

This article is published in a peer-reviewed section of the Utrecht Law Review

The Six Faces of Transparency

Anoeska Buijze*

1. Introduction

The principle of transparency is without doubt of fundamental importance to EU law. 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. As such, it is thought to contribute to democracy and good governance, and to be essential to the legitimacy of the European Union. In addition, it is derived from other provisions and principles that cannot be realized without observing the principle of transparency. Most prominent amongst these are Article 56 TFEU and the principle of equal treatment.¹ In this context, transparency is thought to contribute to the effective functioning of the internal market and the realization of free movement rights. But the principle of transparency has also been derived from the principles of effective judicial protection and the rights of defence,² and has been used in conjunction with the principles of legal certainty and sound administration.³ In those cases, transparency is essential to safeguard individual rights of all sorts. When we look beyond primary EU law, we discover countless directives and regulations that refer to the principle of transparency, either in their preambles or in the actual provisions.⁴ In addition, transparency is an important issue in the political debate within and about the EU. Despite all that, transparency remains somewhat intangible. The obligations that are derived from the principle of transparency vary widely, and range from the obligation to provide the widest possible access to documents held by the EU institutions to a prohibition on changing the terms of a contract concluded after a procurement procedure.⁵ The wide range of obligations that are derived from the principle of transparency make it difficult to conduct a comprehensive study into its nature. Indeed, most authors focus their attention on one aspect of transparency.⁶ This allows for an in-depth examination, but it fails to show the way in

* Postdoctoral fellow at the Centre for Regulation and Enforcement in Europe, Utrecht University School of Law (the Netherlands), email: a.buijze@uu.nl. This article is a summary of the author's dissertation, *The Principle of Transparency in EU Law*, Utrecht University, 2013.

1 See e.g. Case C-91/08, *Wall*, [2010] ECR 2815; Case C-260/04, *Commission v. Italy*, [2007] ECR I-7083. See also A. Buijze, *The Principle of Transparency in EU Law*, 2013, pp. 205-206.

2 See e.g. Case C-262/88, *Barber*, [1990] ECR I-1889; Case C-226/98; C-243/59; C-285/02; C-300/06 (AG); C-381/99. See also Buijze 2013, supra note 1, pp. 243-244.

3 Case C-24/00, *Commission v. France*, [2004] ECR I-2777; Joined Cases C-154/04 and C-155/04, *Natural Health Alliance*, [2005] ECR I-6451.

4 E.g. Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision, OJ L 192, 24.7.1990, pp. 1-9; 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, pp. 27-36.

5 Case C-496/99 P, *Commission v. CAS Succhi di Frutta SpA*, [2004] ECR I-3801.

6 X. Groussot, *General Principles of Community Law*, 2006, p. 250, and P. Craig & G. De Burca, *EU Law: Texts, Cases and Materials*, 2007,

which different obligations fit together. This is not a problem if we are dealing with truly separate issues. Perhaps there is no connection between public access to information and transparency as a principle of procurement law. However, it is suggested that the different emanations of the principle of transparency are in fact part of one and the same phenomenon.⁷ And indeed, all transparency obligations seem to have a common core. They are all concerned with the availability, accessibility, and comprehensibility of information.⁸ 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 actions will affect that world, and that does not unnecessarily complicate that world.⁹

Even with this definition, we are left with many unanswered questions. The definition of transparency does not determine towards whom public authorities should be transparent, what they should be transparent about, or when they should provide transparency. It does not tell them whether they should provide transparency on their own account or only upon request, or what quality the information they supply should have, and it says nothing about the acceptability of exceptions to a general obligation to be transparent. Most importantly, it says nothing about why public authorities should be transparent. It is clear that the answers to these questions vary depending on the specific context in which the principle of transparency is applied. Our understanding of the principle of transparency will therefore benefit from a systematic approach to how context-specific factors affect the answer to these questions. In this article, I will present two factors that affect the interpretation and application of the principle of transparency: the manner in which transparency contributes to the realization of the purposes underlying the law, and the normative framework governing the relation between government institutions and citizens.

In Section 2, I will discuss the importance of transparency as an instrumental value. There is a multitude of positive effects that are attributed to transparency, but when we take a closer look, we see that all these effects are realized through two distinct mechanisms: first, transparency improves the quality of decisions taken by all sorts of actors, and second, it allows outsiders to see what public authorities are doing. In Section 3, I will discuss three different citizen types, and the normative frameworks that govern the relations between those citizens, on the one hand, and public authorities on the other. In Section 4, I combine the functions of transparency with the citizen types to arrive at six categories of transparency. For each of those categories, the answer to the questions I identified above is different. Finally, in Section 5, I will make some concluding remarks about the value of this framework to our understanding of the principle of transparency in EU law.

The framework presented in this article is based on a more in-depth analysis of the EU Treaties, a large sample of regulations and directives concerning public procurement, public access to information, telecom law, state aid, and gender equality, and the case law of the Court of Justice, the General Court, and the European Court of Human Rights. The interested reader is referred to my dissertation, where the complete analysis can be found.

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.¹⁰ Transparency is welcomed because it promotes democracy, trust in public

p. 562 focus on transparency as access to information. P. Craig, *EU Administrative Law*, 2012, p. 366 argues for a general principle of transparency, but retains the focus on public access to information. C.H. Bovis, *EU Public Procurement Law*, 2007, p. 65, E. Pijnacker Hordijk, *Aanbestedingsrecht: Handboek van het Europese en het Nederlandse aanbestedingsrecht*, 2009, p. 30 and M.J.J.M. Essers, *Aanbestedingsrecht voor overheden: naar een verantwoord aanbestedingsbeleid onder het nieuwe aanbestedingsrecht*, 2006, p. 181 all discuss the principle of transparency in procurement law.

7 B. Vesterdorf, 'Transparency, Not Just a Vogue Word,' 1998 *Fordham International Law Journal* 22, no. 3, pp. 902-929, p. 903; S. Prechal, 'De emancipatie van het algemene transparantiebeginsel', 2008 *SEW* 56, no. 9, pp. 316-322; S. Prechal & M. De Leeuw, 'Dimensions of Transparency: the Building Blocks of a New Legal Principle?', 2007 *RealLaw*, no. 1, pp. 51-61. A more cautious approach can be found in R.J.G.M. Widdershoven et al., *De Europese agenda van de Awb*, 2007, p. 87.

8 Buijze 2013, supra note 1, p. 62.

9 The definition is derived from the one given by W.B.T. Mock, 'On the Centrality of Information Law: a Rational Choice Discussion of Information Law and Transparency,' 1999 *Journal of Computer & Information Law* 17, pp. 1069-1100, pp. 1079-1081. For a more extensive treatment of the issue see Buijze 2013, supra note 1, pp. 30-31.

