IS THERE A GENERAL PRINCIPLE REQUIRING TRANSPARENCY ABOUT HOW DECISIONS WILL BE TAKEN?

Introduction

Transparency is a fashionable term. It is now mentioned expressly in certain provisions of the Treaties[1] and in legislation made under them[2]. It is a term that can be, and is, invoked in a number of different areas. The subject matter of this paper, however, is limited. It concerns the principle of transparency which is said to flow from, or to be implied by, the principles of non-discrimination and equal treatment and what in practice it adds to what would otherwise be required by those principles. In particular it is concerned with assertions that the principle of transparency requires prior publication of unambiguous objective criteria by reference to which a public authority must exercise any discretion it has which engages rights and freedoms recognised in the Treaties.

This paper begins with a historical survey of the case law that may support the contention that there is such a general principle of transparency that forms part of primary EU law. It focuses principally on two streams of case law, that concerning public procurement and that governing prior administrative authorisations required before certain Treaty freedoms can be exercised. Both streams of case law appear to have developed separately in the last decade but they have recently converged.

This paper then considers the reasons that have been said to have prompted the development of a requirement for such prior publication in these and other areas. It will suggest that, of the reasons offered for such a requirement, two could support a general principle to this effect. These are precluding the risk of arbitrary decisions affecting rights and freedoms recognised in the Treaties and predictability about what such rights and freedoms will mean in practice,

But it will be suggested that there should be no invariable requirement for prior publication of unambiguous, objective criteria on which the exercise of any administrative discretion will

---

1 For example article 1 TEU refers to a Union "in which decisions are taken as openly as possible"; cf also article 10.3 TEU that provides that "decisions shall be taken as openly and as closely as possible to the citizen". There is a similar provision in article 15.1 TFEU and article 15.3 provides that "every institution, body, office or agency shall ensure that its proceedings are transparent".

2 See eg Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents.

be based that engages Treaty rights and freedoms in respect of which persons are entitled to equal treatment without discrimination. What transparency should require in such cases by way of prior publication ought to depend on the nature of the particular case and what in the circumstances it may be reasonable to expect by way of foreseeablity and protection against arbitrary decisions without unnecessarily sacrificing flexibility which is desirable to maintain in the public interest and to avoid injustice. Recognition of a general principle of transparency requiring invariable prior publication of unambiguous, objective criteria would be insufficiently sensitive to such needs for flexibility.

Background

i. public procurement

There have been directives designed to co-ordinate procedures for the award of contracts by public authorities and by utilities for the carrying out of works for them, and for the supply of goods and for the provision of services to them, for many years[3]. These directives have required such entities generally to advertise their intention to award any such contract and to set out in advance what the contractor will be required to do and the basis on which the contract is to be awarded, namely the lowest price or the most economically advantageous offer from the point of view of the contracting entity. Where the latter basis for the award is chosen, the contracting entity has also had to set out in advance the criteria by reference to which it would determine which offer it received was the most economically advantageous. Initially it had also to set out those award criteria where possible in descending order of importance. Since the latest Public Sector and Utility Directives in 2004, however, it has to set out instead the weighting of the various award criteria unless that is not possible (in which case they now have to be set out in a descending order of importance).

---

[3] In respect of public works contracts see: Directives 71/305/EEC which was subsequently amended on a number of occasions; these provisions were consolidated with further amendments in Directive 93/37/EEC; in respect of supplies to public bodies see: Directive 77/62/EEC which was subsequently amended on a number of occasions; these provisions were consolidated with further amendments in Directive 93/36/EC; in respect of services to public bodies: see Directive 92/50/EEC. These Directives were consolidated with amendments into a general Public Sector Directive, Directive 2004/18/EC. There have been three Directives, 90/531/EEC, 93/38/EEC and the current Directive, 2004/17/EC, in respect of utility procurement. Procurement by institutions of the Union has also been regulated by legislation similar in many respects to these Directives. For the sake of simplicity the development of this legislation is not traced in this paper. Some of the case law on it, however, is.

Before the 2004 Directives[4], these Directives imposed requirements on contracting entities to ensure that there was no discrimination between suppliers, contractors or service providers[5]. But they did not impose a specific duty to treat economic operators equally or to act in a transparent way. However the Court of Justice had no difficulty in finding that the duty to observe the principle of equal treatment lay at the very heart of these directives[6]. It inferred that to be the case from recitals to the Directives, from the general provision precluding discrimination[7] and from certain other specific provisions precluding discrimination on the ground of nationality[8]. It then stated in ***Case C-87/94 EC v Belgium***[9], for example, that

> "Furthermore, the 33rd recital [to the 1990 Utilities Directive] shows that the Directive aims to ensure a minimum level of transparency in the award of contracts to which it applies. The procedure of comparing tenders therefore had to comply with both the principle of equal treatment of tenderers and the principle of transparency so as to afford equality of opportunity to all tenderers when formulating their tenders."

Having decided that the Directives were based on those principles, the Court of Justice then proceeded to use them to impose requirements on a contracting entity to give publication in advance of matters which it was not specifically required to publish by the Directives

---

4 The 2004 Directives have introduced express obligations on contracting entities to treat economic operators equally and non-discriminatorily and to act in a transparent way: see article 10 of the Utilities Directive, 2004/17/EC, and article 2 of the Public Sector Directive, Directive 2004/18/EC.

5 See article 5.7 of 93/36/EEC coordinating procedures for the award of public supply contracts as amended by Directive 97/52/EC; article 6.6 of Directive 93/37/EEC concerning the coordination of procedures for the award of public works contracts as amended by Directive 97/52/EC; article 3.2 of Directive 92/50/EEC relating to the co-ordination of procedures for the award of public service contracts; and article 4.2 of Directive 93/38/EC coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.

