Summary of concluding observations

The following is a translation of the summary of the concluding observations (Chapter 12) of the dissertation entitled

TRANSPARENT AND FAIR ALLOCATION OF LIMITED PUBLIC RIGHTS.

Research into the added value of a transparency obligation in the allocation of limited public rights in Dutch administrative law.[1]

1.1 INTRODUCTION

The key issue at the centre of this research concerns which transparency requirements should be observed in the allocation of limited administrative decisions by Dutch administrative authorities, the extent to which these requirements are already being observed in Dutch administrative law practice and, where this falls short, how these transparency requirements could be better guaranteed in Dutch administrative law. Based on the preceding chapters, this chapter will first provide an answer to the sub-questions raised in Chapter 1 of this book and then turn to the main question.

1.2 DEFINITION: CONTEXT AND TERMINOLOGY

In this research two concepts are key: the 'obligation of transparency' – or the 'principle of transparency' – and 'limited public decisions' – or 'limited public rights'. For a firm understanding and the stand-alone readability of these concluding observations these concepts are briefly explained below. For a more detailed explanation I refer to Chapter 2 of this book.

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1 Dutch title*: Transparante en eerlijke verdeling van schaarse besluiten. Een onderzoek naar de toegevoegde waarde van een transparantieverplichting bij de verdeling van schaarse besluiten in het Nederlandse bestuursrecht*.

1.2.1 Limited public decisions

With limited public rights the number of rights that can be allocated is restricted.[2] This limitation may be created by administrative authorities by setting a 'ceiling' that indicates the maximum number of award decisions that can be made.[3] This research is restricted to administrative law. As a result the award of limited public rights pursuant to a decision within the meaning of the Dutch General Administrative Law Act (GALA) is key. 'Limited public decisions' are therefore taken to mean any and all decisions where the number of potential applicants may be greater than the number of available award decisions.[4] Limited public decisions may therefore relate to licences, exemptions, concessions and subsidies. While GALA does have a definition for a 'decision' in section 1:3 GALA, there is no definition for a licence, exemption or concession. Directive 2004/18/EC does contain a definition for a public contract and concession, but not for a licence or subsidy. In the answer to the second sub-question (paragraph 1.4) the differences between a public contract, concession, licence and subsidy are discussed in more detail.

Limited public decisions are allocated by means of an allocation procedure. Examples of allocation procedures include a drawing of lots, an auction, a comparative assessment – tender system – or allocation in order of receipt ('first come, first served'). In all of these allocation procedures the obligation of transparency plays a role. This is because in all cases there is a situation of limitation, whereby a choice will be made between the various applicants. The submitted applications will have to be ranked. For these applicants and potential applicants to be treated equally they will need to know which method of allocation will be used, which rules will be applied during the procedure and which criteria apply to the ranking of the applications. These are all aspects of the obligation of transparency.

1.2.2 The obligation, the principle and the requirements of transparency

In this chapter a distinction is made between the obligation, the principle and the requirements of transparency. The *obligation of transparency* is the main term used for the obligation under European Union law, to be described in

2 A distinction can be made between natural or technical limitations and limitations created artificially for policy-based reasons. This research relates to both.

3 On the matter of ceilings, see also Van Ommeren 2004, pp. 2 and 24, and Wolswinkel 2013, pp. 224ff.

4 This research relates to 'limited public decisions'. As stated, limitation exists when the number of award decisions is restricted. This number may be one, leading to a monopoly, or several, leading to an oligopoly. The creation of a monopoly pursuant to a decision is sometimes also referred to as the awarding of a 'sole right', or 'exclusive right'. The creation of an oligopoly is referred to as the awarding of a 'special right'.

more detail below, to preclude any risk of favouritism and arbitrariness by, inter alia, displaying a sufficient degree of advertising. The first reason for this is that it matches the terminology of the European Court of Justice.[5] The second reason is that if one of the sub-questions is whether there is a principle, it does not seem satisfactory to adopt the 'principle of transparency' as the main term because this suggests that the research pre-supposes that we are dealing with a principle, which is not the case. The term *principle of transparency* is therefore only used in these concluding observations if it is actually referring to the principle of transparency as an independent general principle of proper administration. Finally, the obligation of transparency – and so too the principle of transparency – can be given definite form. A number of specific requirements can be derived from the case law of the European Court of Justice. These requirements are referred to in this book as *requirements of transparency* and thus form part of the obligation of transparency.

The obligation of transparency that is key in this research is the obligation of transparency under European Union procurement law. According to settled case law of the Supreme Court of the Netherlands (*Hoge Raad*)[6] and the European Court of Justice[7] the obligation of transparency, in essence, serves to guarantee the preclusion of any risk of favouritism and arbitrariness on the part of the contracting authority. This means, in particular, that at the beginning of a procurement procedure contracting authorities must display a 'sufficient degree of advertising'. The obligation of transparency was described as follows by the Supreme Court on 9 May 2014:

> 'It follows from legal precedent of the EUCJ (see, inter alia, EUCJ 29 April 2004, Case C-496/99 P, ECLI:NL:XX:2004:BG2419 (Succhi di Frutta), paragraphs 108 and 110) that the contracting authority must respect the principle of equal treatment. Under this principle, the aim of which is to promote the development of healthy and effective competition between undertakings taking part, all tenderers must be afforded equality of opportunity when formulating their tenders, which therefore implies that the tenders of all competitors must be subject to the same conditions.
>
> The contracting authority must also observe the principle of transparency (see the Succhi di Frutta judgment, paragraph 111). In essence, the purpose of that principle is to guarantee the preclusion of any risk of favouritism and arbitrariness by the contracting authority. It implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents so that, first, all reasonably informed

5 Although the terminology of the European Court of Justice is inconsistent, it can be observed that the term 'obligation' is used more frequently than the term 'principle'. For example, in October 2013 the European Court of Justice concluded that 'European Union law applies, inter alia, the principle of equal treatment of tenderers and the obligation of transparency resulting therefrom' (EUCJ 10 October 2013, C-336/12).

6 Inter alia, Supreme Court of the Netherlands 4 November 2005, *BR* 2006/36, with commentary by H. Nijholt and *NJ* 2006/204, with commentary by M.R. Mok.

7 Inter alia, EUCJ 29 April 2004, C-496/99 (Succhi di Frutta).

> tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant public contract. These requirements also relate to the assessment system to be used by the contracting authority.'[8]

Three objectives and nine obligations that stem from the obligation of transparency can be derived from the case law of the European Court of Justice. These will be described below, in the answer to the first sub-question (paragraph 1.3).

1.2.3 Scope of the obligation of transparency

The case law of the European Court of Justice reveals that the obligation of transparency ensues not only from the procurement directives,[9] but also directly from the principle of non-discrimination laid down by the TFEU.[10] The fact that the obligation of transparency ensues from European Union law expands the scope of the requirement on the one hand, yet restricts it on the other.

Expansion is due to the fact that the scope of application is not restricted to the scope of the procurement directives, but is also relevant to concession contracts, IIB services and contracts that do not exceed the threshold values. The extent to which the obligation of transparency must be applied when awarding licences and subsidies is less clear. For that reason, this will be discussed in the answer to the second sub-question (paragraph 1.4).

Restriction is due to the fact that, in principle, European Union law does not apply to purely internal situations.[11] The question of when a situation

8 Supreme Court of the Netherlands 9 May 2014, ECLI:NL:HR:2014:1078. Cf. also Supreme Court of the Netherlands 7 December 2012, ECLI:NL:HR:2012:BW9231, *TBR* 2013/33, with commentary by B.J.H. Blaisse-Verkooyen and ECLI:NL:HR:2012:BW9233. The Supreme Court uses identical wording to describe the obligation of transparency, but also adds here: 'All of this not only means that all tenderers will be treated equally, but also – partly for the purpose of effective control at a later date – that they must be afforded, in equal degree, a clear insight into the terms under which the tender will be processed, such as the selection criteria.'

9 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.

10 Articles 49 and 56 TFEU, formerly Articles 43 and 49 EC Treaty.

11 See for example the Council of State 23 November 2011, ECLI:NL:RVS:2011:BU5444.

is purely internal should not be answered too reticently.[12] The European Court of Justice held that the obligation of transparency must be observed whenever there is a 'clear cross-border interest'. If there is no such clear cross-border interest, and therefore European Union law does not apply, 'voluntary' adoption of a European Union law obligation is possible if a Member State deems this community obligation a good complement, or in order to avoid two variations of the same obligation having to be applied in the national legal system.[13]

Given the objectives of the obligation of transparency, including the preclusion of favouritism and arbitrariness and the creation of fair competition by offering equal opportunities to all potentially interested parties, it can be argued that the obligation of transparency could be a complement to Dutch administrative law. Furthermore, I find such legal disparity between citizens of the European Union, certainly where it concerns a standard such as the obligation of transparency that is designed to protect parties against favouritism and arbitrariness on the part of the government, difficult to justify. This research is therefore not restricted to the question of when the European Union law obligation of transparency *must* be observed, it also looks at the question of whether, in purely internal situations, the obligation of transparency formulated in European Union law is already sufficiently guaranteed by the administrative courts by examination for compatibility with general principles of proper administration and GALA or whether the obligation of transparency might still be of added value to Dutch administrative law. This question is discussed, in particular, in paragraphs 1.5 and 1.6 of these concluding observations.

1.2.4 The role of the obligation of transparency in the allocation of limited public rights

In administrative law, the obligation of transparency plays a role in the allocation of limited public decisions because of the element of competition and potential competition, where there are more interested parties than there are rights available. In such a situation, in my view, it is self-evident that if a competition situation is actually created, this competition must be 'fair', in other words all potential applicants must have equal opportunities to be con-

12 See on this point also Opinion of Advocate General Bot of 17 December 2009 on the Betfair judgment (C-203/08). Cf. also EUCJ 19 July 2012, C-470/11, *AB* 2012/324, with commentary by A. Drahmann.

13 Widdershoven 2004, pp. 293-327, in particular pp. 307-308. If the obligation of transparency under European Union law is made directly and unconditionally applicable through national law, the European Court of Justice will also deem itself competent to interpret this obligation in purely internal situations (see, inter alia, EUCJ 21 December 2011, C-482/10, *AB* 2012/254, with commentary by R.J.G.M. Widdershoven).

sidered for the limited public decision. The obligation of transparency constitutes a specification of how a decision-making process must be designed so that those equal opportunities can be guaranteed.

The grounds of appeal that are submitted in proceedings on limited public decisions before the administrative courts show similarities with the grounds that are submitted in provisional relief proceedings before the civil courts against the awarding of a public contract. The civil courts will examine these for compatibility with the obligation of transparency and the principle of equal opportunities, whereas the administrative courts will examine these for compatibility with the general principles of proper administration, such as the principle of due care and the obligation to state reasons. For example, it can be derived from the case law of the Dutch Trade and Industry Appeals Tribunal (CBb) that by not including allocation rules the administrative authority, according to the CBb, has envisaged a system of allocation on a first come, first served basis.[14] However, such implicit choice of an allocation system is difficult to reconcile with the case law of the European Court of Justice that provides that any risk of favouritism and arbitrariness on the part of the contracting authority must be precluded by formulating all terms and modalities of the procedure in a clear, precise and unambiguous manner. In this research I therefore consider, among other things, whether the obligation of transparency could have added value for Dutch administrative law. As part of this, it is relevant that according to legal precedent of the CBb strict requirements need to be imposed on the process of making limited public decisions, inter alia, for reasons of legal certainty.[15] These strict requirements often show striking similarities with the European Union law obligation of transparency that is key in this research. The obligation of transparency may therefore be seen as a further elaboration of the 'strict requirements' formulated by the CBb. The question of what role the obligation of transparency might play in the allocation of limited public decisions in Dutch administrative law is discussed in particular in paragraphs 1.5 and 1.6 of these concluding observations.

1.3 SUB-QUESTION 1

The case law of the European Court of Justice on procurement law procedures reveals that the transparency requirements must be met. What do these requirements entail?

The first sub-question is: what specific transparency requirements have been set by the European Court of Justice? This is answered, specifically, in the articles/chapters entitled 'On to a more transparent 2012; an overview of one

14 CBb 28 April 2010, *AB* 2010/186, with commentary by C.J. Wolswinkel.
15 Inter alia, CBb 5 December 2012, ECLI:NL:CBB:2012:1, *AB* 2013/293, with commentary by C.J. Wolswinkel.

year's case law on transparency'[16] (Chapters 3 and 4 of this book) and paragraph 3 of 'Is transparency sufficiently guaranteed in the allocation of limited public licences?'[17] (Chapter 9 of this book).

I will begin by setting out the transparency requirements under European Union law following from the case law of the European Court of Justice, before going on to discuss a number of judgments – in provisional relief proceedings – of the Dutch civil law courts regarding the obligation of transparency.

1.3.1 The obligation of transparency under European Union law following from the case law of the European Court of Justice

Three objectives, resulting from the obligation of transparency, can be derived from the case law of the European Court of Justice. An important point here is that, according to the European Court of Justice, the application of the principle of equal treatment and the resulting obligation of transparency does not constitute an objective in itself, but must be understood in the light of the objectives that it is intended to achieve.[18] The first objective of the obligation of transparency is to open up the market to competition.[19] The second objective is to guarantee that any risk of favouritism and arbitrariness by administrative authorities is precluded.[20] The third and final objective is to ensure that any interested party – or any potential applicant – can decide to submit an application on the basis of all the relevant information – also described as guaranteeing equality of opportunity.[21]

In addition, a number of specific requirements resulting from the obligation of transparency can also be derived from the case law of the European Court of Justice. This case law mainly relates to disputes over public contracts and concessions ('procurement law'). Although I will deal with the scope of the obligation of transparency in the following paragraph, I note here that there is common ground for applying these requirements – by analogy – to limited public decisions such as licences and subsidies. The reason for this is that there is still a dearth of case law from the European Court of Justice on limited public decisions, but in what case law there is, the European Court of Justice uses identical terminology in respect of the meaning of the obligation of transparency and it also refers to earlier case law on public contracts.[22]

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16 Dutch title: *Op naar een transparant(er) 2012; een overzicht van één jaar transparantierechtspraak*.
17 Dutch title: *Is de transparantie bij de verdeling van schaarse vergunningen voldoende gewaarborgd?*
18 EUCJ 10 October 2013, C-336/12.
19 Inter alia, EUCJ 7 December 2000, C-324/98.
20 Inter alia, EUCJ 29 April 2004, C-496/99.
21 Inter alia, EUCJ 16 February 2012, C-72/10 and C-77/10.
22 Inter alia, General Court (EGC) 15 April 2011, T-297/05, *AB* 2011/285, with commentary by A. Drahmann (on transparent award of subsidies), EUCJ 3 June 2010, C-203/8, *AB* 2011/17, with commentary by A. Buijze, *JB* 2010/181, with commentary by C.J. Wolswinkel and

On the basis of the available case law of the European Court of Justice I have sub-divided the obligation of transparency into the following nine transparency requirements.

First, every potential applicant must be guaranteed *a sufficient degree of advertising*: all potential applicants must – prior to submitting their application – be able to take note of the criteria that the application must meet as well as the relative importance of each of these criteria.[23] In the Commission Interpretive Communication on the Community law applicable to public contract awards not or not fully subject to the provisions of the Public Procurement Directives (the 'Interpretive Communication')[24] it is emphasised that a 'selective approach'[25] as well as all forms of 'passive publicity'[26] are contrary to this transparency requirement. The obligation of transparency is only met by the publication of a 'sufficiently accessible advertisement'.[27]

Secondly, *all the conditions and detailed rules* of the allocation procedure must be *drawn up* beforehand *in a clear, precise and unequivocal manner*. This therefore defines the discretionary power of the administrative authority. The administrative authority must be able to ascertain – based on the information and evid-

NJ 2010/491, with commentary by M.R. Mok and EUCJ 14 November 2013, C-221/12, *NJ* 2014/96, with commentary by M.R. Mok, *TA* 2014/6, with commentary by A. Drahmann and *JAAN* 2014/3, with commentary by A. Drahmann (both on transparent granting of authorisations).

23 Inter alia, EUCJ 25 April 1996, C-87/94 and EUCJ 7 December 2000, C-324/98.

24 Commission Interpretive Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (2006/C 179/02).

25 This limits the contracting entity itself to contacting a number of potential tenderers. This practice is not sufficient, even if the contracting entity does not limit itself to undertakings from its own country or attempts to reach all potential suppliers.

26 This is taken to mean that a contracting entity will reply to requests for information from applicants who found out by their own means about the intended contract award.

27 Administrative authorities may themselves decide on the most appropriate medium for advertising. As part of this, according to the European Commission, they should look at the relevance of the contract to the Internal Market, in particular in view of its subject-matter and value and of the customary practices in the relevant sector. The European Commission gives the following examples of adequate and commonly used means of publication: (i) Internet, (ii) National Official Journals, national journals specialising in public procurement announcements, newspapers with national or regional coverage or specialist publications, (iii) local means of publication (contracting entities may still use local means of publication such as local newspapers, municipal announcement journals or even notice boards. However, such means ensure only strictly local publication, which might be adequate in special cases, such as very small contracts for which there is only a local market), (iv) Official Journal of the European Union/TED (Tenders Electronic Daily) (Paragraph 2.1.3 of the Commission Interpretive Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (2006/C 179/02)). The advertisement of a limited public decision-making procedure may therefore be limited to a short description of the essential details of the limited public right, the allocation procedure and the contact details of the contracting authority, in order for it to be possible to request the further information, such as supporting documents, from it.

ence provided by the applicants – whether the applications meet the set criteria.[28]

The third requirement is that *all reasonably informed applicants exercising ordinary care can understand the exact significance of the criteria* and interpret them in the same way.[29]

Fourthly, a *final date for receipt of applications* must be set. As a result, all applicants will have the same period after publication of the tender notice (the call to compete) within which to prepare their applications.[30] In the Interpretive Communication, the European Commission states that the time-limits must also be appropriate. Time-limits for submission of offers should be long enough to allow undertakings from other Member States to make a meaningful assessment and prepare their offer.

The fifth transparency requirement is that *an amendment to the initial application of only one applicant must not be taken into account* because that applicant would then enjoy an advantage over his competitors.[31] However, an administrative authority can ask an applicant to improve or add to the submitted details, provided the request relates to details which can be objectively shown to pre-date the submission deadline. If it was expressly laid down in the allocation rules that, unless such documents or information were provided, the application would be rejected, adding to the application is no longer possible because an administrative authority must strictly comply with the criteria which it has set itself beforehand. Furthermore, that request must not unduly favour or disadvantage the applicant or applicants to which it is addressed.[32]

The sixth transparency requirement is that the administrative authority must interpret the *criteria in the same way throughout the procedure*.[33]

The seventh requirement explains that *the criteria must be applied objectively and uniformly* to all applicants *when comparing the applications*.[34]

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28 Inter alia, EUCJ 29 April 2004, C-496/99, EUCJ 16 February 2012, C-72/10 and C-77/10 and EUCJ 12 September 2013, C-660/11 and C-8/12.

29 Inter alia, EUCJ 18 October 2001, C-19/00 and EUCJ 29 April 2004, C-496/99.

30 Inter alia, EUCJ 25 April 1996, C-87/94.

31 Inter alia, EUCJ 25 April 1996, C-87/94.

32 EUCJ 10 October 2013, C-336/12. Cf. also EUCJ 29 March 2012, C?599/10, in which it was ruled that to enable the contracting authority to require a tenderer whose tender it regards as imprecise or as failing to meet the technical requirements of the tender specifications to provide clarification in that regard would be to run the risk of making the contracting authority appear to have negotiated with the tenderer on a confidential basis, in the event that the tenderer was finally successful, to the detriment of the other tenderers and in breach of the principle of equal treatment and the obligation of transparency. Furthermore, in such a situation the contracting authority is not obliged to contact the tenderer concerned, since the lack of clarity of their tender is attributable solely to their failure to exercise due diligence.

33 Inter alia, EUCJ 18 October 2001, C-19/00.

34 Inter alia, EUCJ 18 October 2001, C-19/00.

According to the eighth requirement, allocation procedures must *allow for [...] review of the impartiality [of procurement procedures]*. For this reason it is necessary for the limited public decision to be reasoned. The principle of equal treatment implies an obligation of transparency in order to enable verification that it has been complied with.[35]

The ninth and final transparency requirement is that, in principle, *substantial amendments to essential provisions of the limited public decision are not possible*. An amendment may be regarded as substantial if it introduces conditions which, if they had been part of the original award procedure, would have allowed for the acceptance of an offer other than that originally accepted. If the administrative authority has reason to change certain provisions, conditions or obligations after the decision has been made, it must expressly provide for the possibility of making such an alteration and its method of application in the legal regulation – or further rules based thereon – on which the allocation procedure is based.[36]

All nine of these obligations are characterised by the fact that they ensure a transparent allocation procedure by contributing to awareness of and objectivity in all parts of the procedure and thereby to the equal treatment of all potential applicants in that procedure.

1.3.2 The obligation of transparency as it follows from case law of the Dutch civil courts, mostly in provisional relief proceedings

The obligation of transparency is codified in the Dutch Public Procurement Act (*Aanbestedingswet*) 2012 and its predecessor, the Public Procurement Tendering Rules Decree (*Besluit aanbestedingsregels voor overheidsopdrachten, Bao*). In recent years, the Dutch civil courts have delivered many judgments – in provisional relief proceedings – on the application of the obligation of transparency in procurement law disputes. A number of examples of such cases from the year 2012 will be given in this paragraph.[37] These judgments give a more detailed interpretation of the obligations drawn up by the European Court of Justice and their application in the Netherlands.

With regard to the sufficient degree of advertising it is important that if there is any inconsistency in the publication, which has possibly deterred

35 Inter alia, EUCJ 4 December 2003, C-448/01.

36 Inter alia, EUCJ 13 April 2010, C-91/08. Cf. also EUCJ 19 June 2008, C-454/06.

37 For the case law overview in Chapters 3 and 4 I ran searches on rechtspraak.nl and curia.europa.eu for all judgments published between 1 January 2012 and 31 December 2012, containing the words *'transparantie**'* or *'doorzichtigheid**'* (transparency). For this summary of concluding observations I have chosen what, in my view, are the most illustrative judgments on the obligation of transparency.

interested parties from submitting a tender, the procurement procedure must be withdrawn.[38]

With regard to the clarity of the requirements set, it is first of all important that, for the interpretation of the requirements from the procurement documentation, the civil courts use what is known as the 'CLA standard'. This means that requirements are interpreted according to objective criteria within the context of all procurement documentation.[39] A requirement that can be met by only two parties means that access to the public contract will be too limited.[40] If something does not follow expressly from the procurement documents, it will need to be investigated whether it should nevertheless have been clear, to a reasonably informed tenderer exercising ordinary care, from the information that was set out in the procurement documents.[41] Experience, or the lack of it, on the part of the tenderers may not be taken into account.[42] Nor may any knowledge that the contracting authority may have about whether or not a tenderer meets certain requirements or any knowledge or experience it has from the past.[43] What may play a role is what is customary in the industry to which the contract award relates.[44]

In relation to the objectivity of the requirements set, the provisional relief judge of the District Court of Haarlem ruled that the assessment of a presentation or user review is by its nature subjective. However, these criteria may be proper criteria, provided they are sufficiently connected to the performance of the public contract. Here, whether or not the assessment is made by experts does have a bearing.[45]

Additionally, in procurement law the summary of additional information plays a major role. If it is argued in provisional relief proceedings that a requirement is contrary to the obligation of transparency, whether or not the tenderer has asked questions in the information procedure may also be relevant. If this is not the case, it may be held that this risk is to be borne by the tenderer.[46]

With respect to the possibility of amending the requirements at a later stage after they have been set, the provisional relief judge of the District Court of

38 District Court of Leeuwarden (Provisional relief) 5 July 2012, ECLI:NL:RBLEE:2012:BX2163.
39 Inter alia, Court of Appeal of Leeuwarden 20 November 2012, ECLI:NL:GHLEE:2012:BY3635, Dutch Supreme Court 20 February 2004, *NJ* 2005/493 and Dutch Supreme Court 24 February 2012, ECLI:NL:HR:2012:BU9889.
40 District Court of Arnhem (Provisional relief) 2 August 2012, ECLI:NL:RBARN:2012:BX7020.
41 District Court of Dordrecht (Provisional relief) 18 October 2012, ECLI:NL:RBDOR:2012:BY0431.
42 District Court of The Hague (Provisional relief) 30 August 2012, ECLI:NL:RBSGR:2012:BX6099.
43 District Court of The Hague (Provisional relief) 30 August 2012, ECLI:NL:RBSGR:2012:BX6099.
44 District Court of Arnhem (Provisional relief) 3 February 2012, ECLI:NL:RBARN:2012:BV6312.
45 District Court of Haarlem (Provisional relief) 6 March 2012, ECLI:NL:RBHAA:2012:BV7715.
46 Inter alia, Court of Appeal of Den Bosch 17 January 2012, ECLI:NL:GHSHE:2012:BV1472.

