ARTICLES

TRANSPARENCY AND ACCESS TO PUBLIC SECTOR INFORMATION IN ITALY: A PROPER REVOLUTION?

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Abstract

In 2006 the Italian Government adopted a Legislative Decree (No. 36/2006) to transpose Directive 2003/98/EC on the re-use of public sector information. The Directive 2003/98/EC represents, as a matter of fact, the starting point for the adoption of open data policies in many Member States, including Italy. In fact, while it merely aimed at providing a minimal harmonization and did not pose any obligation to allow re-use of documents, it *de facto* encouraged a broader availability of public sector information with the idea that such an extended availability would represent some sort of added value also for the public body itself, by promoting transparency and accountability.

Following this open data policy trend, in 2009 and in 2013 the Italian Government adopted two important legislative decrees, aiming at implementing the principle of transparency in our national legal system, understood as a mere obligation to disclose a set of information. Transparency is thus ensured, at present, via publication of a large amount of information on Public Administration institutional websites.

This idea of transparency raises at least two important issues. On the one hand, while transparency of the Public Administration is certainly an important issue for modern democracies, it still cannot be understood as a value in itself and its consistency with other founding values, such as privacy and data protection, has to be guaranteed at all times. On the other

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hand, if the ultimate reason for national transparency policies is to ensure accountability of the Public Administration, the extent to which transparency, understood as a mere open data policy, can actually deliver on its revolutionary potential has also to be called into question.

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1. Introduction

Law No. 241 of 1990 on administrative procedure established, for the first time, general rules on the right of access to administrative documents,[1] which partly reproduce rules already laid down in sectorial legislations.

Law No. 241/90 was, as a matter of fact, the first concrete

[1] Law No. 241 of 11 August 1990 setting new rules concerning administrative procedure and the right of access to documents, published in the Official Gazette of 18 August 1990, No. 192.

and organic attempt by the legislator to implement the principles laid down in the first paragraph of article 97 of the Italian Constitution, according to which public bodies are organized in such a way as to ensure good administration and impartiality.

Nevertheless, fifteen year later, with Law No. 15/2005,[2] the Italian Parliament re-wrote almost the entire Chapter V of Law No. 241/90 on access to administrative documents and made some steps back, in so far as access to administrative documents is concerned.

At the same time, in 2006 a Legislative Decree (No. 36/2006)[3] was adopted in order to transpose Directive 2003/98/EC[4] on the re-use of public sector information.

Although the aim of this Directive was only to establish a minimum set of rules governing the re-use (for private or commercial purposes) of existing documents held by public bodies of the Member States, and although the Directive aimed at building on the existing access regimes in the Member States, without changing the national rules on access to documents[5], it did represent a starting point for the adoption of open data policies in many Member States, including Italy. In fact, while it merely aimed at providing a minimal harmonization and did not pose any obligation to allow re-use of documents, *de facto* it encouraged a broader availability of public sector information with the idea that such an extended availability would represent some sort of added value also for the public body itself, by promoting transparency and accountability.[6]

Following this open data policy trend, in 2009 and in 2013 the Italian Government adopted two legislative decrees bearing

[2] Law No. 15 of 11 February 2005 that introduces Amendments to Law No. 241 of 7 August 1990, relating to general rules on administrative action, published in the Official Gazette of 21 February 2005, No. 42

[3] Legislative Decree No. 36 of 24 January 2006, published in the Official Gazette of 14 February 2006.

[4] Directive 2003/98/EC of the European Parliament and Council of 17 November 2003 on the re-use of public sector information, at http://www.eurlex.eu. Directive 2003/98/EC was recently amended by Directive 2013/37/EU of the European Parliament and Council of 26 June 2013, at http://www.eurlex.eu.

[5] Directive 2003/98/EC quoted above, recital No. 9.

[6] See now Directive 2003/98/EC as amended by Directive 2013/37/EU quoted above, recital No. 4.

the paradigmatic headings: "Optimization of productivity of public work and efficiency and transparency of the public administration" (legislative decree No. 150/2009[7]) and "Reorganization of the rules concerning the obligations of publicity, transparency and dissemination of information by public authorities" (legislative decree No. 33/2013[8]).

