need for confidentiality,[984] public interests that justify secret contracts,[985] and the Treaty exceptions to the free movement rules as well as the rule of reason exceptions. In addition, public authorities must respect the DPD and the right to privacy. The weight of these opposing interests is affected by the adverse effect on their realisation that is caused by complying with the principle of transparency.

7.4.3 Transparency for homo dignus

Transparency for homo dignus aims to ensure respect for individual rights by facilitating people in making decisions, and by allowing them to defend their interests when public authorities take decisions that have the potential to affect them. Homo dignus has rights, which he is entitled to based solely on his intrinsic worth as a human being, and the observance of these rights requires transparency. These are private rights, in the sense that they allow him to function in the private sphere, unhindered by undue government interference.

[983] Paragraphs 4.4.3.3.3 and 4.4.3.3.4.
[984] Paragraph 4.4.4.2.
[985] Paragraph 4.4.4.1.2.

Respect for the rights of homo dignus requires that he has access to information that concerns him. This right has been given effect in the Data Protection Directive[986] and requires individuals to have access to their personal data, and to be informed about how their data are processed. However, they should also be able to access data about their family, both because this may impact their own identity and because their right to family life is protected.[987] This is not guaranteed in the DPD, nor under Regulation 1049/2001, but it is implicit in EU law and can be derived from the Charter of Fundamental Rights and the concepts of human dignity and autonomy.

Individuals should also have access to information that does not concern themselves, but concerns their environment,[988] if this information is needed for them to secure their Convention rights, in particular the right to private and family life, which includes a right to make informed choices about one's health, family life, and place to live, and the right to life. This right is non-derogable when it concerns information that can save people's lives.[989] Although EU law does recognise the rights of homo dignus,[990] his intrinsic worth as a human being, and his right to life and privacy, there is no provision to ensure he has access to the information he needs to secure those rights, other than in the Aarhus regulation. That right is limited in scope though, because it only concerns environmental information as defined in that directive.[991] There are other indications that EU law takes this right seriously, in the Telecom Directives for example, which require the member states to ensure that people know about the emergency number and have access to information services they need to be able to function in a modern society:[992] the principle is recognised, but there is no comprehensive approach of the issue in written law. This right can therefore only be derived from the relevant rights and the principle of transparency whose observance is required to guarantee them.

With the exception of access to life-saving information,[993] these rights are not absolute. Exceptions are allowed if necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[994] Because homo dignus' right to information is not regulated in a comprehensive way, it is unclear how these interests are balanced.

Respect for the homo dignus also requires that he has access to information he needs to protect his rights against government interference, either by participating in procedures that might result in his rights being infringed, or by holding public authorities account-

[986] Paragraphs 6.3.2.1 and 6.4.3.
[987] Paragraph 6.3.2.1.
[988] Paragraph 6.3.2.2.
[989] Paragraph 6.3.3.
[990] Paragraph 6.4.1.
[991] Paragraph 6.4.4.
[992] Paragraph 6.4.4.
[993] Paragraph 6.3.3.
[994] Paragraph 6.6.

able for illegal interferences.[995] This is not just a means to protect the substantive rights that are at risk of being interfered, but also a recognition of homo dignus as an autonomous creature who is able to make his own choices and defend his own rights.[996] This means that compromises to transparency are not acceptable if they are justified with the argument that they do not affect whether the substantive right is infringed or not. However, compromises are more easily acceptable if homo dignus is still able to defend his own rights, by himself.[997]

These obligations are covered for the most part by the principles of effective judicial review and the rights of defence. In proceedings before the courts, parties must have access to judgments. The addressee of a decision must be made aware of it. Parties must have the same access to records and other documents pertaining to a case. They must have knowledge of all evidence adduced and all observations filed.[998] In administrative proceedings, the party concerned must be informed of the evidence adduced against it to justify the proposed administrative sanction. Future addressees of a decision must be given access to the administrative file before the decision is taken, when his input can still avert it. Public authorities must give reasons to justify decisions which affect EU rights adversely. The obligation to state reasons requires an adequate statement of the reasons on which a decision is based: all the legal and factual elements on which the decision is based must be mentioned as well as the considerations which have led to the adoption of the decision.[999]

The principle of transparency does require more than only the observance of the rights of defence and effective judicial protection. People should be given access to the file even if there are no administrative proceedings likely to result in adverse consequences when this can prevent such proceedings from being instituted at a later time.[1000]

These rights to be informed are not absolute, and sometimes have to be balanced against opposing interests. They can be restricted if the restrictions correspond to objectives of a general interest pursued by the measure in question, provided those restrictions are proportionate with regard to the objective pursued. An intolerable interference which infringes upon the very substance of the rights guaranteed is not allowed. The right to confidentiality of business secrets and other confidential information might lead to certain information being removed from the file before it can be accessed. Such information cannot be relied upon to justify a decision that adversely affects the interests of the party. Exceptions to the right to access information are furthermore permitted when the purpose of the decision to be taken would or could be jeopardised if the right to be heard would be observed. If the effectiveness of a measure depends on the element of surprise, prior notification of the decision is not required. However, interested parties must be informed of the evidence adduced against them

[995] Paragraphs 6.3.4 and 6.4.5.
[996] Paragraphs 6.3.4, 6.4.5.1 and 6.4.5.2.
[997] Paragraph 6.6.
[998] Paragraph 6.4.5.2.
[999] Paragraph 6.4.5.1.
[1000] Paragraph 6.5.1.

either concomitantly with or as soon as possible after the adoption of the initial decision. Finally, the right of access to the file does not apply to confidential information and internal documents.[1001]

In abstracto, when the principle of transparency needs to be balanced against other interests, its weight is affected positively by its importance in the realisation of the rights of homo dignus. The weight of the opposing interests is determined by the potential harm that transparency can do to those interests. This means in particular that restrictions to ex post transparency will be hard to justify, since this will usually be less harmful.

7.4.4 Relation with other legal principles

We knew at the outset of this research that the principle of transparency overlaps to a significant extent with other principles. This has not changed. It is not possible to demarcate the border between transparency and other principles, nor is there a pressing need to do so. But the previous chapters show that it is impossible to cast transparency aside as superfluous. There are obligations that are derived from the principle of transparency that fall outside of the scope of traditional principles, and in addition the principle of transparency can aid in the interpretation of other principles. In this paragraph, we will address the more traditional principles: legal certainty, equal treatment, the duty to give reasons, the rights of defence and effective judicial protection. In paragraph 7.4.5, we will address the relation between transparency and participation and accountability.

7.4.4.1 Legal certainty

In chapter 4, we encountered the principle of legal certainty, which requires that those subject to the law must know what the law is. This obligation serves the same goal as the principle of transparency: it facilitates decision-making by allowing people to factor in the legal consequences their actions will have.[1002] Indeed, public authorities must be transparent to ensure they comply with the principle of legal certainty. To comply with the principle of legal certainty, public authorities must observe the principle of transparency, and they must provide a level of transparency that ensures that people are aware of what the law is. However, this is not the only thing the principle of legal certainty requires, and neither is it the only purpose served by the principle of transparency. This is important for both homo dignus and homo economicus.[1003]

The principle of transparency requires, first, that regulations are clear, obvious and understandable without doubt or ambiguity, and second, that the Commission abides by its own guidelines and communications, if it has adopted any. It also requires that the Commission adopts policy guidelines on how it intends to use its discretionary powers.

[1001] Paragraphs 6.4.5.1, 6.5.4.2 and 6.6.
[1002] Paragraph 4.3.1.
[1003] Paragraphs 4.3.1 and 6.4.5.

In the area of market regulation, the agenda for decision-making must be known.[1004] Simplicity and clarity are desired because they bring down the costs associated with processing information, even though they are not necessary to achieve legal certainty.[1005] Telecom law requires member states to coordinate their practices in a transparent way to ensure a consistent interpretation and application.[1006]

The principle of legal certainty requires public authorities to be more transparent when their actions affect the decision-making abilities of homo economicus. Of course, homo economicus has no more of a right to legal certainty than homo dignus. The difference can only be understood if we take the beneficial effects of transparency on the internal market into account. Thus, by understanding how transparency functions, we can understand why transparency obligations derived from the principle of legal certainty vary from case to case. In other words, since the proper functioning of the market benefits from the adoption of policy rules, the principle of transparency, requiring a measure of transparency that will ensure the proper functioning of the market, includes an obligation to adopt policy rules.[1007]

7.4.4.2 Equal treatment

In chapters 4 and 5, we explored the relation between the principle of equal treatment and the principle of transparency. The Court of Justice is not consistent in its statements about the relation between these two principles. Its alternates between a juxtaposition of the two principles and a hierarchical relation where transparency serves to guarantee equal treatment.[1008] It is true that a lack of transparency lead to discrimination against foreign undertakings, because they face higher costs when gathering information on their own to compensate for it. But transparency also has independent value, because it leads to lower transaction costs for all market actors, and thus increases the overall efficiency of the economy. This seems to be reflected in the courts' acceptance that transparency about the criteria for the evaluation of tenders also serves to allow tenderers to adapt their offers to them; the use of the criterion that public authorities must provide a level of publicity that opens up the market for competition; and in the fact that a lack of transparency can be an interference with the free movement rules even if it is not discriminatory. Behaviours that are not discriminatory are nevertheless ruled to violate EU law based on the principle of transparency, like in Succhi di Frutta.[1009] In short, a lack of transparency harms all market actors.