Alkmaar ruled that, in principle, it is not possible to make substantial amendments to the procurement documentation shortly before the time-limit for tendering expires. Any amendment must be advertised in good time to all potential tenderers, so that they can amend their tenders accordingly. Whether the document – for example the summary of additional information – has been downloaded by all interested parties, may be relevant.[47]

With regard to the review of the submitted tenders, it was ruled that introducing new award criteria or sub-criteria during the review, amending the award criteria or sub-criteria set out in the procurement documents or applying weighting factors that were not advertised beforehand was contrary to the obligation of transparency.[48] The interpretation and evaluation of specific differences between tenders does not automatically lead to the introduction of new award criteria. This is only the case if a tenderer did not need to expect a particular specific application of the award criteria and that specific application of the award criteria – if it had been known beforehand – would also have led to other bids.[49] The general assumption that when reviewing the tenders the contract authority considers the tenders in the form in which they were originally received when the time-limit for submission has expired is also discussed in case law. An exception to this is made for improving or adding to tenders if it is evident that a simple alteration is needed to make them more precise, or in order to rectify obvious substantive errors, provided that this amendment does not mean that, in reality, a new tender is being submitted. Similarly, in the event of a request from a contracting authority for any such further explanation, all tenderers must be treated equally.[50] The possibility of asking a tenderer for additional information may also be obligatory under certain circumstances, for example if there is some ambiguity in the procurement documentation.[51] Review committees are often used to review the tenders, but there is no obligation to involve external parties in the review process. The composition of a technical review committee does not need to be known in advance.[52]

With regard to the obligation to provide reasons for the award decision it was held that, in principle, later additions to the relevant reasons for the

47 District Court of Alkmaar (Provisional relief) 23 August 2012, ECLI:NL:RBALK:2012:BY1651.
48 District Court of Rotterdam (Provisional relief) 10 May 2012, ECLI:NL:RBROT:2012:BW5760.
49 District Court of Amsterdam (Provisional relief) 7 June 2012, ECLI:NL:RBAMS:2012:BW7787 and District Court of Amsterdam (Provisional relief) 21 February 2012, ECLI:NL:RBAMS:2012:BV8489.
50 Court of Appeal of Arnhem 7 August 2012, ECLI:NL:GHARN:2012:BX4609. Cf. District Court of The Hague (Provisional relief) 13 September 2012, ECLI:NL:RBSGR:2012:BX7357 and District Court of Arnhem (Provisional relief) 24 January 2012, ECLI:NL:RBARN:2012:BV3641.
51 District Court of Utrecht (Provisional relief) 7 September 2012, ECLI:NL:RBUTR:2012:BX6236.
52 District Court of Utrecht (Provisional relief) 1 August 2012, ECLI:NL:RBUTR:2012:BX3372 and District Court of Amsterdam (Provisional relief) 18 August 2011, ECLI:NL:RBAMS:2011:BR6264.

decision are not possible. Further explanation is possible, but putting forward new reasons is not.[53] There is no obligation to make information available that might harm the commercial interests of the tenderers.[54]

In civil proceedings, like administrative law, the discretion of administrative authorities to set their own policy, as well as the ensuing restrained review by the courts, are addressed. Contracting authorities have a large degree of freedom when choosing award criteria, setting up a procurement procedure, defining the review system, and reviewing these criteria. The provisional relief judge is restrained in his review: except in the case of gross negligence and other evident mistakes it is not up to the provisional relief judge to interfere with the review of the tenders conducted by the contracting authority's review team. In this restrained review it is relevant whether a contracting authority has sufficiently safeguarded the review process in terms of objectivity and due diligence, for example by using a review committee, which may be external and/or made up of experts. This restraint is inappropriate if the procurement documents have to be interpreted. An assessment is needed on whether the requirements were drawn up in a clear, precise and unequivocal manner. If parties do not invoke the obligation of transparency – explicitly or otherwise – it is not ultra petita if the provisional relief judge adds to the legal grounds.[55]

According to the European Court of Justice, in principle, substantial amendments to essential provisions of public contracts, once awarded, are not possible.[56] The case law of the Dutch civil courts reveals that an amendment is substantial if: (1) a contracting authority introduces conditions which, had they been part of the initial award procedure, would have allowed for (a) the admission of tenderers other than those initially admitted, or (b) would have allowed for the acceptance of a tender other than the one initially accepted, (2) a contracting authority extends the scope of the public contract considerably to encompass services not initially covered, or (3) a contracting authority changes the economic balance of the contract in favour of the contractor in a manner which was not provided for in the terms of the initial contract. In

53 Dutch Supreme Court 7 December 2012, ECLI:NL:HR:2012:BW9231, *TBR* 2013/33, with commentary by B.J.H. Blaisse-Verkooyen.

54 District Court of Almelo (Provisional relief) 4 June 2012, ECLI:NL:RBALM:2012:BW7664 and ECLI:NL:RBALM:2012:BW7541.

55 District Court of Amsterdam (Provisional relief) 7 June 2012, ECLI:NL:RBAMS:2012:BW7787, District Court of The Hague (Provisional relief) 16 October 2012, ECLI:NL:RBSGR:2012:BY5239, Court of Appeal of Arnhem 30 October 2012, ECLI:NL:GHARN:2012:BY2248.

56 Inter alia, EUCJ 13 April 2010, C-91/08 (Wall). Cf. also EUCJ 19 June 2008, C-454/06 (Pressetext Nachrichtenagentur).

this way, an alternative method of execution, even if it complies with the specifications, may constitute a substantial amendment.[57]

Finally, it is interesting to look at what consequence the civil courts attach to a breach of the obligation of transparency. First of all, it is possible that a demand for a renewed tender will be granted.[58] Instead of a renewed tender, sometimes a re-appraisal of the submitted tenders will suffice.[59] An order to award the public contract can also be issued, but this is only possible if it is clear to whom the public contract should be awarded, and for that reason, it is a rare occurrence.[60] Substitute damages are also a possibility.[61]

1.3.3 Conclusion

Based on the information above, the question of what the transparency requirements, as introduced by the European Court of Justice, entail can be answered as follows.

Two important basic principles are (i) that transparency requirements guarantee the preclusion of any risk of favouritism and arbitrariness by administrative authorities, and (ii) that transparency requirements must ensure that any potential applicant can decide to submit an application on the basis of all the relevant information. Compliance with these basic tenets is possible through various forms of advertising. These transparency requirements apply before, during and after the allocation procedure.

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57 Inter alia, District Court of Amsterdam (Provisional relief) 21 September 2012, ECLI:NL:RBAMS:2012:BX9050, District Court of Amsterdam (Provisional relief) 1 June 2012, ECLI:NL:RBAMS:2012:BX3758 and District Court of The Hague 3 October 2012, ECLI:NL:RBSGR:2012:BY0155.

58 If this demand is granted, then the contracting authority will have to completely reorganise the procurement procedure. District Court of Rotterdam (Provisional relief) 10 May 2012, ECLI:NL:RBROT:2012:BW5760, District Court of The Hague (Provisional relief) 24 January 2012, ECLI:NL:RBSGR:2012:BV1636 and ECLI:NL:RBSGR:2012:BV1638, District Court of Haarlem (Provisional relief) 14 June 2012, ECLI:NL:RBHAA:2012:BX0160, District Court of Maastricht (Provisional relief) 27 February 2012, ECLI:NL:RBMAA:2012:BV7037 and District Court of Zutphen (Provisional relief) 1 March 2012, ECLI:NL:RBZUT:2012:BW5058.

59 Inter alia, District Court of The Hague (Provisional relief) 17 February 2012, ECLI:NL:RBSGR:2012:BV8342.

60 With an order like this the contracting authority must award the contract to – and conclude the accompanying agreement with – one particular party – the claimant, not the party to whom the preliminary award was given. Inter alia, District Court of Leeuwarden (Provisional relief) 3 October 2012, ECLI:NL:RBLEE:2012:BX9015, District Court of The Hague (Provisional relief) 25 July 2012, ECLI:NL:RBSGR:2012:BX3356, District Court of The Hague (Provisional relief) 13 November 2012, ECLI:NL:RBSGR:2012:BY5065, District Court of Arnhem (Provisional relief) 3 February 2012, ECLI:NL:RBARN:2012:BV6312 and Court of Appeal of Arnhem 9 October 2012, ECLI:NL:GHARN:2012:BX9806.

61 District Court of Amsterdam (Provisional relief) 29 May 2012, ECLI:NL:RBAMS:2012:BX1677 and District Court of Utrecht 14 November 2012, ECLI:NL:RBUTR:2012:BY5823.

Prior to the allocation procedure all the conditions and detailed rules thereof must be drawn up in a clear, precise and unequivocal manner. All reasonably informed applicants exercising ordinary care must be able to understand the exact significance of the criteria set and interpret them in the same way. A final date for receipt of applications must be set, so that all applicants will have the same period within which to prepare their application.

During the allocation procedure the administrative authority must be in a position to ascertain whether the applications meet the criteria that were set in advance. An amendment to the initial application of only one applicant may not be taken into account. The administrative authority must interpret the criteria in the same way throughout the entire procedure. When reviewing the applications, the criteria must be applied to all applicants in an objective and uniform manner.

Finally, after the allocation procedure it must be possible to review the procedure for impartiality by means of reasons given for the decision. Substantial amendments to essential provisions of the limited public decision are not possible in principle.

If the obligation of transparency is complied with, all applicants and potential applicants will have the same opportunities to be considered for the limited public right, so that the relevant market is opened up to competition and the intended objective of the obligation of transparency is achieved.

1.4 SUB-QUESTION 2

What is the scope of the obligation of transparency introduced by the European Court of Justice?

This sub-question is answered, specifically, in the articles/chapters entitled 'Transparency and competition in Dutch administrative law: from contracts, via concessions, to licences'[62] (Chapter 5 of this book), 'Extending the scope of the principle of transparency: from concessions to licences?'[63] (Chapter 6 of this book) and 'Is the strict differentiation between subsidy and contract awards still tenable?'[64] (Chapter 7 of this book). The article/chapter entitled 'The importance of the principle of transparency for environmental law'[65] (Chapter 10 of this book) looks at the extent to which the obligation of transparency might be applied in environmental law. In this paragraph I will set out the most significant findings from these chapters. I will then consider

62 Dutch title: *Transparantie en mededinging in het Nederlandse bestuursrecht: van opdrachten, via concessies naar vergunningen*.

63 Dutch title: *Uitdijing van de werking van het transparantiebeginsel: van concessies naar vergunningen?*

64 Dutch title: *Is het strikte onderscheid tussen subsidie- en opdrachtverlening nog houdbaar?*

65 Dutch title: *De betekenis van het transparantiebeginsel voor het omgevingsrecht*.

several recent developments, such as new Directives being adopted by the European Parliament. These developments have not been discussed in the aforementioned chapters.

First, I will briefly outline the scope of the obligation of transparency under European Union law. I will then go on to discuss two grey areas in the determining of the scope of the obligation of transparency, notably the difference between a concession and a licence and the difference between a subsidy and a contract. Finally, I will deal with the question of how the scope of the obligation of transparency might – and possibly should – be extended.

1.4.1 Scope of the obligation of transparency under European Union law

The procurement law obligation of transparency under European Union law must be observed, according to case law of the European Court of Justice (i) when awarding a contract that falls within the scope of application of Directive 2004/18/EC, (ii) when awarding a services concession, (iii) for IIB services, (iv) when awarding a contract the value of which does not exceed the threshold values in Directive 2004/18/EC, (v) when granting a licence to one or more operators 'because the effects of such a licence on undertakings established in other Member States and potentially interested in that activity are the same as those of a service concession contract', and (vi) for European subsidies.[66] These six categories will be explained briefly below. I will then deal, with the following in order: Directive 2004/18/EC and the principle of non-discrimination (A), the Dutch Public Procurement Act 2012 (B), the new Directives 2014/23/EU and 2014/24/EU (C), Directive 2006/123/EC (D), the granting of licences (E), European subsidies (F), the difference between works, supplies and services (G), the Charter of fundamental rights of the European Union (H), the European Administrative Procedure Act (I), and the scope of application of European Union law (J).

A) Directive 2004/18/EC and the principle of non-discrimination

Pursuant to Article 2 of Directive 2004/18/EC,[67] contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in

66 For the sake of completeness I am referring in this regard to 'private tender'. In a private tender a private party voluntarily decides to organise a 'tender'. In doing so, this party can also decide to observe the principle of transparency (inter alia, Dutch Supreme Court 3 May 2013, *TBR* 2013/118, with commentary by B.J.H. Blaisse-Verkooyen).

67 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

a transparent way.[68] The Directive applies to public contracts for works, supplies and services above a certain threshold value. It is beyond doubt that since the implementation of the Directive in the Netherlands, this obligation of transparency must be observed when awarding a public contract.

The scope of application of the Directive is, in addition to the aforementioned threshold value, limited in certain aspects. First, the Directive does not apply to service concessions. Secondly, the Directive does not apply to some of the services referred to in the schedule to the Directive. However, the European Court of Justice has ruled that the obligation of transparency must also be observed here because the obligation of transparency results directly from the principle of non-discrimination embodied in the TFEU.[69] The obligation of transparency is therefore part of primary European Union law.[70]

B) Dutch Public Procurement Act 2012

In the Netherlands, Directive 2014/18/EC was initially implemented in the Public Procurement Tendering Rules Decree (*Besluit aanbestedingsregels voor overheidsopdrachten, Bao*)[71] and since 1 April 2013 the Directive is implemented in the Dutch Public Procurement Act 2012.[72] The Public Procurement Act provides that for both European and national tenders a contracting authority must act in a transparent way.[73] So for contracts that fall within the scope of the Public Procurement Act 2012, it is beyond doubt that the obligation of transparency must be observed.

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68 Also relevant here is Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.

69 Articles 49 and 56 TFEU, formerly Articles 43 and 49 EC Treaty. For concessions, the European Court of Justice ruled on this in inter alia, EUCJ 7 December 2000, C-324/98, *NJ* 2001/387 (Telaustia) and EUCJ 21 July 2005, C-231/03 (Coname); for IIB services in inter alia, EUCJ 13 November 2007, C-507/03, *NJ* 2008/101, with commentary by M.R. Mok (An Post) and EUCJ 18 November 2010, C-226/09 (Commission v Ireland) and for contracts that do not exceed the threshold values in inter alia, EUCJ 21 February 2008, C-412/04, *BR* 2008/111, with commentary by P.H.L.M. Kuypers (Commission v Italy), EUCJ 18 December 2007, C-220/06, *NJ* 2008/281 (Correos).

70 On this matter, the European Commission has adopted an Interpretive Communication (the Interpretive Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, 2006/C179/02).

71 Dutch Bulletin of Acts and Decrees *(Stb.)* 2005, 408.

72 Dutch Bulletin of Acts and Decrees *(Stb.)* 2012, 542.

73 Sections 1.9 and 1.12 of the Dutch Public Procurement Act 2012. The provision for 'national tenders' applies to contracting authorities to which the section on European tenders (pursuant to section 1.7) does not apply and which have advertised of their own volition.

C) *New directives: Directive 2014/23/EU and Directive 2014/24/EU*

On 28 March 2014 new directives were published in the Official Journal of the European Union. Alongside a new directive for public contracts, a directive for concessions was also adopted.[74] The Netherlands will have to implement these directives by 18 April 2016.

Directive 2014/24/EU relates to public procurement.[75] Article 18 defines the principles of procurement. The first paragraph provides that contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner. Directive 2014/23/EU relates to the award of concession contracts.[76] The obligation of transparency is embodied in Article 3 of the Directive.

The new directives are not expected to have any consequences for the scope and meaning of the obligation of transparency. After all, in both the current and the new directives for the award of public contracts the obligation of transparency has been codified. For the granting of service concessions the unwritten obligation of transparency introduced by the European Court of Justice will be codified in the Concession Directive.

D) *Directive 2006/123/EC*

The objective of Directive 2006/123/EC, better known as the Services Directive, is to facilitate the free movement of services.[77]

The Services Directive contains obligations for 'authorisation schemes'.[78] The number of authorisations available within the meaning of the Services Directive may be limited (scarce), but that is not a prerequisite. For the scope of the obligation of transparency Articles 10 and 12 are relevant. Article 10 of the Services Directive provides that authorisation schemes must be based on criteria which preclude the competent authorities from exercising their power of assessment in an arbitrary manner. These criteria must be, inter alia, 'transparent and accessible'. Article 12 of the Services Directive provides that, if the number of authorisations available for a given activity is limited because

74 Also adopted was Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

75 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (L 94/65).

76 Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (L 94/1).

77 See for more details on the Dutch Services Act: Wolswinkel, SEW 2009/120, Wolswinkel, REALaw 2009, pp. 61-104 and Buijze 2013, pp. 199-200 and 207-208.

78 An 'authorisation scheme' means 'any procedure under which a provider or recipient is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity or the exercise thereof' (Article 4 of the Services Directive).

of the scarcity of available natural resources or technical capacity, a selection procedure must be adopted. That means that administrative authorities must 'apply a selection procedure to potential candidates which provides full guarantees of impartiality and transparency, including, in particular, adequate publicity about the launch, conduct and completion of the procedure.'

However, the Directive does have limited scope. First, the Directive only applies to the provision of services.[79] The Services Directive does not relate to the free movement of goods. In a ruling on a zoning plan for the supermarket retail trade the Administrative Jurisdiction Division of the Council of State (hereinafter: 'Council of State') held that the economic activities exercised did not constitute services within the meaning of the Services Directive because the freedom to provide services in this case was subordinate to the free movement of goods.[80] Secondly, the obligation to apply a transparent selection procedure pursuant to this Directive was limited to the scarcity of natural resources or technical capacity.[81] Artificial limited authorisation schemes introduced for policy reasons do not, therefore, fall under this provision. Finally, it is relevant that the Directive applies only to requirements which affect the access to, or the exercise of, a service activity. The consequence of this is that the Directive does not apply to rules concerning town and country planning.[82] According to settled case law of the Council of State the Services Directive therefore does not apply to zoning plans.[83]

In my opinion, if the Services Directive does not apply, this does not necessarily mean that the obligation of transparency cannot be relevant to the granting of authorisations. In that case, as was the case in the Betfair judgment for example, the obligation of transparency can result directly from the TFEU.

E) Granting of authorisations

Granting of permits, licences and other authorisations does not fall within the scope of Directive 2004/18/EC – and often not under Directive 2006/123/EC

79 A 'service' in the Services Directive is defined as 'any self-employed economic activity, normally provided for remuneration, as referred to in Article 50 of the Treaty ' (Article 4, preamble and (1), of Directive 2006/123/EC). Article 50 of the EC Treaty is now Article 57 TFEU. The article provides that 'Services shall be considered to be 'services' within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons. 'Services' shall in particular include: a) activities of an industrial character, b) activities of a commercial character, c) activities of craftsmen, d) activities of the professions.'

80 Inter alia, Council of State 25 June 2014, *TBR* 2014/133, with commentary by J.C. van Oosten and I.L. Haverkate.

81 Article 12 of the Services Directive.

82 Recital 9 of the Services Directive.

83 Inter alia, Council of State 19 January 2011, *AB* 2011/86, with commentary by A.G.A. Nijmeijer, Council of State 2 May 2012, *AB* 2012/153, with commentary by A.G.A. Nijmeijer.

either, but the case law of the European Court of Justice reveals that with some authorisation schemes the fundamental rules of the TFEU, which include the obligation of transparency, must be observed. This relates to granting a licence to one, or a few, operators 'because the effects of such a licence on undertakings established in other Member States and potentially interested in that activity are the same as those of a service concession contract'.[84]

F) European subsidies

The award of subsidies does not fall within the scope of Directive 2004/18/EC either, but that does not mean that the obligation of transparency does not need to be observed. In the award of European subsidies to which Council Regulation (EC, Euratom) No 966/2012[85] – the successor to the Financial Regulation[86] – applies, the award of subsidies shall be subject to the obligation of transparency and the principle of equal treatment.[87]

The General Court of the European Union had to give a ruling on a procedure to which this Financial Regulation did not apply, but an earlier version in which these principles had not yet been explicitly mentioned did. The Court considered that, in the light of the fundamental nature of the obligation of transparency and the principle of equal treatment, they applied *mutatis mutandis* to the procedure for awarding subsidies from the Community budget.[88]

84 EUCJ 3 June 2010, C-203/8, *AB* 2011/17, with commentary by A. Buijze, *JB* 2010/181, with commentary by C.J. Wolswinkel and *NJ* 2010/491, with commentary by M.R. Mok (Betfair).

85 Article 125 of Council Regulation (EC, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002.

86 Council Regulation (EC, Euratom) No 1605/2002.

87 On the subject of the obligation of transparency in EU subsidy law see: Van den Brink 2012, pp. 172-179 and 354-363.

88 The General Court subsequently described the obligation of transparency for awarding subsidies in a manner almost identical to the European Court of Justice in procurement law procedures: 'With regard to budgetary matters, the obligation of transparency, which is the corollary of the principle of equal treatment, is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the budgetary authority. It implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner, inter alia, in the call for proposals. Accordingly, all the information relevant for the purpose of a sound understanding of the call for proposals must be made available as soon as possible to all the operators who may be interested in a procedure for awarding subsidies in order, first, to enable all reasonably well-informed and normally diligent applicants to understand their precise scope and to interpret them in the same manner and, secondly, to enable the budgetary authority actually to verify whether the proposed projects meet the selection and award criteria previously announced' (EGC 15 April 2011, T-297/05, *AB* 2011/285, with commentary by A. Drahmann).

G) Works, supplies and services: Directive 2004/18/EC and Directive 2006/123/EC

In the Procurement Directive (Directive 2004/18/EC) and Services Directive (Directive 2006/123/EC) a distinction is made between works, supplies and services – or a limited number thereof. The Procurement Directive does not apply to service concessions. Added to this, the Directive contains different threshold values for works, supplies and services. To answer the question of whether a procurement procedure that meets the requirements of this Directive must be followed, the distinction between work, supply and service is therefore relevant. The Services Directive also relates to the provision of services, but only within the scope of application of the Directive.[89] If the Procurement Directive and Services Directive do not apply, the obligation of transparency cannot be based on these Directives. In that case one must fall back on the principle of non-discrimination as enshrined in the TFEU.[90]

This can be shown in a table, as follows:

	Work[a]	Supply[b]	Service[c]
Public contract	Article 2 Directive 2004/18/EC with additional operation of TFEU	Article 2 Directive 2004/18/EC with additional operation of TFEU	Article 2 Directive 2004/18/EC with additional operation of TFEU
Concession	Article 2 Directive 2004/18/EC with additional operation of TFEU	Article 2 Directive 2004/18/EC with additional operation of TFEU	TFEU
Authorisation	TFEU	TFEU	Articles 10 and 12 of the Services Directive with additional operation of TFEU
EU subsidy	Council Regulation No 966/2012 with additional operation of TFEU	Council Regulation No 966/2012 with additional operation of TFEU	Council Regulation No 966/2012 with additional operation of TFEU

a A 'work' means the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function.' (Article 1(2)(b) of Directive 2004/18/EC).

b A 'supply' contract has as its object the purchase, lease, rental or hire purchase, with or without option to buy, of products Article 1(2)(c) of Directive 2004/18/EC).

89 Article 2 of Directive 2006/123/EC.

90 Article 49 and 56 TFEU, formerly Articles 43 and 49 EC Treaty.

c 'Public service contracts' are public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II of Directive 2004/18/EC (Article 1(2)(b)-(d) of Directive 2004/18/EC). In addition a 'service' in the Services Directive is defined as 'any self-employed economic activity, normally provided for remuneration, as referred to in Article 50 of the Treaty' (Article 4, preamble and under (1), of Directive 2006/123/EC). Article 50 of the EC Treaty is now Article 57 TFEU. That article provides that 'Services shall be considered to be 'services' within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons. 'Services' shall in particular include: a) activities of an industrial character, b) activities of a commercial character, c) activities of craftsmen, d) activities of the professions.'

H) Charter of fundamental rights of the European Union

The obligation of transparency – as the main issue in this research – is not enshrined in the Charter, or at least not explicitly.[91] What is enshrined, in Article 21, is the principle of non-discrimination. Pursuant to paragraph 2 of this Article, within the scope of application of the Treaties and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited. This is in line with the settled case law of the European Court of Justice, that the obligation of transparency results directly from the principle of non-discrimination as enshrined in the TFEU.[92]

I) Towards an European Administrative Procedure Act?

From 2009-2014 the Research Network on EU Administrative Law, ReNEUAL worked on 'ReNEUAL Model Rules on EU Administrative Procedure'. These Model Rules aim to strengthen the general principles of European Union law and to formulate best practices. A 'Competitive award procedure' is set out in Book IV (Contracts), Chapter 2, paragraph 3. This paragraph includes, inter alia, an obligation of 'prior advertising'. Section IV-16 (Equal treatment) contains a general obligation to guarantee transparency and equal treatment during the procedure. Book III is concerned with 'Single Case Decision-Making', in other words: awarding decisions. In Chapter 2 (Article II-6.4) the 'Competitive award procedure' will be applied *mutatis mutandis* to award procedures where the number of applications that can be granted is limited. The Model Rules have no legal status. On 15 January 2013 the European Parliament adopted a resolution in which the Commission asked for a proposal to be submitted for a Regulation on a Law of Administrative Procedure of

91 If another, broader meaning of the obligation of transparency is used, then the right of access to documents (Article 42) and the right to good administration (Article 41) are relevant.

92 Inter alia, EUCJ 13 April 2010, C-91/08, *NJ* 2010/367 (Wall AG v Stadt Frankfurt am Main).

the European Union.[93] The question is, whether a section of the Model Rules will also be incorporated into this Law of Administrative Procedure of the European Union. Van Ommeren and Wolswinkel call the Model Rules a source of inspiration for Dutch administrative law, referring to, inter alia, the rule for the allocation of limited public rights that therefore applies, irrespective of whether the allocation procedure results in a contract or a decision. They expect the Model Rules to have a spin-off effect on the laws of the Member States because in future it will no longer be easy to justify why EU authorities should be bound by substantially different regulations than national authorities.[94] I think such a spin-off effect would be a good development.

J) The scope of application of EU law: purely internal situations

That the scope of the obligation of transparency is not limited to the scope of application of Directive 2004/18/EC is due to the fact that the European Court of Justice has ruled that the obligation of transparency results directly from the principle of non-discrimination as enshrined in the TFEU.[95] The obligation of transparency is therefore part of primary EU law.[96] The scope of the obligation of transparency under EU law is limited to the scope of application of EU law. The Treaty provisions on the freedom to provide services do not apply in 'purely internal situations'.[97] The question of when a situation is purely internal must not be answered too restrictively.[98] With regard to the obligation of transparency under EU law the European Court of Justice has furthermore ruled that there is a requirement to comply with 'the fundamental rules of the TFEU, the principles of non-discrimination on grounds of nationality and equal treatment, and also the obligation of transparency thereunder' where there is a contract or concession with a 'certain cross-border interest'. This certain cross-border interest 'may result, inter alia, from the financial value of the planned agreement, from the location where it is to be performed [...] or from its technical characteristics'. Furthermore, it is not necessary that an economic operator has actually manifested its interest to establish a certain cross-border interest. After all, if there is a lack of transparency economic operators established in other Member States do not have

93 European Parliament resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union (2012/2024(INI)).

94 Van Ommeren and Wolswinkel, *NTB* 2014/23. See also, on the ReNEUAL Model Rules, Addink, *NTB* 2014/24.

95 Articles 49 and 56 TFEU, formerly Articles 43 and 49 EC Treaty.

96 The European Commission has laid down an Interpretive Communication on this (Interpretive Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, 2006/C179/02).