2. The Right of Access to Administrative Documents in Italian Law No. 241/90 on Administrative Procedure

2.1. Origin and Nature of the Right of Access

The general discipline on the right of access to administrative documents, which in Italy was defined for the first time under Chapter V of Law No. 241/1990 setting new rules concerning administrative procedure and the right of access to documents, is the result of a long and complex development process.

The Report of the Constituent Assembly, which was submitted to the Investigation Commission set up by order of the Prime Minister on 11 October 1944, already pointed out that a general law on the public administration was required in order to regulate, amongst other things, the possibility for citizens to view and obtain copies of administrative documents in order to «counter the bad habit prevailing in the public administration to hinder such knowledge.»[9] However, the scheme of the aforementioned general law designed by the *Forti* Commission did not receive the expected support, as was the case with the following draft laws presented in 1954 and in 1955, and submitted in Parliament during the same period and, again, in 1963.[10]

So, after several failed attempts made in the previous decades, at the beginning of the 1980's pressure toward the

[7] Legislative Decree No. 150 of 27 October 2009, published in the Official Gazette of 31 October 2009, No. 254.

[8] Legislative Decree No. 33 of 14 March 2013, published in the Official Gazette of 5 March 2013, No. 80.

[9] See F. Cuocolo, *Commento all'articolo 22*, in V. Italia & M. Bassani (eds.), *Procedimento amministrativo e diritto di accesso ai documenti (Legge 7 agosto 1990, n. 241 e regolamenti di attuazione)* (1995).

[10] See G. Pastori, *Il diritto d'accesso ai documenti amministrativi in Italia*, 1 Amministrare 149 (1986); B. Selleri, *Il diritto di accesso agli atti del procedimento amministrativo* (1984).

legislator increased and specific requests were made to issue general rules on administrative procedure, reflecting what had recently happened in Germany with the introduction of the *Verwaltunsgverfahrensgesetz* of 1976. As a result, a new commission chaired by Professor Mario Nigro[11] was appointed, which concluded its work in 1984. The commission prepared two different law drafts: one on the administrative procedure and one on the right of access to administrative documents. The documents in point were then unified and, together, were formalized into Law No. 241/90 under the heading «New rules concerning administrative procedure and the right of access to documents».

Later on, as we will see, Chapter V of Law No. 241/90 on access to administrative documents was re-written almost entirely (under Law No. 15/2005).

Before the adoption of Law No. 241/90, the right of access to administrative documents had already been established – specifically as from the beginning of the 1980's – but only in sectorial legislations.[12] However, the Italian legal doctrine had long identified sound constitutional grounds on which a general right of access to the public administration documents could be based. Such grounds included, first and foremost, the principles of democracy, protection of personal rights, and equality set under articles 1, 2, and 3 of the Constitution; secondly, the general guarantee of those freedoms that provide a democratic connotation to the citizen/authority relationship, most notably the freedom of information, which is guaranteed under article 21 of the Constitution but, more than that, by the entire Italian Constitution itself.[13] This right to information is, in turn, also a result of the provisions of articles 97 and 98 of the Constitution.[14] Further constitutional grounds supporting access to administrative documents are to be found also in articles 24 and

[11] Leading exponent of the Italian legal doctrine on administrative law for many decades. For information visit http://www.treccani.it/enciclopedia/mario-nigro_%28Enciclopedia_Italiana%29/. Accessed 10 June 2014.

[12] For a general overview of the previous sectorial legislation on this topic: M.A. Sandulli, *Accesso alle notizie e ai documenti amministrativi*, 4 Enc. dir. 15 (2000).

[13] See B. Selleri, *Il diritto di accesso* cit. at 10.

[14] G. Morbidelli, *Il procedimento amministrativo*, in L. Mazzarolli (ed.), *Diritto amministrativo* (2005).