Again, the principle of transparency is important in two ways. Its observance contributes to equal treatment, and only by comprehending the manner in which transparency functions can we understand why equal treatment requires transparency. In addition, transparency contributes to the same goal that the principle of equal treatment aims to

[1004] Paragraph 4.3.1.2.
[1005] Paragraph 4.3.1.3.
[1006] Paragraph 4.3.1.2.
[1007] Paragraph 4.3.1.1.1.
[1008] Paragraph 4.4.2.1.
[1009] Paragraph 4.4.2.2.

realise: an internal market that allocates resources in the most efficient way possible and contributes to the welfare of all European citizens.

7.4.4.3 The duty to give reasons

The relation between the principle of transparency and the duty to give reasons has been addressed at several points. The duty to give reasons requires public authorities to communicate the reasons for their decisions, and when it is observed it allows its addressees to review whether the decision was legitimate and to decide whether they want to challenge it. Essentially, it is a specific transparency obligation, and it can be seen as a specification of the principle of transparency. That means it should be interpreted by reference to the principle of transparency. Public authorities only need to provide addressees with enough information to realise the level of transparency that is required for the realisation of the goals underlying both principles. It is not necessary to address all relevant points of fact and law: where the reasons for the decision are clear and understandable for the concerned parties, a sufficient level of transparency has been realised and the duty to give reasons has been met.[1010]

7.4.4.4 The rights of defence

The principle of transparency is closely related to the rights of defence. The right to be informed about the evidence adduced against you to justify an intended adverse decision and the right to access the file are both specific transparency obligations. The rights of defence are instrumental in the defence of the rights that are the subject of the administrative proceedings, but it has intrinsic value as well. Respect for the autonomy of homo dignus requires that he is allowed to defend his rights vis à vis public authorities that try to interfere with them. In this case, the rights of homo dignus are the higher order principle, and the principle of transparency needs to be interpreted by reference to this higher order principle. Transparency is instrumental, and only required to the extent it is necessary to allow homo dignus to defend his rights. It can be compromised upon if homo dignus' rights can be guaranteed in an alternative way.

Still, the principle of transparency has some additional value. In those cases where no administrative procedure likely to realise in an adverse decision has been initiated, the defence of one's rights can still require access to information. This will be the case if it is clearly foreseeable that the information will be required at a future point to defend one’s rights, or to prevent administrative proceedings likely to result in adverse consequences from being initiated in the first place. The principle of transparency does require such access, even if the rights of defence do not.[1011]

[1010] Paragraph 5.3.6.5 and 6.4.5.2.
[1011] Paragraph 6.5.1.

7.4.4.5 Effective judicial protection

We see a similar thing with regard to the right to effective judicial protection. Transparency is required to guarantee this, and the measure of transparency that is required is determined by reference to the right to effective judicial protection. The fact that the principle of transparency is subordinate and instrumental to the right to effective judicial protection means transparency requirements are not absolute. If the right to effective judicial protection can be guaranteed in another way, that is acceptable.[1012]

7.4.4.6 What transparency brings to the table

The principle of transparency shows overlap with a number of other legal principles, which tend to be well-established. The nature of the relation between transparency and its neighbours varies. The duty to give reasons can be seen as a sub-principle of the principle of transparency, which allows addressees to review the legality of decisions and to decide whether they want to challenge it. We see the second function of transparency in action here: it allows outsiders to observe what public authorities are doing and a first condition to allow them to take action to affect those actions. In the case of the principles of equality and legal certainty, transparency is necessary to realise these principles, but also contributes to the realisation of the values that form the foundation of these principles in other, independent, ways. In the case of the rights of the rights of defence and the right to effective judicial protection, transparency is the most obvious way to realise these principles, but not necessarily the only way, and compromises to transparency are easier to justify. However, transparency also has an independent function in realising the right of homo dignus to defend his interests vis à vis the EU institutions, and can require access to information that is relevant in this regard prior to that information becoming available to him based on the principles of the rights of defence and the right to effective judicial protection.

7.4.5 Transparency and the principles of good governance

Transparency is one of the principles of good governance, alongside participation, accountability, effectiveness, proper administration, and human rights administration. Good governance is a relatively new legal concept. There is debate about what obligations can be derived from the various principles of good governance, and about what they add to the existing content of the law. This is especially true for transparency, accountability and participation, and perhaps to an even larger degree for effectiveness. For transparency, I hope to have contributed significantly to the resolution of this problem. But to what extent are our findings relevant to the broader issue of good governance?

The principles of participation and accountability have surfaced in this thesis at several places.[1013] Yet, at first sight we have found little that can help us gain a comprehensive understanding of what these principles require. Both participation and accountability

[1012] Paragraphs 4.4.3.3, 5.3.6 and 6.4.5.2.
[1013] Paragraphs 2.3.3.2, 3.2.2.2, 5.3.3.3, 6.4.4, 6.4.5.1.

require transparency to be effective, that much is true. We found that they require particular kinds of transparency, and perhaps our understanding of the relation between the principle of transparency and the principles of accountability and participation has increased. It is not possible to derive from the principle of transparency when accountability and participation are required, though, nor does it offer a framework to decide what sort of accountability or participation is required. Such questions fall outside the scope of this thesis. Hence, we do not know what kind of obligations can be derived from the principle of participation and the principle of accountability, provided that they are indeed legal principles that we can derive obligations from to begin with.[1014]

Nevertheless, there are striking similarities between the principle of transparency and the principles of participation and accountability. All of these concepts are diffuse. Many different things can be designated as 'transparency', and many different things can be designated as 'participation' or 'accountability.' Like transparency, participation and accountability are believed to contribute to democracy, economic development, and a multitude of other goals. Like transparency, they combine a concern for the respect of individual rights with a concern for efficiency and the actual results of government action. As concepts that hold sway outside the field of law as well as within, other scholars have examined their effects on realising the common good, and their results can guide their application as legal principles. It is precisely this combination of concern for fundamental values and empirical results that I believe to be the distinctive characteristic of the good governance approach of law.

Hence, I believe the principles of accountability and participation could profit from a similar approach to the one adopted towards the principle of transparency in this thesis. It would be useful to come up with a classification for the different kinds of participation and accountability that can be discerned and to identify and classify the multitude of aims whose realisation they are thought to contribute to. Next, one should examine the exact manner in which the various kinds of participation and accountability contribute to the realisation of those aims, the extent to which there is a legal obligation to realise those aims through the adoption of participation and accountability, and what opposing interests might be harmed by particular kinds of participation and accountability.

7.5 Transparency as an explanatory principle

We have established what transparency as a legal norm requires, and how this research can aid in the further development of the doctrine of good governance. But we are not done yet. We saw in chapter 2 that legal principles are a homonym. The term can refer to a particular species of legal norms, but it can also refer to a theoretical building block of the law: a rule which explains or predicts observed legal phenomena. How does the principle of transparency fare in this respect? We already observed that 'the principle of transparency' is not much of an explanation for the variety of transparency

[1014] For a comprehensive account of participation within the EU, see Mendes 2011, who covers a lot of the issues that follow.

phenomena we encounter in EU law. But when we look beyond the term, can we see some kind of structure underlying the obligations and provisions that the principle appears to inspire?

The answer is a resounding yes. Still, the account to be given in this paragraph is only a model. It does not accurately predict each and every transparency obligation we encounter, or fail to encounter, in EU law. Only a list of all transparency obligations in EU law can give us a truly accurate picture of the EU transparency regime, and a very unwieldy one as well. Having made this reservation, we are ready to expound the structure underlying the transparency obligations in EU law.

Clearly, such a structure would have to take into account both the function of transparency and the normative framework that governs its application in the relation between public authorities and citizens. Since we discerned two separate functions of transparency and three different normative frameworks that govern the relation between the government and its citizens, we can discern 6 different categories of transparency obligations, as presented in the following table.

	Transparency facilitates decision-making. 1st function.	Transparency facilitates outside scrutiny of the behaviour of public authorities. 2nd function.
Citoyen	(A) collection & dissemination of information on matters of public interest to stimulate public debate	(B) dissemination of information on government activity with the purpose of allowing the citoyen to influence or monitor its behaviour
Homo economicus	(C) collection & dissemination of information that will stimulate the proper functioning of the market and increase efficiency, by increasing the quality of the decisions economic actors make	(D) dissemination of information on activities of public authorities that affect homo economicus with the purpose of allowing him to influence or monitor that behaviour to protect his rights with the purpose of promoting the internal market
Homo Dignus	(E) collection & dissemination of information that helps people in individual decision-making	(F) dissemination of information on activities of public authorities which affect a given individual with the purpose of allowing him to influence or monitor that behaviour to protect his rights

For each of these categories, transparency has a different goal, and for each of them, the answer to the question of how transparency contributes to the realisation of the underlying goal is different. *It is the answer to this question that determines what transparency obligations actually exist in law*. Thus, the instrumentality of transparen-

cy is essential in understanding the law on transparency. It determines the answer to most of the questions encountered in chapter 2: who the target of the transparency obligation is, about what a public authority needs to be transparent, when he should be transparent about it, whether the obligation is an active or a passive one, whether information communicated should meet certain quality criteria, and to what extent exceptions can be justified. If a particular transparency obligation contributes to one of these goals, it is required, subject to justifications to the contrary. Transparency that does not contribute to one of these goals cannot be justified, and is not required. Likewise, the harm that transparency does to opposing interests will determine whether such an opposing interest can justify an exception to the obligation to be transparent.