10 D. Heald, 'Transparency as an Instrumental Value,' in C. Hood & D. Heald (eds.), *Transparency, the Key to Better Governance?*, 2006, pp. 59-73, p. 59.

institutions, or market efficiency. If we make an inventory of all the benefits that have been ascribed to transparency, we can come up with a very impressive list; so much so that transparency has been described as a ‘pervasive cliché’ of a ‘quasi-religious nature.’¹¹ Not all kinds of transparency are equally well suited to all goals, though.¹² If transparency is introduced to help realise a specific goal, it makes sense to require public authorities to observe only those transparency obligations that actually contribute to the realisation of that goal. Below, I will provide a brief overview of the positive effects attributed to transparency, and discuss the manner in which transparency is thought to lead to their realisation. Subsequently, I will show that there are two distinct mechanisms at work that bring about these effects. These mechanisms have been identified by a close reading of the literature on the beneficial effects of transparency, and by using insights on how transparency affects outcomes from rational choice theory, information economics and principal-agent analysis. The section concludes with a more in-depth description of the two mechanisms.

2.1. Democracy

First, transparency is said to contribute to democracy. The availability of information can fuel the public debate, and helps with the process of will formation.¹³ In other words, it facilitates public decision making. It enables citizens to determine what they, as a society, want to do. In addition, transparency is considered a necessary, albeit not sufficient, condition for participation,¹⁴ which allows people to exert influence on different types of governmental activities,¹⁵ and for accountability,¹⁶ which ultimately allows people to judge government actions and attach consequences to them.¹⁷

The fact that transparency improves democracy has been recognised in authoritative legal sources. 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.¹⁸ Likewise, recital 2 of the preamble to Regulation 1049/2001 holds that ‘openness contributes to strengthening the principles of democracy and respect for fundamental rights.’¹⁹ The case law of the European courts shows that their interpretation of the right to access information is affected by the importance of transparency for real democracy. They hold 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 act 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.’²⁰ Indeed, when ruling on the legitimacy of a refusal to disclose information, they will take into account whether a refusal to release the information would interfere with democratic accountability.²¹

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.²² This in turn improves the efficacy of the institutions, as people are more inclined

11 C. Hood, ‘Transparency in Historical Perspective,’ in C. Hood & D. Heald (eds.), *Transparency, the Key to Better Governance?*, pp. 3-24, p. 3.

12 A. Prat, ‘The More Closely we are Watched, the Better we Behave?’, in C. Hood & D. Heald (eds.), *Transparency: the Key to Better Government?*, 2006, pp. 91-103, p. 101; Heald 2006, supra note 10.

13 D.M. Curtin, ‘Citizens’ fundamental right of access to EU information: an evolving digital passepartout?’, 2000 *CML Rev.* 37, no. 1, pp. 7-41, p. 7, argues that this is the most important function of public access to information.

14 G.H. Addink et al., *Sourcebook Human Rights & Good Governance*, 2010, pp. 54-55; J.E. Stiglitz, *On liberty, the right to know, and public discourse: the role of transparency in public life*, 1999, p. 7; D. Banisar, *Freedom of Information around the World*, 2006, p. 6.

15 Addink et al. 2010, supra note 14, p. 54.

16 Ibid, p. 53; Banisar 2006, supra note 14, p. 18; Stiglitz 1999, supra note 14, p. 7.

17 M. Bovens, ‘Analysing and Assessing Accountability: A Conceptual Framework’, 2007 *European Law Journal* 13, no. 4, pp. 447-468, p. 453.

18 See Declaration No. 17 to the Final Act of the Treaty on European Union signed at Maastricht on 7 February 1992.

19 Regulation 1049/2001/EC of the European Parliament and of the Council of 20 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, pp. 43-48.

20 Case C-41/00 P, *Interporc Im- und Export GmbH v. Commission*, [2003] ECR I-2156, Para. 39; Case T-211/00, *Kuijjer v. Council*, [2002] ECR II-485, Para. 52.

21 Joined Cases C-92/09 and C-93/03, *Schecke*, [2010] ECR I-11063, Para. 83.

22 Banisar 2006, supra note 14, p. 6; O. O’Neill, ‘Transparency and the Ethics of Communication’, in C. Hood & D. Heald (eds.), *Transparency: the Key to Better Government?*, 2006, pp. 75-89, p. 76; K. Lenaerts, ‘“In the Union we trust”: trust-enhancing principles of community law’, 2004 *CML Rev.* 41, no. 2, pp. 317-343, pp. 317-318.

to accept their decisions, and enforcement costs will be lowered.²³ Whether transparency actually has these effects is debatable. At the very least the conditions under which it does so are ill-understood.²⁴ So although the European Institutions promoted transparency to a large extent because they thought it would improve their legitimacy and the trust that European citizens would place in the Union,²⁵ the actual influence of this argument on the *legal* development of the principle of transparency appears to be limited.²⁶ In the *Turco* case, the Court of Justice rejected the argument that transparency adversely affects the legitimacy of the EU and the public's faith in them, because the Regulation is based on the assumption that it does just the opposite.²⁷ However, if there are legitimate reasons to keep information secret, and a balancing of interests is required, the legitimacy argument does not seem to carry much weight.

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. In other words, the observation that transparency may increase trust and legitimacy does not help us to answer the questions identified in the first section. Although the argument that transparency has this effect may have contributed to its emergence as a legal principle in EU law, it probably has a limited effect on the manner in which the principle of transparency is interpreted in concrete cases.²⁸

2.3. Quality of governance

Transparency is thought to contribute to the quality of governance in several ways. According to Addink and Ten Berge, high-quality governance requires that the government fulfils its tasks in accordance with the norms of the rule of law and democracy and in an honest and impartial way.²⁹

Transparency can contribute to the observance of the rule of law and promote integrity among public officials. The mere fact that officials know they are being watched, and that the quality of their work can be checked, is thought to improve their performance.³⁰ Transparency also enables the supervision of public officials,³¹ both by their superiors and by the courts,³² and makes it possible to impose consequences on public officials that shirk their duties, or display other undesirable behaviour. Enabling supervision is acknowledged by the Commission to be one of the purposes underlying the introduction of access to information in the Member States, as it brings 'checks and balances' that improve the control of government organs.³³ 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.³⁴ The argument plays a role in the 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

23 J.C. Piris, 'After Maastricht, are the Community Institutions more Efficacious, more Democratic and more Transparent?', 1994 *European Law Review* 19, p. 461; D.M. Curtin & A. Meijer, 'Does Transparency Strengthen Legitimacy?', 2006 *Information Policy* 11, pp. 109-122, p. 116.

24 Ibid.

25 A. Roberts, *Blacked Out: Government Secrecy in the Information Age*, 2006, p. 174.

26 Joined Cases C-39/05 P and C-52/05 P, *Turco*, [2008] ECR I-4723, Para. 59. See also Case C-506/08 P, *MyTravel*, [2011] ECR I-00000, Para. 113.

27 Recital 2 to Regulation 1049/2001.

28 See also T. Von Danwitz, 'Good Governance in the Hands of the Judiciary: Lessons from the European Example', 2010 *Potchefstroom Electronic Law Journal* 13, no. 1, pp. 2-23, pp. 12-13.