6 See eg ***C-243/89 EC v Denmark*** [1993] ECR I- 3353 ("32. Since the Commission claims in its pleadings..that Storebaelt acted in breach of the principle that all tenderers should be treated alike, the Danish Government's argument that that principle is not mentioned in the directive and therefore constitutes a new legal basis for the complaint of breach of State obligations must be considered first. 33. On this issue, it need only be observed that, although the directive makes no express mention of the principle of equal treatment of tenderers, the duty to observe that principle lies at the very heart of the directive whose purpose is, according to the ninth recital in its preamble, to ensure in particular the development of effective competition in the field of public contracts and which, in Title IV, lays down criteria for selection and for award of the contracts, by means of which such competition is to be ensured."

7 ***C-87/94 EC v Belgium*** [1996] ECR I-2043 at [51]-[52]; ***C-340/02 EC v France*** [2004] ECR I-9845 at [34].

8 ***C-285/99 Impressa Lombardini Spa v ANAS*** [2001] ECR I-9233 at [37].

9 [1996] ECR I-2043 at [53]-[54].

themselves. For example it used these principles in ***C-470/99 Universale-Bau AG***[10] to require a contracting authority, which had stated the criteria by reference to which it intended to select those who were to be invited to tender, to publish how it had in fact decided to weight those criteria. It did so notwithstanding the fact that the Directive in question contained no specific provision requiring prior advertising of the criteria for such selection themselves in the restricted procedure being used and notwithstanding the fact, by contrast, that the Directive did for a negotiated procedure and even in that case said nothing about publication of their weighting[11]. In that case on one view there was no breach of the requirement of equal treatment: all those seeking selection were equally ignorant of the weightings intended to be imposed and they all knew what criteria were to be applied. Moreover the Court apparently imposed a rule requiring the publication of the weightings of such selection criteria, regardless of whether their publication could have affected how those involved would have put their case for selection[12]. Subsequently, in ***C-331/04 ATI EAC Srl v ACTV Venezia Spa***[13], however, the Court of Justice found that publication of the weightings of sub-headings or sub-criteria which were used to assess offers against the criteria for determining which offer received was the most economically advantageous had to be set out in advance but only if, *inter alia*, that could affect what offers might be made.

The Court of Justice also used the principles of equal treatment and transparency to enunciate rules limiting what criteria a contracting entity could adopt. Thus, for example in ***C-19/00 SIAC Construction Limited v the County of Mayo***, the Court found that the principle of transparency

---

10 [2002] ECR I-11617.

11 See [84]-[100]. The position in respect of prior advertising of criteria for the selection of those to participate in the competition are described in [11] and [87].

12 The Court has subsequently recognised that the principle of transparency itself does not require prior publication of the weightings of criteria unless *inter alia* knowledge of them could have made a difference to what those interested would have offered in ***C-226/09 EC v Ireland*** [2010] ECR *** at [40]-[48].

13 [2005] ECR I-10109. This ruling was subsequently endorsed in ***C-532/06 Lianakis AE v Dimos Alexandroupolis*** [2008] ECR I-251. In the latter case the Court appears to have thought that "sub-criteria" of the award criteria could themselves be "criteria" for the purpose of the specific provision requiring prior publication of award criteria. That is inconsistent, however, with the subsequent decision of General Court in ***T-70/05 Evropaiki Dynamiki v EMSA*** [2010] ECR ***. In this case the court did not regard the rule requiring prior publication of the weightings to be given to award "criteria" as being applicable to "sub-criteria"; instead it applied the approach in ***Case-331/04 ATI-EAC Srl***, thus treating the "sub-criteria" in question as not constituting award "criteria" for the purpose of the specific provision requiring prior publication of award criteria: see at [10] and [153]-[155]. That approach is preferable as it does not involve imposing an absolute rule that serves no purpose in assisting tenderers.

meant that an award criterion could not have the effect of conferring an unrestricted freedom of choice on the contracting authority when awarding any contract: it required such criteria to be formulated "in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way" and that they must be capable of being applied objectively[14].

The Court had thus derived from the principles of non-discrimination and of equality of treatment, which it had found embodied in the Directives, a principle of transparency. It used that principle to impose an obligation on contracting entities to publish in advance not only the criteria by reference to which their discretionary decisions would be taken but also other matters which would be taken into account when applying them, and with what importance they would be regarded, if publication of such matters could affect what was submitted to them[15]. The Court appears to have been thought it irrelevant that those involved were in equal ignorance and it did not consider whether any breach of the principles of equal treatment and non-discrimination had in fact occurred when any discretion was exercised. It had also sought to use that principle to limit the nature of the criteria by reference to which the contracting authority could exercise its discretion so that they were unambiguous and objective. These were by no means the only uses to which the general principle of transparency was put. But they were to be significant.

