

Dimensions of Transparency: The Building Blocks for a New Legal Principle?

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Abstract

This short article explores a number less well-known aspects of the principle of transparency in so far as it emerges in the relationship between public authorities and individuals. The debate about transparency was, until now, strongly focused on transparency in the sense of openness of government and access to EU documents. The phenomenon is, however, much broader, cutting across various fields and levels of EU. Are we facing a process of a new legal principle coming into being?

I Introduction

Ever since the 1990s transparency has gained considerable attention in the EU context. The most familiar and also the most developed dimension of transparency is openness in the decision-making process, and in particular access to documents. There are, indeed, other elements included in transparency, such as the clarity of procedures, clear drafting, the publication and notification of legislation/decisions and the duty to give reasons.

These elements manifest themselves on different levels. On the political – or perhaps constitutional – level they are often linked to the fundamental notions of democracy, legitimacy and accountability. There is, however, the more concrete level of administration and, arguably, transparency also plays a role between private individuals. As examples we could mention the extensive transparency and information obligations in EU financial markets regulation or, in a completely different area, the directive ‘on an employer’s obligation to inform employees of the conditions applicable to the contract or employment relationship.’¹ We are not going to address this dimension as we will confine ourselves to the relationships between public authorities and individuals (which may indeed be undertakings). To this, one may also add another distinction: the EU level and the level of the Member States. As

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¹ Directive 91/533, OJ 1991 L 288/32.

we will show, EU law-inspired transparency is increasingly relevant on both levels.

The various elements of transparency are relatively open-ended and have to be honed down in the context of the more specific areas of application in order to produce some concrete results. Clarity of legislative texts, for instance, is something which is different from the clarity of an individual decision. Nevertheless, the question should be asked whether these elements do not constitute separate building blocks of an overarching principle of transparency. To some extent one may compare this with the right of defence, a general principle of Community law, which in fact is also 'built up' from a number of sub-principles, such as the right to be informed, the right to be heard, the right not to incriminate oneself, the right to legal assistance and legal privilege.²

An interesting phenomenon in this respect is that there is a considerable overlap of the various elements of transparency or the – often loosely used – notion of transparency itself with other principles. In many respects transparency or its elements seem rather to support other general principles of law, instead of having a self-standing meaning. We will illustrate this interplay with a number of examples. On the basis of this brief discussion, we will reflect on the question whether transparency is emerging as a new general principle of EU law.

2 Transparency and the Principle of Sound Administration

Transparency in the sense of access to a person's file, which may be considered as an individual manifestation of access to documents in general, is explicitly recognised in Article 41(2) of the Charter of Fundamental Rights as a part of the right to good administration. Although access to a file is often linked to the right of defence, in the Charter it was included under the broader heading of good administration.

The *Natural health* case³ illustrates another aspect of transparency, namely the need to have clear procedures. At the same time it also provides a fine example of how the principle guides the interpretation of legislation, aiming, *inter alia*, at the avoidance of an outright conflict. This case concerned, as far as is relevant, the legality of a procedure, provided under Directive 2002/46⁴, to be followed when a decision has to be taken as to whether certain vitamins and minerals in food supplements may be placed

² Cf. Jans a.o. *Europeanisation of Public Law*, Europa Law Publishing, Groningen 2007, at p. 191-193.

³ Joined Cases C-154/04 and C-155/04 *Natural Health* [2005] ECR I-6451.