97 See e.g. Council of State 23 November 2011, ECLI:NL:RVS:2011:BU5444.

98 See also on this matter the Opinion of Advocate General Bot of 17 December 2009 on the Betfair judgment (C-203/08). Cf. also EUCJ 19 July 2012, C-470/11, *AB* 2012/324, with commentary by A. Drahmann.

a genuine opportunity to manifest their interest in obtaining that concession. Once it has been established that there is certain cross-border interest administrative authorities must comply with the obligation of transparency, even when a potential tenderer is established in the same Member State as those authorities.[99] The European Court of Justice therefore deems whether there is any potential barrier to trade to be relevant, while the Dutch courts appear to take the actual correlations in the procedure into account.[100]

K) Grey area?

Based on the foregoing one could conclude that the scope of the obligation of transparency has been reasonably well established. But – as is often the case in law – there are grey areas. First, there is a grey area between a licence and a service concession contract. Secondly, there is a grey area between a subsidy and a contract. In paragraphs 1.4.2 and 1.4.3 below, I will deal with the difference between these legal concepts.

1.4.2 Grey area 1: the licence and the concession

With a concession the consideration for the works to be carried out consists in a right. Where there is a limited public decision, a right is also granted. For example, the prohibition on offering games of chance can be circumvented by granting one or a few operators an exploitation right.

It follows from the Betfair judgment that the obligation of transparency when granting licences must be observed if licences are granted to one or a few economic operators, where 'the effects of such a licence on undertakings established in other Member States and potentially interested in that activity are the same as those of a service concession contract'.[101]

It appears from this judgment that the European Court of Justice does not look at the form of the public intervention – contract, concession or licence – but at the effect thereof on the freedom to provide services. The moment that economic operators from various Member States are not given a genuine

99 EUCJ 14 November 2013, C-221/12, *TA* 2014/6, with commentary by A. Drahmann and *NJ* 2014/96, with commentary by M.R. Mok. On the same day the European Court of Justice also ruled that the fact that a concession is not capable of generating substantial net revenue does not, in itself, support the inference that the concession is of no economic interest for undertakings located in Member States other than that of the contracting authority because an undertaking may take the tactical decision to seek the award in that State of a concession – albeit loss-making – since that opportunity could nevertheless enable the undertaking to establish itself on the market of that State and to make itself known there with a view to preparing its future expansion.' (EUCJ 14 November 2013, C-388/12).

100 Steyger, SEW 2014/24.

101 EUCJ 3 June 2010, C-203/08, *JB* 2010/171, with commentary by C.J. Wolswinkel (Betfair) and EUCJ 9 September 2010, C-64/08, *NJ* 2010/661 (Engelmann).

opportunity to manifest their interest, the obligation of transparency is breached. This applies to both the granting of a sole – or exclusive – right[102] and to special rights.[103]

The obligation of transparency must therefore be observed where a 'licence' has the same effect as a 'service concession contract'. It is therefore interesting to look at the similarities and differences between a licence and a concession.

The definition of a public works concession in Directive 2004/18/EC specifies that a concession is a contract

> 'of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment.'[104]

The Concession Directive[105] adopted in 2014 defines a 'services concession' as

> 'a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the provision and the management of services other than the execution of works referred to in point (a) to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment.'

102 Section 1.1. Public Procurement Act 2012 defines a sole or exclusive right as 'a right granted to an undertaking by legal regulation or by decision of an administrative authority, where the right is reserved for that undertaking to exercise a service or activity within a specific geographical area'. Therefore, a sole or exclusive right creates a monopoly for the holder of that right.

103 Section 1.1. Public Procurement Act 2012 defines a special right as 'special right: a right granted to a limited number of undertakings by legal regulation or by decision of an administrative authority and where, within a specific geographical area: (a) the number of these undertakings permitted to exercise a service or activity in a manner other than according to objective, proportional and non-discriminatory criteria is limited to two or more, (b) different competing undertakings permitted to exercise a service or activity in a manner other than according to these criteria are appointed, or (c) in a manner other than according to these criteria, one or more undertakings permitted to exercise a service or activity are favoured thus presenting a significant barrier to any other undertaking being able to exercise the same activities within the same geographical area under essentially the same circumstances'. A special right therefore creates an oligopoly for the holders of that right.

104 Article 1 of Directive 2004/18/EC. This Article was transposed in section 1.1 of the Dutch Public Procurement Act 2012.

105 Article 5(1)(b) of Directive 2014/23/EU.

A 'licence' or 'authorisation' is not defined in Directive 2004/18/EC.[106] A judgment of the European Court of Justice from November 2013 reveals that the difference between a concession and an authorisation lies in the obligation of execution. In this judgment the European Court of Justice, with reference to the Betfair and Engelmann judgments, notes:

> 'European Union law also imposes the same requirements on the concession-granting authority where the agreement at issue in the main proceedings did not oblige the tenderer to engage in the transferred activity, with the result that that agreement then confers authorisation to engage in an economic activity.'[107]

Recital (14) of Directive 2014/23/EU also reveals that a distinction should be made between concessions – within the meaning of the Directive – and authorisations or licences. The following is considered:

> 'In addition, certain Member State acts such as authorisations or licences, whereby the Member State or a public authority thereof establishes the conditions for the exercise of an economic activity, including a condition to carry out a given operation, granted, normally, on request of the economic operator and not on the initiative of the contracting authority or the contracting entity and where the economic operator remains free to withdraw from the provision of works or services, should not qualify as concessions. In the case of those Member State acts, the specific provisions of Directive 2006/123/EC of the European Parliament and of the Council [the Services Directive – AD] apply. In contrast to those Member State acts, concession contracts provide for mutually binding obligations where the execution of the works or services are subject to specific requirements defined by the contracting authority or the contracting entity, which are legally enforceable.'

This obligation of execution follows from the 'pecuniary interest' that a concession contract has. An 'ordinary' authorisation or licence has, in principle, no obligation of execution. Thus, a holder of an integrated environmental permit is not obliged to build. The administrative authority can often revoke an authorisation or licence if it is not being used and sometimes an authorisation or licence expires by operation of law if it is not used, or is not used promptly. The administrative authority cannot normally oblige a permit or

106 Article 4 of the Services Directive does, however, contain a description of an 'authorisation scheme'. This means 'any procedure under which a provider or recipient is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity or the exercise thereof'.

107 EUCJ 14 November 2013, C-221/12, *TA* 2014/6, with commentary by A. Drahmann and *NJ* 2014/96, with commentary by M.R. Mok. The European Court of Justice adds that such an authorisation is no different 'from a service concession in terms of the obligation to comply with the fundamental rules of the Treaty and the principles flowing therefrom, as the exercise of that activity is liable to be of potential interest to economic operators in other Member States'.

licence holder to use the permit or licence and perform the authorised activity. In terms of subsidy law, all that may happen is that the subsidy may be set at a lower level – down to nil – if the activity is not executed; in principle there is no obligation of execution.

When granting limited public decisions an obligation of execution is sometimes imposed because it is deemed undesirable for a limited public right to be awarded after a selection procedure to one or a few parties and subsequently for this right to not be used. In subsidy law it is possible to conclude an implementation agreement.[108] However, sometimes the obligation of execution is enshrined in a statutory regulation[109] or in a condition attached to the licence.[110] In my view, we are dealing with a 'pecuniary interest' if the execution of an authorised activity can be enforced by means of an administrative or other penalty, an order for periodic penalty payments, or an order for coercive administrative action. If the other elements of the definition of a concession are also met,[111] then a licence could, under certain circumstances, be considered to be a concession. As is evident from the Betfair judgment, this is not relevant to the scope of the obligation of transparency, but may well be relevant if the Concession Directive is transposed into Dutch law by 18 April 2016.

Finally, what stands out in this context is the fact that the Dutch Directives for Law-making (*Aanwijzingen voor de regelgeving*, the Ar Directives) do contain definitions of the terms licence (*vergunning*), dispensation (*vrijstelling*), exemption (*ontheffing*) and recognition (*erkenning*), but not of the term concession (*concessie*). The Ar Directives state that the use of terms other than these four concepts must be avoided. From this, it appears that under certain circumstances a limited public licence with an obligation of execution can be considered a 'concession' within the meaning of Directive 2004/18/EC.

Recommendation
I would therefore like to make an argument for the concession decision to be added to the Ar Directives as a legal concept. This description must match the substantive concept of concession from Directive 2004/

108 Section 4:36(2) GALA.
109 E.g. Section 34 Dutch Passenger Transport Act 2000.
110 E.g. Article 4 of the State Lottery Order (*Beschikking Staatsloterij*) provides that the state lottery must be held at least ten times a year. The Regulation regarding the application and auction procedure for 800, 900 and 1800 MHz licences (Government Gazette (*Stcrt.*) 2012, 392, pp. 47-48) reveals that an 'obligation to put into use' is attached to the frequency licences.
111 In this context I would point out that it follows from the case law of the European Court of Justice that the term 'contract' should be interpreted substantially and broadly. Furthermore, it can be stated that in a limited public decision we are dealing with an *'acte negocié'* (negotiated act). After all, it is difficult to imagine a limited public decision being awarded to an economic operator against its will.

18/EC and the future Concession Directive as closely as possible. It might read as follows:

'a concession is a decision that has as its object the execution of works or services, the consideration of which consists in the right to exploit the works or services or in that right together with a price, and where the concessionaire is obliged to carry out the works or services'.

The obligation of transparency must also be complied with when granting limited public decisions that do not carry an obligation of execution. It will not always be easy, either for administrative authorities or potential applicants, to determine what type of licence scheme applies. This is a job for the legislature – central and decentralised – when a new licence scheme is created. For this the following two recommendations can be drawn up:

Recommendation

When introducing a limited public licence scheme, it is desirable that the explanatory notes state expressly that this is a licence scheme that facilitates the granting of an exclusive or special right and that an authorisation will only be awarded once a transparent procedure has been followed. Even if this is not the case, the administrative courts will – when ruling on disputes regarding limited public decisions – always have to ask themselves whether the licence scheme is, substantively, a concession scheme, or a licence scheme that has the same effects – because an exclusive or special right is being granted. In both cases – if there is a certain cross-border interest – the administrative authority must comply with Treaty principles such as the principle of equal treatment and the obligation of transparency and the administrative courts must assess these for compatibility.

Recommendation

When forming a licence scheme it is recommended that the following three questions be considered:

1) Is it necessary to limit the number of available rights by setting a ceiling?
2) Is there a certain cross-border interest?
   If the answer to these two questions is yes, then the obligation of transparency must be complied with. This obligation to organise a transparent allocation procedure can be termed 'procurement light'. That means that there is no need for full procurement according to the rules of Directive 2004/18/EC – and from 18 April 2016 Directives 2014/23/EU and 2014/24/EU – but that a transparent allocation procedure still needs to be followed.
3) Is it necessary to attach an obligation of execution to the decision – or will an authority to revoke suffice?

If an obligation of execution is attached to the decision, this may be a concession decision and, from 2016, the requirements of the Directive 2014/23/EU (the Concession Directive) must also be met.

1.4.3 Grey area 2: the subsidy and the public contract

The case law of the European Court of Justice reveals that the obligation of transparency applies to the procedure for the award of subsidies from the European Union budget.[112]

In addition, the obligation of transparency under EU law must be complied with if a subsidy[113] could be classified as a public contract.[114] Often, it is obvious whether the provision of funding qualifies as a subsidy or as a public contract ('purchasing'), but there is also a grey area. Four substantive differences between a public contract and a subsidy can be discerned, namely (i) whether there is a pecuniary interest, (ii) who took the initiative: the contracting authority or the applicant, (iii) what the objective of the activity is: personal interest or public interest, and (iv) whether the activities are commercial: price in line with the market or partial reimbursement of the costs.[115]

For a public contract, just as for a concession, there needs to be a 'pecuniary interest' and an 'agreement or contract'. If an implementation agreement is also concluded along with a subsidy decision, there is a 'pecuniary interest' – i.e. the obligation of execution – and an 'agreement or contract' and therefore both elements are fulfilled. If the other three criteria are also met, then one might be dealing with the award of a contract where compliance with the obligation of transparency is required. Since both the subsidy and the public contract are substantive terms, the –administrative, or other, courts would not only have to convert a decision to enter into a contract into a subsidy decision,[116] but also vice versa, from a subsidy decision to a public contract where necessary.

The new Directive 2014/24/EU emphasises that the Union rules on public procurement are not intended to cover all forms of disbursement of public funds, but only those aimed at the acquisition of works, supplies or services

112 EGC 15 April 2011, T-297/05, *AB* 2011/285, with commentary by A. Drahmann.

113 A subsidy is a claim for funding from an administrative authority, provided for the purpose of specific activities of the applicant, other than as payment for goods or services provided to the administrative authority (section 4:21 GALA).

114 In Directive 2004/18/EC 'public contracts' are defined as contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services.

115 See the Dutch Parliamentary Documents II 1993/94, 23 700, no. 3, p. 33-34 and Ten Kate & Van den Ende, *Gst*. 2006/149, but also, for example, the Pianoo website (www.pianoo.nl) or Europa Decentraal (www.europadecentraal.nl).

116 See e.g. CBb 9 September 2008, *AB* 2008/340, with commentary by J.R. van Angeren.

for consideration by means of a public contract. It should be clarified that such acquisitions of works, supplies or services should be subject to this Directive whether they are implemented through purchase, leasing or other contractual forms. It is emphasised that

> 'the mere financing, in particular through grants, of an activity, which is frequently linked to the obligation to reimburse the amounts received where they are not used for the purposes intended, does not usually fall within the scope of the public procurement rules. Similarly, situations where all operators fulfilling certain conditions are entitled to perform a given task, without any selectivity, such as customer choice and service voucher systems, should not be understood as being procurement but simple authorisation schemes (for instance licences for medicines or medical services).'

Finally, when comparing a subsidy to a contract and concession, it is relevant that if an operator or other party is precluded from receiving a subsidy – e.g. because the ceiling has been reached – this does not mean that this party may not exploit the same activity. In contrast to a concession, no exclusive right has been awarded. Obviously, this does not alter the fact that in practice it will often be difficult to carry out an activity without a subsidy, especially if a competitor has already received one. After all, a subsidy is normally awarded to provide an incentive for a certain activity that would not – or could not – be carried out without it.

On this basis, the following general recommendation can be drawn up:

> *Recommendation*
> When forming a subsidy scheme it is recommended that the following questions be considered:
> 1) Is a European subsidy scheme being implemented?
>   If the answer to this question is yes, then the obligation of transparency must be complied with.
> 2) Does the 'subsidy' meet the definition of a 'public contract' and is there a certain cross-border interest?
>   If the answer to this question is yes, then the obligation of transparency must be complied with.

1.4.4 Possible extension of the scope of the obligation of transparency

The obligation of transparency under EU law has a broad scope because it is conferred directly by primary EU law. It therefore plays a role in all government actions that limit, in particular, the freedom to provide services by not giving economic operators from various Member States a genuine opportunity to compete. This can relate to contracts, concessions, licences or European

subsidies.[117] I share Buijze's view that the obligation of transparency will apply – where it does not already – to any allocation of limited public rights.[118] That means, first, extension of the principle to purely internal situations and, secondly, within purely internal situations, to all sub-divisions of administrative law, including environmental law.

A) Purely internal situations

The obligation of transparency under EU law does not apply in purely internal situations. The question is whether this is desirable. 'Voluntary' adoption of a principle of EU law is possible if a Member State deems this community principle a good complement, or in order to avoid two variations of the same principle having to be applied in the national legal system.[119] Having regard to the aim of the obligation of transparency, I believe that the obligation of transparency could be a complement to Dutch administrative law. Furthermore, there is the risk, otherwise, that a discrepancy in legal protection will arise between EU law disputes and national disputes. This risk will specifically affect subsidy provision, now that the European Court of Justice has ruled, where EU subsidy provision is concerned, that the award of subsidies must be undertaken with due regard for, in particular, the obligation of transparency and the principle of equal treatment.[120] One final advantage is that the application of the obligation of transparency in Dutch administrative law would no longer be governed by the formal preliminary questions of whether there was a contract under private law or a certain cross-border interest.

The question of whether application of the obligation of transparency in Dutch administrative law would also result in substantive changes to the law, will be dealt with when answering the following sub-question.

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117 Szydlo also considers the question of who is bound by the obligation of transparency, in particular to what extent private operators are bound by this obligation. He believes that the principle of non-discrimination does have an indirect horizontal effect, but that the obligation of transparency does not (Szydlo, *ELR* 2009, pp. 720-737).

118 Buijze 2013, p. 287.

119 Widdershoven 2004, pp. 293-327, in particular pp. 307-308. If the obligation of transparency under EU law is made applicable by national law directly and unconditionally then interpretation, by the European Court of Justice, of this obligation in purely internal situations is warranted, in the Court's opinion (according to, inter alia, EUCJ 21 December 2011, C-482/10, *AB* 2012/254, with commentary by R.J.G.M. Widdershoven).

120 In this context the development of a 'European Law of Administrative Procedure' is also relevant because 'A European Law of Administrative Procedure could strengthen a spontaneous convergence of national administrative law' (European Parliament resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union (2012/2024(INI)). See also: Meuwese, RegelMaat 2013, Issue 2, pp. 135-139).

B) From licences and subsidies to other decisions: transparent environmental law

In the context of limited public decisions, I have already dealt with licences, exemptions and subsidies in particular. If we look at environmental law, then what stands out is that there are other limited public decisions, where the aim is to allocate usable space or usable environmental space (*milieugebruiksruimte*) as efficiently as possible. To date, the obligation of transparency has played a role in the private law element of environmental law (area development). However, the competent authority can also largely regulate this use by means of public law decisions. For example, a municipal council can, by adopting a zoning plan, determine the desired or prohibited use – and the location thereof – in the context of appropriate land-use planning. The adoption of a zoning plan is not subject to classic procurement law. Nevertheless, a decision of this nature may result in only one operator acquiring development or exploitation opportunities to the detriment of others. I have already discussed above the settled case law of the Council of State from which it follows that the Services Directive does not apply to zoning plan regulations. Like Botman I do wonder, however, whether the Council of State is not attaching too much value to Recital 9 of the Preamble to the Services Directive.[121] The Services Directive builds on the freedom to provide services and freedom of establishment and must therefore be interpreted in conjunction with Articles 49 and 56 TFEU and the case law of the European Court of Justice on this subject. For example, the European Court of Justice has ruled that regulations in the area of land-use planning may constitute a restriction on the freedom of establishment.[122] Furthermore, it follows from the case law of the European Court of Justice that the obligation of transparency is conferred directly by EU law. The obligation of transparency appears to be a mandatory prior condition of the right of a Member State to award to an operator the exclusive right to carry on an economic activity, irrespective of the method of selecting that operator.[123] If, in environmental law, a decision is taken that grants an operator an exclusive right to the detriment of another operator, the obligation of transparency must be complied with. Most environmental law decisions, such as zoning plans, will not award such a right. However, in environmental law there is a perceptible and growing trend in the use of ceilings or the award of exclusive rights. I refer below to three environmental law concepts where the obligation of transparency could be applied and, in case of a certain cross-border interest, most likely should be applied:

121 Council of State 26 September 2012, *AB* 2013/63, with commentary by M.R. Botman.
122 EUCJ 24 March 2011, C-400/08, *BR* 2011/92, with commentary by G. Aarts.
123 EUCJ 3 June 2010, C-203/08, *AB* 2011/17, with commentary by A. Buijze, JB 2010/171, with commentary by C.J. Wolswinkel and *NJ* 2010/491, with commentary by M.R. Mok.

Programmatic approach[124]
The essence of the programmatic approach is that a package is adopted including, on the one hand, measures that create space for developments and, on the other, projects that need space. This gives rise to the idea of usable environmental space. This usable environmental space must be allocated. In my opinion, this allocation rule should comply with the obligation of transparency.

Zoning plans with a one-in-one-out-rule[125] *or zoning*[126]
On the grounds of the speciality rule the Council of State will assess a zoning plan purely on aspects relevant to land-use. Maximising the number of establishments in the zoning plan will, in principle, render the establishment of new establishments impossible, thus favouring a single operator over other operators. There is an argument for allocating these limited public rights, of establishment or use, transparently.

What stands out is that zoning plans are sometimes linked with decentralised single licence schemes (operating licences).[127] In such cases, it will be stipulated by a regulation or municipal bye-law that carrying out a particular activity without authorisation is prohibited and that only a limited number of licences – operating or otherwise – can be awarded. One of the grounds for refusal of a licence is that the activity is also in accordance with the zoning plan.

Noise zoning
The zone management plan of the Dutch Noise Abatement Act, and in future the Environment & Planning Act, could be used – provided it acquires clear legal status – for a transparent allocation of noise space.

In view of this, the two following recommendations can be drawn up:

Recommendation
In drafting the Environment & Planning Act it is recommended that attention be paid to the trend in environmental law, outlined above,

124 See the Dutch Government Memorandum on Environmental Law System Reform (*Kabinetsnotitie Stelselwijziging Omgevingsrecht*) dated 9 March 2012 (Parliamentary Documents II 2011/12, 33 118, no. 3). Examples of programmes with a programmatic approach are the National Air Quality Plan (*Nationale Samenwerkingsprogramma Luchtkwaliteit*) *(NSL)* and the Programmatic Approach to Nitrogen (*Programmatische Aanpak Stikstof*) *(PAS)* in the Dutch Nature Conservation Act 1998.

125 Council of State 24 November 2010, ECLI:NL:RVS:2010:BO4872 and Council of State 9 January 2013, *BR* 2013/63, with commentary by A. Drahmann.

126 Council of State 29 January 2014, ECLI:NL:RVS:2014:200, *AB* 2014/124, with commentary by A. Drahmann.

127 Cf. Council of State 9 January 2013, *BR* 2013/63, with commentary by A. Drahmann and Council of State 29 January 2014, ECLI:NL:RVS:2014:200, *AB* 2014/124, with commentary by A. Drahmann.

of setting ceilings or establishing exclusive rights. If a regulation for the wider use of the programmatic approach is included in the Environment & Planning Act, then it could be stipulated in the Act – or the underlying regulation – that the development space must be allocated transparently.

Recommendation
Operating licences that are closely linked to the zoning plan could be part of the integrated environmental permit. An allocation system could be introduced by statutory regulation – the Environment & Planning Act in conjunction with an environmental bye-law or regulation. This allocation system must be transparent, which means in particular that if operating space becomes available, this must be advertised and it must be clear who is eligible for the licence, and under what conditions. Should such integration still be considered a bridge too far, then it is recommended that the various limited public decisions be allowed to be effected in a coordinated manner, for example through simultaneous adoption of the zoning plan – or granting of the integrated environmental permit – and the operating licence.

C) Interim conclusion

From this information the following general recommendation can be drawn up:

Recommendation
Applying the obligation of transparency in purely internal situations is recommended. These include the granting of limited public licences and exemptions, subsidies and certain environmental law legal concepts.

1.4.5 Conclusion

On the basis of the foregoing, the question as to what the scope of the obligation of transparency introduced by the European Court of Justice is, can be answered. The obligation of transparency under EU law must, as evidenced by the case law of the European Court of Justice, be complied with (i) when awarding a contract that falls within the scope of application of Directive 2004/18/EC, (ii) when awarding a services concession, (iii) for IIB services, (iv) when awarding a contract, the value of which does not exceed the threshold values in Directive 2004/18/EC, (v) when granting a licence to one or a few operators 'because the effects of such a licence on undertakings established in other

Member States and potentially interested in that activity are the same as those of a service concession contract', and (vi) for European subsidies.

In addition, in answering this sub-question I have drawn particular attention to the terms 'public contract' and 'concession'. The European Court of Justice itself rules on whether the definitions of these terms have been met, independent of the national definition of an agreement/contract or decision. However, for the purpose of applying the obligation of transparency this is irrelevant because with both public contracts and concessions the obligation of transparency must be complied with.

Finally, I have advocated applying the obligation of transparency in purely internal situations. These include the granting of limited public licences and exemptions, subsidies and certain environmental law legal concepts.

1.5 SUB-QUESTION 3

To what extent are the transparency requirements already guaranteed in Dutch general administrative law?

This third sub-question can be divided into two parts, namely the question of whether there are elements in GALA that correspond to, or rather are at odds with, the obligation of transparency and, alongside that, whether there are trends in the case law of the Dutch administrative courts that correspond to, or rather are at odds with, the obligation of transparency.

This sub-question is answered, in particular, in the article/chapter entitled 'Is transparency sufficiently guaranteed in the allocation of limited public licences?'[128] (Chapter 9 of this book).

In addition, for the purpose of answering this sub-question special attention is paid to a number of subdivisions of administrative law where limited public rights are awarded, by answering the following questions:

- To what extent are the transparency requirements complied with when awarding limited exemptions pursuant to the Opening Hours Act and the award of limited public licences and exemptions pursuant to General Municipal Bye-laws (APVs)? This question is answered, in particular, in the article/chapter 'Is transparency sufficiently guaranteed in the allocation of limited public licences?'[129] (Chapter 9) ;
- To what extent are transparency requirements complied with in the provision of subsidies? This question is answered, in particular, in the article/chapter 'Could subsidy law be more transparent?'[130] (Chapter 8); and
- To what extent should the transparency requirements be applied in environmental law – for the granting of authorisations and the adoption of

128 Dutch title: *Is de transparantie bij de verdeling van schaarse vergunningen voldoende gewaarborgd*?
129 Dutch title: *Is de transparantie bij de verdeling van schaarse vergunningen voldoende gewaarborgd?*
130 Dutch title: *Kan het subsidierecht transparanter?*

plans – and are these requirements already being applied substantively? This question is answered, in particular, in the article/chapter 'The importance of the principle of transparency for environmental law'[131] (Chapter 10).

To answer this sub-question, two starting points are possible. First, it is possible to take the transparency requirements – listed in the first sub-question – as a starting point, before going on to apply national law, and the second option is to take national law as the starting point and to examine it for compatibility with the obligation of transparency. Determining which of these is the preferred option will depend on the perspective of the reader. For that reason, this sub-question will be answered both ways.