Thus far, however, the principles of non-discrimination and of equal treatment and the consequent obligation of transparency (which was said to be implied by, or to flow from, those

---

14 See [2001] ECR I-7725 at [37], [42] and [44].

15 Not everything that would be used in assessing how an offer would be assessed need necessarily be disclosed. Quite apart from weightings of sub-headings or sub-criteria, the non-publication in advance of a formula used to work out from the prices submitted for different items which offer would produce the lowest price over the period of the contract was found not to be unlawful in ***T-4/01 Renco Spa v the Council*** [2003] ECR I-171 at [2]-[6], [8]-[13], [85]-[86].There are statements in the cases that "in order to ensure respect for the principles of equal treatment and transparency, it is important that potential tenderers are aware of all the features to be taken into account in identifying the most economically advantageous offer, and, if possible, their relative importance, when they prepare their bids": see ***C-331/04 ATI EAC Srl v ACTV Venezia Spa*** [2005] ECR I-10109 at [24], ***C-532/06 Lianakis AE v Dimos Alexandroupolis*** [2008] ECR 251 at [36]. But it is important to note that these statements were based on passages that simply described what specific provisions (which were the equivalent of article 53 in the 2004 Public Sector Directive) then provided: see ***C-87/94 EC v Belgium*** [1996] ECR I-2043 at [88]; ***C-470/99 Universale Bau AG*** [2002] ECR I-11617 at [98]. In any event they are simply inconsistent with the decisions in *Renco*, *ATI-EAC* and *Lianakis*.

principles) appeared to be derived from the Directives themselves. But their significance was amplified by decisions that in fact these principles formed a part of EU primary law in relation to Treaty provisions relating to establishment, goods and services. The Court of Justice inferred from these Treaty provisions a principle of freedom of movement of goods, a principle of freedom to provide services and a principle of freedom of establishment. It then derived from these principles further general principles of non-discrimination, equality of treatment and thus of transparency when dealing with public procurement outwith the scope of the directives on public procurement[16] (as well as to supplement the Directives where their application to particular contracts is limited[17]).

The practical starting point for this development was the Court's decision in ***C-324/98 Telaustria Verlags Gmbh v Telekom Austria AG***[18]. Having found that public service concession contracts did not fall within the scope of the relevant Directive, the Court nonetheless stated that contracting entities awarding them were bound to comply with the fundamental rules of the Treaty and in particular the principle of non-discrimination on the ground of nationality and that that principle implied a principle of transparency which consisted in ensuring a degree of advertising sufficient to enable the service market to be opened up to competition and the impartiality of procurement procedures to be reviewed. The Court has consequently held that the principle of transparency in primary EU law applies, at least *prima facie*[19], to the

---

16 This is reflected in recital (2) to Directive 2004/18/EC.

17 See the decision of the Grand Chamber in respect of contracts falling within Annex IB of Directive 92/50 in ***C-507/03 EC v Ireland*** [2007] ECR I-9777.

18 [2000] ECR I-10745. It might be said that the origin of this development was an obscure assertion in the earlier case, ***C-275/98 Unitron Scandinavia A/S*** [1999] ECR I-8291. In that case the Directive required a contracting authority, which granted special or exclusive rights to another body [which was not a contracting authority] to engage in a public service activity, to stipulate in the instrument granting such rights that that body observe the principle of non-discrimination by nationality when awarding public supply contracts. The Court held that this did not require that body to follow the procedures in the Directive when awarding such contracts but stated that "the principle of non-discrimination on the ground of nationality...implies..an obligation of transparency to enable the contracting authority [not it may be noted the body awarding the contract] to satisfy itself that it has been complied with": see at [31]. What this meant was left opaque.

19 Freedom to provide services, as a fundamental principle of the Treaty, may be restricted only by rules which are justified by overriding reasons in the general interest and are applicable to all persons or undertakings pursuing an activity in the territory of the host Member State. Furthermore, in order to be so justified, the national legislation in question must be suitable for securing the attainment of the objective which it pursues and must not go beyond what is necessary in order to attain it.

award of any service concession contract[20], or of a contract whose value falls beneath the thresholds which would otherwise bring it within the scope of the Directives[21], which may be of interest to a person located in a Member State other than that in which the contract is awarded[22]. The General Court has accepted that the obligation of transparency in respect of such contracts requires prior publication of appropriate information about the contracts, including the applicable rules governing their award, so as to afford equality of opportunity for all in formulating the terms of their applications to take part and any offer made[23].

ii. prior administrative authorisations which constrain the free movement of goods, services, businesses and capital

The second stream of case law concerns the exercise of any administrative discretion involved in giving authorisation for activities which, at least *prima facie*, persons are free to carry on under EU law. This stream of case law appears to have developed at about the same time as the principle of transparency was recognised as part of primary EU law in procurement cases but it was developed, ostensibly at least, independently of it.

Legislative schemes that require prior administrative authorisation before services may be, or are to be, provided involve restrictions on the freedom to provide services and other freedoms. In relation to such a scheme affecting the freedom to provide maritime transport, the Court of Justice said, in ***C-205/99 Analir v Administración General del Estado***[24],

---

[20] See ***C-231/03 Coname v Comune di Cingia de Botta*** [2005] ECR I-7287; ***C-91/08 Wall AG v Stadt Frankfurt am Main*** [2010] ECR **. These decisions of the Grand Chamber followed those in ***Telaustria*** *(supra),* ***C-458/03 Parking Brixen*** [2005] ECR I-8585 at [46]-[50] in which it was stated that the principle of equal treatment applied even in the absence of discrimination on grounds of nationality; and ***C-410/04 ANAV v Commune di Bari*** [2006] ECR I-3303 at [19]-[23].

[21] ***C-6/05 Medipac-Kazantzidis AE v Venizelio-Pananio*** [2007] ECR I-4557 at [35]; ***C-220/06 Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v Administración General del Estado*** [2007] ECR I-12175 at [70]-[88]; ***C-147/06 SECAP SpA v Comune di Torino*** [2008] ECR I-3565;

[22] It appears to be an obligation incumbent on a contracting entity to satisfy itself that a contract will not have cross-border interest: see ***T-258/06 Germany and others v EC*** [2010] ECR ** at [90]-[95].

[23] See ***T-258/06 Germany and others v EC*** [2010] ECR ** at [68]-[80], [85], [109]-[111], and [124]-[125].