29 G.H. Addink & J.B.J.M. ten Berge, 'Study on Innovation of Legal Means for Eliminating Corruption in the Public Service in the Netherlands', 2007 *Electronic Journal of Comparative Law* 1, no. 1, pp. 1-33, p. 12.

30 Prat 2006, supra note 12, p. 89; O'Neill 2006, supra note 22, p. 76.

31 Prat 2006, supra note 12, p. 89.

32 For the relation between transparency and judicial protection, see K. Man, 'Over de toepassing van het beginsel van openbaarheid van bestuur en het transparantiebeginsel in het raam van de gunning van overheidsopdrachten', 2008 *Chronique de Droit Publique*, no. 3, pp. 587-609, p. 587.

33 Commission Communication: Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission, COM(2002) 704 final, pp. 19-22.

34 In public procurement, one of the main functions of transparency is to allow the courts to review whether the procuring authority has complied with the principle of equal treatment. See e.g. Case C-220/06, *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v. Administración General del Estado (Correos)*, [2007] ECR I-12175, Para. 75; Case C-324/98, *Telaustria*, [2000] ECR I-745, Para. 62.

arbitrariness and nepotism is an important goal of public procurement regulation, and an important reason to introduce transparency in this field.³⁵

2.4. Economic performance and market efficiency

Fourth, transparency is argued to increase economic performance and market efficiency.³⁶ As economic decision making is dependent on the availability of information, transparency facilitates good decisions.³⁷ Access to government-held information is of particular importance, because 'for much of the information relevant to decision-makers in political and economic markets, government is in fact the sole repository (and producer).'³⁸ 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.³⁹

The economic argument is most visible in economic law: in market regulation, public procurement, and competition law.⁴⁰ 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.⁴¹ 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.⁴² The economic argument is also made for transparency, access to information, and the publication of economic data in general.⁴³ When interpreting public access to information legislation, economic arguments in favour of transparency play no role. Economic considerations are much more prevalent in the public procurement directives, and the various market regulation directives.⁴⁴

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.⁴⁵

2.5. Realising individual rights

Finally, transparency can contribute to the realisation of many social and economic rights, like education, food, and a healthy environment.⁴⁶ 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 with regard to things like education, health care, and their living environment. 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

35 Addink & Ten Berge 2007, *supra* note 29, pp. 21-22.

36 J.E. Stiglitz, 'Information and the Change in Paradigm in Economics', in J.E. Stiglitz, *Selected Works of Joseph E. Stiglitz*, Vol. 1, 2009, pp. 53-94; Bovis 2007, *supra* note 6; L. Hancher et al., 'Principles of Good Market Governance', 2003 *Journal of Network Industries* 4, no. 4, pp. 355-390, p. 356.

37 W.B.T. Mock, 'An Interdisciplinary Introduction to Legal Transparency: A Tool for Rational Development', 1999 *Dickinson Journal of International Law* 8, no. 2, pp. 294-304, pp. 303-304.

38 R. Islam, *Do more transparent governments govern better?*, World Bank policy research working paper, World Bank Institute, Poverty Reduction and Economic Management Division, 2003, p. 3.

39 D. Kaufmann & A. Belver, *Transparenting Transparency: Initial Empirics and Policy Application*, 2005, available at <http://mpr.ub.uni-muenchen.de/8188/1/MPRA_paper_8188.pdf> (last visited 4 July 2013), pp. 7, 29; Mock 1999, *supra* note 37, p. 303.

40 C. Zoellner, 'Transparency: An Analysis of an Evolving Fundamental Principle in International Economic Law', 2006 *Michigan Journal of International Law* 27, pp. 579-628; C.P. Jellema, 'The Redheaded Stepchild of Community Competition Law: the Third Party and its Right to be Heard in Competition Proceedings', 2002 *Boston University International Law Journal* 20, pp. 211-292; A.T. Ottow, *Telecommunicatietoezicht: de invloed van het Europese en Nederlandse bestuurs(proces)recht*, 2006.

41 S.J. Evenett & B.M. Hoekman, 'Government procurement: market access, transparency, and multilateral trade rules', 2005 *European Journal of Political Economy* 21, no. 1, pp.163-183.

42 Commission Green Paper on the development of the common market for telecommunication services and equipment, COM(87) 290 final.

43 Commission Communication: Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission, COM(2002) 704, pp. 19-22.

44 Buijze 2013, *supra* note 1, Chapters 4 & 5; see also A. Buijze, 'Waarom het transparantiebeginsel maar niet transparant wil worden', 2011 *Nederlands tijdschrift voor Europees recht*, no. 7, pp. 240-248.

45 See note 37 *supra*.

46 See for examples Roberts 2006, *supra* note 25; FreedomInfo.org also collects success stories on its website: <<http://www.freedominfo.org/category/latest-features/>> (last visited 4 July 2013).

statement of the reasons for that decision – are people able to defend themselves, if necessary before the courts. Transparency also facilitates the utilisation of government procedures that bestow benefits upon individuals. 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.⁴⁷

The view that transparency contributes to the realisation of individual rights is represented in the case law on the ECHR, where access to information rights tends to be based on Articles 2, 6 and 8,⁴⁸ 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.⁴⁹ The idea is also supported in the Aarhus Convention, which obliges public authorities to communicate all relevant information to individuals in life-threatening situations.⁵⁰ It can be seen in the telecommunications directives, more specifically in the universal services directive.⁵¹ In addition, more classic transparency obligations are generally thought to protect individual 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.⁵²

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 which might try to interfere with them.

2.6. Two main functions of transparency

The previous section shows 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. We have seen that:

- Transparency 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 their wishes.
- In addition, transparency may contribute to legitimacy and to the public's faith in public institutions. The exact mechanisms are not entirely clear, and although this assumption may have contributed to the emergence of the principle of transparency in EU law, it is of limited use when interpreting and applying the principle of transparency in concrete cases.
- Transparency contributes to the proper functioning of the market. It does this by creating a transparent environment, thus allowing economic actors to make better decisions.
- It also allows accountability on the part of public authorities. It allows economic actors to see whether they are being treated impartially and equally, and hence is a necessary condition for them to take action if they are not.
- Finally, transparency 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 being breached, and hence is a necessary condition for them to take action if they are not.

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

47 *Odièvre v. France* (Application No. 42326/98), ECHR 2003-II.

48 A. Buijze & G.H. Addink, *An Alternative Legal Take at Transparency*, 2012, paper presented at the 2nd transatlantic conference on transparency research, available at <<http://www.transparencyconference.nl/papers/>> (last visited 14 May 2013).

49 Recital 3 to the Convention on access to information.

50 Art. 5(1)c Aarhus Convention.

51 See e.g. Para. 11 of the preamble to Directive 2002/22/EC.

52 See Vesterdorf 1998, supra note 7.

actions increases. This is true whether they make political decisions, decisions about their private lives, or about their consumption patterns.

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.

Thus, transparency:

1. facilitates decision making;
2. allows outsiders to observe what a transparent organisation is doing.