⁴ Directive 2002/46 (approximation of the laws of the Member States relating to food supplements), OJ 2002 L 183/51.

on the market, i.e. included in a so-called ‘positive list’. AG Geelhoed was of the opinion that the ‘procedure, in so far as it may exist and in so far as it may deserve this title, has the transparency of a black box: no provision is made for parties to be heard, no time-limits apply in respect of decision-making; nor, indeed, is there any certainty that a final decision will be taken.’⁵ In his view, since the Directive lacked appropriate and transparent procedures for its application, it infringed the principle of proportionality and was, therefore, invalid.⁶ The ECJ did not agree with this and found that the procedure was indeed legal. However, it did point out that ‘[I]t would, no doubt, have been desirable ... for the directive to have included provisions which in themselves ensured that that stage [*the critical stage of the procedure, including the consultation of the European Food Safety Authority (EFSA) – SP/MdL*] be completed transparently and within a reasonable time.’⁷ The lack of such provisions had to be compensated by the Commission. By virtue of the implementing powers conferred on it by Directive 2002/46, it had to adopt, in accordance with the principle of sound administration, the measures necessary to ensure that the consultation stage with the EFSA is carried out transparently and within a reasonable time.

In the area of state aid, it follows from the legislation and the case law that decisions must be taken without delay and must be addressed to the Member States concerned in the interest of transparency and legal certainty.⁸ Therefore, a failure to notify the Commission’s decision to the Member State concerned can in certain circumstances justify the annulment of an act of a Community institution.⁹ However, in some cases the obligations of the Commission may extend further: according to the CFI, the Commission may be bound in accordance with its duty of ‘sound administration’ or ‘sound administration and transparency’ to inform the complainant of its decisions or its consequences.¹⁰

3 Transparency and the Principle of Legal Certainty

The marriage between legal certainty and transparency entails at least two different aspects. For a part it coincides with the requirements of the clarity and unambiguous nature of legal texts. In this respect,

⁵ Point 85 of the Opinion.

⁶ Proportionality played a role in the sense that objectives of the Directive could have been achieved by less restrictive solutions than the approach taken by the Community legislature.

⁷ Para. 81 of the judgment.

⁸ Preamble 21 to Council Regulation 659/1999 (detailed rules for the application of Article 93 of the EC Treaty), OJ 1999 L 83/I.

⁹ Case C-398/00 *Spain v. Commission* [2002] ECR I-5643, para. 33.

¹⁰ See Case T-82/96 *ARAP v. Commission* [1999] ECR II-1889 and Case T-277/94 *AITEC v. Commission* [1996] ECR II-351.

together with the requirement of publication, it strongly supports the cognizability of the law. For another part, in so far as it militates in favour of policy rules and perhaps even their codification in binding acts, at a certain moment it helps to make policy action predictable in the case of broad discretionary powers. Here it serves as one of the safeguards against discretion ending up as arbitrariness.

According to well-established Luxembourg case law, Community legislation must be certain and its application must be foreseeable by individuals. It is here, in particular, that the principle of legal certainty requires every measure of the institutions having legal effects to be clear and precise and brought to the notice of the person concerned. The latter must be able to know the extent of the obligations which it imposes on him/her.¹¹ Although the required clarity, precision and notification or publication undoubtedly also pertain to transparency, as a rule they are treated as a matter of legal certainty. However, since more recent times, transparency seems to ‘sneak in’ discretely, either in the judgments or at least in the opinions of Advocates General.

In case C-110/03, *Belgium v. Commission*,¹² the Belgian government sought the annulment of (group) Regulation 2204/2002.¹³ It argued that the fifth recital in the preamble to Regulation 994/98 (the enabling regulation) requires exemption regulations to increase transparency and legal certainty, but that Regulation 2204/2002 on aid to employment is completely lacking in clarity in terms of both context and content. The AG first noted that the preamble or introductory recitals are not binding, and therefore any failure to take the principle of transparency and legal certainty into account cannot lead to the annulment of the Regulation. However, according to the AG, “both the principle of transparency and legal certainty must be respected by the legislature as sources of Community law, and a failure to do so would, under article 230 EC constitute an infringement, irrespective of whether they are referred to in the preamble to Regulation 994/98”.¹⁴ The AG subsequently analyzed whether the Regulation lacks transparency in the sense of “the quality of being clear, obvious and understandable without doubt or ambiguity”.¹⁵ In the end he was satisfied that there was no breach.