[24] [2001] ECR I-1271 at [38]. That any decision not to reimburse costs of imported medicinal preparations had to be based on "objective criteria...verifiable by any importer" had been stated previously by the Court in ***Case 238/82 Duphar BV v Netherlands*** [1984] ECR 523 at [21]. But the Court had not there stated that such criteria had to be communicated in advance. The formula in ***C-205 Anilar*** was reasserted, for example, by the Court in ***C-157/99 B.S.M. Geraets-Smits v Stichting Ziekenfonds VGZ*** [2001] ECR I-5473 at [90];

> "if a prior administrative authorisation scheme is to be justified even though it derogates from a fundamental freedom, it must, in any event, be based on objective, non-discriminatory criteria which are known in advance to the undertakings concerned, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily."

This test meant, in the Court's view in a subsequent case, for example, that "the mere setting out, in the statement of reasons for the national legislation, of declarations of principle and general policy objectives cannot be considered sufficient"[25]. Nor could a test, which was considered in another case, whether "that the project concerned be in the interests of public housing in the" Member State, be regarded as sufficient[26]. The Court found equally insufficient the criterion of "the existence of a need for the services offered" when it was shown that the approach to how it might be satisfied varied between different parts of a State[27]. The Court followed this line of cases in relation to the free movement of capital in ***C-483/99 EC v France***[28] finding that "a reference, formulated in general terms....to the protection of the national interest" in a provision requiring the approval of a Minister to the acquisition of shareholdings of a certain size in a company was insufficiently precise as "the investors concerned are given no indication whatever as to the specific, objective circumstances in which prior authorisation will be granted or refused". In this and other cases it found that this meant that "such lack of precision does not enable individuals to be apprised of the extent of their rights and

---

C-390/99 Canal Satélite Digital SL v Administracíon General del Estado [2002] ECR I-607 at [35] and [41]; ***C-385/99 V.G. Müller-Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA*** [2003] ECR I-4509 at [85]. It may be noted that, when considering a scheme that required prior administrative authorisation for hospital treatment abroad if its costs were to be reimbursed by a state sickness insurance scheme, the Court also stated in ***C-157/99 B.S.M. Geraets-Smits*** *supra* at [90] that "such a prior administrative authorisation scheme must likewise be based on a procedural system which is easily accessible and capable of ensuring that a request for authorisation will be dealt with objectively and impartially within a reasonable time and refusals to grant authorisation must also be capable of being challenged in judicial or quasi-judicial proceedings."

[25] See ***C-250/06 United Pan-Europe Communications Belgium SA v Belgium*** [2007] 1-11135 at [46].This case concerned the application of general treaty principles governing restrictions on the freedom to provide services before the coming into force of Directive 2002/22/EC. The issues were considered again in the light of the coming into force of that Directive in ***C-134/10 EC v Belgium*** [2011] ECR **.

[26] See ***C-567/07 Minister voor Wonen, Wijken en Integratie v Woningstichting Sint Servatius*** [2009] ECR I-9021at [37].

[27] See ***C-169/07 Hartlauer Handelsgesellschaft Gmbh v Wiener Landesregierung*** [2009] ECR I-1721at [64]-[70].

[28] [2002] ECR I-4781 at [46]-[49].

obligations"[29].

In enunciating these principles in these cases no reference was made to principles of equal treatment or transparency. Express reliance on these principles appears to have been imported subsequently based on the case law on public procurement. The Court applied the principles it had developed in relation to service concessions contracts to the award by an administrative authority of a limited number of licences to provide gambling services[30]. In particular, having referred to some of the case law stemming from ***C-205/99 Analir***, the Court added, in ***C-238/08 Sporting Exchange Ltd v Minister van Justitie***[31], "compliance with the principle of equal treatment and with the consequent obligation of transparency necessarily means that the objective criteria enabling the Member States' competent authorities' discretion to be circumscribed must be sufficiently advertised". The analogy with service concession contracts was subsequently dispensed with by the court when considering whether national legislation could confer a discretion on an authority to grant a licence enabling a person to provide gambling services. Effectively relying on both these streams of authority, the Grand Chamber recently stated, in ***C-46/08 Carmen Media Group v Land Schleswig-Holstein***[32], in respect of a restriction on the freedom to provide services, that

> "..where a system of authorisation pursuing legitimate objectives recognised by the case law is established in a Member State, such a system cannot render legitimate discretionary conduct on the part of the national authorities which is liable to negate the effectiveness of provisions of EU law, in particular those relating to a fundamental freedom such as that at issue in the main proceedings... Also, if a prior administrative authorisation scheme is to be justified, even though it derogates from a fundamental freedom, it must be based on objective, non-discriminatory criteria known in advance, in such a way as to circumscribe the exercise of the authorities' discretion so that it is not used arbitrarily."

iii. other areas of the law

It should not be thought that these are the only areas in which statements such as this can be

---

29 See also ***C-463/00 EC v Spain*** [2003] ECR I-4581at [69]-[75]. See also ***C-452/01Margarethe Ospelt v Schlössle Weissenberg Familienstiftung*** [2003] ECR I-9743.

30 See ***C-260/04 EC v Italy*** [2007] ECR I-7083; ***C-238/08 Sporting Exchange Ltd v Minister van Justitie*** [2010] ECR ** at [38]-[51]; ***C-64/08 Ernst Englemann*** [2010] ECR ** at [49]-[58].

31 [2010] ECR ** at [26].

32 [2010] ECR ** at [86]-[87]; see also at [90].

found. Recently, for example, in ***C-62/09 R (ABPI) v Medicines and Healthcare Products Regulatory Agency***[33], the Court found that the public health authorities could offer financial inducements to medical practices to prescribe certain medicinal products to their patients in order to reduce public expenditure provided (a) that the scheme for identifying which products benefited was based on objective criteria and made public and (b) that the evaluations establishing the therapeutic equivalence of the active substances belonging to the therapeutic class covered by the scheme were made available to health care professionals and professionals in the pharmaceutical industry. These provisos were obviously designed to ensure the "transparency" of the exercise of the authorities' discretion in relation to the products to which incentives attached.