The empirical knowledge about how transparency functions does not correspond perfectly to the legal assumptions about how it functions. There is sometimes empirical uncertainty about whether transparency has a given effect or not. In those cases, the law tends to adopt an assumption one way or the other, which parties may be able to refute in concrete cases when they provide appropriate arguments.

7.5.1 Type A: will formation

Type A transparency is required in a democratic society and aims to allow citoyens to participate effectively in the process of public will formation. To meet this goal, transparency should target all citoyens. The scope of the transparency obligation is wide: all information in the possession of public authorities falls under it, since it is up to the general public to determine which information is or is not relevant to the process of public will formation. For the same reason, passive access to information is usually the most obvious choice. Applicants are better suited to determine which information they need than public authorities. However, public authorities should be pro-active when they know the information is required, that is, when there is a public debate that will obviously benefit from its inclusion. Time-wise, transparency should be provided upon request, or at the time it becomes clear it will benefit the public debate.

Exceptions are relatively easy to justify,[1015] both because it is the citoyen's prerogative to decide certain information does not belong in the public domain, and because the refusal of an individual request will have a limited impact on the quality of the public debate and the autonomy of the citoyen in the public sphere. Clearly though, public authorities cannot frustrate the public debate. Exceptions are harder to justify when the government has a monopoly on certain information, and it cannot interfere with the exchange of information by third parties.

7.5.2 Type B: public participation and accountability

Type B transparency is required in a democratic society and aims to ensure that public authorities do in fact represent the public interest as discovered through the process of

[1015] Relatively easy, with the emphasis on relative. I do not mean to argue exceptions should be made lightly.

public will formation. It does so by allowing the citoyen to see what public authorities are doing, which enables them to hold them accountable for their actions and to try to affect their actions. Again, to meet this goal, transparency should target all citoyens. The scope of the obligation is more limited. Transparency is only required when it concerns the actions of public authorities or public officials. The release of information that is held by them, but does not concern their actions, contributes little to the realisation of this goal. In addition, if the release of information actually harms public authorities' ability to represent the public interest, transparency is not required. The general assumption in EU law is that transparency will not have this effect though, and only if the institutions provide convincing arguments to the contrary the Courts will reject the argument.

The moment at which transparency should be provided can differ. To enable participation, information should be provided prior to, or at least in an early stage of, decision making. But although participation can contribute positively to democracy and public autonomy, it is not always required. In addition, the risk of underrepresentation of certain interests may mean that participation can sometimes hamper rather than help the public interest. If participation is required, transparency should be provided prior to decision-making. If it is not, transparency can be delayed. However, people should eventually always be able to find out what public authorities have done. Arguments against participation, even if they are valid, do not justify compromises to ex post transparency which is necessary to ensure accountability.

Public authorities should make information about participation possibilities public of their own account. Detailed information can be provided upon request to those who have expressed a desire to participate. As regards accountability, information on government activities should ideally be made public pro-actively, since public authorities will know this information is required for the citoyen to assess their performance. In both cases, the information should be of sufficient quality to allow people to understand it.

Exceptions to transparency are more problematic, since public authorities are naturally the primary source for information about their own performance. If the government does not provide information to fuel the public debate, the public debate can still be there. If it fails to provide information about its own actions, it becomes devilishly hard to evaluate these actions, let alone try to impact them. However, this goal of transparency will be much less compromised if only ex ante and ex durante transparency are limited. Ex post transparency is essential to its realisation though, and although delayed transparency may be justifiable, eventually, transparency should be provided.

Having said that, the harm an individual refusal to disclose information will cause to the realisation of the goal – a government that represents the public interest – is relatively limited.

7.5.3 Type C: efficient decision-making

Type C transparency is required to comply with the free movement rules and aims to increase the overall efficiency of the EU's internal market by improving the quality of the decisions of homo economicus. This obligation targets homo economicus, and transparency does not need to be provided to the general public, but only to those economic actors who require it to optimise their decisions. However, because public authorities are not as capable as those economic actors themselves to determine who does or does not need a particular piece of information, there is a tendency to require them to make the information available to everyone, just to be on the safe side. The scope of the obligation is again somewhat limited. It only applies to information that has the potential to impact the decisions of homo economicus, and that will affect the functioning of the market. Thus, it applies to information about actions of public authorities on the market, either as market actors or as market regulators. The information needs to be available at a time that homo economicus can still act upon it. Thus, public authorities need to be transparent about their actions beforehand. The information public authorities make available needs to be of a quality that allows all market players to interpret it in the same way. Public authorities should usually be pro-active, because economic actors are not aware there is information they should ask about in the first place. When public authorities have communicated this fact though, they can leave it to market actors to request additional information, at least if they can reasonably assume this is the most efficient solution.

Exceptions to this obligation are problematic. Although the impact on the internal market of a single instance where transparency is lacking is limited, it will violate the principle of equal treatment and the free movement rights. The latter have required fundamental status in EU law, and as such cannot be interfered with lightly.

Having said that, it is often unclear whether transparency will actually contribute to improving efficiency, especially when transparency can potentially resolve a market failure. The EU institutions may not be in the right position to judge the effect of transparency on a national or local market. In such cases, the interest in transparency must be taken into account, but apart from that, the EU institutions are reluctant to impose strict obligations.

7.5.4 Type D: compliance with economic law

Type D transparency is required to ensure that public authorities comply with the rules governing the EU's internal market by allowing homo economicus to see what public authorities are doing, which enables him to hold them accountable for their actions and try to affect those actions. In this case, transparency should target those economic actors who are affected by the actions of public authorities, and who have been given the right to participate in the decision-making process leading to those actions, or the right to challenge these decisions. Not all economic actors who might be affected have been given these rights, for valid reasons. Their primary interest is not in upholding EU law, but in securing their own interest. There is nothing wrong with that, but EU law tends to give them that right only when it is likely to contribute to public authorities' comply-

ing with the rules. Indeed, ex durante transparency is prohibited in procurement law exactly because it allows economic actors to try to manipulate decisions to their advantage, which ruin the level playing field required for effective competition.

Public authorities need to communicate the reasons for their decisions. Transparency should be active, since they know who the information should be communicated to, and the quality of the information must be of a level that allows the recipient to assess whether EU law was complied with.

Exceptions to this obligation are fairly easy to justify. The impact of a refusal to provide transparency on the realisation of the goal – to ensure that public authorities comply with the rules governing the internal market – is limited. Although the rights of homo economicus come into play as well, the non-interference with these rights can be guaranteed in other ways as well, e.g. by giving the Commission the task of monitoring the behaviour of the member states. Since homo economicus is not an autonomous individual, it does not matter if he does not get this honour himself. Again, compromises to ex ante and ex durante transparency are more acceptable than compromises to ex post transparency.

7.5.5 Type E: respecting the intrinsic worth of homo dignus

Type E transparency is required to respect the rights of homo dignus and aims to facilitate autonomous decision-making. It requires transparency to only those individuals whose dignus-rights are affected by it. The scope of the obligation is narrow, and varies from individual to individual. It only concerns information that people need to make autonomous decisions regarding their private and family life, or to secure their human rights, in particular the right to life. It does however concern potentially all government-held information, regardless of whether it concerns the activities of public authorities or is merely held by them. Homo dignus will usually be the better judge of whether and when he needs this information, so public authorities should supply it upon request. Positive obligations will exist if it is obvious that an individual requires information, like when he is in a life-threatening situation and transparency can help him find his way out of it. This will be rare though, because if public authorities try to determine for someone whether he needs information or not, that very act diminishes his autonomy.

Exceptions to this obligation will be fairly difficult to justify, because even a single refusal to provide transparency results in a failure to respect the rights of homo dignus.

7.5.6 Type F: ensuring respect for homo dignus

Type F transparency is required to ensure that public authorities respect the rights of homo dignus by allowing him to see what public authorities are doing, which enables him to hold them accountable for their actions and try to affect those actions. Transparency should be provided to those individuals whose rights will be adversely affected by the decision of a public authority. Unlike in the case of homo economicus, the right of homo dignus to participate in the procedure to try to affect its outcome as well as his

right to challenge it are a given. Transparency should be provided about the reasons for such decisions, including the decision to instigate proceedings against someone. The quality of the information provided should be sufficient to allow homo dignus to determine whether the public authority has respected his rights. Information should be given as early as possible, to allow homo dignus to affect the outcome of a procedure. Public authorities should be pro-active in providing transparency, since homo dignus will only become aware of the possibility that his rights are being violated if they do so.