2.7. The first function of transparency

I argued above that transparency facilitates decision making. The dominant theory about how people make decisions is rational choice theory,⁵³ which provides a strong argument that people do indeed benefit from transparency. Rational choice assumes that 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.⁵⁴ Because they are not omniscient, success is not guaranteed: it is impossible to determine with absolute certainty what the consequences of a particular course of action will be.⁵⁵ People can improve the predictability of how their actions work out in practice by gathering additional information. This is only useful to a certain extent, though. Gathering information incurs a cost, and if the costs exceed the expected gain from the better informed decision, then the gathering of the information is irrational.⁵⁶ Transparency improves the quality of decision making, because it makes it easier to predict the consequences one's actions will have: in a transparent world information is easy to come by and the world is easy to comprehend.

If the state creates a transparent environment, it will improve the overall quality of decision making by its constituents.⁵⁷ However, rational choice theory by itself provides few arguments for the state to actually disperse information. 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; it does not in any way impose an obligation on public authorities to facilitate this. Indeed, 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, the government should not be obliged to assist people in all their endeavours. Rational choice theory is value-neutral, the law is not. It has goals, and attributes more value to some goals that individuals strive for than to others.

So how does rational choice theory help us in understanding the principle of transparency? First and foremost, it provides us with an insight into one of the reasons why transparency contributes to the realisation of democracy, individual rights, a smoothly functioning economy, and a multitude of more specific policy goals: transparency empowers the target of transparency measures. It helps them to take those decisions that contribute the most to the realisation of their goals. Where the law requires the empowerment of individuals, transparency is a useful tool to achieve this. If the law requires public authorities to assist people in realizing their rights, the supply of information becomes a logical first step in helping people to help themselves. Rational choice theory also suggests that if the law recognizes that a certain goal should be striven for, and if the realisation of this goal depends on individuals taking

53 E.L. Rubin, 'Rational choice and rat choice: some thoughts on the relationship among rationality, markets, and human beings', 2005 *Chicago Kent Law Review* 80, pp. 1091-1127, pp. 1100-1101.

54 *Ibid.*, p. 1092.

55 T.S. Ulen, 'Rational Choice Theory in Law and Economics', in *Encyclopedia of Law and Economics on line*, 1999, pp. 790-818, p. 793.

56 Rubin 2005, *supra* note 53, p. 1095.

57 Ulen 1999, *supra* note 55, p. 813.

the proper actions, people must be provided with transparency to facilitate those actions.⁵⁸ An example can clarify this point: if the 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. If it wants them to take legal action, 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 simply tell everybody what to do to achieve maximum efficiency, but since governments are not omniscient, they depend on individuals' decisions to produce market efficiency.⁵⁹ Improving the quality of those individual decisions is the best option to increase market efficiency as a whole.

2.8. The second function of transparency

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 the government is doing on our behalf. This can be considered valuable in itself,⁶⁰ but it is also the first step to ensure that public authorities are actually doing what they should be doing, that is, executing democratically agreed upon policies while observing the rule of law.

The crux of this argument for transparency is that public institutions and officials have to represent the interests of their constituents, not their own.⁶¹ 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. A principal-agent relation exists when one party, the agent, acts on behalf of another, the principal, in exchange for remuneration.⁶² Of course, the relation between governments and their citizens is somewhat more complicated than a simple principal-agent relation. The theory can still prove useful though: in early political work, it was already asserted that principals and agents need not be individuals, but can also be collectives of various sorts, and might have complicated interrelations.⁶³ Today, the idea that government is best understood as a network of principal-agent relations is still very much alive.⁶⁴

The principal-agent theory assumes that the interests of the agent differ from those of the principal. That causes problems for the principal. First, classic economic theory assumes people are rational and opportunistic, and because of that, 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.⁶⁵ The result an agent achieves on behalf of his principal will be determined only partially by his own effort. External factors, like market conditions, the weather, or the acts of third parties, are out of his control, but will affect the quality of his work. The agent will be better able to judge how these factors have contributed to the end result than the principal. This means he can 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. 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

58 Ulen 1999, supra note 55, p. 813.

59 See extensively Buijze 2013, supra note 1, Chapter 4, in particular pp. 124-126.

60 P. Birkinshaw, 'Freedom of Information and Openness: Fundamental Human Rights?', 2006 *Administrative Law Review* 58, pp. 177-218, p. 179.

61 M.D. McCubbins et al., 'Administrative Procedures as Instruments of Political Control', 1987 *Journal of Law, Economics, and Organization* 3, no. 2, pp. 243-277, p. 243.

62 S.A. Ross, 'The economic theory of agency: the principal's problem', 1973 *American Economic Review* 63, pp. 134-139, p. 134; outside of economic theory, remuneration is not a necessary element. B.M. Mitnick, *Fiduciary responsibility and public policy: the theory of agency and some consequences*, paper presented at the 1973 Annual Meeting of the American Political Science Association. Proceedings of the APSA, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1020859> (last visited 4 July 2013), p. 1 defines an agency relationship simply as one where one party acts on behalf of another.

63 Mitnick 1973, supra note 62, p. 2.

64 J.E. Lane, *Public administration and public management: the principal-agent perspective*, 2005, p. 46.

65 McCubbins et al. 1987, supra note 61, p. 247.

making remuneration dependent on the outcome, through profit sharing for example,⁶⁶ or the principal can choose to monitor the agent's behaviour.⁶⁷

The first option does not work very well for the principal-agent relationships within governments and between the government and the general public.⁶⁸ Public officials tend to receive set wages, and since the 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 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.⁶⁹

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.⁷⁰ But although observing the behaviour of an agent is generally beneficial to an agent, there appear to be some exceptions to this rule. Negotiations are notorious for being conducted in secret. The 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.⁷¹ Why is this? Again, principal-agent theory assumes that the agents have interests of their own, and that they will attempt to further them if they are given 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 instead of their own, which is clearly a good thing.⁷² 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 being 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.⁷³ 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 achieve this. Rather than appearing to deviate from the point of view of their principals, they adhere to the public opinion.⁷⁴

In addition, 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 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.⁷⁵ The problem is worst if actual outcomes are difficult to observe. This mechanism offers a rationale for the exemption of pre-decision information from the open government

66 A. Sharma 'Professional as agent: knowledge asymmetry in agency exchange', 1997 *Academy of Management Review* 22, pp. 758-798, p. 791; K.M. Eisenhardt, 'Agency Theory: An Assessment and Review', 1989 *The Academy of Management Review* 14, no. 1, pp. 57-74, p. 66.

67 Eisenhardt 1989, supra note 66, p. 60; R.W. Waterman & B.D. Wood, 'Policy monitoring and policy analysis', 1993 *Journal of Policy Analysis and Management* 12, no. 4, pp. 685-699, p. 686.

68 S.S. Shapiro, 'Agency Theory', 2005 *Annual Review of Sociology* 31, pp. 263-284, p. 268.

69 R.W. Waterman & K.J. Meier, 'Principal-agent models: an expansion?', 1998 *Journal of Public Administration Research and Theory* 8, no. 2, pp. 173-202, p. 185.