Similarly the conditions which compensatory payments must meet to avoid being classified as a state aid reflect the need for transparency to avoid discrimination and unequal treatment. Thus the second condition in ***C-280/00 Altmark Transport GmbH v Nahverkehrsgesellschaft Altmark GmbH***[34] is that

> "the parameters on the basis of which the compensation is calculated have been established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings."

What is perhaps more surprising is that it is more difficult to find examples of this approach to transparency in the field of equality law. That is not to say that there are no examples. In one case, for example, a directive permitted a derogation from the principle of equal treatment for men and women in respect of recruitment in respect of certain "occupational activities" which Member States were to identify. A French system of recruitment fixed the percentage of certain posts in the national police force which were to be filled by men and women. That was found by the Court of Justice in ***Case 318/86 EC v France***[35] to fail "the requirement of transparency" as the fixing of those percentages was "not governed by any objective criterion defined in a legislative provision" which thus made it "impossible to exercise any form of supervision...in order to verify whether the percentages fixed for the recruitment of each sex actually correspond to specific activities for which the sex of the person to be employed constitutes a

---

[33] [2010] ECR ***. I am grateful to Tom de laMare for this reference.

[34] [2003] ECR I-7747at [90] and [95].

[35] [1988] ECR 3559 at [24]-[27].

determining factor".

Reasons given why there should be a requirement for prior publication

A number of reasons have been given why there should be a requirement for prior publication of objective criteria by reference to which a public authority must exercise any discretion it has. These include (i) ensuring that the principles of equal treatment and non-discrimination are complied with; (ii) enabling compliance with them to be verified; (iii) precluding any risk of favouritism or arbitrariness on the part of the authority; (iv) enabling others to know what their rights and obligations are; and (v) opening up public procurement to effective competition.

As the principle of transparency is said to be implied by, or to flow from, the principles of equal treatment and of non-discrimination, it is easy to assume that it exists to ensure that they are complied with[36]. But that cannot justify an additional principle of transparency requiring prior publication of objective criteria on which a public authority must exercise any discretion it has for two reasons. (i) If there can be no equal treatment (or if there will be discrimination) without such publication, then there is simply a breach of the principles of equal treatment and non-discrimination if there is no publication. There is no need to invoke a further additional principle of transparency to justify the requirement of publication in such cases: it is simply what the principles of equal treatment and non-discrimination require. (ii) But there will be cases in which there is no breach of the principles of equal treatment and non-discrimination even if there has been no publication in advance of any criteria by reference to which any decision may be taken. In such cases the requirement for prior publication of the basis on which the decision will be taken certainly adds something to the principles of equal treatment and non-discrimination; but the addition is not necessary in order to ensure that they are complied with.

It may be for such reasons that the most frequent reason given for the requirement for prior publication of the criteria which are to be applied is that it enables compliance with the

---

[36] See eg ***C-87/94 EC v Belgium*** [1996] ECR I-2043 at [54]; ***T-406/06 Evropaïki Dynamiki v Commission*** [2008] ECR II-247at [85]; ***T-125/06 Centro Studi Antonio Manieri Srl v the Council*** [2009] ECR II-69 at [89]; ***C-226/09 EC v Ireland*** [2010] ECR ** at [42].

principles of equal treatment and non-discrimination to be verified[37]. Sometimes it is even said, somewhat oddly[38], that it exists to enable such compliance to be verified by the public authority itself[39]. Such explanations for the existence of an *invariable* requirement are equally unpersuasive. They fail to explain why a requirement exists for the prior publication of criteria which are to be applied in addition to an obligation to provide a statement of the reasons for the decision. As the Court of Justice pointed out in ***C-92/00 Hospital Ingenieure v Stadt Wien***[40],

> "The Court's case-law...demonstrates that the principle of equal treatment.. implies in particular an obligation of transparency in order to enable verification that it has been complied with...In that respect, it should be noted that the duty to notify reasons for a decision...is dictated precisely by concern to ensure a minimum level of transparency in the contract-awarding procedures to which that directive applies and hence compliance with the principle of equal treatment."

Thus a statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the authority which adopted the measure in question in such a way as to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights, and to enable the court to exercise its supervisory jurisdiction. The function of a statement of reasons is thus to enable those concerned and the courts to ascertain, for example, whether the principles of equal treatment and non-discrimination have been complied with. That may be possible without any objective criteria which have in fact been applied having been published in advance of any decision.

A third reason given for the principle of transparency in this context is that it exists to preclude any risk of favouritism or arbitrariness on the part of the authority[41]. This explanation explains

---

37 See eg ***C-285/99 Impressa Lombardini SpA v ANAS*** [2001] ECR I-9233 at [38]; ***C-19/00 SIAC Construction Ltd v County of Mayo*** [2001] ECR I-7725 at [41]; ***C-470/99 Universale-Bau AG*** [2002] ECR I-11617at [91]; ***C-496/99 EC v CAS Succhi di Frutta SpA*** [2004] ECR I-3801 at [109]; ***T-345/03 Evropaïki Dynamiki v EC*** [2008] ECR II-341 at [142].

38 The reason appears simply to be the continued reiteration of the formulation used in ***C-275 Unitron Scandinavia*** [1999] ECR I-8291 which reflected the specific provision in the Directive under consideration in that case: see footnote 15 above.