113 of the Constitution due to the broader guarantee that the right of access to administrative documents provides to the judicial protection of the rights and interests set forth therein.[15]

After the adoption of Law No. 241/90 the Italian legal doctrine agreed that, with the provisions on the right of access set forth under article 22 of Law No. 241/90, the principle of secrecy in administrative activities had finally been overturned in favor of the opposite principle of transparency.[16] Indeed, in its original version, article 22 of Law No. 241/90 explicitly provided that "In order to ensure transparency in the administrative activities and to facilitate impartiality thereof, anyone who may be interested therein for the protection of legally relevant situations is granted the right to access administrative documents pursuant to the formalities established under this law." However, in the years following the introduction of the above-mentioned legislation, a restrictive interpretation approach began to be commonly taken in Court rulings,[17] aimed at equating the interest to gaining access to administrative documents to the so-called interest to bring a legal action. The consequence of this was that the applicant was required to provide evidence of a *direct, concrete, and actual* interest to access administrative documents as is required, in the Italian system of administrative judicial protection, of anyone who wants to bring a legal action.[18]

Later on, the new legislation introduced in 2005[19] radically changed the provision of article 22 of law No. 241/90 and adopted this restrictive interpretation established in Court rulings. This

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[15] M.A. Sandulli, *Accesso alle notizie e ai documenti amministrativi* cit. at 12.

[16] See A. Sandulli, *La riduzione dei limiti all'accesso ai documenti amministrativi*, 2 Gior. Dir. Amm. 529 (1998), who underlines the overcoming of the idea of secrecy as a subjective predicate (a document is secret just because it is of the public administration), for a transition to a concept of secrecy as an objective requirement of the document, rather related to the substance of the information contained therein.

[17] Italian Council of State, IV, 10 June 1996, No. 1024; VI, 7 December 1993, No. 966; VI, 19 July 1994, No. 1243; IV, 26 November 1993, No. 1036. See C. Gallo & S. Foà, *Accesso agli atti amministrativi*, 1 Dig. Disc. Pubbl. 6 (2000).

[18] See R. Villata, *La trasparenza dell'azione amministrativa*, in VV. AA. (eds.), *La disciplina generale del procedimento amministrativo (Atti del XXXII Convegno di studi di scienza dell'amministrazione, Varenna-Villa Monastero, 18-20 settembre 1986)* (1989).

[19] Cit. at 3.

meant that, on that occasion, transparency was expunged from the right of access[20] - and included, instead, in article 1 of Law No. 241/90: the provision setting the general principles for the administrative activities.[21] In essence, as from 2005, pursuant to the general rules established under article 22, the exercise of the right of access was explicitly limited to "private parties, including stakeholders representing public or widespread interests, who have a direct, concrete, and actual interest corresponding to a legally protected situation that is linked to the document to which access is requested."[22]

As a complement to such restrictive provision, para 3 of article 24 of Law No. 241/90, (also introduced with the new provisions of Law No. 15/2005) explicitly provides that "no requests of access made with the intention of generally monitoring the work of public administrative bodies shall be accepted."

As to the nature of the right to access, while in EU Law the nature of access to documents is that of a proper right to citizenship,[23] in the Italian legal system the nature of such access is still debated, both in Court rulings and in the legal doctrine.

While some authors, making reference to the literal meaning (right of access) and to other elements (e.g. exclusive jurisdiction of the administrative Court), consider it to be a subjective right,[24] others, focusing on different elements (judicial protection entrusted to the administrative Court, request subject to the discretionary approval of the administration), speak of a mere legitimate interest.[25] And therefore of a legal position which

[20] See E. Carloni, *La "casa di vetro" e le riforme. Modelli e paradossi della trasparenza amministrativa*, 3 Dir. Pubbl. 779 (2009). See *infra,* paragraph 3.1.

[21] According to article 1 of Law No. 241/90, in the version amended in 2005, "Administrative activities shall pursue the objectives established by the law and shall be governed by the criteria of economy of action, effectiveness, impartiality, publicity and transparency, in accordance with the formalities laid down both in this law and in the other provisions governing individual procedures, as well as by the principles established in the legal order of the European Community."

[22] Article 22, paragraph 1b of Law No. 241/90.

[23] Court of First Instance, 17 June 1998, in Case T-174/95, Svenska Journalistförbunde v. Council, in ECR, 1998, p. II-2289 et seq.

[24] See F. Figorilli, *Il contraddittorio nel giudizio speciale sul diritto di accesso*, in 3 Dir. Proc. Amm. 584 (1995), A. Perini, *L'autonomia del diritto di accesso in giudizio*, in 1 Dir. Proc. Amm. 109 (1996).