The ECJ did not refer to the principle of transparency as it found that the Belgian argument as to the Regulation’s lack of clarity in reality concerned a breach of the general principle of legal certainty. From the case it can be deduced that the ECJ may, at most, consider transparency only as an element of the principle of legal certainty.

¹¹ Cf. *inter alia* T-115/94 *Opel Austria* [1997] ECR II-2739, and long before this case e.g. Case 70/83 *Kloppenburger* [1984] ECR 1075.

¹² [2005] ECR I-2801.

¹³ Commission Regulation 2204/2002 (on the application of Articles 87 and 88 of the EC Treaty to State aid for employment), OJ 2002 L 337/3.

¹⁴ Point 36.

¹⁵ Point 44

However, in Case C-149/96¹⁶ the Court took a slightly different position. Portugal argued, in this case, that the principle of transparency had been breached “because the contested decision approves Memoranda of Understanding which [were] not adequately structured and [were] drafted in obscure terms which prevent a normal reader from immediately grasping all their implications, in particular as regards their retroactive application”.¹⁷ The ECJ dismissed this argument, however, not because Portugal could not rely on the principle of transparency, but because it found the decision to be clear in every relevant aspect.

Similarly, in the case law on the proper implementation of directives, which is, as is well known, strongly influenced by the principle of legal certainty, transparency sometimes features as a separate requirement. Thus, for instance, according to Case C-417/99, provisions of directives must be implemented in national law “with precision, clarity and transparency required in order to comply fully with the requirement of legal certainty”.¹⁸ Or the provisions must be “... capable of creating a situation which is sufficiently precise, clear and transparent to enable individuals to ascertain their rights and obligations”.¹⁹ This case law also illustrates how transparency may also permeate the law at the national level.

As to the second aspect, the area of state aid and competition provides some good examples. In this field the Commission attaches – as it has done since the mid-1990s – great importance to the transparency and predictability of its policy. This has resulted in the adoption and publication by the Commission of numerous soft-law instruments such as notices, communications, frameworks, guidelines, and codes, but also legislation on the application of the rules in those sectors by the Commission.

For example, in the field of state aid the Commission has adopted guidelines concerning aid to employment.²⁰ The guidelines explained that their objective is to clarify the interpretation of Articles 92 and 93 (now articles 87 and 88) of the Treaty with regard to State aid in the field of employment in order to ensure *greater transparency* of notification decisions under Article 93 of the Treaty. In case C-310/99 the ECJ explained that such guidelines, setting out the approach that the Commission proposes to follow, help to ensure that it acts in a manner which is transparent, foreseeable and consistent with legal certainty.²¹

¹⁶ Case C-149/96 *Portugal v. Council* [1999] ECR I-8395.

¹⁷ Para. 55.

¹⁸ Case C-417/99 *Commission v. Spain* [2001] ECR I-6015, para. 40.

¹⁹ Case C-177/04 *Commission v. France* [2006] ECR I-2461, para 48.

²⁰ OJ 1995 C 334/4. These guidelines have ceased to exist from the date of the entry into force of Commission Regulation 2204/2002 of 12 December 2002 on the application of articles 87 and 88 of the EC Treaty to state aid to employment, OJ 2002 L 337/3.

²¹ Case C-310/99 *Italian Republic v. Commission* [2002] ECR I-2289.

Another illustration is the guidelines on the method of setting fines imposed pursuant to article 15(2) of Regulation 17/62 and article 65(5) ECSC in competition cases.²² For many years the Commission has been criticised for the opaque manner in which it calculated fines in competition cases.²³ Before the adoption of the guidelines, undertakings were required to commence court proceedings to know the method for calculating fines imposed upon them. However, this lack of transparency did not, in the opinion of the ECJ, amount to a violation of the obligation to provide reasoned decisions.²⁴ It follows from the preamble to the guidelines that they were adopted with a view to ensuring the *transparency and impartiality* of the Commission's decisions in that area (recital 1). According to the ECJ, the guidelines also ensure legal certainty on the part of the undertakings themselves.²⁵ By making the criteria for the setting of fines public, the Commission shall impose similar fines on undertakings which violate competition rules in similar circumstances.