39 See eg ***C-275/98 Unitron Scandinavia A/S*** [1999] ECR I-8291 at [31]; ***C-324/98 Telaustria Verlags GmbH v Telecom Austria*** [2000] ECR I-10745 at [61]; ***C-458/03 Parking Brixen*** [2005] ECR I-8585 at [49]; ***T-258/06 Germany v EC*** [2010] ECR *** at [76].

40 [2002] ECR I-5553 at [45]-[46].

41 See in the context of public procurement ***C-496/99 EC v CAS Succhi di Frutta SpA*** [2004] ECR I-3801 at [111]; ***T-345/03 Evropaïki Dynamiki v EC*** [2008] ECR II-341 at [144]; ***T-437/05 Brink's Security Luxembourg***

why what has to be published in advance are unambiguous "objective criteria" on which the exercise of discretion is to be based. It also explains why the obligation to give reasons may not suffice to serve the purpose it exists for in the absence of such prior publication. As the Court stated ***C-463/00 EC v Spain***[42], for example, in that case "the fact that it appears to be possible to bring legal proceedings against such decisions makes no difference... since neither the law nor the decrees at issue provide the national courts with sufficiently precise criteria to enable them to review the way in which the administrative authority exercises its discretion." The same point was made by the Court in ***Case 318/86 EC v France*** *supra*. This reason for a requirement for prior publication of unambiguous objective criteria by reference to which a public authority must exercise any discretion it has, therefore, at least explains why such a requirement might be adopted and its content. It may also be thought to reflect a view that discretions should be rule-governed if the rule of law is to be upheld. As Dicey once put it, "wherever there is discretion there is room for arbitrariness, and...discretionary authority on the part of the government must mean insecurity for legal freedom on the part of its subjects...[the rule of law] excludes the existence of arbitrariness..or even of wide discretionary authority on the part of the government"[43]. Thus second ingredient of the rule of law in Lord Bingham's view was that "questions of legal right and liability should ordinarily be resolved by the application of the law and not the exercise of discretion". In his view that did "not mean...that the criteria governing administrative decisions should be prescribed in statute or regulations made under a statute...what matters is that decisions should be based on stated criteria and that they should be amenable to legal challenge"[44].

A fourth reason given for the requirement for prior publication of the objective criteria on which discretions will be exercised is to enable those affected to know what their rights and obligations are[45]. This reason could be seen to be merely a reflection of the implicit concern

---

SA v EC [2009] ECR ** at [115]; ***T-50/05 Evropaïki Dynamiki v Commission*** [2010] ECR ** at [58]; in the context of the cases on prior administrative authorisations ***C-205/99 Anilar*** [2001] ECR I-1271 at [38]; ***C-250/06 United Pan Europe Communications Belgium SA v Belgium*** [2007] ECR I-11135 at [46]; ***C-389/05 EC v France*** [2008] ECR I-5397 at [94]; ***C-169/07 Hartlauer*** [2009] ECR I-1721 at [64]; ***C-203/08 Sporting Exchange Ltd v Minister van Justitie*** [2010] ECR ** at [50]; ***C-46/08 Carmen Media Group*** [2010] ECR ** at [87].

42 [2003] ECR I-4581 at [79].

43 See AV Dicey *Introduction to the Law of the Constitution* 8th ed London 1915 at p184 and p198.

44 See Tom Bingham *The Rule of Law* 2010 p48,50.

45 See eg ***C-483/99 EC v France*** [2002] ECR I-4781 at [50]; ***C-463/00 EC v Spain*** [2003] ECR I-4581 at [75].

underlying previous reason for adopting the requirement: unless the exercise of discretions are rule-bound, its exercise will necessarily be unpredictable and those whose rights and obligations are made subject to it will not be able to predict what their rights and obligations may be in practice. But it may also reflect another value to which the rule of law seeks to give effect. As Lord Bingham has said, "the law must be accessible and so far as possible intelligible, clear and predictable" because, amongst other reasons, "if we are to claim the rights which the civil (that is non-criminal) law gives us, or to perform the obligations which it imposes on us, it is important to know what our rights and obligations are. Otherwise we cannot claim the rights or perform the obligations". Moreover, as he pointed out, "the successful conduct of trade, investment and business generally is promoted by a body of accessible rules governing commercial rights and obligations"[46].

The final reason given for the requirement for prior publication is opening up public procurement to effective competition[47]. This objective is perhaps best able to explain some of the requirements that have developed in the context of public procurement[48]. But it is not a reason which applies in situations in which no competition required, so that it does not provide support for a general principle requiring prior publication and cannot support some of the case law referred to above.

Only two of the reasons offered for a general requirement for prior publication of objective criteria by reference to which a public authority must exercise any discretions it has which

---

[46] See Tom Bingham *The Rule of Law* 2010 p37-38.

[47] See eg recital 2 to Directive 2004/17/EC; ***Case 31/87 Gebroeders Beentjes BV v Netherlands*** [1988] ECR 4635 at [21]; ***C-138/08 Hochtief AG v Közbeszerzések Tanácsa Közbeszerzési Döntobizottság*** [2009] ECR I-9889 at [47]-[48]; ***C-324/98 Telaustria Verlags GmbH v Telekom Austria*** [2000] ECR I-10745 at [62]; ***C-458/03 Parking Brixen*** [2005] ECR I-8585 at [49].