A point for consideration here is that the case law of the administrative courts often relates to a specific legal area in administrative law, for example, a subsidy, an events licence or an exemption for opening hours. Administrative authorities can decide to set a ceiling and thereby create a limit, but this is not mandatory. This research relates to limited public decisions. In these concluding observations generalisations are made regarding case law on, for example, a limited events licence or a limited subsidy, when answering the question of whether limited public decisions are assessed for compatibility with the requirements of transparency. It is possible that the administrative courts, when giving their ruling, did not envisage giving a general ruling on limited public decisions in a broader sense than the authorisation or subsidy scheme at issue. However, my starting point is that the obligation of transparency is a legal rule – or a part thereof – that must be taken into consideration in all limited public decision-making and, on that basis, generalisation should be possible.

I will start below by comparing the requirements listed when answering the first sub-question, with the case law of the administrative courts on limited public decisions and GALA. I will then go on to answer the question of whether – and if so, which – sections from GALA are at odds with the obligation of transparency. Finally, I will answer the question of whether one can highlight trends in the case law of the administrative courts that either correspond to, or rather are at odds with, the obligation of transparency, to show the extent to which the obligation of transparency is guaranteed in Dutch administrative law.

131 Dutch title: *De betekenis van het transparantiebeginsel voor het omgevingsrecht*.

1.5.1 From the obligation of transparency under EU law to national administrative law

When answering the first sub-question, in paragraph 1.3.1, nine transparency requirements were listed. These requirements will be compared below with GALA and the case law of the administrative courts.

A) Every potential applicant must be guaranteed a sufficient degree of advertising

This transparency requirement means, in particular, that all potential applicants – prior to submitting their application – must be able to take note of the criteria that the application must meet, as well as the relative importance of each of these criteria. This means that for a limited public decision-making procedure the following information, as a minimum, will have to be the subject of appropriate publication: the period within which applications can be submitted (start and end date); the criteria against which these applications will be evaluated (selection criteria); and how the decision-making will take place (rules of procedure).

If we look at GALA then two sections stand out, namely Division 3.6 GALA (publication and communication) and Title 4.2 GALA (subsidies).

In Division 3.6 GALA, section 3:42 provides that publication of such decisions must be made in the Government Gazette *(Staatscourant)* for central government, or, for decentralised authorities, in an official publication issued by the authorities or in a daily or weekly newspaper or free local paper or in any other suitable way. This provision ensures the general publication of decisions and is therefore, in principle, in accordance with this transparency requirement. The section is worded generally; it is not clear, from the section itself, what the content of the decisions should be. This means that the section must be fleshed out 'transparently' in the allocation of limited public decisions. Where necessary, this may be a task for the administrative courts.

In addition, the title on subsidies of GALA contains several provisions that are relevant to the adequate degree of publicity, notably section 4:23 GALA (legal basis), section 4:25 GALA (subsidy ceiling) and section 4:26 GALA (manner of allocation). With the aid of these provisions the sufficient degree of advertising in the allocation of limited subsidies is guaranteed. For example, when the subsidy ceiling is publicised the manner of allocation must also be stated. However, it is noteworthy that the provisions have been worded very generally. It will be up to the administrative courts to give further interpretation to these legal provisions.

So, the next question is how the administrative courts have fleshed out these sections from GALA to date. Case law on the general publication of limited public decisions – and the allocation thereof – shows that transparency is reasonably well guaranteed, but that one can identify five particular points for consideration.

First, it is important that the publication is a *general* publication. The case law of the CBb also reveals that selectively approaching a number of operators is not sufficient.[132] All applicants must be given the opportunity to compete for the limited public decision.[133] Awarding a limited public decision at the same time as withdrawing a previously awarded limited public decision is contrary to the requirement of transparency. The CBb also ruled that this creates a situation whereby third parties could not have been made aware of the fact that a licence had become available and the ceiling had no longer been reached.[134] This case law therefore sufficiently guarantees this transparency requirement (via sections 3:2 and 3:4 GALA). A point for consideration here, however, is that in its ruling the CBb appeared to consider that this was a situation in which only a limited circle of interested parties had been approached, whereas the administrative authority was aware that there were also other applicants. It follows from the case law of the European Court of Justice that it is not necessary for the administrative authority to have this knowledge. Under the transparency requirement an adequate degree of publicity that reaches all potential applicants – i.e. not only those that are known – is always necessary.

Secondly, on the basis of this transparency requirement, the way in which this allocation will take place (the allocation procedure) must be adopted and publicised beforehand. For the award of subsidies this is codified in section 4:26 GALA. A point of consideration here is that the CBb, in the context of granting exemptions under the Opening Hours Act, ruled that if no allocation procedure has been prescribed in policy or other rules, allocation on a 'first come, first served' basis is therefore not unreasonable.[135] The Council of State also ruled that if an administrative authority is faced with the situation whereby a choice has to be made between two applicants and the legal review framework for making that choice is lacking, the administrative courts must

132 CBb 24 August 2012, ECLI:NL:CBB:2012:BX6540, *AB* 2012/373, with commentary by C.J. Wolswinkel and *JB* 2012/250, with commentary by L.J. Wildeboer. The CBb considered this conduct to be contrary to section 3:2 and 3:4 GALA.

133 CBb 15 May 2012, ECLI:NL:CBB:2012:BW6630, *AB* 2012/372, with commentary by C.J. Wolswinkel. The CBb considered the decision-making process to be contrary to section 3:4 GALA. From this judgment it also appears that awarding a limited public decision for an indefinite period ignores the interests of others in being able to compete for the limited exemption in the future. In principle, extending a limited exemption that has been granted is not possible either (CBb 6 June 2012, *AB* 2012/374, with commentary by C.J. Wolswinkel). When converting an open-ended licence to a fixed term licence a transitional arrangement will be necessary (CBb 5 December 2012, *AB* 2013/293, with commentary by C.J. Wolswinkel and CBb 17 July 2013, *AB* 2013/294, with commentary by C.J. Wolswinkel).

134 CBb 3 June 2009, ECLI:NL:CBB:2009:BI6466, *JB* 2009/188 and *AB* 2009/373, with commentary by C.J. Wolswinkel.

135 CBb 7 December 2011, ECLI:NL:CBB:2011:BU8507 and ECLI:NL:CBB:2011:BU8509, *AB* 2012/55, with commentary by C.J. Wolswinkel. See also CBb (Provisional relief) 22 April 2011, ECLI:NL:CBB:2011:BQ3306, *AB* 2011/179, with commentary by C.J. Wolswinkel.

limit themselves to the question of whether the weighing up by the administrative authority was unreasonable, or otherwise contrary to general principles of proper administration.[136] In my opinion, an implicit choice on an allocation method is insufficiently transparent.[137]

Thirdly, it is important that when introducing a new or amended allocation system pursuant to the requirement of transparency a start date for the submission of applications is set and publicised. Pursuant to section 4:27 GALA a subsidy ceiling must be publicised in advance. If a subsidy ceiling is publicised too late, this publication, in principle, will have no consequences for applications submitted before that date.[138] A point of consideration that follows from case law is that, from the point of view of transparency, it is difficult to argue that the start date is in the past. However, in order to determine who was first to submit their application – again, in the context of exemptions under the Opening Hours Act – the CBb seems to have no objection to a reference date being in the past.[139] In addition, the CBb held that if the introduction or amendment to an allocation method is generally publicised in the form of an announcement, but is not yet enshrined in a formal decision, then that notice can only be understood to mean that no further applications can be honoured prior to the new allocation. If they were, it would make the introduction of the new allocation mechanism unworkable in practice.[140] This standstill provision benefits transparency.

Fourthly, in the context of this transparency requirement, it is important that all potential applicants should and must be able to know which conditions

136 Council of State 25 September 2013, *AB* 2013/385, with commentary by A. Drahmann.

137 Especially because complications can also arise with this allocation method, such as what is known as the 'postbag problem'. What is an administrative authority supposed to do if on a single day more completed applications arrive by post – and are therefore all received at the same time – than can be awarded? In that case it is a good idea for the administrative authority to establish, before the start of the procedure, that in that eventuality lots will be drawn as a secondary allocation method (inter alia, CBb 18 November 2010, *AB* 2011/37, with commentary by C.J. Wolswinkel and Council of State 3 April 2013, ECLI:NL:RVS:2013:BZ7542, *AB* 2013/219, with commentary by C.J. Wolswinkel).

138 Cf. also Council of State 3 January 2007, *AB* 2007/224, with commentary by W. den Ouden.

139 See however: CBb 7 December 2011, ECLI:NL:CBB:2011:BU8507 and ECLI:NL:CBB:2011:BU8509, *AB* 2012/55, with commentary by C.J. Wolswinkel – about a change of course in 2011 that was the result of an earlier appeal procedure on the award of limited exemptions, where the application from 2008 was the first application that was eligible for the award and general publication was, according to the CBb, not necessary. Cf. also CBb 13 December 2012, ECLI:NL:CBB:2012:BZ2031, *AB* 2013/295, with commentary by C.J. Wolswinkel, from which it follows that when allocating in order of receipt a reference date in the past can be set, in principle, but that an irrevocably rejected application cannot be considered to be the first application.

140 CBb 13 March 2012, ECLI:NL:CBB:2012:BW0415, *AB* 2012/146, with commentary by A. Drahmann. See also the judgment in the context of provisional relief: CBb (Provisional relief) 19 September 2011, ECLI:NL:CBB:2011:BT6359, *AB* 2011/364, with commentary by A. Drahmann. Cf. also CBb 15 February 2012, ECLI:NL:CBB:2012:BV797, *AB* 2012/148 with commentary by C.J. Wolswinkel and *Gst*. 2012/65, with commentary by W.P. Adriaanse.

they must meet if the limited public decision is to be awarded to them. In administrative law these conditions are sometimes enshrined in a generally-binding regulation (for example a bye-law), but often also in conditions attached to the licence. If these conditions are contravened, enforcement action may be taken. In the allocation of a limited public decision it is therefore important for all applicants and potential applicants to know what the conditions will be. In such instances the draft award decision must also be adequately publicised.[141] The CBb came to a similar finding. A procedure where the exact content of an exemption is only notified once the drawing of lots has begun, meaning that the applicants can no longer file any objections to that content, is regarded by the CBb as insufficiently detailed, and contrary to sections 3:2 and 3:4 GALA.[142] The CBb also held that with the adoption and publication of a draft licence, as it will be awarded with the conditions and restrictions that will be attached to the licence, the content of the licence to be awarded subsequently is, to that extent, already determined. This adoption is, according to the CBb, of major importance to a potential applicant, in the context of an auction to determine the level of the bid to issue. As a result, the legal position of the potential licence holder, independent of the eventual award of a licence – to the highest bidder – is explained in more detail, so that draft licences, too, are or may be decisions that are subject to appeal.[143]

In the context of the publication of the relevant documentation, the role of advisory committees is also important. If an advisory committee draws up its own evaluation guidelines or evaluation forms, on the basis of which they will evaluate the applications, and these guidelines give an additional explanation of the selection criteria to be used, then these documents would, in my view, have to be advertised on the basis of this transparency requirement, even before the procedure. However, the Council of State held otherwise.[144] Nevertheless, the lack of such documents may lead to the conclusion that the decision is insufficiently reasoned.[145]

According to the fifth consideration, in addition to the content of the publication, the manner of publication is also important. Often, administrative authorities choose to lay down their allocation procedures and criteria in policy

141 Following on from this it can sometimes also be a good idea, prior to the allocation procedure, to publicise the draft regulation and to give all potential applicants the opportunity to respond to it. As a result objections from these potential applicants to the allocation criteria – including the conditions attached to the licence – can be known early on and, where necessary, taken into account.

142 CBb 24 August 2012, ECLI:NL:CBB:2012:BX6540, *AB* 2012/373, with commentary by C.J. Wolswinkel and *JB* 2012/250, with commentary by L.J. Wildeboer.

143 CBb 24 May 2012, *AB* 2013/66, with commentary by C.J. Wolswinkel.

144 Council of State 10 December 2008, ECLI:NL:RVS:2008:BG6429 and Council of State 24 April 2013, ECLI:NL:RVS:2013:BZ8429, *AB* 2013/327, with commentary by C.J. Wolswinkel.

145 Council of State 16 October 2013, ECLI:NL:RVS:2013:1521, *AB* 2014/40, with commentary by C.J. Wolswinkel.

rules.[146] However, there is a difference between policy rules and generally binding regulations and that is the inherent power of derogation under section 4:84 GALA. The application of this power of derogation negatively affects the requirement of transparency, since if the rules enshrined in the policy rule are derogated from the applicants and potential applicants are no longer being treated equally. I will discuss the tension between the inherent power of derogation and the obligation of transparency in more detail in the following paragraph. I would just like to point out here, in a general sense, that it would be preferable for the allocation procedure and criteria to be laid down in a generally binding regulation.

Finally, it is important that the sufficient degree of advertising is complied with in good time in the decision-making procedure. This is especially important in what is referred to as chain-based decision-making. This refers to a situation whereby an administrative authority organises an allocation procedure for a limited public decision, which decision is no longer eligible to everyone because a 'preselection' has already been made by virtue of an earlier decision. The question, to what extent a 'duty of competition' exists, will be left to one side in this research.[147] From the point of view of transparency, however, it can be noted that if the choice is made to organise a limited public decision-making procedure, it may be sensible to publicise the various decisions in the chain in a coordinated manner, thereby displaying the sufficient degree of advertising, or to organise a transparent allocation procedure for the first decision in the chain. Examples of such chain-based decision-making can be found in subsidy law[148] and in environmental law.[149]

It is evident that the requirement to guarantee a sufficient degree of advertising is already largely covered by GALA (in particular sections 3:42, 4:23, 4:25 and 4:26 GALA). The administrative courts also regard this element of the obligation of transparency as important. If a sufficient degree of advertising is not displayed, the administrative courts regard this as being contrary to the duty of care under sections 3:2 and 3:4 GALA or the principle of legal certainty. However, some fine tuning of certain aspects is possible.

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146 Administrative authorities have a discretionary power to grant exemptions and have the leeway, when exercising that power, to develop policy. The Opening Hours Act contains the power, but not the obligation, to impose further rules. Also, according to the CBb an opening hours bye-law does not need to contain all the rules relating to the award of exemptions (CBb 29 April 2011, ECLI:NL:CBB:2011:BQ3763 and CBb 1 February 2013, ECLI:NL:CBB:2013:BZ3871).

147 Van Ommeren 2011a, pp. 235-265.

148 Council of State 20 October 2010, *JB* 2011/3, with commentary by M.J. Jacobs and *AB* 2011/232, with commentary by W. den Ouden (Coach4Kids).

149 Cf. Council of State 9 January 2013, *BR* 2013/63, with commentary by A. Drahmann and Council of State 29 January 2014, ECLI:NL:RVS:2014:200, *AB* 2014/124, with commentary by A. Drahmann.

B) All the conditions and detailed rules of the allocation procedure must be drawn up beforehand in a clear, precise and unequivocal manner

Another aspect of the obligation of transparency is that the conditions and detailed rules of the allocation procedure must be drawn up beforehand in a clear, precise and unequivocal manner. The Council of State also held that, inter alia, the lack of known criteria and a known weighting when taking a limited public decision is negligent.[150]

This transparency requirement also means that the administrative authority – based on the information and evidence provided by the applicants – must be sufficiently able to ascertain whether the applications meet the criteria set. The Council of State also held that if reports are used for limited public decision-making, these reports must be sufficiently clear, otherwise the decision is insufficiently reasoned.[151]

In addition, it may be recommended that an administrative authority draws up an application form, so that all applicants state, in a similar manner, the extent to which they meet the criteria set.[152] This will contribute to the transparency of the procedure. The case law of the administrative courts also reveals that in such instances this form must be complete. The applicant may assume that by answering all the questions on the form and submitting all the documents that must be attached – as requested – that it has provided all the information necessary for the review of that application. The Council of State explicitly found, in that case, that clarity regarding the details to be submitted with the application is particularly important, since an applicant has in fact only one chance to submit a successful application because the ceiling – in this case the subsidy ceiling – is often reached the moment anything is added to an incomplete application.[153]

C) All reasonably informed applicants exercising ordinary care must be able to understand the exact significance of the criteria and interpret them in the same way

A third aspect of the obligation of transparency is that all reasonably informed applicants exercising ordinary care must be able to understand the exact significance of the criteria and interpret them in the same way. In this regard it may be a good idea to give applicants the opportunity to ask questions about

150 Council of State 22 February 2012, ECLI:NL:RVS:2012:BV6519.

151 Council of State 8 September 2004, ECLI:NL:RVS:2004:AQ9962, *AB* 2005/107, with commentary by F.R. Vermeer.

152 If no obligation to use a standard application form is included in the subsidy scheme, then applications that are not submitted with that form cannot be overlooked (Council of State 19 January 2001, *AB* 2001/113, with commentary by N. Verheij).

153 Cf. CBb 17 June 2011, ECLI:NL:CBB:2011:BQ9603 and Council of State 29 May 2013, *AB* 2013/356, with commentary by A. Drahmann.

the criteria set. The administrative authority can do this by working with a 'summary of additional information '. It is not a good idea to give a single operator further information – by phone or in writing – about the criteria set because at that moment this particular operator will have at its disposal more information than the other applicants or potential applicants. Only by giving the information to everyone can the equal position of the potential applicants be guaranteed. This is possible by stating in the publication that all interested parties can raise any questions about the criteria before a certain date. These questions will then be answered at the same time in a written document, which is then generally publicised. It is also possible to organise information meetings, provided that everyone is invited *and* that a record of the information given out during the meeting is drawn up and generally publicised. This general publication, for example via the website, guarantees that all interested parties have the same information at their disposal.

D) A final date for receipt of applications must be set, so that all applicants have the same amount of time to prepare their application

Pursuant to the obligation of transparency a final date must be set, by which applications must be received by the administrative authority. As a result all applicants will have the same period after publication of the tender notice (the call to compete) within which to prepare their applications.

The question then is, how should the administrative authority deal with incomplete applications? Whether additions can be made to these in the primary phase is another question which often arises. Generally, it can be stated that, pursuant to this transparency requirement, any amendment or addition to the initial application is, in principle, not possible because this would mean that one applicant would receive an advantage over its competitors. What an administrative authority can do is ask an applicant to improve on – or make additions to – the information in any such file in a targeted manner, provided that the request relates to information that can be objectively found to originate from before the end of the time-limit for submission. It can also be stated that, according to the European Court of Justice, the administrative authority is not obliged to contact the applicants because the lack of clarity in the application, which is the result of a failure on the part of the applicants in their duty of care.

There is a wealth of case law available on the subject of incomplete applications. In addition, the relationship between this transparency requirement and the possibility of rectification in administrative law under section 4:5 GALA is interesting.[154]

154 On the application of section 4:5 GALA see also: Jacobs & Den Ouden 2011, Jacobs & Den Ouden, *JBplus* 2011, pp. 35-58, Drahmann 2011 and Wolswinkel, *NTB* 2014/7.

Pursuant to section 4:5 GALA an administrative authority may decide not to process an application on the grounds that it is incomplete only if the applicant has been given the opportunity to amplify the application within the time-limit set by the administrative authority. Offering a time-limit for rectification may comply with both section 4:5 GALA and the obligation of transparency, provided the basic principles drawn up for this purpose are observed. The possible tension between section 4:5 GALA and the obligation of transparency will be discussed in more detail in the next paragraph.

In addition, the case law of the administrative courts reveals that in limited public decision-making special requirements are imposed on applications, which derogate from the case law surrounding section 4:5 GALA in 'ordinary' non-limited public decisions.[155] For example, the Council of State ruled that 'before the end of the time-limit for receipt of applications, all information relevant to that review and ranking must be submitted, and after that date any information that is essentially an amendment or addition to that application will not be taken into account. Including information that dates from after the end of the time-limit for receipt of applications is not compatible with the simultaneous review and ranking of the submitted applications, which is key to the tender system.'[156] The CBb also ruled that it is possible to complement an incomplete application submitted on time after the statutory time-limit for submission has expired, but only insofar as this applies to missing documents that existed prior to the expiry of that time-limit. If that document, in this case a licence, is not yet in existence at that time, there is no basis for deciding not to process the application pursuant to section 4:5 GALA and the application must be rejected.[157] This case law is fully in line with this transparency requirement.

E) In principle, any amendment to the initial application of any one applicant may not be taken into account

It also follows from the obligation of transparency that any amendment to the initial application of any one applicant may not be taken into account because this applicant is then being favoured over its competitors. The Dutch administrative courts adopt a similar starting point. According to case law from the Council of State, including information that dates from after the end of the time-limit for receipt of applications is not compatible with the simulta-

155 According to case law the administrative authority, although not obliged to do so, is free to take into consideration, in its review, information that is submitted after the primary decision not to process an application and that is initially missing (inter alia, Council of State 1 October 2008, ECLI:NL:RVS:2008:BF3868, *AB* 2009/17, with commentary by A.T. Marseille).

156 Council of State 26 September 2012, *AB* 2012/397, with commentary by A. Drahmann, ECLI:NL:RVS:2012:BX8283.

157 CBb 18 November 2011, ECLI:NL:CBB:2011:BU5467.

neous review and ranking of the submitted applications, which is key to the tender system. The very nature of the tender system also means that prior to the end of the time-limit for receipt of applications all information relevant to that review and ranking must be submitted, and that after that date, any information that is essentially an amendment or addition to that application may not be taken into account.[158] In my opinion, this starting point ought to apply not only to a comparative evaluation, but also to all limited public allocation procedures.

The CBb ruled, entirely in line with this transparency requirement, that only the substantive information provided by applicants before the end of the time-limit for receipt of applications, can be included in the review. It is therefore not for the administrative authority to inquire into that substantive information again in the review phase. What the administrative authority must do, when preparing a decision, is to ascertain whether an application is complete and, if this proves not to be the case, give the applicant the opportunity to provide the missing information (pursuant to section 4:5 GALA).[159]

Both the administrative courts and the European Court of Justice thereby make a distinction between, on the one hand, information that is missing but does exist, and on the other hand new and/or substantive information. Additions can be made to the first type of information, but with the second type of information that would be an impermissible amendment to the application. It will not always be simple to determine whether or not there is an 'amendment' or an impermissible amendment. The following four examples from the case law of the administrative courts may provide more clarity:

- Notice from the applicant that further inspection has revealed that VAT cannot be reimbursed or deducted is an amendment to the application.[160]
- Evident slips of the pen are glaringly obvious calculation errors or typos, which are, without question, immediately identifiable as mistakes.[161]
- 'Resubmission' of the application, but on the right application form, is possible provided that there is no new information that is substantively relevant.[162]
- If there is a substantial amendment to the application that is too far removed from the initial application, the request for amendment must be treated as a new application.[163]

158 Inter alia, Council of State 15 July 2009, ECLI:NL:RVS:2009:BJ2654, Council of State 20 December 2006, ECLI:NL:RVS:2006:AZ4815, and Council of State 25 July 2001, *AB* 2001/339, with commentary by N. Verheij.

159 CBb 6 November 2013, ECLI:NL:CBB:2013:224, *AB* 2014/112, with commentary by A. Drahmann.

160 Inter alia, Council of State 15 August 2007, *AB* 2008/29, with commentary by J.H.A. van der Grinten and W. den Ouden.

161 CBb 7 July 2011, ECLI:NL:CBB:2011:BR5050.

162 Council of State 12 January 2005, *AB* 2005/239, with commentary by N. Verheij.

163 CBb 11 August 2010, ECLI:NL:CBB:2010:BN4730.

The administrative courts also assume that a certain amount of care may be expected from an applicant when filling out and submitting a subsidy application.[164] This individual responsibility of the applicant to submit its application has consequences not only for the possibilities for amendment, which may be limited, but also means that the administrative authority itself, in principle, does not have to take any action in order to obtain further information from the applicant.[165]

F) The administrative authority must interpret the criteria in the same way throughout the entire procedure

Pursuant to the obligation of transparency, once the selection criteria and procedural rules have been laid down, these must be applied throughout the whole procedure. The administrative courts also ruled that changing an allocation method, pending the procedure, from comparative evaluation to order of receipt, is contrary to the principle of legal certainty.[166] Changing the award criteria pending the procedure is also unacceptable from the point of view of objectivity, transparency and legal certainty.[167]

Finally, it follows from this transparency requirement that the procedural rules must be laid down before the start of the allocation procedure and that they cannot be amended during the procedure. For Dutch administrative law this means that decisions on objections must be taken *ex tunc*.[168] This is therefore an exception to the classic assumption that an administrative authority decides *ex nunc*.[169] The Council of State found, with regard to the relevant reference date, that the applicable law is the law as it applied on the last day on which the applications could be submitted.[170] It would be useful – or even more useful – for the purposes of transparency if this reference date was not the last day, but the first day on which the applications could be submitted. The judgment of the Council of State makes it possible for allocation rules to be amended even during the application time-limit, but after publication of the allocation procedure. This is risky from a transparency point of view because it is uncertain whether all applicants and potential applicants would be able to take note of this amendment and adapt their application accordingly.

164 CBb 11 August 2010, ECLI:NL:CBB:2010:BN4730.
165 CBb 3 April 2001, ECLI:NL:CBB:2001:AB1115.
166 CBb 8 January 2010, *AB* 2010/73, with commentary by I. Sewandono.
167 CBb 19 December 2007, *JB* 2008/67.
168 CBb 3 July 2009, *AB* 2009/334, with commentary by I. Sewandono and *JB* 2009/227, in which the CBb ruled that the review on appeal must take place according to the facts and circumstances as per the decision date of the primary decision.
169 To the extent that this applies, Cf. Verheij, *JBplus* 2003, p. 26-47.
170 Council of State 29 October 2008, ECLI:NL:RVS:2008:BG1839, *JB* 2009/6, with commentary by M.A.Heldeweg and Council of State 6 June 2012, ECLI:NL:RVS:2012:BW7592, *AB* 2013/73, with commentary by C.J. Wolswinkel. Otherwise: Council of State 6 April 2011, ECLI:NL:RVS:2011:BQ0297 and ECLI:NL:RVS:2011:BQ0298.

If the final day is taken as the starting point, then the burden of proof should in any case rest on the administrative authority to show that all applicants and potential applicants could take note of the amendment, so that they were able to adapt their application accordingly.