In other – more general – terms, by clearly setting out in what way the Commission shall exercise its discretionary powers, it makes this exercise visible, clear and understandable, i.e. transparent. In this way, it becomes possible to foresee the behaviour of the institution and to achieve legal certainty. The fact that many rules regarding the Commission's discretionary exercise of powers in the area of state aid and competition are laid down in soft-law instruments, such as guidelines, does not mean that the Commission can deviate there from whenever it pleases. The Court has ruled that the Commission, by adopting and publishing rules of conduct designed to produce external effects, has imposed a limit on the exercise of its discretion and cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations.²⁶ By setting out in detail the procedural rules, it is prevented that the Commission acts in a

²² OJ 1998 C 9/3. The guidelines have now been replaced by new ones adopted pursuant Regulation 1/2003. Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003, OJ 2006 C 210/3.

²³ See in particular Case T-148/89 *Tréfilunion v. Commission* [1995] ECR II-1063.

²⁴ See C-248/98 P *NV Koninklijke KNP BT v. Commission* [2000] ECR I-9641.

²⁵ See, for example, Case C-167/04 P *JCB Service v. Commission* [2006] ECR I-8935. The link between transparency, foreseeability and legal certainty has also been made by the ECJ in respect of the guidelines published by the Commission setting out the amount of lump-sum or penalty payments which it intends to propose to the Court that they should be calculated in the light of Article 228(2) EC. See C-177/04 *Commission v. French Republic* [2006] ECR I-2461.

²⁶ See Joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri A/S and Others v. Commission* [2005] ECR I-5425, par. 211. This case concerned the Guidelines on setting fines.

partial and non-objective manner. Therefore, we submit that transparency here functions as a mechanism to prevent arbitrary behaviour on the part of the institution in question.

4 Transparency and the Principle of Equal Treatment

Most clearly elaborated seems to be the relationship between transparency and non-discrimination, in particular where it aims to safeguard objectivity and non-discrimination in public procurement²⁷ and comparable – in particular public concessions – procedures.

The first contours of transparency in public procurement can be found in the judgment in Case C-87/94 *Commission v. Belgium*, in which the Court held, on the basis of the text of Directive 90/531, that the procedure for comparing tenderers had to comply at every stage with both the principle of the equal treatment of tenderers and the principle of transparency. The relationship between equality of treatment and transparency was elaborated in more detail in a number of cases, first in public procurement cases – on the national²⁸ and EU level²⁹ – but soon also in relation to concessions, which are outside the scope of the public procurement directives³⁰ or in cases which are below the thresholds of the procurement directives.³¹ This ‘spillover’ from procurement to concessions was possible precisely because the link established between equal treatment or non-discrimination and transparency. As the ECJ pointed out, the principle of equal treatment underlies both the EC public procurement rules and the free movement rules of the internal market which govern, *inter alia*, the award of concessions.³²

The relationship between equal treatment and transparency is not entirely clear. In some cases the principle of equal treatment and non-

²⁷ I.e. the four procurement directives are Directive 93/36 (supplies), OJ 1993 L 199/1, Directive 93/37 (works), OJ 1993 L 199/54, Directive 92/50 (services), OJ 1992 L 209/1 and Directive 93/38 (utility sectors), OJ 1993 L 199/84. These have been recently replaced by Directive 2004/18 (procedures for the award of public works contracts, public supply contracts and public service contracts), OJ 2004 L 134/114 and Directive 2004/17 (procurement procedures of entities operating in the water, energy, transport and postal services sectors), OJ 2004 L 134/1.