[48] As Advocate General Jacobs said in his opinion in ***C-19/00 SIAC Construction Ltd v the County of Mayo*** [2001] ECR I-7725 at [41] about the requirement to give notice of the award criteria imposed by a directive, "the mere fact of awarding the contract on the basis of criteria of which tenderers were not informed prevents them from planning the structure of their tenders so as to achieve *optimum competitivity* and clearly fails to meet the requirements of transparency embodied in art 29(2) - a fact which vitiates the procedure regardless of whether the criteria used were in fact objective and regardless of whether all tenderers were kept equally uninformed of the true basis on which the award was made." (Emphasis added). It is possible to have a competition in which those participating are aware of the framework within which the competition is being conducted but equally ignorant of certain matters (such as the weighting to be applied to the criteria for assessing bids) which may in fact be taken into account without treating those involved unequally or discriminating against or in favour of anyone.

engages with the rights and freedoms of others, therefore, would appear to explain the existence of any such general requirement and its apparent content. These are precluding the risk of arbitrary decisions and predictability of what such rights and freedoms will mean in practice.

Is there, and should there by a general principle of transparency which requires prior publication?

The cases to which I have referred may be thought sufficient to support the recognition of a general principle of transparency which would impose a requirement for prior publication of unambiguous, objective criteria on which the exercise of administrative discretions that engage rights and freedoms recognised in the Treaties will be based. This would involve a general principle of transparency *ex ante* in addition to a general principle of transparency *ex post* (provided by the obligation to give reasons).

Any such general principle (if it exists) has received scant attention in standard English texts expounding EU law, although there is an assertion in *Law of the European Union*, when dealing with general principles (based simply on three procurement cases), that "the principle of equality..implies an obligation of transparency so that respect for the principle can be ensured"[49], albeit without any indication of what that might entail. The relative lack of attention in such texts to the existence and content of any such general principle may be explicable, however, by the fact that the two main streams of case law to which I have referred have only emerged in the last decade.

There are good reasons, however, to hesitate before recognising a general principle of EU law that there must be prior publication of unambiguous, objective criteria on which the exercise of administrative discretions that engage Treaty rights and freedoms will be based. Such general principles do not need to be replicated in national law: domestic courts must give effect to them in matters falling within the scope of European law[50]. With the advent of the Charter of Fundamental Rights of the European Union[51] and the expansion of the competence of the

---

[49] See *Law of the European Union* eds Vaughan and Robertson Vol 1 Section 3 at [3(9].

[50] Cf ***C-147/08 Jürgen Römer v Freie und Hansestadt Hamburg*** [2011] ** (GC) at [53]-[64].

[51] See Title III.

Union, equality and non-discrimination may be rights which will attract more attention and be more generally applicable as a matter of primary EU law. The significance of recognising that a principle of transparency is implied by, or flows from them, which itself requires transparency *ex ante* in relation to the exercise of administrative discretions, therefore, could have wide ramifications dependent on its content.

Effectively what any requirement for prior publication of unambiguous, objective criteria on which the exercise of administrative discretions will be based seeks to do is to deprive an authority of discretion when it comes to make any decision, leaving it only with a need to exercise judgment against predetermined criteria. This does not eliminate the risk of arbitrariness but it may reduce it; it may make decisions more predictable and it may make any defects in decision-making more easily detectable. But it presupposes an omniscience which will enable an exhaustive statement of such criteria to be provided in advance which may be unrealistic and it inevitably involves a loss of flexibility when taking decisions in responding to the merits of a particular case which may not have been anticipated or which the criteria fixed in advance do not sufficiently allow to be taken into account. There will thus inevitably be difficulties and costs involved in having an invariable requirement for prior publication.

Thus it is one thing to have a policy to guide the exercise of any discretion in a particular case. It is another, as English public law recognises, to have a rule which will permit of no exceptions when such a policy is applied in the exercise of a discretion: that is regarded as fettering it unlawfully[52]. Thus Lord Bingham, who shared Dicey's distrust of executive power and thought that administrative decisions should be based on stated criteria, also recognised that "there is a danger in carrying it to the extreme, by holding that officials or ministers charged with making decisions should have no discretion at all. Such a degree of inflexibility built into the system would make no allowance for the exceptional case calling for special treatment, which would itself be a source of injustice"[53].

English constitutional law has not even gone so far as requiring the publication of a policy to guide the exercise of any administrative discretion before it can be exercised. Its current approach is that what the rule of law requires is the identification of a framework within which

---

[52] See eg HWR Wade and CF Forsyth *Administrative Law* 10th ed p270-276.

[53] See Tom Bingham *The Rule of Law* 2010 p50.

any discretion may be exercised coupled with scrutiny of how it has in fact been exercised within it. But that framework may be provided solely by the identification of the purposes for which the discretion exists[54]. It may well be said that this approach neglects two problems from the point of view of the rule of law which the principle of transparency illustrated in the case law discussed above seeks to address: (i) *ex post facto* review within such a legal framework, even when reasons are provided, may make it difficult to ascertain whether a decision was in fact arbitrary since it may be difficult to determine from the decision itself whether similar cases have been, or would be, treated similarly; and (ii) it does not address one of the values to which the rule of law seeks to give effect, that is predictability so that those subject to the law can plan and co-ordinate their activities with reasonable confidence about what they may or must do and what they may be entitled to in practice.

Recognition of these drawbacks to the conventional English approach does not necessarily entail, however, simply adopting a requirement to publish in advance objective criteria on which the exercise of any administrative discretion engaging Treaty rights and freedoms will be based. There are other options.