G) The criteria must be applied objectively and uniformly to all applicants when comparing the applications

The administrative authority must interpret the criteria in the same way throughout the entire procedure. When the applications are being evaluated the criteria must be applied in an objective and uniform manner to all applicants It follows from the case law of the European Court of Justice that the allocation criteria must be advertised.[171] The relative weighting of those criteria does not need to be advertised beforehand, but must be established before the applications submitted are to be evaluated.[172] In this context the judgment from the CBb is interesting, with the CBb ruling that a procedure in which the committees and sub-committees that advised on the ranking of the submitted subsidy applications, advised – on the basis of the elements of the plans found in the various applications – on the valuation of those elements with a score and also participated in the application of that points system developed accordingly, was not contrary to section 4:26 GALA.[173] A procedure where the points system is developed only after receipt and initial study of the applications, is contrary to this requirement of transparency. The administrative authority had chosen this method so that it could take into account new insights and ideas that might emerge from the applications. Where there is such a subsidy award for innovative projects and where the administrative authority itself obviously has insufficient knowledge on what is innovative, the authority should instead choose a preliminary market consultation.

H) Allocation procedures must be able to be reviewed for impartiality and therefore decisions must be reasoned

Allocation procedures must be able to be reviewed for impartiality. For this it is necessary for the limited public decision to be reasoned. The administrative authority's obligation to provide reasons can be described as a 'comparative obligation to provide reasons'.[174] The principle of equal treatment entails

171 Inter alia, EUCJ 25 April 1996, C-87/94 (Wallonia buses) and EUCJ 24 January 2008, C-532/06 (Lianakis and others).

172 EUCJ 18 November 2010, C-226/09, *NJ* 2011/87.

173 CBb 21 December 2011, *AB* 2012/63, with commentary by A. Drahmann and J.M.J. van Rijn van Alkemade.

174 J.M.J. van Rijn van Alkemade, *'Rechtsbescherming bij de verdeling van schaarse subsidies: motivering en (processuele) openbaarheid'* in: Van Ommeren, Den Ouden & Wolswinkel 2011, p. 379ff.

an obligation of transparency, so that compliance with it can be checked. The CBb ruled that with a system of subsidy awards 'where the submitted applications are compared and then ranked according to a number of qualitative criteria, in order to promote a sufficient degree of transparency, requirements must be imposed on the way in which, after the weightings and evaluations have taken place, reporting is carried out and account is rendered.' This means that clear documentation must be available on both the development of the criteria, and the application thereof to the applications submitted. This documentation consists of insight into the composition of the committee or committees that have studied the applications, the exact task and procedure of the committee(s) the advice from the committee(s).[175] It may sometimes be desirable for a record to be drawn up of the procedure followed. This can be used to show that the procedure ran transparently.[176] The Council of State ruled that in a subsidy tender system, discretion is conferred upon the administrative authority, but that this does not alter the fact that a decision must be accompanied by comprehensible substantiation, where the evaluation criteria are respected, so that insight can be obtained into the evaluation underlying the decision and a review of the points score used by the administrative authority is possible. In this case, the experts engaged by the administrative authority had each stated on separate score sheets how many points the project had scored, based on the evaluation criteria and accompanying sub-criteria, and what the total score for the project was. The Council of State deemed this insufficient because these sheets did not give a comprehensible substantiation for the award of the points as it was not clear how the review criteria had been implemented.[177]

I) Substantial amendments to essential provisions of the limited public decision are not possible in principle

In principle substantial amendments to essential provisions of the limited public decision are not possible. An amendment may be considered 'substantial' if it introduces conditions which, had they been part of the initial award procedure, would have allowed for the acceptance of an application other than the one initially accepted. If the administrative authority has reason to amend certain provisions, conditions or obligations after a decision had been made, then the administrative authority must expressly make provision

175 CBb 21 December 2011, *AB* 2012/63, with commentary by A. Drahmann and J.M.J. van Rijn van Alkemade. See also Council of State 22 September 2009, *AB* 2010/138, with commentary by J.M.J. van Rijn van Alkemade and Council of State 15 December 2010, *AB* 2011/87, with commentary by W. den Ouden.

176 Cf. Opinion of the Advocate General 12 April 2005, C-231/03 and CBb 20 September 2002, ECLI:NL:CBB:2002:AE9952.

177 Council of State 16 October 2013, ECLI:NL:RVS:2013:1521, *AB* 2014/40, with commentary by C.J. Wolswinkel.

for such alteration and its method of application in the generally publicised legal regulation – or further rules based thereon – on which the allocation procedure is based.

In subsidy law too, the alteration of subsidy decisions is restricted. For example, in theory, it is not possible to increase the subsidy amount at a later stage on the basis that the subsequent adjustment of the subsidy amount would lead to inequality in respect of the other applicants.[178] A request to alter an activity, submitted after the publication of the subsidy ceiling, can only be honoured if this alteration falls entirely within the frameworks of a subsidy awarded prior to the publication of the ceiling and the alteration does not exceed the level of the subsidy awarded.[179] If there is a material derogation from what was included in the initial application, then full or partial reduction of the subsidy is not unreasonable if the alteration would have led to the application being assessed substantially differently and being ranked considerably lower.[180] A similar line should also be adopted for other limited public decisions.

1.5.2 From GALA to the obligation of transparency under EU law

In the previous paragraph a number of parallels were drawn between GALA and the case law of the administrative courts, based on the nine transparency requirements. In this paragraph GALA is taken as the starting point. Looking at the most salient sections, I will describe the extent to which these contribute to transparency and where any risks lie.

A) The publication of decisions: section 3:42 GALA and sections 4:23-4:26 GALA

Pursuant to section 3:42 GALA, decisions must be published in the Government Gazette (*Staatscourant*) (central government), in an official publication published by a public authority or in a daily or weekly newspaper or free local paper, or in another suitable manner. This provision takes care of the general publication of decisions and therefore, in principle, corresponds to the obligation of transparency. However, the section is worded generally; it is not clear, from the section itself, what the content of the decisions should be. Pursuant to the obligation of transparency, it follows that for a limited public decision-making

178 CBb 11 August 2010, *JB* 2010/243.

179 For example, a simple change of project name or other administrative amendment which would not have any substantive significance (Council of State 17 September 2008, *AB* 2009/77, with commentary by J.E. van den Brink). Cf. also Council of State 2 October 2013, ECLI:NL:RVS:2013:1365, *AB* 2014/31, with commentary by M.A.M. Dieperink.

180 Council of State 25 August 2005, *AB* 2005/390, with commentary by J.H. van der Veen.

procedure the following information, as a minimum, must be the subject of appropriate publication: (a) the period within which applications can be submitted (start and end date), (b) the criteria against which these applications will be evaluated (selection criteria), and (c) and how the decision-making will take place (rules of procedure). These obligations must be read into section 3:42 GALA. Alternatively, a supplementary provision could be adopted. This provision could resemble the further requirements set out in the subsidy title (in particular sections 4:23-4:26 GALA). These provisions guarantee a sufficient degree of advertising in the allocation of limited subsidies. For example, the manner of allocation shall be stated when the subsidy ceiling is notified. It seems that the provisions here are very generally worded and that the application thereof by the administrative courts does not always mean that there is transparent decision-making. For example, the CBb ruled that a procedure in which an advisory committee scored the applications that had already been submitted, and subsequently applied this points system to the applications, is not contrary to section 4:26 GALA.[181] This procedure, where the points system is developed only after receipt and initial study of the applications is, however, contrary to the obligation of transparency.[182] In addition, the Council of State held that a subsidy allocation system should actually have been published in the Dutch Government Gazette (*Staatscourant*) pursuant to section 3:42 GALA, but that a brochure published on the internet could be considered to be a consistent course of action and therefore could be used as the basis for the decision-making process.[183]

Therefore it can be noted that these sections from GALA are not contrary to the obligation of transparency, but that it is up to the administrative authority and, where necessary, the administrative courts to give a more detailed and more transparent interpretation of these statutory provisions. As will be seen in the next paragraph, this does also happen to a large extent, but there are several points for improvement.

Finally, it is also worth exploring whether publication in a journal published by a public authority or in a daily or weekly newspaper or free local paper is 'appropriate'. According to the Dutch Public Procurement Act 2012, announcements for public contracts must be posted on the TenderNed website.

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181 CBb 21 December 2011, *AB* 2012/63, with commentary by A. Drahmann and J.M.J. van Rijn van Alkemade.

182 Furthermore, it must be doubted whether the criteria set by the administrative authority were not so open that they had not been drawn up in a clear, precise and unequivocal manner. The administrative body had chosen this method so that it could take into account new insights and ideas that might emerge from the applications. Where there is a provision of a subsidy of that nature for innovative projects and where the administrative authority itself obviously has insufficient knowledge of what is innovative, the administrative authority should instead choose a preliminary market consultation.

183 Council of State 14 November 2002, ECLI:NL:RVS:2012:BY3051, *AB* 2013/121, with commentary by A. Drahmann.

This means that the public contracts from all the contracting authorities can be found in one place. Section 3:42 GALA does not contain an obligation for central publication of that nature. A growing number of administrative authorities now post their local publications on www.overheid.nl.[184] This is a positive development because the use of a single central website by all administrative authorities improves transparency; especially if the option of an email alert is also linked to it.

Recommendation
On the basis of the foregoing one might consider, therefore, introducing an active, general duty of publication for limited public decisions, supplementary to the regulation on the publication of decisions in section 3:40 GALA, etc. On that basis, administrative authorities would be obliged to publicise the commencement of a procedure when a limited public decision is being awarded. The publication would have to mention the submission deadline for applications as well as where further information on the allocation procedure and rules can be found. This active, general duty of publication for administrative authorities will guarantee that all potentially interested parties can take note of the procedure and take part in it. This general duty of publication could be explicitly included in GALA or be based, by the administrative courts, on section 3:42 GALA – possibly in combination with the principle of equality or the obligation of transparency. Following on from the Public Procurement Act 2012, an alternative would be to oblige all administrative authorities to publicise decisions – or the allocation of their limited public decisions – centrally on a single website. An obligation of this nature would then have to be enshrined in GALA. Although this is not strictly necessary for a sufficient degree of advertising, this would considerably improve transparency in my view.

B) Provision of advice: Division 3.3 GALA

Division 3.3 GALA relates to the provision of advice to administrative authorities. Section 3:9 GALA relates to the duty to ascertain all the relevant facts. Administrative authorities must satisfy themselves that the investigation by an external adviser was carried out with due care. In the allocation of limited

184 Publication of a notice via the internet may be considered appropriate within the meaning of section 3:12(1) GALA. Pursuant to section 2:14(2) and section 3:12(1) GALA however, unless otherwise provided by law, a draft decision must be communicated in at least one suitable, non-electronic means (Council of State 7 March 2013, ECLI:NL:RVS:2013:BZ4007, *JB* 2013/81, with commentary by G. Overkleeft-Verburg).

public decisions advisory committees of experts are often used.[185] These advisory committees must also comply with the obligation of transparency and the administrative authority has to satisfy itself that this has been done. I will mention a few points for consideration for advisory committees and administrative authorities using external advisers in the allocation of limited public decisions in the paragraphs below.

First, part of the objective of the obligation of transparency is to guarantee the preclusion of any risk of favouritism and arbitrariness by administrative authorities. This risk of favouritism must be addressed in the composition of these committees. For example, it would be imprudent and contrary to the prohibition on prejudice – as enshrined in section 2:4 GALA – to allow one of the current licence holders to be a member of an advisory committee that is due to advise on the future allocation of the same licence.[186]

Secondly, administrative authorities and advisory committees must interpret the allocation criteria in the same way throughout the entire procedure. The CBb ruled that a procedure in which the committees and sub-committees were involved in the ranking of submitted subsidy applications, on the basis of the elements of the plans found in the applications and the points system to score the participants, was not contrary to section 4:26 GALA.[187] It has already been explained above that a procedure where the points system is developed only after receipt and initial study of the applications, is contrary to the obligation of transparency.

Thirdly, it is important that if an advisory committee draws up its own evaluation guidelines or evaluation forms, on the basis of which they will evaluate the applications, and these guidelines give an additional explanation of the selection criteria to be used, then these documents should, in my opinion, be advertised on the basis of this transparency requirement, even before the procedure. However, the Council of State held otherwise.[188]

Finally, reasons must be stated for decisions and limited public decisions. For instance, the CBb ruled that requirements must be imposed on the way in which reporting is carried out and account rendered once the weighting and evaluation process has taken place. This means that clear documentation must be available on both the development of the criteria and the application

185 See e.g. Council of State 24 March 2010, *AB* 2010/137, with commentary by W. den Ouden, and Council of State 25 February 2009, *AB* 2009/222, with commentary by W. den Ouden and J.M.J. van Rijn van Alkemade.

186 Council of State 6 June 2012, ECLI:NL:RVS:2012:BW7592, *AB* 2013/73, with commentary by C.J. Wolswinkel.

187 CBb 21 December 2011, *AB* 2012/63, with commentary by A. Drahmann and J.M.J. van Rijn van Alkemade.

188 Council of State 10 December 2008, ECLI:NL:RVS:2008:BG6429 and Council of State 24 April 2013, ECLI:NL:RVS:2013:BZ8429, *AB* 2013/327, with commentary by C.J. Wolswinkel. The absence of such documents may, however, lead to the conclusion that the decision is insufficiently reasoned (Council of State 16 October 2013, ECLI:NL:RVS:2013:1521, *AB* 2014/40, with commentary by C.J. Wolswinkel).

thereof in relation to the applications submitted. This documentation consists of insight into the composition of the committee or committees that have studied the applications, the exact task and procedure of the committee(s) and the advice from the committee(s).[189]

C) Policy rules and the inherent power of derogation: section 4:84 GALA

Administrative authorities will often choose to lay down their allocation procedures and criteria in policy rules.[190] Pursuant to section 4:84 GALA, administrative authorities shall act in accordance with these policy rules unless, due to special circumstances, this would affect one or more interested parties disproportionately in relation to the objectives of the policy rule. This inherent power of derogation is not readily compatible with the obligation of transparency because if there is derogation from the rules enshrined in the policy rule not all the applicants and potential applicants are being treated equally any more. The administrative courts were therefore justified in finding grounds here for fleshing out section 4:84 GALA in the allocation of limited public decisions to create more transparency. For example, the Council of State ruled that in the allocation of subsidies via a tender system 'there is in principle no leeway for allowing exceptions in individual cases. For the purpose of section 4:84 of the General Administrative Law Act (hereinafter: GALA) the circumstances must be special, i.e. circumstances that were not accounted for when drafting the policy rule.' By choosing an tender procedure the administrative authority therefore, according to the Council of State, deliberately chose to evaluate applications based on certain objective criteria.[191] In addition, the CBb ruled that if no single submitted application met the allocation criteria laid down in the policy rule in the first place, all applications must

189 CBb 21 December 2011, *AB* 2012/63, with commentary by A. Drahmann and J.M.J. van Rijn van Alkemade. See also Council of State 22 September 2009, *AB* 2010/138, with commentary by J.M.J. van Rijn van Alkemade and Council of State 15 December 2010, *AB* 2011/87, with commentary by W. den Ouden. Cf. also Council of State 16 October 2013, ECLI:NL:RVS:2013:1521, *AB* 2014/40, with commentary by C.J. Wolswinkel.

190 Administrative authorities have a discretionary power to grant exemptions and have the leeway, when exercising that power, to develop policy. The Opening Hours Act contains the power, but not the obligation, to impose further rules. Also, according to the CBb an opening hours bye-law does not need to contain all the rules relating to the award of exemptions (CBb 29 April 2011, ECLI:NL:CBB:2011:BQ3763 and CBb 1 February 2013, ECLI:NL:CBB:2013:BZ3871).

191 Council of State 24 April 2013, ECLI:NL:RVS:2013:BZ8429, *AB* 2013/327, with commentary by C.J. Wolswinkel. The CBb also ruled, for the granting of exemptions under the Opening Hours Act, that derogation from the procedural rules laid down in the policy rules – on the drawing of lots that was to be followed – was contrary to section 4:84 GALA (CBb 16 December 2011, ECLI:NL:CBB:2011:BV0942 and ECLI:NL:CBB:2011:BV0936, *AB* 2012/161, with commentary by J.M.J. van Rijn van Alkemade and *JB* 2012/59).

be rejected. The fact that every application fails to meet the set criteria is not a special circumstance within the meaning of section 4:84 GALA.[192]

This interpretation of section 4:84 GALA is in line with the obligation of transparency, although the Council of State is still keeping a small possibility of derogation open by ruling that 'in principle' no derogation is possible.

It can also be noted here that potential tension exists between section 4:84 GALA and the obligation of transparency. This tension may be – and has been, to a large extent, by the Council of State – removed by limiting the possibility of derogation: in the allocation of limited public decisions there can be no special circumstances that would affect one or more interested parties disproportionately in relation to the objectives of the policy rule, i.e. the organising of a transparent allocation procedure where everyone must have an equal opportunity to be considered for the limited public right.[193]

With respect to the above, two further comments can also be made. The first concerns whether the administrative courts 'fleshing out' of section 4:84 GALA, as outlined above, is a good idea. After all, the fleshing out does seem to be an unwritten exception to GALA. The second comment relates to the more administrative question of why administrative authorities prefer to work with policy rules instead of generally binding regulations – for example in the form of 'detailed rules'.[194] Having regard to the importance of known rules – which is generally greater with generally binding regulations than with policy rules – and the limited possibilities for derogation – from both generally binding regulations and policy rules – administrative authorities should consider choosing a generally binding regulation over policy rules more often in my opinion. Although not strictly necessary, if a title is inserted for the allocation of limited public decisions, an explicit exception to section 4:84 GALA – or, instead, an obligation to enshrine the allocation rules and criteria in a generally binding regulation – could therefore be included.

Finally, it is important that the inherent power of derogation is intended for special circumstances. Not all unforeseen circumstances qualify as special circumstances. On the basis of the obligation of transparency an administrative authority must lay down the allocation criteria prior to the allocation procedure. This means that administrative authorities must have sufficient knowledge to lay down these criteria. If an administrative authority has insufficient knowledge, in the allocation of limited public decisions where innovation is

192 CBb 19 December 2007, ECLI:NL:CBB:2007:BC2460, *JB* 2008/67. In this judgment the CBb also found that an administrative authority is not at liberty, during the decision-making phase, to make changes to the policy rules. From the point of view of objectivity, transparency and legal certainty, when applying a comparative evaluation, the criteria against which the applications are being evaluated must be laid down in advance and these criteria cannot be amended during the decision-making phase – at most, they can be clarified.

193 Cf. Wolswinkel who states that the inherent power of derogation adds to the limited nature of the right (Wolswinkel, *NTB* 2014/7).

194 See e.g. CBb 1 February 2013, *AB* 2013/296, with commentary by C.J. Wolswinkel.

a selection criterion, then an administrative authority could consider a consultation beforehand – possibly on the internet – in which a draft regulation is published and everyone is invited to come up with ideas on how to flesh out the innovative subsidy criteria.[195] An alternative is to set a time-limit so that questions can be raised on the criteria set, which can then be answered in a public paper. This is comparable to the summary of additional information for 'ordinary' procurement procedures.[196] One final possibility is to include, in the allocation scheme, certain flexible options.[197] If some or all of these options are used by administrative authorities, then special, unforeseen circumstances will hardly ever arise, if at all, meaning that the importance of section 4:84 GALA will be reduced.

Recommendation
There is tension between section 4:84 GALA and the obligation of transparency. This can be resolved (i) by assuming that in limited public decision-making there are no special circumstances that would affect one or more interested parties disproportionately in relation to the objectives of the policy rule, (ii) if a separate title were to be included in GALA for the allocation of limited public decisions, including an exception to this section in it, or (iii) by not laying down allocation criteria and rules in a policy rule but include a generally binding regulation instead.

D) Supplementing incomplete applications: section 4:5 GALA

The basic tenet of the obligation of transparency is that all applicants will have the same period after publication of the tender notice (the call to compete) within which to prepare their applications. Pursuant to section 4:5 GALA, an administrative authority may decide not to consider an application if it is incomplete, provided that the applicant has been given the opportunity to supplement the application within a period set by the administrative authority.

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195 In procurement law, too, over the past few years, experience has been gained in inviting tenders for complex projects where the contracting authority itself was not in a position to specify the terms of the project beforehand and could not judge beforehand what the market had to offer. For projects of this nature, the procedure known as 'competitive dialogue' can be followed. Part of this procedure may be a market consultation.

196 Cf. CBb 21 December 2011, ECLI:NL:CBB:2011:BU9729, *AB* 2012/63, with commentary by A. Drahmann and J.M.J. van Rijn van Alkemade.

197 Parallels can be drawn here with the case law of the European Court of Justice (inter alia, EUCJ 13 April 2010, C-91/08 (Wall) and EUCJ 19 June 2008, C-454/06 (Pressetext Nachrichtenagentur)) about substantial amendments: if for certain reasons, once the decision has been made, the administrative authority wishes to be able to amend certain provisions, terms or conditions, then the administrative authority must expressly provide for the possibility of making such an alteration and its method of application in the legal regulation – or further rules based thereon – on which the allocation procedure is based.

In this situation tension may also arise between section 4:5 GALA and the obligation of transparency, but this can be avoided by 'fleshing out', in a transparent manner, section 4:5 GALA in the allocation of limited public decisions.[198]

This transparent application of section 4:5 GALA relates to: (i) restricting the type of information that may be supplemented, and (ii) setting out the way in which section 4:5 GALA will be applied beforehand. This way, offering a time-limit for rectification will conform to the obligation of transparency, and must of course be applied equally to all applicants.

With regard to the type of information that can be supplemented, both the European Court of Justice and the administrative courts have ruled that it is possible to add to an incomplete application – that was submitted on time – after the expiry of the statutory time-limit for submission, but that this only applies to a document that existed before the expiry of the time-limit for submission and to rectify obvious mistakes.[199] Only the substantive information provided by applicants before the end of the application period can therefore be included in the evaluation. The administrative authority is not obliged to enquire again about that substantive information in the review phase, but the administrative authority must – when preparing a decision – ascertain whether an application is complete, and if this proves not to be the case, give the applicant the opportunity to provide the missing information.[200]

With regard to the second aspect – setting out the way in which section 4:5 GALA will be applied beforehand – subsidy law can be used as an example. It is customary to set out in the subsidy scheme the fact that the ranking of the submitted applications will be made on the basis of *complete* applications.[201] This makes it clear that, in accordance with section 4:5 GALA, supplementing an application is possible, but that submitting an incomplete application will have negative consequences on its ranking. This will also prevent participants submitting a pro forma application as quickly as possible.[202] Supplementary to this, it is also possible to anticipate the application of this section by stipulating in the rules of procedure that incomplete applications

198 In so doing, it is necessary to bear in mind that derogation from section 4:5 GALA is only possible by law in a formal sense. Administrative authorities will therefore only be able to 'flesh out' section 4:5 GALA but not derogate from it.

199 CBb 18 November 2011, ECLI:NL:CBB:2011:BU5467. Cf. also Council of State 15 August 2007, *AB* 2008/29, with commentary by J.H.A. van der Grinten and W. den Ouden, CBb 7 July 2011, ECLI:NL:CBB:2011:BR5050 and Council of State 12 January 2005, *AB* 2005/239, with commentary by N. Verheij.

200 CBb 6 November 2013, ECLI:NL:CBB:2013:224, *AB* 2014/112, with commentary by A. Drahmann. Cf. also CBb 3 April 2001, ECLI:NL:CBB:2001:AB1115 and CBb 11 August 2010, ECLI:NL:CBB:2010:BN4730.

201 Inter alia, Article 58 of the Renewable Energy Production Incentive Scheme (*Besluit stimulering duurzame energieproductie*).

202 CBb 18 November 2010, *AB* 2011/37, with commentary by Wolswinkel. Cf. Council of State 19 January 2001, *AB* 2001/113, with commentary by N. Verheij.

can be submitted within the time-limit, but that all applicants with incomplete applications will be given the same opportunity to rectify their paperwork.[203] By offering an identical time-limit for rectification – which will be publicised beforehand to all potential applicants – the equal treatment of applicants is guaranteed, and the procedure satisfies transparency requirements.

In addition, it is important that if an applicant does not make use of the possibility of rectification, the decision may be taken not to process the application. The corollary question is then whether the missing information can still be submitted on appeal. According to case law, in the award of 'ordinary' non-limited public decisions an administrative authority, although not obliged to do so, is free to take into consideration, in its review, initially missing information that is submitted after the primary decision not to process an application. This is a discretionary power that must be subject to restrained review by the courts.[204] In my view this settled case law on section 4:5 GALA cannot be applied to limited public decision-making, since the Council of State also ruled that 'before the end of the time-limit for receipt of applications, all information relevant to that review and ranking must be submitted, and after that date any information that is essentially an amendment or addition to that application will not be taken into account. Including information that dates from after the end of the time-limit for receipt of applications is not compatible with the simultaneous review and ranking of the submitted applications, which is key to the tender system.'[205]

In the manner described above, section 4:5 GALA is applied 'transparently'. However, this is not easy to read into the section and requires sound knowledge of the case law of the administrative courts on the matter. This could be grounds for including an exception to section 4:5 GALA, if a separate title were to be included in GALA for the allocation of limited public decisions.

Recommendation

Tension exists between section 4:5 GALA and the obligation of transparency. This can be resolved (i) by applying section 4:5 GALA 'transparently' by including a regulation for it in the rules of procedure, or (ii) if a separate title were to be included in GALA for the allocation of limited public decisions, including an exception to section 4:5 in it.

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203 Cf. Council of State 8 March 2006, ECLI:NL:RVS:2006:AV3886.

204 Council of State 1 October 2008, ECLI:NL:RVS:2008:BF3868, *AB* 2009/17, with commentary by A.T. Marseille.

205 Council of State 26 September 2012, *AB* 2012/397, with commentary by A. Drahmann, ECLI:NL:RVS:2012:BX8283. Cf. also Council of State 15 July 2009, ECLI:NL:RVS:2009:BJ2654; Council of State 20 December 2006, ECLI:NL:RVS:2006:AZ4815; and Council of State 25 July 2001, *AB* 2001/339, with commentary by N. Verheij.

E) Relationship with the Dutch Government Information (Public Access) Act

Under the obligation of transparency the disclosure of information is mandatory. The Dutch Government Information (Public Access) Act (*Wet openbaarheid van bestuur*, the 'WOB Act') also governs public access to information. The WOB Act contains both an active and a passive disclosure obligation. If the regulation in the WOB Act is compared to the obligation of transparency then the following stands out.