70 M. Dewatripont et al., 'The Economics of Career Concerns, Part I: Comparing Information Structures', 1999 *Review of Economic Studies* 66, no. 1, pp. 183-198 provide a theoretical counter-example. In practice, such a situation would be unlikely to arise, though. Prat 2006, supra note 12, p. 98.

71 D. Stasavage, 'Does Transparency Make a Difference?', in C. Hood & D. Heald (eds.), *Transparency, the Key to Better Governance?*, 2006, pp. 165-179, pp. 174-176.

72 Ibid, p. 166.

73 Ibid, p. 168.

74 Ibid, p. 169.

75 Prat 2006, supra note 12, p. 99.

principle.⁷⁶ 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, 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.⁷⁷

The delayed release of information might be beneficial in other circumstances as well.⁷⁸ 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.⁷⁹ There is by no means a plea for general delayed transparency, though: they warn that the practical application of their analysis may be limited, and they advocate more research.⁸⁰

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 the principal-agent theory confirms that transparency will usually be beneficial, it also suggests there are some exceptions to this rule.

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 citizens can profit from this.

3. Citizen types

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. That normative framework is not uniform, but depends on how the relation between citizens and their government is perceived.

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 the *bourgeois*. The *citoyen* is characterised by his membership of a political community, he has the right to participate in the public affairs of the state, and he has an obligation to look after the interests of the community.⁸¹ When people act in their capacity of *citoyens*, they act in the public interest. The *bourgeois*, on the other hand, are private individuals, carriers of rights to protect them against arbitrary state intervention, and require the protection of their personal integrity and private property.⁸² 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* (state under the rule of law) is there to protect the rights of the *bourgeois*, or subjects.

However, the traditional distinction between *citoyens* and *bourgeois* is often felt to no longer suffice. The *citoyen* is further broken down into the voter, the co-producer of policy,⁸³ and the participant,⁸⁴

76 Ibid, p. 100.

77 Ibid, p. 100.

78 A. Arya et al., 'The Interaction between Decision and Control Problems and the Value of Information', 1997 *The Accounting Review* 72, no. 4, pp. 561-574.

79 Like a mid-level manager.

80 Arya et al. 1997, supra note 78, p. 572.

81 E.O. Eriksen & J. Weigard, 'The End of Citizenship? New Roles Challenging the Political Order', in C. McKinnon & I. Hampsher-Monk (eds.), *The Demands of Citizenship*, 2000, pp. 13-34, p. 15.

82 Ibid, p. 15.

83 J. Wallage et al., *In dienst van de democratie: het rapport van de Commissie Toekomst Overheidscommunicatie*, 2001, p. 24; P.W. Tops & S. Zouridis, *Burgers en overheidscommunicatie*, Commissie Toekomst Overheidscommunicatie, The Hague 2000, available at <<http://www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2007/09/20/in-dienst-van-de-democratie-het-rapport-van-de-commissie-toekomst-overheidscommunicatie.html>> (last visited 13 May 2013), pp. 17, 22.

84 J. Hiemstra, *Presterende Gemeenten: hoe gemeenten beter kunnen presteren*, 2003, who discerns customers, users, participants, subjects

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. More novel is the approach of the individual as a rational, utility maximising actor.⁸⁵ When looking at transparency, it is only natural 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. Indeed, transparency is of great use to rational utility maximizers. We can contrast this *homo economicus* with the legal subject, the bearer of rights, or, as I like to refer to him: *homo dignus*.⁸⁶

EU law regulates the relation between the governments of the Member States and the EU, on the one hand, and the citizen, *homo dignus* and *homo economicus*, on the other.⁸⁷ Transparency is relevant in all these relations. People profit from transparent governance in all three capacities: that of citizen, that of *homo dignus* and that of *homo economicus*.⁸⁸ But why and to what extent are public authorities required to provide transparency to each of those citizens?

3.1. Transparency for the citizen

The citizen is the European citizen in his capacity as a member of the European political community – the theoretical collective of Europeans who together pursue the common European good. The relationship between the citizen and the EU institutions is regulated by the principle of democracy,⁸⁹ which recognises people as autonomous individuals who are entitled to participate in public decision making by virtue of their intrinsic worth as human beings.⁹⁰ It embodies the ideal of self-rule, where the identity of the rulers coincides with that of the ruled.⁹¹ It also implies that the rulers exercise their function on behalf of the ruled. Thus, the EU institutions rule in the interest of the citizens, meaning that they pursue the common good as determined by their constituents. To realise democracy in this way, citizens 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, in other words, that they are good agents. In short, public authorities in a democracy are required to provide transparency to the citizen if this is necessary to allow him to engage in the public debate, and if it contributes to making public institutions better agents of the people.

3.2. Transparency for *homo economicus*

Homo economicus is a product of economic rather than political or philosophical thought, a model of how people act in a situation of scarcity. *Homo economicus* is assumed to be rational,⁹² and to maximise his utility.⁹³ In short, he uses his limited resources to acquire those goods and services that best satisfy his

and voters. The model used by the *Vereniging Nederlandse Gemeenten* (the union of Dutch municipalities) which is based on his work distinguishes voters, customers, subjects, partners, taxpayers and neighbourhood residents.

85 Eriksen & Weigard 2000, *supra* note 81, p. 18.

86 In the context of the EU the issue of citizen roles has been tackled by W.T. Eijbouts, 'De verhouding tussen de Unie, haar burgers en haar staten onder het prisma van het Europese recht', in A. van den Brink et al., (eds.), *Beginselen bouwen burgerschap*, 2011, pp. 14-17, 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. Of these five, the citoyen fondateur is of limited practical importance. The citoyen 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 citizen. The citoyen calculateur corresponds to *homo economicus*, whereas the citoyen libérateur is our *homo dignus*.

87 Buijze 2013, *supra* note 1, p. 22.

88 See respectively Sections 2.1, 2.4 and 2.5 above.

89 See Buijze 2013, *supra* note 1, Section 3.3.

90 J. Habermas, 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles?', 2001 *Political Theory* 29, no. 6, pp. 766-781, pp. 767-768.

91 J.J. Rousseau, *Du contrat social ou Principes du droit politique*, 1762, Book III, Chapter 1.

92 His preferences are complete. To be considered rational, preferences must also be transitive and reflexive. Preferences are transitive if and 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 R. Cooter & T. Ulen, *Law and Economics*, 2012, p. 19.

93 *Ibid*, p. 12.

desires. Because homo economicus is the ultimate decision maker, it is easy to see that he profits from transparency.