Exceptions to this obligations will be the most difficult to justify. Not only will a refusal jeopardise the substantive right at issue, which could be resolved by protecting it in another way, it also denies the autonomy of homo dignus by denying him the opportunity to actively fight for his own rights. Again, a single refusal to provide transparency results in a failure to respect the rights of homo dignus.

Delayed transparency is less harmful than a complete lack of transparency, but the situation differs from that under b. Delayed transparency will have a much harsher impact on the rights of homo dignus than on the aim of ensuring that public authorities act in compliance with the public interest. If the general public gets to hold officials accountable for their behaviour after some delay, the harm caused is likely to be much smaller than if homo dignus has to live with a violation for his rights for a similar period of time.

7.5.7 Opposing interests

The effects of different kinds of transparency are equally important when assessing the weight that should be attributed to the interests opposing transparency. The harmfulness of transparency will be affected by the target of the transparency obligation, what information is being communicated, the time at which public authorities are being transparent, and by the quality of the information.

Transparency to the general public will be more harmful than transparency to a selected group of recipients, provided that the recipients of information do not communicate it any further. This is an important condition, because it is hard to control what people do with information once they have been given access to it. It may be justified to make an exception to a transparency obligation that targets the general public, or even a more selective group, but only if transparency towards a smaller group, where information is secure, is observed. If specific individuals are entitled to transparency based on homo dignus or homo economicus rights, the option of allowing them access to information under the condition that they do not share it could at least be taken into account. Alternatively, this allows people to secure their rights through trustees, and although it is not an optimal solution, it is better than allowing objections to transparency to prevent them from securing their rights at all.

Clearly, the exact nature of the information that public authorities communicate will impact the effect transparency has on opposing interests. This has resulted in a tenden-

cy in EU law to shun blanket exceptions, and to impose a duty on institutions that refuse a request for transparency to show that actual harm is likely to occur. Exceptions should be constructed narrowly. In addition, only the information the release of which is potentially harmful may be refused. If possible, applicants should get partial access to documents. On a related note, one can imagine that information of an abominable quality is less harmful. However, we have seen that public authorities who purposefully obfuscate things are highly undesirable, and lowering the quality of information should probably not be acceptable.

Finally, the moment at which transparency is observed will greatly affect its potential for harm. Often, the danger will dissipate after some time has passed, and interests that can justify exceptions to an obligation to provide transparency immediately will lose force as time proceeds. No information should be kept secret for ever. As regards decision-making and negotiations, in particular ex durante transparency can be harmful. Ex post and ex ante transparency are much less likely to be so. Even if internal decision-making processes and negotiations justify exceptions to transparency, there is much less of a reason not to be open about the decision making agenda upfront, or about what happened after the decisions has been taken or the negotiations have ended.

As regards the harmfulness of ex durante transparency, EU law seems to be out on a limb. There is no general assumption it is so harmful that it defeats the interests in transparency. However, for specific categories of cases, like for the file in state aid investigations, there are blanket exceptions, where the Commission is free to assume that harm will occur if documents are released. This presumption is rebuttable though.[1016]

7.5.8 Should I be transparent? A guide for public authorities[1017]

To determine whether a particular transparency obligation exists, that is, an obligation incumbent on a public authority to communicate a piece of information of a certain quality to a certain individual or group, at a given time, either on its own accord or upon request, one needs to take a number of steps. We saw that the goal of a particular transparency obligation determines the answer to a number of questions: who is the target of the transparency obligation, what information should be disclosed, when, upon request or of one's own accord, what should the quality of the information be, and what exceptions can be made?

The first step to take is to identify the goal of a particular transparency obligation. In paragraph 7.5.1 to 7.5.6 we discerned six categories of transparency obligations, each with a specific purpose. The goals of these obligations are summarised in the first rows of the table in appendix 1. The transparency obligations that fall into each of those categories differ with regard of their target, scope, and the strength of the legal arguments to assume an obligation exists. For most of the categories, there are specific sorts

[1016] Paragraph 3.4.2.
[1017] This paragraph should be read in conjunction with appendix 1.

of information that are especially relevant to the realisation of the goal. For those categories of information, the weight of the transparency obligation increases, which means exceptions become harder to justify.

When we look at the moment at which transparency should be provided, we can discern a pattern. If transparency serves to facilitate decision-making, it should be provided at a moment where the decision-maker can still incorporate it in his decision-making process. When transparency aims to ensure that citizens can see what public authorities are doing, matters are slightly more complicated. The purpose of allowing outside scrutiny is to ensure that public authorities comply with the norms incumbent upon them: they should execute the public will as determined by the citoyens through public deliberation, comply with the rules governing the internal market and respect the rights of homo economicus, or respect the rights of homo dignus and comply with the rule of law. Transparency contributes to this in two ways. First, allowing citizens to see what is going on inside government allows for participation. They can try to affect ongoing procedures. To facilitate this, transparency should be provided either before or early in a decision-making procedure, to that the input of citizens can still affect the outcome. Second, transparency ensures that public officials know their actions will get out in the open and allows them to be hold accountable. To realise this, ex post transparency is sufficient. Because accountability is valued higher in EU law than participation, ex post transparency carries more weight.

When we look at whether information should be provided upon request or spontaneously, we notice that information required for autonomous decision-making is best supplied upon request. The autonomous individual is the only one who knows what information he requires. In those cases where public authorities know what information people will need, it is reasonable to assume an obligation to disclose information spontaneously, provided that they do not have to violate the privacy of homo dignus to determine what information he needs. There is a caveat here though. Because people generally do not know what information public authorities have, the active disclosure of what information is held by public authorities is necessary for them to make effective use of a right to request information. This is reflected in the obligation to have a register of documents that we find in article 11 of Regulation 1049/2001[1018] as well as in the acceptability of a list of documents contained in the file combined with the possibility to request access to those documents in cases where an exception to the active duty to give access to the file can be justified.

The quality of information should generally speaking be sufficient to enable the target of the transparency obligation to use it for its intended goal. The quality of information is of particular importance if the goal of the obligation is to improve efficiency, because information that is hard to process leads to high costs for economic actors.

When we look at the possibility for exceptions, we notice several things. First, for some transparency obligations, exceptions can never be justified. These obligations are

[1018] The quality of the registers, particularly that of the Commission can be criticised though. Curtin 2009, p. 220-232.

derived from the right to life and the right to physical integrity, which are internationally recognised as non-derogable rights. This has consequences for the right to information of both homo dignus and the citoyen. Homo dignus has a non-derogable right to access information that can save his life or his physical integrity, whereas the citoyen has a non-derogable right to information about how government and its officials deal with those rights. Second, there should be a possibility to make exceptions to transparency to protect the fundamental rights of individuals, in particular the right to privacy. EU law offers this option across the board, and does in fact offer a high level of protection to these rights. Third, exceptions to transparency are to be expected where transparency does not contribute to the realisation of its goals. This argument is made for both democracy understood as a system in which public officials execute the general will to the best of their ability, and for efficiency. The argument that transparency undermines decision-making and complicates negotiations does not carry a lot of weight in EU law. There appears to be a general assumption that the benefits of transparency outweigh the disadvantages, an assumption that might be prudent considering the tendency in public officials to want more secrecy than is warranted. Nevertheless, EU law leaves the possibility open that transparency may hamper democracy in a concrete case, although the burden of proof imposed on the institutions is rather heavy. That transparency sometimes hampers efficiency is generally accepted, and exceptions to transparency obligations that aim to improve efficiency are quite common in those cases where transparency is thought not to contribute to efficiency. Fourth, there are a number of other interests that can justify exceptions to transparency obligations, including public safety, national security, and commercial interests. The acceptability – and desirability – of such exceptions is mostly a political matter. Nevertheless, they cannot infringe upon the core of the rights of homo dignus and the citoyen, and a balancing exercise is required.

If there is a legitimate interest that opposes transparency, there are several options for compromise. These compromises vary in how they affect the different goals transparency obligations can have, and their acceptability is therefore determined by what goal a particular transparency obligation has. Public authorities can disclose information to fiduciaries if they are worried disclosure to the original target will result in abuse of the information. Transparency to fiduciaries does not facilitate decision-making, because decision-makers cannot put information they do not have to good use. It does allow for accountability though, provided the fiduciary is properly representing the interests of the original target of the transparency obligation. In the case of homo dignus, the use of a fiduciary is intrinsically problematic, because it denies his autonomy. His right to defend his own interests is infringed. Hence, there are strict criteria that the use of special advocates and the like have to comply with. In the case of homo economicus, the use of fiduciaries is unproblematic. Homo economicus has no interest in being able to autonomously defend his rights. Indeed, he would be quite happy if someone else put in the effort on his behalf, and as long as his substantive interests are safeguarded there are no objections to the use of special advocates or methods where the court assesses the relevance of documents.[1019] I suspect this difference between homo dignus and

[1019] The use of special advocates for homo economicus is not actually seen in EU law. Access will simply be refused or limited to the court.

homo economicus to go a long way in explaining the observations about the court's switching between a more instrumentalist approach of the rights of defence and a more essentialist approach.[1020] In addition, 'fiduciaries' would not need to represent the interests of homo economicus, but the interest in a properly functioning economy as such. Unsurprisingly, the Commission is tasked with holding public authorities accountable for their compliance with economic law quite often, especially where economic actors would press their own interests rather than the general interest.