Under the obligation of transparency active disclosure is the starting point: an administrative authority must of its own accord, prior to the allocation procedure, establish and publish all terms. This active disclosure is enshrined in section 8 of the WOB Act. Pursuant to this section an administrative authority is obliged to provide, of its own accord, information 'on its policy and the preparation and implementation thereof, whenever the provision of such information is in the interests of effective, democratic governance'. At least three differences can be cited between this active disclosure obligation in the WOB Act and the obligation of transparency. First, the regulation in the WOB Act, according to the Council of State, is primarily the responsibility of the administrative authority to which it directly applies. The WOB Act does not provide for the possibility of submitting a request for active disclosure and this duty of disclosure is therefore not enforceable.[206] This differs from the obligation of transparency, which does impose a standard on the administrative authority. If, when a limited public decision is made, the obligation of transparency has not been complied with, the administrative courts should nullify that decision. Secondly, the grounds for rejection under the WOB Act apply to both active and passive disclosure.[207] The question is how this fits in with the obligation of transparency. The importance of transparency in the allocation of limited public decisions will mean that grounds for rejection will not be readily applicable.[208] Finally, it is important that the Council of State – in the context of passive disclosure – has ruled that the WOB Act relates to the documents held by the government and does not imply any duty to process.[209] However, the obligation of transparency obliges an administrative authority – factually, at least – to establish allocation rules and criteria and to publicise these. An administrative authority cannot make do with stating that there were no criteria and that these, therefore, did not need to be publicised. Even the lack of such criteria is sufficient reason to find the decision

206 Council of State 19 December 2012, JB 2013/23, with commentary by G. Overkleeft-Verburg. See also on the subject of the instruction standard under section 8 WOB Act: Daalder 2011, p. 227.

207 Inter alia, Council of State 15 December 2010, *JB* 2011/41, with commentary by G. Overkleeft-Verburg.

208 See also in this context E. Pietermaat and J. Muller, *'De Wob in het aanbestedingsrecht'*, *TA* 2010, pp. 341-357.

209 Council of State 23 July 2014, ECLI:NL:RVS:2014:2770. See also Daalder 2011, p. 139.

to be contrary to the principle of equal treatment and the ensuing obligation of transparency.

Under the obligation of transparency the emphasis lies, in contrast to the WOB Act, in active disclosure. Passive disclosure plays a role, in particular, if the 'loser' of an allocation procedure tries to obtain information about the application and evaluation of a competitor. In derogation from the WOB Act[210] the Public Procurement Act 2012 contains a regulation that states that (i) a contracting authority shall not disclose information provided to it in confidence by an operator, and (ii) a contracting authority shall not disclose any information if that information can be used to distort competition.[211] Beyond the scope of the Public Procurement Act 2012, however, assessment for compatibility with the WOB Act will be needed. This is not without its problems, as is evidenced by a judgment of the CBb. This judgment related to the drawing of lots for production rights under the Dutch Fertilisers Act. After the lots had been drawn the administrative authority had published the lot numbers and the associated application numbers, but not the number of production rights for which an exemption had been awarded to each company. The appellant argued that it was necessary to obtain this information in order to be able to verify whether the ceiling had been reached and its application was rejected – rightly – for that reason. The CBb sufficed by finding that there was no reason to doubt the fact that the ceiling had actually been reached, and that the appellant had not submitted any arguments to the contrary. Wolswinkel rightly notes in his annotation that the point is accurate: the appellant cannot submit these arguments without further information. Part of the objective of the obligation of transparency is to facilitate checks on the decision-making process, so that there can be a review of whether the allocation procedure was carried out impartially.[212]

In summary, it can be stated that the obligation of transparency is insufficiently guaranteed by the current regulation in the WOB Act. The added value of the obligation of transparency is embodied in the fact that the obligation of transparency, in contrast to the disclosure regulation in the WOB Act, is an enforceable obligation to actively draw up and publicise information regarding the allocation of limited public decisions.

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210 Council of State 28 August 2013, *JB* 2013/200, with commentary by J.H. Keinemans. See also Hoegee-Kjellevold, *Gst*. 2014/64.

211 Section 2.57 of the Public Procurement Act 2012

212 CBb 30 December 2009, *AB* 2010/265, with commentary by C.J. Wolswinkel. For public access to information in a subsidy tender see: CBb (Provisional relief) 29 July 2010, *AB* 2010/303, with commentary by J.M.J. van Rijn van Alkemade. In these proceedings the petitioners argued that the administrative authority would also be obliged to provide this information under the principle of transparency. The provisional relief judge only ruled on whether one of grounds for rejection applied and did not discuss the argument on the principle of transparency. In the end, the petition was granted.

1.5.3 From the case law of the administrative courts to the obligation of transparency under EU law

The administrative courts have now delivered numerous judgments on limited public decision-making procedures. These are often – fortunately – completely in line with the obligation of transparency and have already been set out in the previous paragraph. If compliance with transparency is inadequate, the administrative courts often consider this to be contrary to the standards of due care under sections 3:2 and 3:4 GALA or the principle of legal certainty. According to settled case law from the CBb, strict requirements must be imposed on decision-making relating to the award of a limited public exemptions, inter alia, for reasons of legal certainty.[213] These strict requirements often show striking similarities with the obligation of transparency. I will limit myself to discussing a few judgments that could be said not to lead to transparent decision-making, or at least not as transparent as it could be. What is important, however, is that case law is always casuistic and that the scope of the proceedings is furthermore dependent on the grounds of appeal submitted.

First, I will refer to a number of judgments of the CBb that relate to the sufficient degree of advertising, the objective of which is to guarantee the obligation of transparency. The CBb ruled that, if for the award of a limited public licence, a 'first come, first served' system is applied to the applications, potential applicants ought to be aware whether the licence is, or will become, available and what procedure will be followed. This is completely in line with the obligation of transparency. However, the CBb went on to consider that the appellant – a potential applicant for a limited public licence – knew or could have known that the validity of the previously awarded licence would expire on 31 December 2007 and the procedure regarding the award of the licence was clear.[214] This actually imposes a duty of investigation on the potential applicants, even though the very starting point of the obligation of transparency is the active duty of publication on the part of the administrative authority. Even where allocation takes place in order of receipt of the applications, a 'call for applications' should be used. Furthermore, the CBb ruled that

213 Inter alia, CBb 5 December 2012, ECLI:NL:CBB:2012:1, *AB* 2013/293, with commentary by C.J. Wolswinkel, CBb 24 August 2012, ECLI:NL:CBB:2012:BX6540, *AB* 2012/373, with commentary by C.J. Wolswinkel and *JB* 2012/250, with commentary by L.J. Wildeboer, CBb 15 May 2012, ECLI:NL:CBB:2012:BW6630, *AB* 2012/372, with commentary by C.J. Wolswinkel and *Gst*. 2012/96, with commentary by W.P. Adriaanse, CBb 7 December 2011, ECLI:NL:CBB:2011:BU8509, *AB* 2012/55, with commentary by C.J. Wolswinkel, Provisional relief CBb 31 March 2010, ECLI:NL:CBB:2010:BL9683 and CBb 8 January 2010, ECLI:NL:CBB:2010:BL3125, *AB* 2010/73, with commentary by I. Sewandono and *JB* 2010/75, with commentary by C.J. Wolswinkel, Provisional relief CBb 22 April 2011, ECLI:NL:CBB:2011:BQ3306, *AB* 2011/179, with commentary by C.J. Wolswinkel.

214 CBb 28 April 2010, *AB* 2010/186, with commentary by C.J. Wolswinkel.

in the case of a limited public decision 'other applicants – who are known to be interested in the available exemption because they also submitted an application – must in principle be given the opportunity to compete for the exemption'.[215] In essence the ruling was in line with the obligation of transparency. However, in my view, the CBb could have gone even further. Apart from the fact that the CBb considers exceptions possible – 'in principle' – the CBb appears – by using the phrase in the middle – to deem it important that the administrative authority was aware of there being other interested parties. However, in my view, this knowledge is not necessary. Pursuant to the obligation of transparency an administrative authority should actively publicise in a way that can reach all the potential applicants, even unknown ones. In addition, the CBb ruled that if rules or policy rules do not make provision for an allocation procedure, allocation on a 'first come, first served' basis is not unreasonable.[216] In my view, an implicit choice like this, in favour of a particular allocation method, is insufficiently transparent. The way in which this allocation will take place (the allocation procedure) must be established and publicised beforehand. A final point for consideration from the case law judgment is the role of documents that are drawn up supplementary to the allocation scheme. For example, advisory committees often draw up evaluation guidelines, on the basis of which they evaluate the applications. If these guidelines give an additional explanation of the selection criteria to be used then, in my opinion, these documents should be disclosed pursuant to the obligation of transparency. However, the Council of State ruled that documents of this nature are not relevant to the case, so they did not even need to be published after the event, let alone beforehand.[217] In 2013 the Council of State also ruled that publicising the policy rules with the evaluation criteria is sufficient; there is no need to include the 'evaluation patterns' that sets out the basis upon which the applications are evaluated for each evaluation aspect, provided the publicised evaluation criteria are clearly described and can be sufficiently clear to the applicant.[218] With all these judgments it can be stated that the administrative authority did not prioritise the interests of all potential applicants in having an equal opportunity to be considered for the limited public decision. The administrative authority did not publish information – or

215 CBb 15 May 2012, ECLI:NL:CBB:2012:BW6630, *AB* 2012/372, with commentary by C.J. Wolswinkel. See also CBB 24 August 2012, ECLI:NL:CBB:2012:BX6540, *AB* 2012/373, with commentary by C.J. Wolswinkel and *JB* 2012/250, with commentary by L.J. Wildeboer and CBb 6 June 2012, *AB* 2012/374, with commentary by C.J. Wolswinkel.

216 CBb 7 December 2011, ECLI:NL:CBB:2011:BU8507 and ECLI:NL:CBB:2011:BU8509, *AB* 2012/55, with commentary by C.J. Wolswinkel. See also CBb (Provisional relief) 22 April 2011, ECLI:NL:CBB:2011:BQ3306, *AB* 2011/179, with commentary by C.J. Wolswinkel. Cf. also Council of State 25 September 2013, *AB* 2013/385, with commentary by A. Drahmann.

217 Council of State 10 December 2008, ECLI:NL:RVS:2008:BG6429.

218 Council of State 24 April 2013, ECLI:NL:RVS:2013:BZ8429, *AB* 2013/327, with commentary by C.J. Wolswinkel.

at least not enough – about the allocation, the procedure or the criteria. In my view, the administrative courts should therefore have overturned the decision. Although the party to the proceedings was obviously not disadvantaged by the restricted public access, since it had time to resort to legal means – meaning that an appeal against this may come across as slightly formalistic – the administrative courts when examining this ground of appeal should take the interests of the absent, potential applicant, into account in their ruling.

It has already been pointed out above that the objective of the obligation of transparency is for all applicants to have an equal opportunity to be considered for the limited public decision. From this point of view, it is difficult to conceive of the start date for submission of applications being in the past. However, the CBb seems to have no objection to a reference date being in the past, in order to determine who submitted their application first.[219] As a corollary to this is, it is important that the allocation procedure and criteria have to be established prior to commencement of the allocation procedure and cannot be amended during the procedure. This means that decisions on objections must be taken *ex tunc*. The Council of State held, with regard to the relevant reference date, that the applicable law is the law as it applied on the last day on which the applications could be submitted.[220] Transparency would be improved even further if this reference date was not the last day, but the first day on which the applications could be submitted. If the final day is taken as the starting point, then the burden of proof must rest on the administrative authority to show that all applicants and potential applicants could take note of the amendment, so that they were able to adapt their application accordingly.

Another point for consideration is that the case law of the European Court of Justice reveals that the allocation criteria must be publicised.[221] The relative weighting of those criteria does not need to be publicised beforehand, but must be established before the evaluation of the submitted applications.[222] However, the CBb ruled that a procedure where advisory committees only drew up the scoring once they had received all the applications, and then went on to apply that points system, is not contrary to GALA.[223] This procedure, where

219 CBb 7 December 2011, ECLI:NL:CBB:2011:BU8507 and ECLI:NL:CBB:2011:BU8509, *AB* 2012/55, with commentary by C.J. Wolswinkel. Cf. also CBb 13 December 2012, ECLI:NL:CBB:2012:BZ2031.

220 Council of State 29 October 2008, ECLI:NL:RVS:2008:BG1839, *JB* 2009/6, with commentary by M.A.Heldeweg and Council of State 6 June 2012, ECLI:NL:RVS:2012:BW7592, *AB* 2013/73, with commentary by C.J. Wolswinkel. Otherwise: Council of State 6 April 2011, ECLI:NL:RVS:2011:BQ0297 and ECLI:NL:RVS:2011:BQ0298.

221 Inter alia, EUCJ 25 April 1996, C-87/94 (Wallonia buses) and EUCJ 24 January 2008, C-532/06 (Lianakis and others).

222 EUCJ 18 November 2010, C-226/09, *NJ* 2011/87.

223 CBb 21 December 2011, *AB* 2012/63, with commentary by A. Drahmann and J.M.J. van Rijn van Alkemade.

the points system is developed only after receipt and initial study of the applications, is contrary to the obligation of transparency.

The judgments of the administrative courts are often completely in line with the obligation of transparency. If compliance with transparency is inadequate, the administrative courts often consider this to be contrary to the standards of due care under sections 3:2 and 3:4 GALA or the principle of legal certainty. Nevertheless, the following *recommendations* can be drawn up in order to improve transparency in the allocation of limited public decisions:

- According to settled case law from the CBb, strict requirements must be imposed on decision-making relating to the award of a limited public exemption, inter alia, for reasons of legal certainty.[224] These strict requirements often show striking similarities with the obligation of transparency. It is recommended that the Council of State adopt this line from case law, where it is desirable for the obligation of transparency or the principle of equal opportunities to be laid down explicitly. I will consider this in more detail in the next paragraph.
- It is recommended that the administrative courts examine whether the administrative authority has displayed a sufficient degree of advertising. This means that an active duty of publication rests on the administrative authority, and there is no duty of investigation on potential applicants. The information must be generally publicised. In addition, an implicit choice in favour of an allocation method is insufficiently transparent. The above applies to all allocation systems, even a system of allocation in order of receipt of applications.
- It is recommended that evaluation guidelines or evaluation patterns, used by advisory committees to give an additional explanation of the selection criteria, be disclosed.
- It is recommended that the administrative courts check that the start date for the submission of applications is not in the past. This also applies to all allocation systems, even a system of allocation in order of receipt of applications.
- It is recommended that the administrative courts check that the allocation procedure and allocation criteria were established prior to the start of the allocation procedure and were not amended during this time. This means, with regard to the relevant reference date, that the applicable law is the law as it applied on the first day on which the applications could be submitted.[225]

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224 Inter alia, CBb 5 December 2012, ECLI:NL:CBB:2012:1, *AB* 2013/293, with commentary by C.J. Wolswinkel.

225 If the last day is taken as a starting point, then the administrative authority should bear the burden of proving that all applicants and potential applicants have taken note of the amendment so that they could adjust their applications accordingly.

1.5.4 Interlude: safeguarding of legal rights

The safeguarding of legal rights in the event of a breach of the obligation of transparency in the allocation of limited public decisions is not part of this research. To this end, I refer to the dissertation of Van Rijn van Alkemade, which will be published at a later date. Nevertheless, I would like to mention at this juncture a number of possible sticking points that hamper the effective safeguarding of legal rights. The reason for this is that in Dutch administrative law there is a tendency – which in itself is good – to strive for final dispute resolution. The question then is, what are the consequences of a breach of the obligation of transparency?

Since 1 January 2013 a decision may be upheld, despite breaching written or unwritten rules of law or general legal principles, if a reasonable case has been made that this has not adversely affected the interested parties.[226] It is in the allocation of limited public rights, in particular, that the obligation of transparency prioritises the interests of potential applicants. It is these potential applicants who must be given equal opportunity to be considered for the limited public decision. The corollary to this is that, if there is a flagrant breach of the obligation of transparency, an allocation procedure must be organised again from scratch. An example of such a breach is where an insufficient degree of advertising has been displayed. From the case law of the European Court of Justice and the civil courts in procurement disputes, it appears that it is sometimes possible to rectify the fault, for example by supplementing the statement of reasons. Furthermore, it is possible to offer substitute damages.[227] The Council of State also ruled that if a limited public decision or subsidy decision is wrongly rejected before going on to be awarded following a judgment of the District Court, the administrative authority is obliged to reinstate the applicant, as far as possible, to the position in which it would have been if the administrative authority had made the right decision in law at the time of the primary decision.[228]

It is inherent to the nature of a limited public decision that they are often the subject of legal action, since the consequences – economic and otherwise – are, after all, significant for the 'loser' of the allocation procedure. The question then is whether there are ways of reducing the number of actions against decisions, both positive and negative.

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226 Section 6:22 GALA.

227 EUCJ 13 April 2010, C-91/08 (Wall AG). See, however, on the complications in such proceedings for damages: Van Rijn van Alkemade, O&A 2011/37.

228 A reasonable application of this rule means that, in this case, the date on which no investments could be made should be taken as, not the day on which the subsidy was ultimately awarded, but the day on which it should have been awarded (Council of State 11 July 2012, ECLI:NL:RVS:2012:BX1076, *AB* 2013/64, with commentary by A.J. Metselaar and J.M.J. van Rijn van Alkemade).

It is interesting, in that regard, that a provision for well-founded objection and appeal procedures for subsidy law can be found in section 4:25(3) GALA. This section provides that if a decision on a subsidy is not made within the applicable time limit or is given in an objection or appeal procedure or by way of executing a judicial decision, the requirement to refuse a subsidy if providing the subsidy would cause the subsidy ceiling to be exceeded, applies only if it also applied at the time when the decision was made or should have been made at first instance. The advantage of this paragraph is that an applicant who is refused the subsidy does not need to use any means of redress against subsidies provided to third parties. The fact that these subsidies provided acquire formal legal effect does not mean that his objection can no longer be upheld and that the subsidy can still be provided. The only time the situation differs is if, on the date of the primary decision, the subsidy ceiling had already been reached. In that case it may be appealing to use means of redress against subsidies provided to a 'competing' applicant.[229] After all, if this subsidy decision is cancelled, then there may again be means by which new applications may be granted.[230] Creating an additional option for well-founded appeals has the drawback that it does not offer any real judicial remedy. This is because an additional subsidy has simply been granted but without a previous subsidy – provided erroneously but irrevocably – being withdrawn.[231] These drawbacks can be prevented by creating a concentration of all the decisions taken in the context of a limited public right – i.e. in a single decision or bundle of decisions – or by regarding such decisions as indivisible.[232] Another option is to create a general authority to revoke any irrevocable limited public decision that later proves to have been granted erroneously, i.e. contrary to the obligation of transparency.

In the foregoing, it is assumed that a party has taken note of the decision-making process, so that it was able to use this means of redress and do so within the time-limit. This will be the case, for example, if a refusal decision goes against it. However, it is also possible that – wrongly – no publication at all took place. In such a case it is highly likely that the decision has acquired formal legal effect, even though the obligation of transparency has obviously been breached. What can an economic operator do in that situation? To my

229 A point for consideration is that the 'competitor' must be able to be classified as an interested party within the meaning of section 1:2 GALA (inter alia, Council of State 29 May 2013, ECLI:NL:RVS:2013:CA1378, *AB* 2013/264, with commentary by W. den Ouden).

230 Cf. Council of State 24 December 2013, *AB* 2014/59, with commentary by A. Drahmann, on the lack of legal interest in bringing proceedings because another mooring permit was irrevocable.

231 See on this subject my annotation to CBb 6 November 2013, ECLI:NL:CBB:2013:224, *AB* 2014/112, with commentary by A. Drahmann.

232 Council of State 29 June 2005, *AB* 2005/365, with commentary by R.J.G.M. Widdershoven, and *Gst*. 2006/6, issue 7243, with commentary by L.M. Koenraad, CBb 8 January 2010, *JB* 2010/75, with commentary by C.J. Wolswinkel and Council of State 24 December 2013, *AB* 2014/59, with commentary by A. Drahmann.

mind, there are two conceivable options. The first is when there has been an excusable failure to meet the deadline (section 6:11 GALA). In that case the party must – within two weeks of becoming aware of the decision-making process – use means of redress under administrative law. The second option is that the lack of publication is regarded as an unlawful factual act (omission), over which the civil courts have jurisdiction. The economic operator would, in that case, have to summons the legal entity to which the administrative authority belongs.[233]

In addition, I would refer in this regard to the fact that in the context of the allocation procedure a number of decisions are often taken.[234] There are no legal rights of appeal against generally binding regulations and preparatory acts within the meaning of section 6:3 GALA. This could mean that objections to an unclear selection criterion, for example, can only be submitted to the administrative courts at a late stage, i.e. after the limited public decisions are provided. This is undesirable, however, it can be solved in several ways. For example, it is also possible to make previous decisions appealable.[235] The second option is to introduce the concept of 'forfeiture of rights' or 'duty of complaint' into Dutch administrative law as well.[236] In the Grossmann judgment, the European Court of Justice ruled that a person can be regarded, once a public contract has been awarded, as having lost his right of access to the review procedures, if he did not participate in the award procedure for that contract on the grounds that he was not in a position to supply all the services for which bids were invited because there were allegedly discriminatory specifications in the documents relating to the invitation to tender, but he did not seek review of those specifications before the contract was awarded. That ruling is connected to the objectives of speed and effectiveness in the procurement directives: waiting for an award decision before challenging it on the grounds of the discriminatory nature of the specifications, in so far as it may

233 See also Huisman & Van Ommeren, *NTB* 2014/6.

234 Van Ommeren distinguishes between the following five decision moments: (i) ceiling and procedural decision, (ii) implementing rules: the regulations, (iii) admission/selection, (iv) award, and (v) granting (Van Ommeren 2004, p. 23ff.).

235 See for example CBb 24 May 2012, *AB* 2013/66, with commentary by C.J. Wolswinkel and CBb 8 May 2014, ECLI:NL:CBB:2014:308. Widdershoven and others emphasise that, given the fact that after the interlocutory decision the follow-up procedure is continued, it is necessary for the legitimacy of the decision to be able to be submitted to the administrative courts in the short term. Given the very restrained examination by the Provisional relief judge and furthermore the provisional nature of the judgment in the case of provisional relief pending the objection procedure, the objection procedure should also be bypassed and direct appeal should be possible (Widdershoven and others 2007, pp. 205-206). Van Ommeren is right in thinking that having a large number of appealable decisions is not a good idea from the point of view of procedural economics. He suggests that only the ceiling decision and the granting decision are made appealable, but not the intervening decisions (Van Ommeren 2004).

236 Cf. CBb 10 July 2014, ECLI:NL:CBB:2014:244, *AB* 2014/336, with commentary by A. Drahmann.

delay, without any objective reason, the commencement of review procedures impairs the effective implementation of the Directives.[237]

Furthermore, it is desirable for the applicants that clarity is created as soon as possible on the usefulness of the limited public decision that has been granted. To facilitate this, one might choose to bypass the objection procedure and make a direct appeal possible. Apart from that, in my opinion. GALA contains enough procedural means to expedite a procedure, such as a request for preliminary relief – with or without short-circuit – the expedited procedure[238] and the administrative loop.[239]

Finally, the enforcement of limited public decisions is a point for consideration. I have already discussed above the possibility of attaching an obligation of execution to limited public decisions. If this obligation of execution is imposed, then enforcement action can be taken against non-execution. If there is no obligation of execution, then often the limited public decision can be revoked.[240] A competitor can therefore also submit a request to an administrative authority for revendication, the revoking of a limited public decision or for enforcement, in the hope that the competitive relationships will be restored as a result.[241]

1.5.5 Conclusion

On the basis of the foregoing, the questions, to what extent the requirements of transparency are already guaranteed in general administrative law and to what extent elements from GALA are at odds with the obligation of transparency, can be answered.

From the case law of the administrative courts it appears that transparency in the allocation of limited public rights is guaranteed up to a certain point. However, there is room for improvement on a number of points. These points for improvement relate to both GALA – and its application – and the case law of the administrative courts. These points for improvement have been described as specifically as possible above. The most important points for improvement lead to these recommendations:

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237 EUCJ of 12 February 2004, C-230/02 and DSC 26 June 2009, *NJ* 2009/306.

238 Section 8:52 GALA.

239 Van Rijn Van Alkemade argues in favour of assigning suspensive effect to an objection or appeal against a limited public licence, in combination with an obligation on the part of the administrative courts to give an expedited judgment in the dispute within a certain time-limit because this offers perspective on a more balanced safeguarding of legal rights, where the interests of speed, diligence and legal certainty are in better balance with each other (Van Rijn Van Alkemade, *JBplus* 2014, p. 40-53).

240 For subsidy payments, recovery is possible under section 4:57 GALA.

241 It follows from Council of State 4 May 2011, ECLI:NL:RVS:2011:BQ3428, *AB* 2011/317, with commentary by W. den Ouden, that a competitor is an interested party in a procedure to recover a subsidy.

Recommendations for the legislature

- It is recommended that, supplementary to the provision on the publication of decisions in section 3:40 GALA et seq., an active general duty of publication for limited public decisions be introduced. On the basis of this, administrative authorities would be obliged to generally publicise the start of a procedure in which a limited public decision will be granted. The publication would have to mention the time-limit for submission of applications and where further information on the allocation procedure and rules can be found. This active general duty of publication on the part of administrative authorities will guarantee that all potentially interested parties can take note of the procedure and take part in it.
- Administrative authorities should be obliged to publicise their decisions – and the allocation of their limited public decisions – centrally on a single website – cf. TenderNed. Although this is not strictly necessary for a sufficient degree of advertising, in my opinion it would considerably improve transparency.
- There is tension between section 4:84 GALA and the obligation of transparency. This can be resolved by including an exception to this section in GALA, if a separate title were to be included in GALA for the allocation of limited public decisions.
- There is tension between section 4:5 GALA and the obligation of transparency. This can be resolved by including in GALA an exception to section 4:5 GALA, if a separate title were to be included in GALA for the allocation of limited public decisions.