Economic theory provides no normative framework that tells public authorities how they should act towards homo economicus, but EU law does. A properly functioning internal market is an important goal of the EU.⁹⁴ Because of this, the Treaties grant a number of rights to homo economicus. The observance of these rights requires public authorities to be transparent.⁹⁵ More in general, their options for interfering with the market are severely limited. Transparency both improves the quality of decision making by homo economicus, and prevents prohibited interferences with homo economicus and the market.⁹⁶

3.3. Transparency for homo dignus

Homo dignus is the ‘worthy human’, or better, the human being possessed of intrinsic worth. He 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 ages⁹⁷ or even to the thoughts of the stoics.⁹⁸ 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,⁹⁹ and that this entitles them to certain rights,¹⁰⁰ it is possible to entertain widely divergent views on what dignity is.¹⁰¹ Nevertheless, the concept plays an important role in human rights theory. In particular, it is used to interpret existing rights.¹⁰² Autonomy is an important aspect of human dignity.¹⁰³ To be autonomous, we should be able to take our own decisions, without being dominated or controlled by someone else. In particular, our decisions must be informed, and thus we need access to information.¹⁰⁴ When we use human dignity as an interpretative concept, we can conclude that there is an obligation to make information available to homo dignus where this is necessary for him to realise his fundamental 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;¹⁰⁵
- make informed choices about their personal life;¹⁰⁶
- defend their interests in administrative proceedings or before a court.¹⁰⁷

94 Buijze 2013, supra note 1, Section 4.3.

95 E.g. Joined Cases C-154/04 and C-155/04, *Natural Health Alliance*, [2005] ECR I-6451. See also Buijze 2011, supra note 44.

96 E.g. Case C-324/98, *Telaustria*, [2000] ECR I-745.

97 J. Griffin, ‘The Presidential Address: Discrepancies between the Best Philosophical Account of Human Rights and the International Law of Human Rights’, 2001 *Proceedings of the Aristotelian Society* 101, no. 1, pp. 1-28, p. 2. See also Eijsbouts 2011, supra note 86, p. 15.

98 Y. Arieli, ‘On the Necessary and Sufficient Conditions for the Emergence of the Dignity of Man and His Rights’, in D. Kretzmer & E. Klein (eds.), *The Concept of Human Dignity in Human Rights Discourse*, 2002, pp. 1-18, p. 14.

99 C. McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’, 2008 *The European Journal of International Law* 19, no. 4, pp. 655-724, p. 679.

100 E.g. O. Schachter, ‘Human Dignity as a Normative Concept’, 1983 *The American Journal of International Law* 77, no. 4, pp. 848-854, p. 848, with an overview of the human rights instruments that recognise dignity as the foundation of human rights. 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 J. Griffin, ‘The Presidential Address: Discrepancies between the Best Philosophical Account of Human Rights and the International Law of Human Rights’, 2001 *Proceedings of the Aristotelian Society* 101, pp. 1-28, and McCrudden 2008, supra note 99, 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.

101 McCrudden 2008, supra note 99.

102 Schachter 1983, supra note 100, 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, supra note 99.

103 In secular thought, Kant has been the designated champion of autonomy. 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. See McCrudden 2008, supra note 99, p. 659.

104 Griffin 2001, supra note 97, p. 7.

105 Art. 2 and 3 ECHR. *Öneryıldız v. Turkey* (Application No. 48939/99), ECHR 2004-XII; *Öcalan v. Turkey* (Application No. 46221/99), ECHR 2005-IV; *Budayeva v. Russia* (Application No. 15339/02), ECHR 20 March 2008.

106 Art. 8 ECHR; *Guerra and others v. Italy* (Application No. 14967/89), ECHR 1998-I 64.

107 Art. 6 ECHR; see e.g. *Ernst and others v. Belgium* (Application No. 33400/96), ECHR 5 July 2003, Paras. 60-61; *Kerojärvi v. Finland* (Application No. 17506/90), (1995) Series A 322, Paras. 39-42; *Walston v. Norway* (Application No. 37372/97), ECHR 3 June 2003; *Nideröst-Huber v. Switzerland* (Application No. 18990/91), ECHR 1997-1 29, Para. 29; *Fitt v. the UK* (Application No. 29777/96),

In addition, they should have access to information that:

- is about them, i.e. personal data.¹⁰⁸

Hence, the contents of the principle of transparency need to be determined by reference to the principle of democracy and the rights of the citizen, the principles governing the way public authorities should approach the internal market and homo economicus, and the fundamental rights of homo dignus. We can only derive a particular transparency obligation from the principle of transparency when that obligation does in fact contribute to the realisation of those higher order principles. Thus, if in a particular instance transparency does not contribute to democracy, the internal market, or the realisation of fundamental rights, public authorities are not required to provide it. Rational choice theory and principal-agent theory can help us understand whether it does.

4. A comprehensive framework for transparency obligations

When we combine the two functions of transparency with the three citizen types and the normative frameworks that govern public authorities' relations with them, we arrive at six categories of transparency obligations, as shown in the following table.

	Transparency facilitates decision-making. 1 st function.	Transparency facilitates outside scrutiny of the behaviour of public authorities. 2 nd function.
Citizen	(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 citizen 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 which transparency obligations actually exist in law.* Thus, the instrumentality of transparency is essential in understanding the law on transparency. It determines the answer to the questions encountered in the introduction: who the target of the transparency obligation should be, about what a public authority needs to be transparent, when it 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, public authorities should observe it, subject to justifications

ECR 2000-II; *Feldbrugge v. The Netherlands* (Application No. 8562/79), (1984) Series A 009; *Hentrich v. France* (Application No. 13616/88), (1993) Series A 296 A; *Van Mechelen and Others v. The Netherlands* (Application No. 21363/93), ECHR 1997-III 36.
 108 Art. 8 ECHR, *Gaskin v. the UK* (Application No. 10454/83), (1989) Series A no. 160; *M.G. v. the UK* (Application no. 39393/98), ECHR 24 September 2002; *Odièvre v. France* (Application No. 42326/98), ECHR 2003-II; *Roche v. the UK* (Application No. 32555/96), ECHR 2005-X, Para. 165. In the EU this right is enshrined in the Data Protection Directive.

to the contrary. Transparency that does not contribute to one of these goals cannot be justified, and is not required.

The empirical knowledge about how transparency functions is incomplete. Where there is uncertainty about the effects of transparency, 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.¹⁰⁹

4.1. Type A transparency: will formation

Type A transparency is required in a democratic society and aims to allow citizens to participate effectively in the process of public will formation. To meet this goal, transparency should target all citizens. 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 proactive 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 that it will benefit the public debate.

Exceptions are relatively easy to justify,¹¹⁰ both because it is the citizen's prerogative to decide that 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 citizen 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.¹¹¹

4.2. Type B transparency: 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 public will formation. It does so by allowing the citizen 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 citizens. 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 will the courts 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 at 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 the 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.

¹⁰⁹ E.g. the assumption that transparency leads to more legitimacy. Buijze 2013, supra note 1, p. 45. In *Technische Glaswerke and Ryanair*, the courts deduced from the State Aid Regulation a general presumption that 'disclosure of documents in the administrative file in principle undermines protection of the objectives of investigation activities.' This assumption is subject to rebuttal. Case C-139/07 P, *Technische Glaswerke Ilmenau*, [2010] ECR I-5885. See also Buijze 2013, supra note 1, p. 65 on the impact of the reliability of empirical assumptions on their effects on the interpretation of legal principles.