Public authorities may also delay transparency if disclosure would harm other interests to a moment where the risk of harm has disappeared. Again, this is not really feasible if transparency aims to facilitate decision-making, but delayed transparency still allows outsiders to see what public authorities are doing, only a bit later. Whether this is a problem depends on how important it is that the target of the transparency obligation can affect the behaviour of the public authority in a particular case, and on how much the delay hampers his ability to do so. Hence, delayed transparency towards the citoyen is reasonably acceptable, because he can still hold public officials accountable, and his ability to participate in decision-making is valued less high than that of the other citizens. Delayed transparency towards homo dignus is problematic, because he has a keen interest in preventing a decision that affects him adversely, and because after a set period of time, he can no longer challenge decisions. The same holds true for homo economicus. The latter has an even bigger interest in timely transparency when he is competing for a scarce right, both because his interest in ensuring the proper decision is taken is high, and because of the problems he faces in challenging a decision that awards the right to a competitor.

Finally, public authorities can provide passive transparency if active transparency would require them to examine and disclose documents that citizens may not be interested in. This has two advantages. First, in the case of large amounts of documents, it saves costs and effort. Second, it allows them to postpone the decision on whether a document should be disclosed to a point where they have information about the relevance of that document to their citizens: if no one expresses an interest in a document the release of which may cause harm, why even consider disclosing it? This solution still requires the public authorities to at least announce that they have the information, for reasons discussed above. Passive transparency towards homo economicus to aid him in decision-making is problematic, both because it will not bring his costs for information gathering down as much as active transparency and because there is a risk that disclosure upon request results in discrimination. Where passive transparency is already the starting point, this compromise obviously does not resolve anything.

These are the considerations that determine whether a given transparency obligation should exist, and, if there are opposing interests, whether these can set the obligation aside. Using this model, we can predict whether EU law imposes a given transparency obligation on public authorities. This I believe is the best account of EU law regarding

[1020] Barbier de la Serre 2006.

transparency, the explanatory principle, or perhaps principles, that account best for the data we observed.

7.6 Reading the cards

In the previous paragraphs we discussed transparency as a legal norm and transparency as an explanatory principle. We have seen what transparency obligations occur in EU law, and how to best account for these obligations. In this paragraph, I will venture to give my opinion on how the principle of transparency will evolve in the future.

It is good to remember that the principle of transparency had gone through a tremendous development during the past two decades. Twenty years ago, this account of when transparency is required under EU law would have been outrageous, and arguably, the EU transparency regime still lacks consistency today. Yet I do believe the EU transparency regime has evolved in the past two decades to match the account given above more closely, and although predicting the future is a hazardous undertaking, I also believe the EU transparency regime will evolve to match the account given above even closer.

In particular:
I expect that EU law will evolve to recognise the right of homo dignus to access information to assist him in decision making to a greater extent. Although I do believe the principle of transparency already requires that public authorities provide transparency to homo dignus to this effect, there are few written rules and few court cases that give effect to this aspect of the principle of transparency. Although homo dignus is able to gain access to information based on a variety of rules and principles, these rules are not tailored to realise the aim of respecting the rights of homo dignus, and although they are often sufficient despite of that, they sometimes are not.

Ensuring that the rights of homo dignus are respected can be realised in several ways. The EU legislator can change the public access to information Regulation to allow public authorities to take account of individual interests. Given the current stalemate in the revision of the Regulation, and the legislator's prior to include this possibility in it, this is unlikely to happen anytime soon. Alternatively, the legislator could adopt a new regulation that allows individuals to request private access to information. This has several advantages. Such a regulation could include safeguards against information spreading any further, and would prevent individual interests from being used against applicants when their requests for information under Regulation 1049/2001/EC are decided upon.

It is more likely though that the courts will further develop the principle of transparency in this direction. They have already taken some steps do so, and the recent developments with regard to the Charter of Fundamental Rights and the ECHR necessitate the recognition of an individual right to transparency.

Transparency is especially important when public authorities allocate scarce resources. The principle of transparency has expanded to cover an increasing number of these procedures. It is a safe bet that this development will continue. The allocation of state aid is a fine example of an area where the influence of the principle of transparency has not been felt strongly yet, but where it will probably gain a strong foothold in the future.

I would argue the principle of transparency will come to apply to the division of all scarce resources, or rather, that it will become increasingly more clear that it applies to the division of all scarce resources. This means that there will be an obligation to give ex ante transparency to ensure a level playing field and allow competition. This will require that opportunities to acquire scarce resources must be advertised widely. Additional information must be supplied either actively or upon request, dependent on efficiency considerations. The protection of the decision-making process from undue influence by economic actors trying to promote their own interests that we saw in public procurement law will transfer to these fields as well. Despite the growing importance of transparency, EU law will not require ex durante transparency in economic decision making in individual cases. Ex post transparency will be highly important though, as it ensures that the EU rules are complied with.

Finally, the interpretation of the principle of transparency is affected by our knowledge of how it contributes to goals like efficiency, democracy and human rights protection. Thus, I expect that the principle of transparency will evolve further as empirical sciences progress. The answer to the question of how transparency contributes to the realisation of each of the six goals that inspire it determines what transparency obligations actually exist. This question is essentially an empirical one, even though the law has answers of its own, which do not correspond entirely to the answers provided by empirical sciences. Nevertheless, developments in the scientific understanding of the effects of transparency will likely lead to developments in the legal transparency regime, although this will take time. This is most likely with regard to issues that are still highly contentious. In particular new insights on the effect of transparency on the functioning of imperfect markets, and on the outcome of negotiations and decision making procedures could have effects on the future development of the principle of transparency.

The developments I sketched above are refinements of the existing transparency regime. But the model of the transparency regime given in the previous paragraph also allows us to predict how developments in EU law that are not directly concerned with the principle of transparency will affect is application.

In particular:
We have seen that transparency is necessary to allow participation. This is true with regard to public participation as well as participation by individuals in procedures that affect them personally. Whenever EU law awards a right to participate, there should be an auxiliary transparency obligation to render this right effective. Participation is a highly topical issue in EU law. If more participation rights are introduced, transparency

obligations will follow suit. The same argument can be made with regard to accountability. Whenever EU law introduces a new accountability forum, a transparency obligation incumbent on the actor that targets the accountability forum should be introduced as well. The principle of transparency does not determine when participation and accountability are required. Its observance does require that if they are required, public authorities offer the necessary transparency to relevant parties.

In addition, the developments with regard to transparency will follow the development of the internal market. If public authorities are obliged to promote competition in more fields, or if the scope of the principle of equal treatment and the free movement rules will expand, so will the scope of the principle of transparency. The principle of transparency does not require observance of the principle of equal treatment, the promotion of competition, or the observance of the Treaty freedoms. However, if those things are required, public authorities need to observe the transparency obligations that are required to ensure compliance.

More generally, transparency will follow rights. If new rights are attributed, either to homo economicus, homo dignus, or the citoyen, public authorities will be obliged to offer the transparency necessary for the enjoyment of these rights. If rights disappear, the transparency obligations that used to be in place to ensure their realisation will become superfluous.

The application of the principle of transparency is affected by insights into the manner it functions, the changing value attributed to the goals it aims to realise, and the introduction or disappearance of rights that require its observance to be realised. As long as the law and our understanding of the role of information in economic, political and legal processes keep evolving, so will the principle of transparency. Despite that, I hope I have been able to provide a guide to its application that will stay relevant for years to come, not just for scholars of EU law, but for all those who are interested in the relationship between transparency and the law.

SAMENVATTING

Het transparantiebeginsel in het recht van de Europese Unie

Het transparantiebeginsel is binnen het EU recht een wat vreemde eend in de bijt. Het lijkt in verschillende rechtsgebieden tegelijk te zijn ontstaan, en de verplichtingen die er aan ontleend worden zijn zeer divers en lijken nauwelijks lijn te bevatten. Van een recht op toegang tot documenten die in het bezit zijn van de Europese Commissie tot een verbod een eenmaal vergeven contract te wijzigen dat zich richt tot aanbesteders: het wordt allemaal ontleend aan het transparantiebeginsel. Anders dan bij andere rechtsbeginselen zijn die verplichtingen grotendeels vreemd aan het recht van de lidstaten. Maar ook bestaande verplichtingen worden opgehangen aan het relatief nieuwe transparantiebeginsel, wat de vraag oproept wat de toegevoegde waarde van die nieuwe classificatie is.

Wat in elk geval duidelijk is, is dat we niet om het transparantiebeginsel heen kunnen. De reikwijdte van het beginsel wordt door het Hof steeds uitgebreid, en ook in zijn hoedanigheid van één van de nog wat enigmatische beginselen van goed bestuur lijkt het transparantiebeginsel een veelbelovende toekomst tegemoet te gaan.