Recommendations for administrative authorities

- There is tension between section 4:84 GALA and the obligation of transparency. This can be resolved by using a generally binding regulation and not by not laying down allocation criteria and rules in a policy rule.
- It is recommended that administrative authorities comply with an active general duty of publication.
- There is tension between section 4:5 GALA and the obligation of transparency. This can be resolved by applying section 4:5 GALA 'transparently' by including a provision for it in the rules of procedure.

Recommendations for the administrative courts

- Administrative authorities must comply with a general duty of publication. The administrative courts could base this obligation on section 3:42 GALA, possibly in combination with the principle of equality or the obligation of transparency.
- There is tension between section 4:84 GALA and the obligation of transparency. This can be resolved by assuming that in limited public de-

cision-making there are never special circumstances that would affect one or more interested parties disproportionately in relation to the objectives of the policy rule.

- According to settled case law from the CBb, strict requirements must be imposed on decision-making relating to the award of a limited public exemption, inter alia, for reasons of legal certainty.[242] These strict requirements often show striking similarities with the obligation of transparency. It is recommended that the Council of State adopt this line from case law, where it is desirable for the obligation of transparency or the principle of equal opportunities to be laid down explicitly. I will consider this in more detail in the next paragraph.
- An administrative authority must display a sufficient degree of advertising. This means that an active duty of publication rests on the administrative authority, and there is no duty of investigation on potential applicants. The information must be generally publicised. In addition, an implicit choice in favour of an allocation method is insufficiently transparent. The above applies to all allocation systems, even a system of allocation in order of receipt of applications.
- It is recommended that any evaluation guidelines or evaluation patterns used by the advisory committees to give an additional explanation of the selection criteria, be disclosed.
- The start date for submission of applications cannot be in the past. This equally applies to all allocation systems, even a system of allocation in order of receipt of applications.
- The allocation procedure and criteria must be established prior to the start of the allocation procedure and cannot be amended during the procedure. This means, with regard to the relevant reference date, that the applicable law is the law as it applied on the first day on which the applications could be submitted.[243]

242 Inter alia, CBb 5 December 2012, ECLI:NL:CBB:2012:1, *AB* 2013/293, with commentary by C.J. Wolswinkel.

243 If the last day is taken as a starting point, then the administrative authority should bear the burden of proving that all applicants and potential applicants have taken note of the amendment so that they could adjust their applications accordingly.

1.6 SUB-QUESTION 4

Insofar as the requirements of transparency are, at present, insufficiently guaranteed in Dutch general administrative law and/or there are elements from GALA that are at odds with the obligation of transparency, how can these requirements still be introduced and guaranteed in Dutch administrative law?

This sub-question is specifically answered in the article/chapter entitled 'How can obligations of transparency be introduced into Dutch administrative law in the allocation of limited public decisions?' (Chapter 11 of this book).[244]

When answering the previous sub-question it was concluded that many transparency requirements are already guaranteed in Dutch administrative law or via general principles of proper administration. Nevertheless, a number of recommendations were also made to improve transparency in the allocation of limited public decisions. In order to be able to achieve these recommendations there are three conceivable options, namely:

i) the obligation of transparency as part of acknowledged general principles of proper administration;
ii) recognition of the obligation of transparency as an independent principle; and/or
iii) codification of the obligation of transparency – or elements thereof – in GALA.

The three options will be elaborated upon, below.

1.6.1 The obligation of transparency as part of acknowledged general principles of proper administration

From case law research, it appears that administrative courts are already assessing compatibility with the requirements of transparency, via the principle of impartiality,[245] the formal principle of legal certainty,[246] the preclusion

244 Dutch title: *Hoe kunnen transparantieverplichtingen worden geïntroduceerd in het Nederlandse bestuursrecht bij de verdeling van schaarse besluiten?*

245 Inter alia, Council of State 6 June 2012, ECLI:NL:RVS:2012:BW7592, *AB* 2013/73, with commentary by C.J. Wolswinkel and Council of State 24 March 2010, *JB* 2010/119 and *AB* 2010/137, with commentary by W. den Ouden.

246 CBb 7 December 2011, ECLI:NL:CBB:2011:BU8507 and ECLI:NL:CBB:2011:BU8509, *AB* 2012/55, with commentary by C.J. Wolswinkel, CBb (Provisional relief) 22 April 2011, ECLI:NL:CBB:2011:BQ3306, *AB* 2011/179, with commentary by C.J. Wolswinkel, CBb 13 December 2012, ECLI:NL:CBB:2012:BZ2031, CBb 8 January 2010, ECLI:NL:CBB:2010:BL3125, *AB* 2010/73, with commentary by I. Sewandono and *JB* 2010/75, with commentary by C.J. Wolswinkel and Council of State 6 April 2011, ECLI:NL:RVS:2011:BQ0297 and ECLI:NL:RVS:2011:BQ0298.

of arbitrariness and the material principle of due care,[247] the formal principle of due care,[248] and the obligation to state reasons.[249] This reveals that, through a combination of these various principles, the transparency of limited public decision-making is largely guaranteed. Insofar as the above paragraphs show that certain transparency requirements in other aspects are not yet guaranteed, they could also be introduced via these principles by a change in case law. However, the question is whether fragmentation of transparency requirements across various principles – which is actually the status quo – is a good idea.

What stands out is that the principle of equality is not used by the administrative courts as grounds to examine limited public decisions for compatibility with the requirements of transparency, even though the European Court of Justice often refers to the principle of equal treatment and the obligation of transparency in one breath, inter alia, by ruling that the obligation of transparency ensues from this principle of equal treatment.[250] This may be due to a difference between the purport of the European principle of equal treatment and the national principle of equality. In one principle the question is whether *potential applicants may* be adversely affected, while in the other one the question looks at whether, in a specific case, there is any *actual detriment* to one party compared to another.

What is interesting in this regard is the judgment from the CBb in which the CBb, in the context of a subsidy tender, considered that it endorsed the administrative authority's view 'that, *from the point of view of equal treatment*, only the substantive information provided by applicants before the end of the time-limit for submission of applications can be included in the evaluation.'[251] In this case, supplementary information was therefore, rightly, excluded from the evaluation. It is also unclear how the CBb would rule *had* it been included: would the 'principle of equality' – in the sense of the principle of equal treatment – have been breached as a result?

By means of a slight modification to the Dutch principle of equality the obligation of transparency can act as a means of creating equal opportunities and thus ensuring fair competition. Such an interpretation is in line with the case law of the European Court of Justice, where it is assumed that the over-

247 CBb 15 May 2012, ECLI:NL:CBB:2012:BW6630, *AB* 2012/372, with commentary by C.J. Wolswinkel, CBb 6 June 2012, *AB* 2012/374, with commentary by C.J. Wolswinkel and CBb 24 August 2012, ECLI:NL:CBB:2012:BX6540, *AB* 2012/373, with commentary by C.J. Wolswinkel and *JB* 2012/250, with commentary by L.J. Wildeboer.

248 CBb 24 August 2012, ECLI:NL:CBB:2012:BX6540, *AB* 2012/373, with commentary by C.J. Wolswinkel and *JB* 2012/250, with commentary by L.J. Wildeboer and Council of State 22 February 2012, ECLI:NL:RVS:2012:BV6519.

249 Council of State 8 September 2004, ECLI:NL:RVS:2004:AQ9962, *AB* 2005/107, with commentary by F.R. Vermeer.

250 See also Van Ommeren 2011a, p. 256.

251 CBb 6 November 2013, *AB* 2014/112, with commentary by A. Drahmann.

arching objective of the obligation of transparency is to facilitate fair competition. Treating all potential applicants equally is, according to the European Court of Justice, necessary in order be able to achieve real competition.[252] The obligation of transparency could be seen as a *means* to reach that objective and thus as a *sub*-principle of the principle of equality.[253]

With that, it is important to note that the obligation of transparency is – almost entirely – a 'formal' obligation. The obligation of transparency only imposes requirements on the way in which the allocation procedure should be designed. In that sense, then, a distinction can be drawn between a 'formal principle of equality', where an allocation procedure must be designed in such a way that all potential applicants must be given an equal opportunity to be considered for the limited public right, and a 'material principle of equality', where the question is whether a right awarded to one should also be awarded to another.

This slight modification to the principle of equality does carry a risk: although the obligation of transparency serves to achieve equality, the specific obligations ensuing from it derogate in terms of their content from the current principle of equality. This adversely affects whether it is possible for those concerned to be aware of the obligation of transparency, so that it is uncertain whether the obligation of transparency can emerge clearly enough through the principle of equality. However, this risk also applies to the obligation of transparency as part of any other principle of proper administration and could only be prevented through the recognition of a principle of transparency or its codification (which will be addressed in the following paragraphs).

In addition, one could ask whether this approach is too theoretical and too far removed from daily administrative law practice. The ground for annulment used most often by the administrative courts is the principle of due care. A breach of the obligation of transparency is therefore seen, in practice, as a lack of due care on the part of the administrative authority. Therefore, it could also be stated that the principle of due care might be a better principle to use as the basis for the obligation of transparency. However, in that case the special nature of limited public rights would be, and would remain, underexposed – wrongly, in my opinion. When answering the previous subquestion I put forward a number of specific examples of allocation procedures that were not conducted transparently, and where the administrative courts did not annul the limited public decisions. One explanation for this could be that the administrative courts are still failing to identify or recognise the special

252 Cf. EUCJ 10 October 2013, C-336/12 (Manova) and also EUCJ 18 December 2007, C-220/06, *NJ* 2008/281 (Correos).

253 Van Wijk/Konijnenbelt & Van Male 2014 (Chapter 8, §3) also state that in the allocation of limited public rights everything revolves around equal opportunities and that, for that reason, a great deal of importance is attached to the transparency of the entire selection process – from announcement up to and including award.

nature of limited public decision-making sufficiently, by aligning with the standards of due care under sections 3:2 and 3:4 GALA. As stated, the obligation of transparency serves three objectives, including offering equal opportunities to potential applicants to be able to actually achieve real competition. Admittedly, it is possible to achieve this by imposing special standards of due care on administrative authorities, but in my view it is better to highlight the ratio of the obligation of transparency in the allocation of limited public rights more effectively by means of the formal principle of equality.

According to settled case law from the CBb, strict requirements must be imposed on decision-making relating to the award of limited public rights.[254] In this respect, the standpoint of equal opportunities for applicants is not mentioned as a basis for these strict requirements. Identifying the formal principle of equality – or principle of equal opportunities – as a fundamental principle underlying the allocation of limited public decisions may ensure that the special nature of limited public decisions is highlighted more effectively. As a corollary to this the obligation of transparency would then be introduced into Dutch administrative law, in the allocation of limited public decisions, as part of this formal principle of equality.

1.6.2 Recognition of the principle of transparency as an independent principle

The obligation of transparency could also be introduced into Dutch administrative law by recognising it as an independent general principle of proper administration. The principle of transparency constitutes a concretisation of how a procedure, in which limited public decisions are allocated, must be designed in order to guarantee equal opportunities for all potential applicants.

However, in the administrative courts there appears to be 'some trepidation' about referring to the principle of transparency as such.[255] Given the considerable number of principles of proper administration that have already

254 Inter alia, CBb 5 December 2012, ECLI:NL:CBB:2012:1, *AB* 2013/293, with commentary by C.J. Wolswinkel, CBb 24 August 2012, ECLI:NL:CBB:2012:BX6540, *AB* 2012/373, with commentary by C.J. Wolswinkel and *JB* 2012/250, with commentary by L.J. Wildeboer, CBb 15 May 2012, ECLI:NL:CBB:2012:BW6630, *AB* 2012/372, with commentary by C.J. Wolswinkel and *Gst*. 2012/96, with commentary by W.P. Adriaanse, CBb 7 December 2011, ECLI:NL:CBB:2011:BU8509, *AB* 2012/55, with commentary by C.J. Wolswinkel, CBb (Provisional relief) 31 March 2010, ECLI:NL:CBB:2010:BL9683 and CBb 8 January 2010, ECLI:NL:CBB:2010:BL3125, *AB* 2010/73, with commentary by I. Sewandono and *JB* 2010/75, with commentary by C.J. Wolswinkel, CBb (Provisional relief) 22 April 2011, ECLI:NL:CBB:2011:BQ3306, *AB* 2011/179, with commentary by C.J. Wolswinkel.

255 Cf. Widdershoven, *JBplus* 2012, pp. 195-213, in particular pp. 203-204. In Van Wijk/Konijnenbelt & Van Male 2014 (Chapter 7, §2) the principle of transparency is included for the first time in the summary of general principles of proper administration, where it was noted that the number of judgments that assessed directly for compatibility with the requirement of transparency is still relatively low.

been distinguished, the question of whether yet another principle is really necessary or whether the principles mentioned in the previous paragraph will suffice, is justified.

However, there are a number of arguments for recognising the obligation of transparency as an independent principle – instead of, for example, via the principle of equality. The principle of transparency seems to have its own meaning that goes further than the principle of equality. First, the principle of transparency imposes independent requirements concerning transparency and clarity of the document in which the allocation rules and criteria are set out.[256] Secondly, transparency takes precedence over the principle of equality: without transparency, verifying compliance with the principle of equality is not possible. Thirdly, the principle of transparency serves a broader objective, i.e. the preclusion of any risk of favouritism and arbitrariness by the competent authority.[257] Fourthly, in situations where EU law applies, the principle of transparency has an independent effect, separate from the principle of equality because – irrespective of who is adversely affected by the lack of transparency – the effect is that European freedom of movement is impeded.[258] Recognition of the principle of transparency would also fit in with a tendency – which is being alluded to – towards *distributive* justice as a function of general administrative law.[259] The various objectives that the principle of transparency aims to promote all have this principle as a starting point. Finally, the major advantage of recognising the principle of transparency as an independent principle – instead of using existing principles as a vehicle for transparency requirements – is clarity. If this principle is independent the connection between the various obligations can be articulated,[260] creating a new – integrated – perspective that can develop its own dynamics.[261]

1.6.3 Codification of the obligation of transparency – or elements thereof – in GALA

The literature urges a restrained approach to the codification of principles in GALA.[262] Gerards looked at the question of when the codification of an unwritten legal principle might have added value. She believes that codification

256 Cf. DSC 4 November 2005, *NJ* 2006/204, with commentary by M.R. Mok.
257 Prechal 2008, Prechal & De Leeuw 2008, in particular p. 231 and Widdershoven, Verhoeven and others 2007, pp. 85-93.
258 Buijze 2013, pp. 153-157.
259 Van Ommeren 2011b, pp. 97-107.
260 Widdershoven, Verhoeven and others 2007, pp. 85-93.
261 Prechal 2008 and Prechal & De Leeuw 2008, in particular p. 241.
262 Schlössels 2012, in particular p. 96. See also Schlössels, *NTB* 2013/24, in which he states that it would be sensible, when changing major system laws such as GALA, to generate calm: 'change prudently, not too often and not too much'.

is only judicially useful if it converts a principle into a rule (transformation) or if the principle has more detail, specific elements, or clauses added to it (modification).[263] These two reasons in particular could yet be grounds for codifying certain specific transparency requirements in GALA.[264]

If a separate title were to be included in GALA for the allocation of limited public decisions then it could contain the following elements:[265]

- A definition of the term 'limited public decision'.
- A definition of the term 'ceiling' and the obligation on the part of the administrative authority to establish and publicise this ceiling prior to the procedure.
- A summary of the possible allocation procedures, i.e. (i) subsidy based on the order of receipt of the application, possibly with a waiting list, (ii) drawing of lots, (iii) comparative assessment, possibly in combination with a financial bid, or (iv) auction; as well as the obligation on the part of the administrative authority to choose the procedure to be followed and to publicise this prior to the procedure.
- The start of the allocation procedure to be publicised in an appropriate manner.
- An obligation to establish and generally publicise the selection criteria by statutory regulation or, possibly, policy rule.[266]
- An exception to section 4:84 GALA or, more generally, a ban on derogating from the established rules, unless the rules themselves contain a possibility of derogation. Once established, the criteria (and the explanatory notes to these) may no longer be amended during the procedure.[267]
- An exception, or a transparent alternative, to section 4:5 GALA. The starting point must be that after the time-limit for submission of applications has expired, applications can no longer be amended or supplemented.
- A provision to the effect that the administrative authority must generally publicise the award decision.
- A provision to the effect that after granting the decision, the administrative authority is not authorised to make substantial amendments to the decision, unless the decision itself contains a possibility of amendment. If the administrative authority still wishes to make such an amendment, the decision will have to be revoked and a new allocation procedure will have to be followed.[268]

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263 Gerards 2012, pp. 19-38. See also Gerards 2010, pp. 787-807.

264 If one wanted to codify the obligation of transparency in another, broad sense, then codification in Chapter 2 of GALA may be an option. Cf. Gerards 2010, pp. 787-807, in particular p. 791 and Addink 2011, in particular p. 9.

265 See also Drahmann 2010.

266 Cf. Van Ommeren 2004.

267 Cf. Widdershoven, Verhoeven and others 2007, pp. xvi and 85-93.

268 Cf. Den Ouden 2010, pp. 689 – 715.

- A description of the decisions and/or interlocutory decisions that are appealable.
- Making a direct appeal to the administrative courts possible – bypassing the objection phase.

In my opinion, a provision of this nature is not necessary in order to guarantee the obligation of transparency in Dutch administrative law, but it may well add value by clarifying the difference between limited and non-limited public decisions. However, it seems unrealistic to expect the legislature to bring such a provision into effect in the short term.[269] An alternative might be therefore to include, in the Ar Directives, directives for a transparent allocation scheme, or to draft separate 'Ar Directives for the allocation of limited public rights'.[270]

1.6.4 Preferred option

On the basis of the foregoing, the question of how the obligation of transparency can be introduced and guaranteed in Dutch administrative law, can be answered. It has been observed that in the current situation there is a fragmentation of the obligation of transparency across various principles of proper administration. This observation is reassuring, on the one hand because administrative authorities already have to comply – or are complying – to a great extent with the obligation of transparency. On the other hand, the case law research that has been carried out has revealed that the obligation of transparency is not yet fully guaranteed. This is a shame because the obligation of transparency contributes to better decision-making in the allocation of limited public decisions in my opinion. A possible cause for this is that the requirements of transparency are so fragmented that, as a result, the objective of the obligation of transparency – and with it the special nature of limited public decisions – is insufficiently identified and/or recognised.

I set out above three possible options, which could further guarantee the requirements of transparency: (i) setting up the obligation of transparency as an element of the formal principle of equality, (ii) recognition of the obligation of transparency as an independent principle, and/or (iii) codification of the obligation of transparency – or elements thereof – in GALA.

In setting out these options I endeavoured to present the advantages and disadvantages of each one as objectively as possible, in particular by describing how the options have been previously described in the literature. However,

269 The fourth tranche of GALA was also finally submitted to the Dutch Lower House on 22 July 2004 but did not come into effect until five years later, on 1 July 2009.

270 Ideally these Ar Directives would then be suitable for both central and decentralised government.

now is the time to choose one of those options as preferred option. By mere virtue of the fact that all the options have advantages and disadvantages, I did not find the choice to be self-evident. Earlier, I argued in favour of the recognition of the obligation of transparency as an unwritten principle of proper administration, possibly combined with the codification of sub-elements of the obligation of transparency.[271] This preference was based, in particular, on practical reasons: it is a clear choice that introduces the various transparency requirements into administrative law in a relatively simple way. I still find that a valid reason. However, due to the further research that I have done since then, I have now come up with a different preference. In so doing I am giving the underlying objective of the obligation of transparency a heavier weighting than the practical reasons. In my opinion, transparency is a means that serves the principle of equal opportunities. I would therefore prefer to see the obligation of transparency as an element – or sub-principle – of the formal principle of equality. I will begin by looking at the question of why the obligation of transparency, in my view, should not become an independent principle. I will then go on to give my reasons against codification. I will end by explaining why guaranteeing transparency via the principle of equality wins my vote.

A) Why not an independent principle?

My main objection to recognising the obligation of transparency as an independent principle is that I feel that it will not contribute to a further clarification of the obligation of transparency in the allocation of limited public decisions. This is due to the fact that 'transparency' is used to mean various things and is particularly associated with the passive obligation to disclose documents.

Alemanno, for example, just recently argued that the obligation of transparency is part of the principle of openness. This principle of openness consists of an obligation of transparency and an obligation of participation. The obligation of transparency in that case affects the – mainly passive – obligation to disclose documents, on request or otherwise. The obligation of participation is an obligation to actively include citizens in decision-making. The principle of openness thereby contributes to democratic decision-making within the European Union.[272] This is just one example that shows how many different meanings the obligation of transparency can have.

According to Prechal and De Leeuw, an independent principle of transparency would be able to articulate better the connection between the various elements of existing principles and, as such, ensure a new – integrated –

271 In my preliminary report for the Young Association for Administrative Law (Jonge VAR-reeks 8) and my contribution in Van Ommeren, Den Ouden and Wolswinkel (Ed.) 2011.
272 Alemanno, ELR 2014, p. 72-90.

perspective that, in turn, would be able to develop its own dynamics.[273] However, in my opinion, the concept of 'transparency' is too broad – or too vague – to be able to act as a clear, independently-functioning standard. Buijze also indicated that – depending on the context – the 'principle of transparency' can acquire an different meaning.[274] In itself, it is not unusual for a principle of proper administration to acquire some added colour within a particular special area of administrative law. However, this means that, with the recognition of an independent principle of transparency, limited public decisions would have to be seen as a special area of administrative law, with the new principle of transparency being given an interpretation that contains all the aforementioned requirements of transparency, including the active ones. Wolswinkel states – and I believe he is right – that the allocation of limited public rights falls somewhere between the special areas of administrative law and general administrative law: limited public rights crop up in all sorts of policy areas, but a few elements keep recurring, such as the ceiling and the allocation procedure.[275] This also means that it is uncertain whether the recognition of a principle of transparency would actually contribute to the guaranteeing of transparency requirements in the allocation of limited public decisions.

Buijze does not regard the broad scope of the obligation of transparency as problematic because general principles interpret the more specific underlying principles, thus contributing to the interpretation of those underlying principles.[276] Here, she assumes that transparency is the general standard that is the basis of democratic decision-making. In itself, I agree with Buijze's reasoning. However, I do wonder whether transparency can be considered to be such a general principle. An explanation for the fact that transparency takes on a different meaning depending on the context is – I believe – the fact that transparency is not an end in itself. Alemanno – who assumes a different meaning of transparency – stresses the instrumental nature of an obligation of transparency. Transparency in the meaning of the disclosure of documents contributes to democratic decision-making. Transparency in the allocation of limited public decisions contributes to the equal treatment of all potential applicants. If transparency is not an end in itself, but rather the means to reach a different and overarching objective, in my view it should not be elevated to the status of independent principle.

According to Prechal and De Leeuw, some aspects of transparency go further than the legal principles that already exist.[277] If one looks at the con-

273 Prechal 2008 and Prechal & De Leeuw 2008.

274 Buijze, NtER 2011, no. 7, p. 240-248. Widdershoven, Verhoeven and others even refer to it as a 'vague collective term that differs somewhat in content, depending on the area in which the term is used.' (Widdershoven, Verhoeven and others 2007, p. 85).

275 Wolswinkel, *NTB* 2014/7.

276 Buijze 2013, p. 74.

277 Prechal 2008 and Prechal & De Leeuw 2008, in particular p. 231.

nection between transparency and the principle of equality they argue first that the principle of transparency appears to have its own specific meaning, which goes further than the principle of equality. In stating this, they point to independent requirements regarding the clarity of the procurement documentation. These requirements can be breached without there being any question of a breach of the principle of equality. Buijze adopts a similar stance. She points out that the obligation for administrative authorities to establish selection criteria beforehand, to publicise them and no longer amend them, has little to do with equal treatment, but with enabling all applicants to submit an application that is as economically favourable to them as possible.[278] In a contrast to Buijze's assertion, I feel that all the transparency requirements contribute to guaranteeing the equal treatment of potential applicants. I will go into this again in more detail below, under (C). In my opinion, the fact that independent transparency requirements can be drawn up, does not mean that an independent principle should be created out of these requirements. Following the example of the European Court of Justice, it can also be stated that the principle of equality must be observed and that this means that a decision must satisfy certain transparency requirements.

Secondly, Prechal and De Leeuw argue that the independence of the principle of transparency lies in the fact that transparency takes precedence over the principle of equality: without transparency, verifying compliance with the principle of equality is not possible. In my view, the instrumental nature of the obligation of transparency stems from the very fact that transparency makes it possible to check compliance with the principle of equality: transparency is a means of guaranteeing the equal treatment of applicants and potential applicants.

Thirdly, Prechal and De Leeuw argue that the principle of transparency also serves a broader objective than equality, and that is guaranteeing the preclusion of any risk of favouritism and arbitrariness by the contracting authority. However, the fact that transparency serves several objectives, is not a reason, in my opinion, to recognise it as an independent principle; quite the opposite. Again, the instrumental nature of the obligation of transparency stems from this. It is also important that, in the context of the allocation of limited public decisions, it can be stated that, if the equal treatment of potential applicants is guaranteed by transparency, this will also preclude favouritism and arbitrariness by the administrative authority concerned. It is precisely with this broad and formal interpretation of the principle of equality that potential applicants can also be protected.

Buijze has also provided a fourth argument for recognising the principle of transparency. She believes that in situations where EU law applies the principle of transparency has an independent effect, separate from the principle of equality because regardless of who is adversely affected by this lack of trans-

278 Buijze 2013, pp. 154-155.

parency, the effect is that European freedom of movement is impeded. She thereby points to the internal market and the Treaty freedoms as the overarching principle underlying transparency. What is more, she argues that transparency lowers transaction costs for all economic operators, thus contributing independently to increasing market efficiency.[279] Transparency in this sense, however, seems to me to be a policy objective rather than a legal standard.

As a corollary to this, Van Ommeren has argued, at a national level, in favour of an obligation to create room for competition (hereinafter referred to as the duty of competition).[280] In so doing, he also pointed to *distributive* justice as a function of general administrative law.[281] In my view, the question of whether a duty of competition exists is a preliminary question. It will have to be seen whether there is any question of a limited public right. If there is, a duty of competition will apply in principle, unless there is a ground for justification – an overriding reason relating to the public interest. If there is such ground for justification, granting a limited public decision without a call to compete must also be an appropriate and proportionate means of fulfilling the ground for justification. If this preliminary question is answered in the affirmative (yes, there is a duty of competition), a procedure for the allocation of the limited public right will have to be commenced. That procedure will have to satisfy a large number of obligations. The obligation of transparency is undoubtedly one of those obligations, but that is still not a reason to introduce an independent principle of transparency. A similar result can be achieved with a principle of equality, considered in the context of the duty of competition.