A more nuanced approach to such a requirement is possible that takes account of the circumstances and what is possible without involving excessive rigidity, as the Strasbourg Court has shown when considering what is required if an authority is to act "in accordance with the law" or "in a manner prescribed by law". As that Court has said[55]

> "a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to

---

54 This approach is perhaps best summarised by HWR Wade and CF Forsyth in *Administrative Law* 10th ed at p286: "It used to be thought to be classical constitutional doctrine that wide discretionary power was incompatible with the rule of law. But this dogma cannot be taken seriously today, and indeed it never contained much truth. What the rule of law demands is not that wide discretionary power should be eliminated, but that the law should control its exercise. Modern government demands discretionary powers that are as wide as they are numerous...The first requirement is the recognition that all power has legal limits. The next requirement, no less vital, is that the courts should draw those limits in a way which strikes the most suitable balance between executive efficiency and legal protection of the citizen...arbitrary power and unfettered discretion are what the courts refuse to countenance. They have woven a network of restrictive principles which require statutory powers to be exercised reasonably and in good faith, for proper purposes only, and in accordance with the spirit as well as the letter of the empowering Act."

55 See ***Sunday Times v the United Kingdom*** (1979) 2 EHRR 245 at [49].

> foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice."

It has also stated that[56]:

> "the scope of the notion of foreseeability depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed. It must also be borne in mind that, however clearly drafted a legal provision may be, its application involves an inevitable element of judicial interpretation, since there will always be a need for clarification of doubtful points and for adaptation to particular circumstances. A margin of doubt in relation to borderline facts does not by itself make a legal provision unforeseeable in its application. Nor does the mere fact that such a provision is capable of more than one construction mean that it fails to meet the requirement of "foreseeability" for the purposes of the Convention."

Accordingly the Strasbourg Court has held that

> "a law which confers a discretion is not in itself inconsistent with the requirement of foreseeability, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference"[57].

Thus a provision allowing a housing authority when considering applications to occupy housing to have regard to "such other factors" as it deemed necessary or expedient, so that it could consider not only the housing situation at relevant time but also the particular circumstances of each case (and thus to weigh the public interest against that of the individual), met the requirement of "forseeability".

There are also other possible techniques for dealing with the problem. Even in those cases in which the absence of prior notification of the objective criteria makes it more difficult for a

---

[56] See ***Sahin v Turkey*** (2007) 44 EHRR 5 at [91].

[57] ***Gillow v the United Kingdom*** (1989) 11 EHRR 335 at [51].

claimant to show, or a court to detect, unequal treatment or discrimination, altering the onus of proof may assist. For, example, where an undertaking applied a system of pay which was wholly lacking in transparency, the Court of Justice found that it was for the employer to prove that his practice in the matter of wages was not discriminatory, if a female worker could establish, in relation to a relatively large number of employees, that the average pay for women was less than that for men[58].

The difficulties of setting unambiguous, objective criteria in advance in accordance with which a decision is to be taken can be seen in the procurement directives and the court's approach to their implementation. This approach involves a more nuanced approach in practice to setting criteria in advance than some statements by the Court might suggest even in the context of a competition where the rules have to be promulgated in advance. Although the Directives require notice to be given the "criteria" by reference to which a contracting entity will decide which offer it receives is most economically advantageous, the sort of "criteria" it had in mind were not rules in accordance with which that decision would be made but rather the types of consideration by reference to which that matter was to be determined. Thus the examples given in the Directive itself of "criteria" are such things as "quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after- sales service and technical assistance, delivery date and delivery period or period of completion"[59]. Such considerations may be given weightings or an indication of their relative importance but they are not rules which can be applied to determine the outcome. Similarly the Court has recognised as "sub-criteria" headings descriptive of types of relevant consideration[60]. The Court has, therefore, dismissed complaints that "criteria" such as "experience and competence", "technical quality of the equipment and materials proposed", "proposed methodology for the project", "understanding of the specifications in terms of reference and the succinct presentation of that understanding" and "quality of the operational services" were too vague and uncertain[61]. Moreover the Court has not insisted in the context

---

58 See ***Case 109/88 Handols v Dansk Arbejdsgiverforening*** [1989] ECR 3199 at [10]-[16].

59 See eg article 53.1(a) of Directive 2004/18/EC.

60 See eg ***C-331/04 ATI EAC Srl v ACTV Venezia Spa*** [2005] ECR I-10109 at [8], [9] and [18]-[19] (eg available parking areas, procedures for supervision, numbers of drivers etc); ***T-70/05 Evropaïki Dynamiki v EMSA*** [2010] ECR ** at [18], [19], [149]-[152] (eg "deliverables")

61 See ***T-4/01 Renco Spa v the Council*** [2003] ECR I-171 at [8], [69]-[71]; ***T-70/05 Evropaïki Dynamiki v EMSA*** [2010] ECR ** at [18]-[19] and [128]-[138]; see also ***T-50/05 Evropaïki Dynamiki v EMSA*** [2010] ECR ** at

of public procurement that the general principle of transparency itself requires more than prior notice of such a framework identifying what types of consideration will be relevant to the decision to be taken, and precluding any subsequent elaboration of it by for example adding weightings or an order of relative importance, unless that could affect what might be offered[62].

There should be no invariable requirement, therefore, for prior publication of unambiguous, objective criteria on which the exercise of any administrative discretion will be based that engages Treaty rights and freedoms in respect of which persons are entitled to equal treatment without discrimination. What transparency should require in such cases by way of prior publication ought to depend on the nature of the particular case and in the circumstances what it may be reasonable to expect by way of foreseeablity and protection against arbitrary decisions without unnecessarily sacrificing flexibility which is desirable to maintain in the public interest and to avoid injustice. Recognition of a general principle of transparency requiring invariable prior publication of unambiguous objective criteria would be insufficiently sensitive to such needs for flexibility. No doubt that may mean that the principle of transparency remains only a principle and that it will require judgment in its application. But so equally do other principles fundamental to the rule of law, such as fairness. That should be no objection to a more nuanced approach.

John Howell QC

---

[110]-[111].

62 See footnote 13 above and ***C-226/09 EC v Ireland*** [2010] ECR *** at [12]-[15], and [40]-[50].