Het is dus handig te weten wat precies vereist is op grond van het transparantiebeginsel. Dit boek geeft het antwoord op die vraag. Dat vereist meer dan het eenvoudig op een rij zetten van de verplichtingen die men aan het transparantiebeginsel heeft ontleend, of in de toekomst zou kunnen gaan ontlenen. Een dergelijke lijst zou immers slechts een onoverzichtelijk brij van verplichtingen opleveren, die op het eerste gezicht maar weinig met elkaar van doen hebben. Het is dus zaak de systematiek bloot te leggen die aan deze transparantieverplichtingen ten grondslag ligt, zodat in de toekomst helder beargumenteerd kan worden welke verplichtingen er wel, en welke verplichtingen er niet bestaan in het Europese recht.

Wanneer we een nadere blik werpen op de begrippen waaruit het transparantiebeginsel is opgebouwd, wordt snel duidelijk waarom het zo ongrijpbaar is. Transparantie valt met enige goede wil wel te definiëren. Een transparante overheid is er één die haar onderdanen voorziet van de informatie die ze nodig hebben om zich te verzekeren van de toestand van de wereld en deze te begrijpen, en één die de wereld niet nodeloos compliceert. Zo bezien gaat transparantie over de beschikbaarheid, toegankelijkheid, en begrijpelijkheid van informatie. Een dergelijke definitie blijft echter dusdanig breed dat een jurist er weinig houvast aan heeft. Want over welke informatie gaat het nu precies? Wie moet er eigenlijk toegang hebben tot informatie? En moet dat direct, of is het acceptabel om informatie pas over een jaar, of nog langer, bekend te maken? Met alleen een definitie van transparantie moeten we het antwoord op dergelijke vragen schuldig blijven. Over de precieze aard van rechtsbeginselen bestaat evenmin overeenstemming. Is het nu een bepaald type rechtsnorm, descriptief, dat een toestand beschrijft die het recht tracht te realiseren, of is het een soort 'natuurwet' die geobserveerde juridische data kan verklaren? Beide benaderingen kunnen ons begrip van het transparantiebeginsel vergroten. Het transparantiebeginsel beschouwd als

rechtsnorm leert ons dat het recht een bepaalde staat van transparantie nastreeft, en dat uit het beginsel verplichtingen kunnen worden afgeleid die bijdragen aan het realiseren van die staat. Als we nauwkeurig vaststellen wat die staat is, en hoe verschillende soorten transparantie bijdragen aan het bereiken daarvan, dan weten we wat het transparantiebeginsel vereist. Beschouwen we het transparantiebeginsel als 'natuurwet', dan suggereert dat dat er een sleutel is om de verscheidenheid aan transparantieverplichtingen die we aantreffen in het Europese recht te begrijpen: het is de eerste stap in het structureren van bestaande verplichtingen, en voorwaarde om ook in een nieuwe situatie te kunnen bepalen welke mate en soort van transparantie vereist is.

Bij het bepalen van de mate en soort transparantie die vereist is, is dan ook doorslaggevend welk doel men met transparantie beoogt te bereiken. De positieve effecten die men toeschrijft aan transparantie zijn niet mis. Transparantie draagt bij aan een goed functionerende democratie, aan de effectiviteit van het bestuur, de legitimiteit van Europese instanties, aan het functioneren van de markt, en aan het realiseren van individuele rechten. Dat gebeurt steeds op twee manieren. Ten eerste stelt transparantie mensen in staat betere, want beter geïnformeerde, beslissingen te nemen. Dat geldt in verschillende omstandigheden: we profiteren van transparantie als we een nieuw telefoonabonnement uitzoeken, maar ook als we in het stemhokje staan. Ten tweede zorgt transparantie ervoor dat buitenstaanders kunnen zien wat er gebeurt binnen een transparante organisatie. In de context van dit proefschrift is dat over het algemeen de overheid. Zodoende kunnen ze trachten die overheid te beïnvloeden door actief te participeren, en kunnen ze indien nodig achteraf de overheid ter verantwoording roepen.

Dat transparantie positieve effecten heeft is op zich niet voldoende om aan te nemen dat er een verplichting bestaat om transparant te zijn. Of er voor de overheid daadwerkelijk een verplichting tot transparantie bestaat, hangt af van het normatieve kader dat de relatie tussen de overheid en haar burgers reguleert. Wat dat normatieve kader is, hangt af van de kijk die men heeft op die relatie. De overheid heeft andere verplichtingen ten opzichte van de citoyen, de klassieke staatsburger, dan ten opzichte van homo economicus, de rationele rekenaar uit de economische theorie die steeds meer beleid inspireert, en weer andere ten opzichte van homo dignus, de privépersoon wiens fundamentele rechten de overheid dient te respecteren. De drie burgers hebben op hun beurt ook behoefte aan verschillende informatie om hun rol goed te kunnen vervullen.

Zodoende kunnen we op voorhand zes categorieën van transparantieverplichtingen onderscheiden. Er zijn verplichtingen die tot doel hebben de citoyen te helpen bij het nemen van beslissingen, en verplichtingen die de citoyen helpen de overheid die hem vertegenwoordigt te controleren en te beïnvloeden. Er zijn verplichtingen die tot doel hebben homo economicus betere beslissingen te laten nemen, en verplichtingen die hem in staat stellen de overheid in de gaten te houden. Ten slotte zijn er verplichtingen die homo dignus helpen bij het nemen van beslissingen, en verplichtingen die maken dat hij weet wat de overheid doet.

Transparantieverplichtingen die zich richten op de citoyen dienen de democratie. Ze faciliteren de wilsvorming door burgers, en zorgen dat diezelfde burgers kunnen participeren in het openbaar bestuur en dat ze hun democratisch gekozen vertegenwoordigers verantwoordelijk kunnen houden voor hun gedrag. De citoyen heeft rechten die de overheid dient te respecteren, die uiteindelijk gestoeld zijn in het beeld van de mens als autonoom wezen, die vrijelijk moet kunnen deelnemen aan het publieke besluitvormingsproces. Zoals individuen vrij zijn hun leven vorm te geven, zo zijn staatsburgers vrij om gezamenlijk de samenleving vorm te geven. De rechten van de citoyen stellen hem dus in staat zijn rol als staatsburger te vervullen.

Het uitgangspunt in het Europese recht is dat in een democratie staatsburgers recht hebben op een zo wijd mogelijke toegang tot documenten. Dat betekent in elk geval dat wanneer er geen belang is dat zich verzet tegen openbaarmaking, documenten publiek beschikbaar moeten zijn. Voor iedereen dus. Vanuit de democratische theorie is dit goed verdedigbaar: alle informatie kan immers van belang zijn voor het proces van wilsvorming. Of ze ook daadwerkelijk relevant is, kan alleen bepaald worden door de staatsburgers zelf, en niet door de overheid. Het van te voren uitsluiten van bepaalde categorieën informatie van het publieke recht op toegang tot informatie valt dus niet te billijken. Wel past met betrekking tot de tweede functie van transparantie enige nuancering. Transparantie faciliteert zoals gezegd participatie en verantwoording. Participatie en verantwoording moeten er op hun beurt voor zorgen dat de overheid daadwerkelijk de publieke wil uitvoert. Dat is immers de essentie van de democratie. Over het algemeen zal transparantie positief bijdragen aan dit einddoel, maar in een enkel geval kan transparantie hier juist aan afdoen. Bij multilaterale onderhandelingen en bij bepaalde soorten beslissingen kan transparantie er toe leiden dat publieke figuren beslissingen nemen die niet optimaal zijn. In dergelijke gevallen is een beperking van transparantie goed te rechtvaardigen vanuit democratisch oogpunt. Het EU-recht erkent dit, maar de bewijslast die op de instellingen rust is zwaar. Een dergelijke zware bewijslast is overigens prima te verdedigen: het mogelijke nadeel van transparantie wordt grotendeels gecompenseerd door haar voordelen, en bovendien is de citoyen vrij te beslissen dat hij transparantie zo belangrijk vindt dat hij het risico op niet-optimale beslissingen voor lief neemt.

Het recht op transparantie van de citoyen is niet absoluut. Soms moet er een afweging gemaakt worden. Als dat zo is, moet aan het openbaarheidsbelang een gewicht toegekend moeten worden. Dat gewicht wordt ontleend aan het belang van transparantie voor het functioneren van de democratie en dus is altijd groot. Onder omstandigheden kan dat belang echter nog groter zijn. Zo kan er een ander publiek belang zijn dat bij openbaarheid is gediend, zoals een gezond leefmilieu. Aan transparantie moet ook extra belang worden gehecht wanneer het over informatie gaat waarop de overheid een monopolie heeft, of informatie over de schending van het recht op leven en het recht op fysieke integriteit. In dat laatste geval is het recht op informatie zelfs absoluut.

Normaliter moet echter het openbaarheidsbelang moet afgewogen worden tegen het belang dat gediend wordt door geheimhouding. Wanneer dit een publiek belang is, is de afweging in feite een politieke. Uiteindelijk is het de citoyen die bepaalt welk belang zwaarder moet wegen, via de wetgever en het bestuur. Wel zal normaal gesproken het gevaar van openbaarmaking afnemen naarmate er tijd verstrijkt. Het gewicht dat moet worden toegekend aan het geheimhoudingsbelang zal dus mettertijd afnemen. Met betrekking tot de belangenafweging moet verder nog worden opgemerkt dat het weigeren van informatie over een specifiek geval vaak een relatief klein effect zal hebben op het vermogen van mensen om als staatsburger te functioneren.