I have come to the conclusion that the arguments for recognising the obligation of transparency as an independent principle of proper administration, whilst valid, are insufficiently convincing. I doubt whether the recognition of a principle of transparency will clarify which transparency requirements must be complied with in the allocation of limited public decisions. This is caused by the varying meanings which can be given to the notion of 'transparency', depending on the context. In addition, I have a more fundamental objection, and that is that transparency requirements, in my opinion, have in particular an instrumental nature. They contribute to an underlying objective, i.e. – in the context of the allocation of limited public decisions that is being discussed here – the guaranteeing of the equal treatment of all potential applicants. I will go into this again in more detail under (C) below, but first I would like to briefly touch on the possibility of codifying the obligation of transparency.

279 Buijze 2013, p. 156 and pp. 272-273.
280 Van Ommeren 2011a, pp.235-265.
281 Van Ommeren 2011b, pp. 97-107.

B) Why not codify?

In the context of the third evaluation of GALA, Widdershoven, Verhoeven and others presented a number of arguments as to why an obligation of transparency might be codified in GALA.[282] First, like Prechal and De Leeuw, they point to the clarity that being defined in GALA would give the obligation, instead of using existing principles as a vehicle for transparency requirements. I have already explained above that, given the broad meaning of transparency, I have my doubts about whether this is the best way to achieve the desired clarity. Instead of codifying the principle of transparency as a whole, I would prefer certain specific transparency requirements to be codified.

Secondly, Widdershoven, Verhoeven and others also state that the principle of transparency appears to impose requirements that go beyond those that can be inferred from Dutch principles of proper administration or GALA. In saying so, they give the example that GALA does not have a general obligation for administrative authorities to explicitly establish and generally publicise rules used for the exercise of their powers.[283] Section 4:81 GALA only contains a power to establish policy rules. Furthermore, section 4:84 GALA contains an inherent power of derogation. In paragraph 1.5.2 I dealt with the tension between section 4:84 GALA and the obligation of transparency. In my view, this tension can be resolved by assuming that in limited public decision-making there are no special circumstances that would affect one or more interested parties disproportionately in relation to the objectives of the policy. But if a separate title were to be included in GALA for the allocation of limited public decisions, then it is certainly a good idea to include an exception to this section in GALA. Incidentally, I would also prefer the allocation criteria and rules not to be laid down in a policy rule but rather in a general binding regulation.

I see the possibility of codifying certain specific transparency requirements as a good 'carrot-and-stick' approach. As shown in the previous paragraph, there are no provisions in GALA that run counter to the obligation of transparency. However, it is necessary to flesh out certain provisions for the allocation of limited public decisions, and to do so transparently. If it transpires in future that this fleshing out is still not being added satisfactorily, for example because the administrative courts are not checking whether a decision by an administrative authority satisfies the obligation of transparency – whether or not as an independent principle or through the link with the principle of equality – only then, in my opinion, does it become a task for the legislature. In that case it would be a good idea for there to be a provision in GALA on limited public decisions.

282 Widdershoven, Verhoeven and others 2007, pp. 91-92.
283 In the same vein: Van Ommeren 2004, pp. 49-50.

C) So: transparency as an element of the principle of equality

I would prefer to see the obligation of transparency as an element of the principle of equality, more precisely the 'formal' principle of equality. The fact is, a distinction can be made between formal, material and procedural equality, as described at length in the dissertation by Gerards. She clarifies the difference between the three forms of equality by giving the following example. The participants in a speed skating race differ in all kinds of respects, for example, talent, level of training, and quality of equipment. Formal equal treatment means that all participants are allowed to turn up at the start and that the same rules apply to all. Procedural equal treatment attaches value to a few differences between the skaters, so that the chance of winning is the same. This could be achieved, for example, by giving a training course to all participants and prescribing and supplying equipment of a certain quality. With this procedural equality there can still be a winner because the differences in talent and speed still exist. With material equal treatment the other differences between the participants will also have to be minimised, for example by giving the slower participants a head start, to produce an equal result – i.e. finishing at the same time.[284]

There is competition in limited public decision-making as well. There will be potentially more applicants than available decisions, so a selection must take place. Applying a material principle of equality is therefore not an option: the very aim of the selection procedure is to appoint a 'winner'. With the obligation of transparency the emphasis lies on establishing and publicising the information relevant for potential applicants at the outset. The emphasis lies on creating equal rules from the beginning. Thus, the circumstance that one of the applicants has little experience of procurement cannot be taken into account, precisely because every applicant must be treated in the same way.[285] Any form of inequality compensation, in principle, is not required under the obligation of transparency, nor is it desirable.[286] For this reason

284 Gerards 2002, pp. 12-16. On the matter of procedural equality, Gerards draws attention to the creation of equal opportunities to win. In limited public decision-making I don't believe it is necessary to create procedural equality: all the applicants may be so different that they do not need to have an equal opportunity to win, but they do have a right to equal treatment during the course of the procedure (the rules).

285 According to the District Court of The Hague (Provisional relief) 30 August 2012, ECLI:NL:RBSGR:2012:BX6099.

286 Here, at the very least, a 'level playing field' must be created. A particular point for consideration here is the position of the tenderer holding the existing contract. If a tenderer already holds the existing contract, it needs to be investigated whether this party has necessary information from the previous concession period, which the other tenderers do not have. If this information is not shared with other potential tenderers it can be ruled that the principle of equality has been breached. Not all potential differences between tenderers can be removed, but a sufficient degree of level playing field does need to be

I regard the obligation of transparency as an element of the formal principle of equality.

I am not the first to regard transparency as an element of the principle of equality. Back in 2004 Van Ommeren pointed out that the principle of equality was a fundamental principle to be complied with in all allocation procedures. The function of the principle of equality in allocation procedures is, according to Van Ommeren, to treat unequal cases – the various applicants – equally. He also pointed out the other formal function that the principle of equality can and must fulfil in the allocation of limited public rights, more so than is ordinarily the case in administrative law: to avoid equal cases being treated unequally.[287] Nevertheless, in his inaugural lecture he does draw a distinction between the principle of equality and the principle of transparency.[288] In 2011 Van Ommeren noted that it is remarkable that in the Dutch administrative courts the principle of equality is almost never, if ever, regarded as a possible basis for creating a duty of competition, even though this is *the* fundamental principle in the allocation of limited public decisions. Even he gives, as a possible explanation, the fact that in Dutch administrative law an appeal on the principle of equality is seen as extremely tiresome and seldom succeeds.[289]

Furthermore, according to Wolswinkel, the obligation of transparency is a 'direct consequence' of the principle of equal treatment. If certain potential applicants are not given the opportunity to submit an application for a limited public decision, then those applicants are being treated unequally compared to other, well-informed potential applicants.[290] I completely agree with this argument. It is all the more notable, then, that Wolswinkel distinguishes between the obligation of a call to compete on the one hand and the substance and timing of this call on the other. He does not categorise these last two elements under the principle of equality, but under the principle of legal certainty.[291] Obviously, a call to publicise that is unclear about which rights are being allocated and the time when applications can be submitted, is contrary to legal certainty. In a case like this, however, there is also a breach or potential breach of the principle of equality because this non-transparent conduct fails to guarantee that all potential applicants can submit an application. Therefore, I also see these aspects as an element of the obligation of transparency and thus the principle of equality.

My preferred option is also in line with Drijber and Stergiou. They believe that it would be clearer if Articles 49 and 56 TFEU served as the only basis for

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created, according to the District Court of Dordrecht (Provisional relief) 24 January 2008, *TBR* 2008/182, with commentary by B.J.H. Blaisse-Verkooyen and D.C. Orobio de Castro.

287 Van Ommeren 2004, p. 45.

288 Van Ommeren 2004, pp. 49-50.

289 Van Ommeren 2011a, p. 256.

290 Wolswinkel 2013, pp. 329 and 339-342.

291 Wolswinkel 2013, pp. 349-351.

review in the European Court of Justice, with this basis having to be interpreted in the light of the fundamental principle of equal treatment. Transparency should not be seen as a separate legal principle, but as a means of guaranteeing equal treatment.[292] Bovis also describes the obligation of transparency as a concrete and specific expression of the principle of equal treatment. Transparency contributes to this equal treatment because it guarantees the conditions for real competition.[293]

As stated, I would prefer the obligation of transparency to be regarded as an element of the formal principle of equality. The obligation of transparency is instrumental in nature and, in the context of limited public decision-making, contributes to the equal treatment of potential applicants. Also, this option directly gives further interpretation to the special nature of limited public decisions.

This approach also aligns with the case law of the European Court of Justice, which has ruled that 'EU law applies, inter alia, the principle of the equal treatment of tenderers and the corollary obligation of transparency'.[294] In addition, with this, the proposed change to Dutch administrative law is not significant. Instead of arguing in favour of an entirely new principle – the scope of which is unclear – all that is being proposed is a slight modification to the principle of equality. As Van Ommeren has already written, the function of the principle of equality is also to treat *un*equal cases *equally* so that all potential applicants have an equal opportunity to be considered for the limited public decision. I share Gerards' view that, in order to review compliance with the principle of equality, it must be assessed whether there are two groups that are being treated differently to each other.[295] In limited public decision-making there is also the key question of whether *potential applicants may* be adversely affected by non-transparent conduct.

It can be stated that this option means that transparency requirements will not be sufficiently known because they are only expressed via another principle. However, I have stated above that this risk also exists with the recognition of a general – broad – principle of transparency, and is possibly even greater. If transparency is given another meaning, depending on the context, it will be just as unclear which obligations of transparency apply and when. By choosing the principle of equality as a basis, the risk of more limited awareness is compensated by placing the objective of the obligation of transparency at centre stage: the guaranteeing of equal opportunities.

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292 Drijber & Stergiou, CMLR 2009, pp. 845-846. They refer in this context to the Opinion of the Advocate General of 17 December 2008, C-250/07, ECLI:EU:C:2008:734.

293 Bovis, CMLR 2012, pp. 247-390, in particular p. 286.

294 EUCJ 10 October 2013, C-336/12.

295 It is not necessary to look again at the differences between the two groups (Gerards 2004, p. 54). There may be an objective and reasonable justification for the difference in treatment. In that case the principle of equality is not breached.

1.6.5 Conclusion

Of the three options set out above, for guaranteeing the transparency requirements (i.e.: (i) establishing the obligation of transparency as an element of the formal principle of equality, (ii) recognition of the obligation of transparency as an independent principle, and/or (iii) codification of the obligation of transparency – or elements of it – in GALA) my preference is towards establishing the obligation of transparency as an element of the formal principle of equality.

All of the outlined options have advantages and disadvantages. For the person seeking justice it matters little – putting it rather bluntly – which of these three options is chosen: first and foremost it is important for administrative authorities to comply with the obligation of transparency and that the administrative courts review compliance, so that the person seeking justice is protected from favouritism and arbitrariness.

In my view, it is primarily up to the administrative courts to review compliance with the obligation of transparency. There is nothing standing in the way of an appeal being upheld on the grounds of a breach of the obligation of transparency. Annulment on the grounds of a breach of the principle of due care is the closest in current legal practice. This is now the most frequently used ground for annulment in limited public decisions. Nevertheless, in the previous paragraphs a number of areas for improvement were also set out. Evidently, these are not currently being read into the principle of due care, by the administrative authorities or the administrative courts. That is why my preference is to establish the obligation of transparency as an element of the formal principle of equality. Identifying the principle of equality – or principle of equal opportunities – as a fundamental principle underlying the allocation of limited public decisions could ensure that the special nature of limited public decisions is highlighted more effectively. As a corollary to this the obligation of transparency would then be introduced into Dutch administrative law, as an element of this principle of equality, in the allocation of limited public decisions.

I am therefore primarily calling on administrative authorities to comply with the obligation of transparency when awarding limited public decisions and on administrative courts to review these decisions for compliance with the principle of equality, with the obligation of transparency as part of that. Should it transpire, in future, that the application of the obligation of transparency in Dutch administrative law is still inadequate, only then, in my opinion, does it become a task for the legislature to codify the obligation of transparency – or elements thereof – in GALA.

1.7 Main question

Which transparency requirements should be complied with by Dutch administrative authorities in the allocation of limited public rights in administrative law, to what extent are these requirements already being complied with in Dutch administrative law practice and, if this is not being done satisfactorily, how could these transparency requirements be better guaranteed in Dutch administrative law?

In this research, the main question is which transparency requirements should be complied with by Dutch administrative authorities in the allocation of limited public rights in administrative law, to what extent these requirements are already being complied with in Dutch administrative law practice and, if this is not being done satisfactorily, how these transparency requirements could be better guaranteed in Dutch administrative law.

This main question will be answered in paragraph 1.7.1 below. Then, in paragraph 1.7.2 I will give a summary of the recommendations drawn up in these concluding observations.

1.7.1 Towards a better guarantee of transparency requirements via the formal principle of equality

With regard to the first part of the main question, it can be concluded that the obligation of transparency under EU law applies not only to the granting of contracts and concessions, but is also already applicable to the granting of limited public decisions. The obligation of transparency must be complied with by administrative authorities in both the granting of licences and the provision of subsidies, but only insofar as there is a certain cross-border interest. If that cross-border interest is not present, EU law does not apply. In this respect, it is important that the question of whether there is a cross-border interest is not answered too restrictively.

In my opinion, there are good reasons to introduce the obligation of transparency into Dutch administrative law as well, if EU law does not apply or does not apply directly. The objectives served by the obligation of transparency are also a useful complement to Dutch administrative law in the allocation of limited public decisions. Furthermore, any difference in legal protection between EU law and national disputes that is difficult to justify must be prevented.

Three objectives and nine specific requirements may be inferred from the case law of the European Court of Justice on the obligation of transparency. The first objective is to open up the market to competition. The second objective is to guarantee the preclusion of any risk of favouritism and arbitrariness by administrative authorities. The third and final objective is to ensure that any interested party – or any potential applicant – may decide to submit an

application on the basis of all the relevant information – also defined as guaranteeing equality of opportunity. The nine transparency requirements are: (1) each potential applicant must be guaranteed a sufficient degree of advertising, (2) all conditions and detailed rules of the allocation procedure must be drawn up beforehand in a clear, precise and unequivocal manner, (3) all reasonably informed applicants exercising ordinary care must be able to understand the exact significance of the criteria set and interpret them in the same way, (4) a final date for receipt of applications must be set, so that all applicants have the same period within which to prepare their applications, (5) in principle, any change to the initial application of a single applicant may not be taken into account, (6) the administrative authority must interpret the criteria in the same way throughout the entire procedure, (7) when reviewing the applications, the criteria must be applied to all applications in an objective and uniform manner (8) allocation procedures must able to be reviewed for impartiality and for that reason decisions must be reasoned, and (9) substantial amendments to essential provisions of the limited public decision are, in principle, not possible.

If the obligation of transparency under EU law does not yet have to be complied with in purely internal situations, but compliance with it is desirable, the logical follow-up question is to what extent the obligation of transparency is already guaranteed in another way in Dutch administrative law. Case law research reveals that – fortunately – in Dutch administrative law the allocation of limited public decisions is already largely transparent. Via general principles of proper administration, such as the principles of due care, proportionality, obligation to state reasons, and the principle of legal certainty, the requirements of transparency are imposed on administrative authorities in the allocation of limited public decisions.

However, certain elements of the obligation of transparency could still be improved. These improvements notably relate to a number of sections from GALA that in principle, can be applied transparently. But, as is also evidenced by the case law, this transparent interpretation is not always adhered to by administrative authorities. This concerns in particular section 3:42 GALA – and, for subsidies, sections 4:23-4:26 GALA – on the publication of decisions, section 4:5 GALA on incomplete applications and section 4:84 GALA on the inherent power of derogation from policy rules. In addition, there are a number of trends in case law that require a certain amount of nuancing. This especially concerns case law relating to the sufficient degree of advertising that the obligation of transparency is intended to guarantee. The obligation of transparency assumes, for example, an active duty of publication by the administrative authority. Publication that is restricted to the known potential applicants is insufficient. An implicit choice in favour of one allocation method is also insufficiently transparent. In addition, the objective of the obligation of transparency is that all applicants must be given an equal opportunity to be considered for the limited public decision. From this point of view, it is difficult

to conceive of a start date for submission of applications being in the past. This has consequences for the way in which applications must be reviewed by the administrative authority in both the primary phase and in the decision-making process. After the time-limit for submission of applications has expired, there is little possibility of supplementing the applications. Finally, it is important that the relative weighting of the allocation criteria for the evaluation of the submitted applications is established.

These limited improvements could be introduced into Dutch administrative law in several ways: the obligation of transparency as an element of already generally recognised general principles of proper administration; recognition of the obligation of transparency as an independent principle; and/or codification of the obligation of transparency – or elements of it – in GALA. My preference is for establishing the obligation of transparency as an element of the formal principle of equality. Identifying the principle of equality – or principle of equal opportunities – as the fundamental principle underlying the allocation of limited public decisions could ensure that the special nature of limited public decisions is highlighted more effectively. As a corollary to this the obligation of transparency would then be introduced into Dutch administrative law in the allocation of limited public decisions as part of this principle of equality.

1.7.2 List of recommendations drawn up

In this dissertation a number of recommendations have been made. The most important general recommendations are also included in these concluding observations. For other recommendations, which often have a high level of detail, please refer to the previous chapters. A list of the recommendations from the concluding observations is set out below. For a quick overview, these have been subdivided into recommendations for the legislature, the administrative authority and the administrative courts.

A) Recommendations for the legislature in a formal sense

1) The concession decision must be added as a legal concept to the Ar Directives. This description must match, as closely as possible, the material concept of concession from Directive 2004/18/EC and the future Concession Directive. This might read as follows: 'a concession is a decision that has as its object the execution of works or services, the consideration of which consists in the right to exploit the works or services or in that right together with a price, and where the concessionaire is obliged to carry out the works or services'.
2) In drafting the Environment & Planning Act attention must be paid to the allocation of limited public rights. If a regulation is included in the Environ-

ment & Planning Act for the wider use of the programmatic approach, then it could be stipulated in the Environment & Planning Act – or the underlying regulation – that the development space must be allocated in a transparent manner. In addition, operating licences that are closely linked to the zoning plan, could become part of the integrated environmental permit. An allocation system could be introduced by statutory regulation – the Environment & Planning Act in connection with an environmental regulation or bye-law. This allocation system must be transparent, which means in particular that if operating space becomes available, this must be generally publicised and it must be clear who is eligible for the licence, and what conditions apply. Should such integration still be considered a bridge too far, then it is recommended that the various limited public decisions be allowed to be effected in a coordinated manner, for example through simultaneous adoption of the zoning plan – or granting of the integrated environmental permit – and the operating licence.

3) Supplementary to the regulation regarding publication of decisions in section 3:40 GALA et seq., an active general duty of publication for limited public decisions must be introduced. On that basis, administrative authorities would be obliged to generally publicise the commencement of a procedure when a limited public decision is being awarded. The publication would have to mention the submission deadline for applications and where further information on the allocation procedure and rules can be found. This active general duty of publication for administrative authorities will guarantee that all potentially interested parties can take note of the procedure and take part in it.
4) Administrative authorities should be obliged to publicise their decisions – and the allocation of their limit public decisions – centrally on a single website – cf. TenderNed. Although this is not strictly necessary for a sufficient degree of advertising, in my opinion it would considerable improve transparency.
5) If a separate title were to be included in GALA for the allocation of limited public decisions, an exception must be made to section 4:84 GALA. This would resolve the tension that exists between the inherent power of derogation in the application of policy rules (section 4:84 GALA) and the obligation of transparency. This tension exists because, if there is derogation from the rules enshrined in the policy rule, not all applicants and potential applicants are being treated equally any more.
6) If a separate title were to be included in GALA for the allocation of limited public decisions, an exception must be made to section 4:5 GALA. This will resolve the tension that exists between the obligation on the part of an administrative authority to give an applicant the opportunity to supplement an incomplete application (section 4:5 GALA) and the obligation of transparency that assumes that all applicants will have the same period after

publication of the tender notice (the call to compete) within which to prepare their application.

B) Recommendations for central and decentralised government bodies that determine those limited allocation schemes

7) Allocation criteria and rules must not be laid down in a policy rule but in a generally binding regulation. This will resolve the tension that exists between the inherent power of derogation in the application of policy rules (section 4:84 GALA) and the obligation of transparency. This tension exists because, if there is derogation from the rules enshrined in the policy rule, not all applicants and potential applicants are being treated equally any more.
8) It must be stated in the allocation scheme how section 4:5 GALA will be applied 'transparently'. This will resolve the tension that exists between the obligation that an administrative authority has to give an applicant the opportunity to supplement an incomplete application (section 4:5 GALA) and the obligation of transparency that assumes that all applicants will have the same period after publication of the tender notice (the call to compete) within which to prepare their applications.
9) In the creation of a limited allocation scheme, the following should be reviewed:
   a) whether it is necessary to limit the number of available public rights by establishing a ceiling. If no ceiling is established, the obligation of transparency does not apply;
   b) whether EU law applies because there is a certain cross-border interest or because the basis for the scheme is a European scheme e.g. a subsidy scheme. If this is the case then the obligation of transparency under EU law must be complied with. In purely internal situations the formal principle of equality and the ensuing transparency requirements must be complied with; and
   c) whether it is necessary to attach an obligation of execution to the decision. If this is necessary, then it cannot be ruled out that the decision may also be designated as a concession or contract. The formal principle of equality and the ensuing obligation of transparency have to be complied with when granting subsidies and licences and the European Directives must be complied with in the award of a contract and – from 2016 – the award of a concession if there is a cross-border interest.

The above considerations must be explicitly reasoned in the explanatory notes, including the conclusion that decision-making cannot take place until a transparent procedure has been followed.

C) Recommendations for administrative authorities that make limited public decisions

10) Administrative authorities must, in the allocation of limited public rights, comply with the formal principle of equality and the ensuing obligation of transparency. This also applies to purely internal situations where EU law does not apply, as well as, to the granting of limited public licences or exemptions, subsidy provision and certain environmental law legal concepts.
11) Administrative authorities must display a sufficient degree of advertising. This means that:
    a) administrative authorities must comply on time with an active general duty of publication. This obligation ensues from section 3:42 GALA, possibly in combination with the formal principle of equality and the ensuing obligation of transparency;
    b) there is no duty of investigation on potential applicants, but rather an active duty of publication for administrative authorities, which results in general publication of the allocation procedure;
    c) an implicit choice in favour of one allocation method is insufficiently transparent;
    d) evaluation guidelines or evaluation patterns, used by the advisory committees to give an additional explanation of the selection criteria to be used. must be disclosed;
    e) the start date for submission of applications must be publicised in advance and therefore cannot be in the past;
    f) the allocation procedure and criteria must be established before the start of the allocation procedure and cannot be amended during the procedure. With regard to the relevant reference date, the applicable law is the law as it applied on the first day on which the applications could be submitted.[296]

The above applies to all allocation systems, even a system of allocation in order of receipt of applications.

12) Administrative authorities must assume that in limited public decision-making there can be no special circumstances that would affect one or more interested parties disproportionately in relation to the objectives of the policy rule. This will resolve the tension that exists between the inherent power of derogation in the application of policy rules (section 4:84 GALA) and the obligation of transparency. This tension exists because, if there is derogation from the rules enshrined in the policy rule, not all applicants and potential applicants are being treated equally any more.

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296 If the last day is taken as a starting point, then the administrative authority should bear the burden of proving that all applicants and potential applicants have taken note of the amendment so that they could adjust their applications accordingly.

D) Recommendations for the administrative courts

13) The administrative courts must check, when reviewing whether a limited public decision is contrary to any general legal principle, that the decision is not contrary to the formal principle of equality and the ensuing obligation of transparency. If this is the case, it will be evidenced by, inter alia, the aforementioned recommendations, in particular recommendation (11).
14) According to settled case law from the CBb, strict requirements must be imposed on decision-making relating to the award of a limited public decision, inter alia, for reasons of legal certainty.[297] These strict requirements often show striking similarities with the obligation of transparency. The CBb should establish the obligation of transparency – as an element of the formal principle of equality (or the principle of equal opportunities) – as the basis for these strict requirements. The other highest administrative courts, in particular the Council of State, should adopt this line of case law.

1.8 Concluding statement

The obligation of transparency under EU law was central to this research. The objective of this obligation is to facilitate competition for limited public decisions, thereby precluding any risk of favouritism and arbitrariness by administrative authorities, and guaranteeing equality of opportunity for each potential applicant. This objective also strikes me as being worth striving for in the allocation of limited public decisions in Dutch administrative law.

In Chapter 1 an example was given of an administrative authority switching from a completely closed licence scheme to a limited licence scheme, and in so doing giving everyone the opportunity to compete for this licence by publicising the fact that the licences would be allocated, and how this would be done. With this transparent conduct the administrative authority ensured that even newcomers were given an equal opportunity to be considered for an operating licence.

If there is a certain cross-border interest, the obligation of transparency must be complied with in the allocation of limited public decisions pursuant to EU law. In my opinion, in purely internal situations administrative authorities must comply with the formal principle of equality and the ensuing transparency requirements, in the allocation of limited public rights.

It appears from case law research that transparency in the allocation of these limited public decisions is guaranteed to a significant extent, but that in several areas useful improvement is still possible. These improvements are

297 Inter alia, CBb 5 December 2012, ECLI:NL:CBB:2012:1, *AB* 2013/293, with commentary by C.J. Wolswinkel.

set out in this research paper. The improvements could be introduced into Dutch administrative law in several ways: the obligation of transparency as an element of already generally recognised general principles of proper administration, recognition of the obligation of transparency as an independent principle, and/or codification of – elements of – the obligation of transparency in GALA. My preference is for establishing the obligation of transparency as an element of the formal principle of equality – or principle of equal opportunities. Identifying the formal principle of equality as a fundamental principle underlying the allocation of limited public decisions could ensure that the special nature of limited public decisions is highlighted more effectively. As a corollary to this, the obligation of transparency – as part of this formal principle of equality in Dutch administrative law – would then have to be complied with in the allocation of limited public decisions by administrative authorities.