¹¹⁰ Relatively easy, with the emphasis on relatively. I do not mean to argue that exceptions should be made lightly.

¹¹¹ For a more extensive argument on what transparency obligations public authorities should observe vis-à-vis the citizen, based on this theoretical framework and on EU law, see Buijze 2013, supra note 1, Chapter 3.

Public authorities, of their own account, should make public any information about participation possibilities. 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 proactively, since public authorities will know this information is required for the citizen 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 extremely difficult to evaluate these actions, let alone to 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.

4.3. Type C transparency: 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 when *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 proactive, 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 acquired a 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.¹¹²

4.4. Type D transparency: 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 to try to affect those actions. In this case, transparency should target those economic actors who are affected by the actions of public authorities,

¹¹² For a more extensive argument on what transparency obligations public authorities should observe vis-à-vis *homo economicus*, based on this theoretical framework and on EU law, see Buijze 2013, *supra* note 1, Chapters 4 and 5.

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' complying 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, 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.

4.5. Type E transparency: 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 towards 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 that situation. 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*.¹¹³

4.6. Type F transparency: 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 to 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 proactive 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 obligation 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

¹¹³ For a more extensive argument on what transparency obligations public authorities should observe vis-à-vis *homo dignus*, based on this theoretical framework and on EU law, see Buijze 2013, *supra* note 1, Chapter 6.

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 get 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 of his rights for a similar period of time.

4.7. Overview

Based on the discussion of the six categories of transparency obligations, we can make some more general remarks. 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 when 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 citizens 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, so that the input of citizens can still affect the outcome. Second, transparency ensures that public officials know their actions will be made public and allows them to be held 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 1049/2001¹¹⁴ 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.¹¹⁵

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 of exceptions, we notice several things. First, for some transparency obligations, exceptions can never be justified. These obligations are derived from the right to life and the right to physical integrity, which are internationally recognised as non-derogable rights.¹¹⁶ This has consequences for the right to information of both homo dignus and the citizen. Homo dignus has a

114 The quality of the registers, particularly that of the Commission, can be criticized, however. See D.M. Curtin, *Executive Power of the European Union. Law, Practices and the Living Constitution*, 2009, pp. 220-232.

115 Case T-410/03, *Hoechst*, [2008] ECR II-881, Para. 154.

116 On the right to life, see J. Callewaert, 'Is there a Margin of Appreciation in the Application of Articles 2, 3 and 4 of the Convention?', 1998 *Human Rights Law Journal* 19, no. 6, pp. 6-9, pp. 8-9; Y. Haeck, 'How to interpret the European Convention on Human Rights', 2011 *Constitutional Law Review* 3, no. 4, pp. 3-30, pp. 22-23. On articles 3 and 4, Haeck 2011, p. 19.

non-derogable right to access information that can save his life or his physical integrity,¹¹⁷ whereas the citizen has a non-derogable right to information about how the government and its officials deal with those rights.¹¹⁸ 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 for 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 among public officials to want more secrecy than is warranted.¹¹⁹ 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.¹²⁰ 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.¹²¹ Fourth, there are a number of other interests that can justify exceptions to transparency obligations, including public safety, national security, and commercial interests.¹²² 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 citizen, and a balancing exercise is required.¹²³

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 that disclosure to the original target will result in an abuse of the information. Transparency towards 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.¹²⁴ I suspect this difference between homo dignus and 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.¹²⁵ 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

117 *L.C.B. v. the UK* (Application No. 23413/94), ECHR 1998-III 76; *Osman v. the UK* (Application No. 23452/94), ECHR 1998-VIII 95; *Öneryıldız v. Turkey* (Application No. 48939/99), ECHR 2004-XII. See for a more extensive argument Buijze 2013, supra note 1, p. 240.

118 *McKerr v. the UK* (Application No. 28883/95), ECHR 2001-III, Paras. 11, 115; *Hugh Jordan v. the UK* (Application No. 24746/94), ECHR 4 May 2001, Para. 105; *Kelly and others v. the UK* (Application No. 30054/96), ECHR 4 May 2001, Paras. 94, 98; *Akdeniz v. Turkey* (Application No. 25165/94), ECHR 31 May 2005, Para. 95; *Ahmet Özkan and others v. Turkey* (Application No. 21689/93), ECHR 6 April 2004; *Slimani v. France* (Application No. 57671/00), ECHR 2004-IX and *Aksoy v. Turkey* (Application No. 21987/93), ECHR 1996-VI 26, Para. 61. See also Buijze 2013, supra note 1, pp. 115-116.

119 According to the UN special rapporteur, 'the tendency to withhold information from the people at large must (...) strongly be checked.' 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.

120 Joined Cases C-39/05 P and C-52/05 P, *Turco*, [2008] ECR I-4723; Case T-166/05, *Borax Europe v. Commission*, [2009] ECR II-28; Case T-144/05, *Muñiz*, [2008] ECR II-335. See also T. Heremans, *Public Access to Documents: Jurisprudence between Principle and Practice*, 2011, p. 66.

121 Buijze 2013, supra note 1, pp. 173-174.

122 Arts. 4(1) and 4(2) Regulation 1049/2001/EC; Art. 35(4) Directive 2004/18/EC.

123 The balancing exercise may be performed by the administration, but it is also acceptable if the legislator performs it.

124 The use of special advocates for homo economicus is not actually seen in EU law. Access to the court will simply be refused or limited.

125 E. Barbier de la Serre, 'Procedural Justice in the European Community case-law concerning the Rights of the Defence: Essentialist and Instrumental Trends', 2006 *European Public Law* 12, no. 2, pp. 225-250.

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.¹²⁶

Public authorities may also delay transparency, if disclosure would harm other interests, to a moment when 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 little 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 citizen is reasonably acceptable, because he can still hold public officials accountable, and his ability to participate in decision making is valued less highly 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 the 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 transparency, the explanatory principle, or perhaps principles that account best for the data we observed.

5. Concluding remarks

The approach to the principle of transparency that was developed in the preceding sections makes it easier to predict the future development of the principle. It is useful to remember that the principle of transparency has 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 the EU transparency regime has evolved in the past two decades to match the account given above quite closely, and although predicting the future is a hazardous undertaking, I do believe that 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.¹²⁷ Although homo dignus is able to gain access to information based on a variety of rules and principles, these rules are not

¹²⁶ E.g. Art. 43 Regulation 2004/18/EC; Art. 9 BER (Block Exemption Regulation).

¹²⁷ Buijze & Addink 2012, *supra* note 48.

tailored to realise the aim of respecting the rights of homo dignus, and although they are often sufficient despite that, they are sometimes 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 reluctance 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 to 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.¹²⁸ The principle of transparency has expanded to cover an increasing number of these procedures.¹²⁹ 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.¹³⁰

I would argue that the principle of transparency will come to apply to the division of all scarce resources, or rather, that it will become increasingly 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 now see 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 which 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 section also allows us to predict how developments in EU law that are not directly concerned with the principle of transparency will affect its application.