Transparantieverplichtingen die zich richten op homo economicus hebben als doel het functioneren van de interne markt te verbeteren. Ze richten zich niet op het publiek, maar op economische actoren die daadwerkelijk belang hebben bij de beschikbaarheid van bepaalde informatie. Transparantie stelt homo economicus in staat betere beslissingen te nemen. Daarnaast zorgt transparantie ervoor dat homo economicus marktverstorend optreden van publieke autoriteiten opmerkt, en eventueel kan aanvechten. Door de belangen van homo economicus te beschermen draagt het Europese recht bij aan een goed functionerende markt. Het Verdrag kent dan ook een aantal fundamentele rechten toe aan homo economicus, de klassieke verdragsvrijheden. Dat aan deze rechten groot gewicht toe komt binnen het Europese recht heeft weinig te maken met enige morele verplichting ten opzichte van homo economicus, maar alles met de grote waardering voor de interne markt.

Het transparantiebeginsel vereist dat wetgeving duidelijk en begrijpelijk is, en geen ambiguïteiten bevat. Wetgeving die taken toevertrouwt aan een bepaalde instantie moet een duidelijke omschrijving van de toegekende competenties bevatten en van de wijze waarop die bijdragen aan het realiseren van de doelstellingen van de wet. Het vereist dat de Commissie beleidsregels opstelt, en zich daar aan houdt. Nationale autoriteiten moeten consistentie nastreven, en regels die zien op besluitvormingsprocessen moeten openbaar zijn. Al deze verplichtingen maken de overheid beter voorspelbaar, zodat homo economicus wanneer hij besluiten neemt zo goed mogelijk rekening kan houden met hoe de overheid de uitkomst van zijn acties beïnvloedt.

Een gebrek aan transparantie heeft een negatief effect op de markt, en kan als zodanig een verboden inbreuk zijn op de verdragsvrijheden. Wanneer overheden wel mogen ingrijpen in de markt moeten ze dat transparant doen om het verlies aan efficiëntie zo veel mogelijk te beperken. Hoewel transparantie in theorie als beleidsinstrument kan dienen om marktfalen te repareren is er geen algemene verplichting om transparantie voor dit doel in te zetten. Onbegrijpelijk is dat niet, want het zou bijzonder moeilijk zijn concreet aan te geven hoe en wanneer transparantie positief zou bijdragen aan het oplossen van marktfalen.

Wanneer marktingrijpen transparant is, kan homo economicus nagaan of dit ingrijpen terecht was, of dat zijn rechten zijn geschonden. Dit wordt gerealiseerd door de rechten van de verdediging, de motiveringsplicht, en het beginsel van effectieve rechtsbescherming te respecteren.

Transparantie ten opzichte van homo economicus is alleen zinvol als dat ook daadwerkelijk bijdraagt aan efficiëntie, en daarmee aan een goed functionerende markt en welvaart binnen Europa. Doordat de rechten van homo economicus zijn neergelegd in het verdrag, en zelfs de status van fundamentele rechten hebben gekregen, heeft de Europese wetgever duidelijk gemaakt dat hij de theorie accepteert dat wanneer homo economicus vrijelijk zijn eigen nut kan maximaliseren, dat uiteindelijk tot meer welvaart voor iedereen leidt. Omdat transparantie goed is voor homo economicus, is dus in beginsel gegeven dat transparantie ook goed is voor de markt. Dat is natuurlijk een simplificatie, en het gewicht dat wordt toegekend aan transparantie kan wel degelijk variëren naar gelang de positieve invloed die transparantie in een concreet geval daadwerkelijk heeft. Wanneer de economische theorie geen sluitend antwoord heeft op de vraag of transparantie positief bijdraagt aan efficiëntie heeft het transparantiebeginsel minder gewicht. Wanneer duidelijk is dat transparantie een negatief effect heeft op het functioneren van de markt geldt hetzelfde, al zal nog wel enig gewicht moeten worden toegekend aan het beginsel omdat de rechten van homo economicus zijn vastgelegd in het Verdrag. Uitzonderingen op het uitgangspunt dat transparant moet worden opgetreden zullen wel gemakkelijker te aanvaarden zijn.

Transparantieverplichtingen die zich richten op homo dignus hebben als doel het respect voor individuele rechten te verzekeren. Zulke verplichtingen vereisen dat homo dignus toegang heeft tot informatie die voor hem als privépersoon van belang is. Zodoende is informatie die beschikbaar is voor de één niet noodzakelijk ook beschikbaar voor de ander. Door homo dignus van informatie te voorzien is hij beter in staat beslissingen te nemen die bijdragen aan het realiseren van zijn persoonlijke doelen. Door transparant te zijn zorgt de overheid dat homo dignus zich kan verdedigen tegen acties die inbreuk maken op zijn rechten. Weer is het uitgangspunt dat mensen worden geboren als autonome wezens, of in elk geval als wezens die de potentie hebben om autonoom te zijn. Het verschil tussen homo dignus en de citoyen is dat die laatste zich uitsluitend in de publieke sfeer beweegt, terwijl homo dignus zich wijdt aan zijn persoonlijke belangen.

Homo dignus heeft potentieel belang bij het verkrijgen van toegang tot een onbegrensde hoeveelheid informatie. Dat wil niet zeggen dat de overheid ook verplicht is hem die te geven. Er bestaat immers geen algemene plicht om mensen in staat te stellen hun privéleven te optimaliseren. Veeleer is het uitgangspunt data homo dignus maar zo veel mogelijk met rust gelaten moet worden. Zodoende heeft homo dignus alleen recht op informatie die noodzakelijk is om andere, in verdragen en wetgeving erkende, rechten te realiseren.

Dat betekent dat homo dignus recht heeft op toegang tot informatie over zichzelf en zijn familie, en op informatie over zijn omgeving. Het EVRM garandeert hem immers het recht geïnformeerde keuzes te maken op het gebied van gezondheid, familieleven, en woonplaats. Daarnaast heeft homo dignus een absoluut recht op informatie die zijn leven zou kunnen redden. Deze rechten kunnen relatief gemakkelijk ontleend worden aan de jurisprudentie van het Europese Hof voor de Rechten van de Mens. In het

Unierecht zijn ze nog veelal impliciet, maar ze zijn in essentie aanwezig en de kiem voor hun verdere ontwikkeling is gelegd in het Handvest en in de jurisprudentie van het Hof.

Het recht op toegang tot informatie die homo dignus nodig heeft om zijn rechten te verdedigen tegen ongeoorloofd overheidsoptreden is wederom neergelegd in het EVRM, en wordt sinds jaar en dag beschermd middels de algemene beginselen van het EU-recht. Meer recent is daar de bescherming van het Handvest bijgekomen.

Ook de transparantieverplichtingen ten opzichte van homo dignus zijn niet absoluut. Wanneer het transparantiebeginsel moet worden gewogen tegen andere belangen, zijn een aantal zaken van belang. De gevolgen van een enkele uitzondering op het transparantiebeginsel kunnen groot zijn. De consequenties van het niet openbaar maken van een enkel willekeurig document voor het functioneren van de democratie zullen over het algemeen wel te overzien zijn. Het niet openbaar maken van een document aan homo dignus kan veel verdergaande consequenties hebben voor dat specifieke individu. Om dezelfde reden is openbaarmaking met vertraging minder opportuun. Het gevaar dat openbaarmaking met zich meebracht mag dan geweken zijn, de kans die homo dignus had om nuttig gebruik te maken van de informatie is dat misschien ook. Hoewel homo dignus en homo economicus beiden een beroep kunnen doen op de rechten van de verdediging, het recht op effectieve rechtsbescherming, en de motiveringsplicht, zijn afwijkingen van die beginselen niet voor allebei even goed te rechtvaardigen. Het achterliggende doel is in het geval van homo economicus vaak ook op een andere wijze te realiseren. Wanneer een derde partij wél het bestuur kan controleren, is het functioneren van de markt nog steeds gegarandeerd, ook al worden de rechten van homo economicus geschonden. Bij homo dignus ligt dat anders. Als autonoom individu heeft hij er belang bij dat hij zelf zijn rechten kan verdedigen. Wanneer die taak aan een derde, zoals een toezichthouder, wordt uitbesteed is dat niet gewoon een praktische oplossing, maar een ontkenning van zijn autonomie waar zwaarwegende redenen voor moeten zijn.