²⁸ See, for instance, Case C-275/98 *Unitron* [1999] ECR I-8291 and Case C-470/99 *Universale Bau* [2002] ECR I-11617.

²⁹ Cf. Joined Cases T-191/96 and T-106/97 *Succhi de frutta* [1999] ECR II-3181 and Case T-183/00 *Strabag Benelux NV* [2003] ECR II-135.

³⁰ Cf. Case C-324/98 *Telaustria* [2000] ECR I-10745 and Case C-231/03 *Coname* [2005] ECR I-7287.

³¹ Case C-6/05 *Medipac*, judgment of 14 June 2007, nyr. in ECR.

³² Cf. for instance Case C-470/99 *Universale-Bau* [2002] ECR I-11617, Case C-231/03 *Coname* [2005] ECR I-7287 and Case C-458/03 *Parking Brixen* [2005] ECR I-8612.

discrimination is said to imply an obligation of transparency.³³ The judgment in *Coname* clarifies that non-compliance with transparency requirements amounts to a violation of the rule against discrimination.³⁴ In *Succhi di Frutta* the principle of transparency is referred to as the ‘corollary’ of the principle of equal treatment between tenderers.³⁵ However, there are also cases which may suggest that transparency and equal treatment are to be considered as two separate principles which exist alongside each other.³⁶ In any case, while, on the one hand, there is a very close link between the principle of equal treatment and transparency, on the other transparency also has, in certain respects, a more specific meaning of its own. It requires, *inter alia*, the clear and unambiguous drafting of the conditions for and the rules on the award procedure. The selection and award criteria must be formulated in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way.³⁷ The adjudicating authority must interpret the selection and award criteria in the same way throughout the entire procedure and must apply them objectively and uniformly to all tenderers.³⁸ The substantive and procedural conditions concerning participation in a contract, including criteria for selecting candidates and those for awarding the contract must be clearly defined in advance and made known to the persons concerned.³⁹ In principle, no new criteria or specifications may subsequently be taken into account.⁴⁰ There should be at least a certain degree of publicity or advertising in order to enable the market in question to be opened up to competition.⁴¹

³³ Cf. for instance Case C-19/00 *SIAC* [2001] ECR I-7725 and Case C-410/04 *ANAV* [2006] ECR I-3303.

³⁴ Case C-231/03 *Coname* [2005] ECR I-7287.

³⁵ Case C-496/99 *P Succhi di frutta* [2004] ECR I-3801; or principle transparency flows from principle of equal treatment: cf. C-340/02 *Commission v. France* [2004] ECR I-9845.

³⁶ For instance Case C-458/03 *Parking Brixen* [2005] ECR I-8612, para. 50 or Case C-448/01 *Wienstrom* [2003] ECR I-14527, para. 58.

³⁷ Case C-19/00 *SIAC* [2001] ECR I-7725 and Case C-448/01 *Wienstrom* [2003] ECR I-14527.

³⁸ Cf. Case C-19/00 *SIAC* [2001] ECR I-7725 and Case C-448/01 *Wienstrom* [2003] ECR I-14527. Case C-6/05 *Medipac*, judgment of 14 June 2007, nyr. in ECR goes in the same direction.

³⁹ For instance Case C-470/99 *Universale-Bau* [2002] ECR I-1617 and Joined Cases C-226/04 and C-228/04 *La Cascina* [2006] ECR I-1347.

⁴⁰ Cf. Case C-6/05 *Medipac*, judgment of 14 June 2007, nyr. in ECR (unless, for instance, the health and safety of patients is at stake, as was arguably the case in *Medipac*. Then, however, the appropriate procedures, where present, have to be followed).