128 Buijze 2013, supra note 1, Section 5.3.5.5.

129 See in particular A. Drahmman, 'Tijd voor een Nederlands transparantiebeginsel?', in *Europees offensief tegen nationale rechtsbeginselen? Over legaliteit, rechtszekerheid, vertrouwen en transparantie; Preadviezen Jonge Var*, 2010.

130 In its 2010 State Aid Action Plan, the Commission resolved to make state aid control more transparent. See also Buijze 2013, supra note 1, Section 5.3.6.5.

In particular:

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 grants 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 citizen, 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 in which 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. It is only when we understand the connections between transparency, democracy, the internal market, and individual rights that we can guide this evolution in the right direction. ¶

The Six Faces of Transparency

Citizen type		a		b		c		d		e		f	
Underlying value		public decision-making		citizen public autonomy		homo economicus decision-making		homo economicus efficiency		private decision-making		homo dignus private autonomy	
Why?	Function	Facilitates allows the citizen to engage in public deliberation and collective decision-making	Transparency allows the citizen to ensure whether public authorities are in fact serving the public interest	Allows outside scrutiny	Transparency allows the citizen to ensure whether public authorities are complying with the rules	Facilitates decision-making	Transparency allows homo economicus to make informed decisions about the utilisation of his resources	Allows outside scrutiny	Transparency allows homo economicus to see whether public authorities are complying with the rules	Facilitates decision-making	Transparency allows homo dignus to make informed decisions about his private life	Allows outside scrutiny	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 if it is necessary to ensure public autonomy	Transparency contributes to efficiency	Transparency is required to the extent it contributes to efficiency	Transparency contributes to efficiency	Transparency is required to the extent it contributes to efficiency	Transparency is required to the extent it contributes to efficiency	Transparency is required to the extent it contributes to efficiency	Transparency is required if it is necessary to ensure private autonomy	Transparency is required if it is necessary to ensure private autonomy	Transparency is required if it is necessary to ensure private autonomy	Transparency is required if it is necessary to ensure private autonomy
Who?	Target	To the general public	To the general public	To the general public	To the general public	To all economic actors equally	To all economic actors equally	To all economic actors equally	To all economic actors equally	To a particular individual	To a particular individual	To a particular individual	To affected homines digni
	Intrinsic weight	Weak obligation	Strong obligation	Strong obligation	Strong obligation	Weak obligation	Weak obligation	Weak obligation	Weak obligation	Strong obligation	Strong obligation	Strong obligation	Strong obligation
	Scope	Information that is relevant to the public debate	Information that relates to the actions of public authorities	Information that relates to the actions of public authorities	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 is relevant to homo economicus to assess the consequences of his actions	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 economicus	Information that is relevant to homo dignus when making decisions about fundamental issues, or is relevant to his personal identity	Information that is relevant to homo dignus when making decisions about fundamental issues, or is relevant to his personal identity	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
What?	subcategory of especially important information (obligation becomes stronger)	Information that public authorities have a monopoly on	Information pertaining to the legislative process	Information about the use of force by state officials	Information about the use of force by state officials	Information about regulation that can impact the consequences of homo economicus' actions	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 physical integrity	Information that allows homo economicus to try to affect the outcome of the procedure (not always required), or ex-post to make judicial review possible	Information that allows homo dignus to realise his right to life or his right to physical integrity	Information that allows homo dignus to realise his right to life or his right to physical integrity	Information that allows homo dignus to realise his right to life or his right to physical 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	Either in time to ensure meaningful participation, or ex-post to make accountability possible	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, or always, for personal information	In time to allow homo economicus to incorporate the information in his decision-making process, or always, for personal information	In time to allow homo dignus to incorporate the information in his decision-making process, or always, for personal information	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 incorporate the information in his decision-making process, or always, for personal information	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 citizen 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 citizen to hold them accountable	Active, since public authorities know which information must be made available to allow the citizen to hold them accountable	Active, since public authorities know which information must be made available to allow the citizen to hold them accountable	Active, since homo economicus will not know about information unless it is made public, and because this is the only way to ensure equality between economic operators	Active, since homo economicus will not know about information unless it is made public, and because this is the only way to ensure equality between economic operators	Usually passive, since homo dignus is the only one who can decide what information is of fundamental importance to him; active transparency would raise privacy issues	Active, since public authorities know what information homo dignus will need	Active, since public authorities know what information homo dignus will need	Active, since public authorities know what information homo dignus will need	Active, since public authorities know what information homo dignus will need	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 meaningful participation and/or public accountability	Sufficient to allow homo economicus to know what his legal rights and obligations are	Sufficient to allow homo economicus to know what his legal rights and obligations are	Sufficient to allow homo economicus to know what his legal rights and obligations are	No	Sufficient for homo economicus to understand the reasons for a decision and to challenge them	No	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 decision and to challenge them

Rights of homo dignus, in particular his right to privacy						
Mandatory exceptions, balancing exercise by legislator or administration	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 rights	
Optional absolute exceptions: transparency may be counterproductive, to be evaluated by the legislator or administration (the grey text indicates arguments that are never made)	Public interest exceptions, subject to democratic approval, may no 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	Public interest exceptions, subject to democratic approval, may not infringe upon the core of the right
Optional relative exceptions: transparency can harm other interests, to be balanced by the legislator or the administration and the judiciary	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)	Provision of access to information that can help save homo dignus' life or prevent violations of his physical integrity (articles 2 & 3 ECHR)
Non-derogable obligations	Parliament, parliamentary committees, courts; acceptable alternatives if they do in fact represent the public interest, subject to democratic approval	No, because information taking the information into account during decision-making and no longer contributes to realisation of the goal of the transparency obligation	No, because information taking the information into account during decision-making and no longer contributes to realisation of the goal of the transparency obligation	No, because information decision-making if it is now known to the decision-maker	No, because information 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
Transparency to fiduciaries	Yes, ex-post transparency is sufficient to allow the citizen to hold his representatives accountable	Yes, ex-post transparency is sufficient to allow the citizen to hold his representatives accountable	Yes, ex-post transparency is sufficient to allow the citizen to hold his representatives accountable	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	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	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
Delayed transparency	No, delayed transparency will prevent the citizen from taking the information into account while deciding on the best public policy and undermines the goal of the transparency obligation	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	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	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	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	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
Mitigating the negative effects of compromises to transparency	Yes	Yes	Yes	Yes	Yes	Yes
Passive instead of active transparency	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	No, passive transparency will prevent homo economicus from being aware there is relevant information to begin with, and will infringe the principle of equality	No, active transparency is only warranted in those cases where it is necessary to realise the rights of homo dignus	No, active transparency is only warranted in those cases where it is necessary to realise the rights of homo dignus	No, active transparency is only warranted in those cases where it is necessary to realise the rights of homo dignus