De analyse van bestaande transparantieverplichtingen in het Europese recht maakt duidelijk welke stappen genomen moeten worden om vast te stellen welke specifieke transparantieverplichtingen bestaan. Eerst moet het doel van de verplichting worden bepaald. Elke verplichting valt in een van de zes hierboven genoemde categorieën. De categorieën verschillen wat betreft hun adressaat, hun reikwijdte, en de aanvaardbaarheid van uitzonderingen op het uitgangspunt dat er transparantie moet zijn. Het optimale tijdstip voor communicatie van de informatie varieert, net als of informatie op verzoek of spontaan moet worden gecommuniceerd. Voor de meeste categorieën zijn er specifieke soorten informatie die in bijzondere mate bijdragen aan het realiseren van het onderliggende doel, zodat het gewicht dat moet worden toegekend aan transparantie groter wordt, en uitzonderingen moeilijker te rechtvaardigen. Het doel van een transparantieverplichting bepaald dus aan wie transparantie moet worden geboden, wanneer, en over wat, of uitzonderingen acceptabel zijn, of op verzoek of proactief gecommuniceerd moet worden, en of er kwaliteitseisen gesteld worden aan de gecommuniceerde informatie. Hoe het doel van

een transparantieverplichting het antwoord op die vragen beïnvloedt is – preciezer dan in de tekst hierboven – schematisch weergegeven in bijlage 1.

LIST OF ABBREVIATIONS

BER: Block Exemption Regulation
CFI: Court of First Instance, now the general court
ECJ: European Court of Justice, now the court of justice
DPD: Data Protection Directive
ECHR: European Convention on Human Rights
ECtHR: European Court of Human Rights
FOIA: Freedom of Information Acts
NRA: National Regulatory Authority
PIN: Prior Information Notice
SME: Small and medium enterprises
SMP: Significant Market Power
TEU: Treaty on the European Union
TFEU: Treaty on the Functioning of the European Union
USD: Universal Service Directive

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CURRICULUM VITAE

Anoeska Buijze was born in 1980 in Leiden, the Netherlands. She read law at Utrecht University from 2003 until 2008. In 2008 she graduated with honours with an LLM in legal research. Her thesis on effectiveness norms in administrative law was awarded the Kienhuis Hoving thesis award 2007/2008. An excerpt was published in the Dutch journal for administrative law (NTB).

From 2008 until 2012 she worked on her PhD thesis on the principle of transparency in European law at the Institute for Constitutional and Administrative Law at Utrecht University. During that period she authored and co-authored a number of articles which were published in various journals and anthologies. She participated in research on behalf of the Council for the Judiciary and the World Bank. She taught courses on constitutional and administrative law, and on the legal aspects of good governance.

She is currently working as a postdoctoral researcher at the Centre for Environmental Law and Policy at Utrecht University, where she researches the manner in which local actors contextualise legal norms in urban development projects. This research is part of CONTEXT, one of the projects within Verdus' Urban Regions in the Delta programm.

		a	b	c	d	e	f
	Citizen type	citoyen		homo economicus		homo dignus	
Why?	Underlying value	public autonomy		efficiency		private autonomy	
	Function	Facilitates decision-making	Allows outside scrutiny	Facilitates decision-making	Allows outside scrutiny	Facilitates decision-making	Allows outside scrutiny
		Transparency allows the citoyen to engage in public deliberation and collective decision-making	Transparency allows the citoyen to ensure whether public authorities are in fact serving the public interest	Transparency allows homo economicus to make informed decisions about the utilisation of his resources	Transparency allows homo economicus to see whether public authorities are complying with the rules	Transparency allows homo dignus to make informed decisions about his private life	Transparency allows homo dignus to defend his rights vis à vis public authorities
	Compulsory nature	Transparency is required if it is necessary to ensure public autonomy		Transparency is required to the extent it contributes to efficiency		Transparency is required if it is necessary to ensure private autonomy	
Who?	Target	To the general public	To the general public	To all economic actors equally	To affected homines economici	To a particular individual	To affected homines digni
	Intrinsic weight	Weak obligation	Strong obligation	Weak obligation	Conditional obligation, only required if this contributes to efficiency	Strong obligation	Strong obligation
What?	Scope	Information that is relevant to the public debate	Information that relates to the actions of public authorities	Information that is relevant to homo economicus to assess the consequences of his actions	Information that relates to actions of public authorities that affect homo economicus	Information that is relevant to homo dignus when making decisions about fundamental issues, or is relevant to his personal identity	Information that relates to actions of public authorities that affect homo dignus
	subcategory of especially important information (obligation becomes stronger)	Information that public authorities have a monopoly on Information about the organisation of government and the capacity of public authorities	Information about the use of force by state officials Information pertaining to the legislative process Environmental information, in particular information about emissions	Information about regulation that can impact the consequences of homo economicus' actions		Information that allows homo dignus to realise his right to life or his right to physicial integrity	Information pertaining to actions that threaten to infringe a fundamental right
When?	When?	Always	Either in time to ensure meaningful participation, or ex-post to make accountability possible	In time to allow homo economicus to incorporate the information in his decision-making process	Either in time to allow homo economicus to try to affect the outcome of the procedure (not always required), or ex-post to make judicial review possible	In time to allow homo dignus to incorporate the information in his decision-making process, or always, for personal information	In time to allow homo dignus to try to affect the outcome of the procedure
Active or passive?	Active or passive?	Usually passive, since the citoyen is better able to assess whether information is relevant to the public debate than public authorities are; active transparency is commendable though	Active, since public authorities know which information must be made available to allow the citoyen to hold them accountable	Active, since homo economicus will not know about infomration unless it is made public, and because this is the only way to ensure equality between economic operators	Active, since public authorities know what information homo economicus will need	Usually passive, since homo dignus is the only one who can decide what information is of fundamental importancce to him; active transparency would raise privacy issues	Active, since public authorities know what information homo dignus will need
Quality standards?	Quality standards?	No	Sufficient to allow meaningful participation and/or public accountability	Sufficient to allow homo economicus to know what his legal rights and obligations are	Sufficient for homo economicus to understand the reasons for a decision and to challenge them	No	Sufficient to allow homo dignus to understand the reasons for a decisions and to challenge them
	Mandatory exceptions, balancing exercise by legislator or adminstration	Rights of homo dignus, in particular his right to privacy					

Exceptions	Optional absolute exceptions: transparency *may* be counterproductive, to be evaluated by the legislator or administration (the grey text indicates arguments that are never made)	Transparency is detrimental to public deliberation	Transparency makes public authorities worse representatives of the public interest: internal decision-making, negotiations with multiple agents	Transparency hampers efficiency: costs of additional transparency outweigh its benefits; transparency allows homo economicus to capture rents	Transparency hampers efficiency: costs of additional transparency outweigh its benefits; transparency allows homo economicus to capture rents	Transparency is detrimental to the private autonomy of the intended target	Transparency harms homo economicus' ability to defend his rigths
	Optional relative exceptions: transparency can harm other interests, to be balanced by the legislator or the administration and the judiciary	Public interest exceptions, subject to democratic approval, may no infringe upon the core of the right	Public interest exceptions, subject to democratic approval, may not infringe upon the core of the right	Public interest exceptions, subject to democratic approval; exception that aim to protect the internal market and the interests of economic actors are easier to justify	Public interest exceptions, subject to democratic approval; exception that aim to protect the internal market and the interests of economic actors are easier to justify	Public interest exceptions, subject to democratic approval, may not infringe upon the core of the right	Public interest exceptions, subject to democratic approval, may not infringe upon the core of the right
	Non-derogable obligations	No	Active communication of the results of investigations into the death, disappearance, or maltreatment of persons in state custody, or by state officials (articles 2 and 3 ECHR)	No	No	Provision of access to information that can help save homo dignus' life or prevent violations of his physical integrity (articles 2 & 3 ECHR)	Provision of access to information that can help save homo dignus' life or prevent violations of his physical integrity (articles 2 & 3 ECHR)
Mitigating the negative effects of compromises to transparency	Transparency to fiduciaries	No, because information cannot contribute to decision-making if it is now known to the decision-maker	Parliament, parliamentary committees, courts; acceptable alternatives if they do in fact represent the public interest, subject to democratic approval	No, because information cannot contribute to decision-making if it is now known to the decision-maker	Courts, administrative supervisors, special advocates; acceptable alternatives to safeguard the interest in efficiency	No, because information cannot contribute to decision-making if it is now known to the decision-maker	Courts, special advocates; acceptable as long as their use does not make it impossible for homo dignus to defend his own rights vis à vis public authorities
	Delayed transparency	No, delayed transparency will prevent the citoyen from taking the information into account while deciding on the best public policy and undermines the goal of the transparency obligation	Yes, ex-post transparency is sufficient to allow the citoyen to hold his representatives accountable	No, delayed transparency will prevent homo economicus from taking the information into account during decision-making and no longer contributes to realisation of the goal of the transparency obligation	Limited. Although ex-post transparency is sufficient to allow review, delays must be sufficiently short to allow review. Adverse decisions may have negative consequences for homo economicus even if they are eventually overturned, so affecting the outcome of the procedure in an earlier stage is preferable	No, delayed transparency will prevent homo dignus from taking the information into account during decision-making and no longer contributes to realisation of the goal of the transparency obligation	Limited. Although ex-post transparency is sufficient to allow review, delays must be sufficiently short to allow review. Adverse decisions may have negative consequences for homo dignus even if they are eventually overturned, so affecting the outcome of the procedure in an earlier stage is preferable
	Passive instead of active transparency	Yes	Yes	No, passive transparency will prevent homo economicus from being aware there is relevant information to begin with, and will infringe the principle of equality	Yes	No, active transparency is only warranted in those cases where it is necessary to realise the rights of homo dignus	Yes