⁴¹ A question under discussion for some time now is how to flesh out the ‘sufficient degree of publicity’ since it can hardly be the purpose of this case law to oblige all contract awards to be publicly announced. For a discussion of this question see, for instance, the Opinion of AG Sharpston, of 18 January 2007, in Case C-195/04 *Commission v. Finland* and the Opinion of AG Stix-Hackl, of 14 September 2006, in case C-532/03 *Commission v. Ireland*. Cf. also the

The principle of equal treatment is said to imply an obligation of transparency for mainly two reasons. The first is the *creation* of equality of opportunity, thus to place all potential bidders on an equal footing. According to the ECJ transparency affords all interested parties equality of opportunity in formulating the terms of the applications for and participation in the tenders. The absence of any transparency may amount to indirect discrimination on the ground of nationality which is prohibited by the Treaty, in particular under Articles 43 and 39.⁴²

The second reason is to facilitate the control of compliance with the principle of equal treatment. The ECJ stresses in its case law that transparency enables the contracting or concession-granting authorities to ensure that the principles of equal treatment and non-discrimination are complied with,⁴³ and the impartiality of procurement procedures are to be reviewed.⁴⁴ In other terms, as we understand it, such control must be possible *during* the award procedure and *ex post*. Without transparency, it is not very feasible for both the tenderers and the authorities to verify whether the principle of equal treatment has been complied with.⁴⁵

The fact that transparency must make it possible to review whether the principle of non-discrimination has been observed illustrates, in our view, that transparency precedes non-discrimination and in this sense it can be separated from equal treatment. Another indication to consider transparency as a principle independent from equality and non-discrimination is that it is also ‘intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority.’⁴⁶ In brief, in some respects transparency seems to extend beyond what non-discrimination requires. The – partly – independent nature of transparency also seems to be underlined in recent public procurement legislation. In two directives from 2004, transparency

Commission’s Interpretative [*and not entirely unambiguous- SP/MdL*] Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, OJ 2006 C 179/2.

⁴² Case C-231/03 *Coname* [2005] ECR I-7287, para. 17 and 18.

⁴³ Case C-458/03 *Parking Brixen* [2005] ECR I-8612, para. 49 and Case C-324/98 *Telaustria* [2000] ECR I-10745, para. 61.

⁴⁴ Case C-458/03 *Parking Brixen* [2005] ECR I-8612, para. 49 and Case C-324/98 *Telaustria* [2000] ECR I-10745, para. 62.

⁴⁵ Some cases may suggest that what is at stake is mainly control by the authorities. However, also tenderers have some interest in control. Indeed, such a broader interpretation seems to be the correct one. Cf. Case C-26/03 *Stadt Halle* [2005] ECR I-I, para. 39: “The obligation of transparency, to which the contracting authority is subject in order to make it possible to verify that the Community rules have been complied with (*HI*, paragraph 45), should be noted in this respect.”

⁴⁶ Case C-496/99 P *Succhi di frutta* [2004] ECR I-3801, para. 111 and Case C-6/05 *Medipack*, judgment of 14 June 2007, nyr. in ECR, para. 53.

has been codified alongside the requirements of equal treatment and non-discrimination.⁴⁷

An interesting aspect of the close link between transparency and the principles of equal treatment and non-discrimination is the potential to spread out to other areas of the law, beyond public procurement and concession contracts. Since equality of treatment and non-discrimination underpin the fundamental Treaty freedoms, it is not difficult to imagine that equal treatment may serve as a vehicle for extending the scope of transparency requirements. After all, the transparency requirements apply to concessions exactly because these are governed by the Treaty provisions on the free movement of services and establishment. The effects may and do, however, reach further, in particular where other aspects of market access are at issue.

In EU legislation, the coupling of transparency and non-discrimination can be found, for instance, in directives concerning liberalization of network sectors, such as Article 7(3) of Directive 2002/20 (authorisation of electronic communications networks and services),⁴⁸ Article 6 of Directive 2003/54 (common rules for the internal market in electricity),⁴⁹ Articles 9 and 11 of Directive 2002/21 (common regulatory framework for electronic communications networks and services – the Framework Directive)⁵⁰ or Article 9 Directive 97/67 (internal market for Community postal services).⁵¹

Another example of the codification of transparency in relation to market access in a more general fashion can be found in the Services Directive.⁵² In so far as this Directive allows for authorisation schemes, justified by overriding reasons relating to public interest (Article 9), the latter must ‘be based on criteria which preclude the competent authorities from exercising their power of assessment in an arbitrary manner.’ (Article 10) According to Section 2 of Article 10, these criteria shall, *inter alia*, be ‘(a) non-discriminatory; ... (d) clear and unambiguous; ... (f) made public in advance; (g) transparent and accessible.’⁵³ Interesting in the Service Directive is also Article 12, which deals with a limited number of authorisations being available due to the scarcity of natural resources or technical capacity. The Member States are bound to apply a selection procedure to potential candidates which

⁴⁷ Directive 2004/18 (procedures for the award of public works contracts, public supply contracts and public service contracts), OJ 2004 L 134/114, Article 2 and Directive 2004/17 (procurement procedures of entities operating in the water, energy, transport and postal services sectors), OJ 2004 L 134/1, Article 10.

⁴⁸ OJ 2002 L 108/21.

⁴⁹ OJ 2003 L 176/37.

⁵⁰ OJ 2002 L 108/33.

⁵¹ OJ 1998 L 15/14.

⁵² Directive 2006/123 (services in the internal market), OJ 2006 L 376/36.

⁵³ Indeed, one may here wonder what meaning is left for transparency itself where it features alongside the requirements of clarity and unambiguity, accessibility and being made public in advance.

‘provides full guarantees of impartiality and transparency, including, in particular, adequate publicity about the launch, conduct and completion of the procedure.’ Article 13(1) provides that authorization procedures and formalities shall be ‘clear, made public in advance and be such as to provide the applicants with a guarantee that their application will be dealt with objectively and impartially.’

5 Some Conclusions

Until now, only transparency in the sense of ‘access to documents’ has been generally considered as a serious nominee for being accepted as a general principle of Community law.⁵⁴ However, our brief exploration illustrates that transparency as a legal principle ‘in gestation’ may cover a much broader area of the law. In many respects it may be too early to recognize transparency as a self-standing principle of law. The various elements need to be crystallized in more detail and have to gain – partly in that same process – more autonomy.

To an extent it is possible to identify a number of recurring core elements of transparency, despite the different ‘colouring in’ depending on the context: clear language, physical access to information and, closely linked to that, publication or notification, the predictability of public authorities’ actions/behaviour, and consistency in the interpretation and application of the law. This may sometimes require the drafting of policy rules which curtail the use of the discretionary powers of the authority concerned. However, the very concrete meaning of the various elements are still very much in a process of taking shape, either in case law or in legislation. The still uncertain content of transparency may also explain why transparency is often linked to other well-established principles of law. The coupling of transparency with another principle also depends on the area or context in which transparency is invoked.

The moulding process which is discretely going on is particularly confusing in the sense that transparency emerges on so many levels. Sometimes it appears next to other legal principles or, occasionally, instead of an established principle. In other situations it is presented as an element of a principle of law, for instance, alongside clarity and precision when legal certainty is at stake. Yet, in other cases any reference to transparency is lacking. Again in other cases it is suggested that transparency includes clarity and precision.

In any case, transparency seems to overlap – partially or completely – with certain elements in other legal principles. How must we assess this? In part, transparency here builds upon existing legal values, such as legal

⁵⁴ P. Craig and G. de Búrca, *EU Law: Text, Cases and Materials*, Fourth Edition, Oxford University Press, Oxford 2007, p. 567, referring to K. Lenaerts.

certainty and equality of treatment. At the same time it further elaborates these values. However, as it also leads to a new amalgamation of these elements, it provides a new – integrated – perspective and, potentially, new dynamics.