[25] L. Mazzarolli, *L'accesso ai documenti amministrativi. Profili sostanziali* (1998).

undoubtedly is less protected and largely ancillary to the protection of public interest.[26] Incidentally, this understanding of the right of access as a mere legitimate interest is also supported in the rulings of the Italian Council of State.[27]

2.2. Ownership and Formalities for Exercising the Right of Access

As anticipated in the previous section, the right of access is now granted – pursuant to article 22 para 1 letter b) of Law No. 241/90 – only to the stakeholders, who are to be understood as "all private parties, including stakeholders representing public or widespread interests, who have a direct, concrete, and actual interest corresponding to a legally protected situation that is linked to the document to which access is requested." As was discussed above, the new provision seems to be more restrictive than the original one established under article 22, but it fully reflects not only the position that has gradually gained consensus in the Court rulings, but also a typical tradition of the Italian administrative system that, starting from the unification of Italy, has always been based on the principle of confidentiality of information,[28] which was a binding duty of civil servants who were obliged to keep the strictest confidentiality on all information that they became aware of in the performance of their working tasks, as a result of an authoritative and all but transparent model

[26] According to the Italian legal theory on administrative law, a "legitimate interest" is an individual interest that is closely connected to a public interest and protected by the law only through the legal protection of the latter. For an introduction to Italian Public Law, see G.F. Ferrari, *Italian Public Law* (2008).

[27] The Italian Council of State (Consiglio di Stato), V, 2 December 1998, No. 1725 confirmed by a later decision of the plenary session of 24 June 1999, No. 16.

[28] Pursuant to Section 15 of the Consolidated Law on civil servants approved by Presidential Decree No. 3 of 10 January 1957: "Employees must keep full confidentiality on their civil service. They shall not disclose information regarding administrative measures or operations, whether ongoing or completed, or information that has come to their knowledge by virtue of their duties, to persons who are not entitled to it, except in the situations and in the ways provided for by the rules governing the right of access. Within their individual fields of competence, employees who are responsible for an office shall issue copies and excerpts from official instruments and documents only in those cases that are not prohibited by the internal rules of the office."

of public administration.[29]

However, the actual provision of article 22 does not prevent the possibility to introduce a broader right of access in special sectorial legislations. This is the case, for instance, of Legislative Decree No. 195/2005[30] on the environment, which makes environmental information available to anyone who applies for it, with no need to state or qualify their interest. Another example is offered by the consolidated law on local government agencies,[31] where article 10, in addition to granting citizens the right to access information to acts and proceedings that directly involve them, recognizes the right to access "the information held by the administration in general."[32] However, the prevailing interpretation of this legislation in the Court rulings is extremely restrictive as, in this case too, evidence of a specific interest in the document in point is requested.[33]

As to the formalities for exercising the right of access, pursuant to article 22 para 1 letter a) of Law No. 241/90, the right of access is to be understood as "the right of interested parties to view and to take copies of administrative documents."

Pursuant to the provisions of Presidential Decree No. 184/2006,[34] access may be both informal, "upon request, including a verbal request" (article 5), and formal, "Should it not be possible to immediately fulfil the request informally, or should there be doubts on the title of the applicant, his/her identity or power of representation, or on the actual interest based on the supplied information or documents, on the accessibility to the document or on the existence of other interested parties" (article 6).

In both cases, the request of access must be duly motivated

[29] G. Arena, *Il segreto amministrativo. Profili storici e sistematici* (1984).

[30] Legislative Decree No. 195 of 19 August 2005, "Implementation of Directive 2003/4/EC on public access to environmental information," published in the Official Gazette of 23 September 2005, No. 222.

[31] Legislative Decree No. 267 of 18 August 2000, "Consolidated law on local government," published in the Official Gazette of 28 September 2000, No. 227.

[32] Back in the pre-Republican time, citizens were entitled to view and obtain copies of all the resolutions taken by municipalities and provinces under article 62 of the Consolidated provincial and municipal laws. See M.A. Sandulli, *Accesso alle notizie e ai documenti amministrativi*, cit. at 12.

[33] For general reference, see Council of State V, No. 1412 of 18 March 2004, at http://www.giustizia-amministrativa.it.

[34] Presidential Decree No. 184 of 12 April 2006, "New regulations on access."

so as to show the qualified interest that is now necessarily required in order for the right of access to be granted.

In the case of informal access, "the request is examined immediately, is subject to no formalities, and is deemed to be approved by the act of indicating the publication containing the relevant information, or showing the relevant document, or making copies, or any other suitable act."[35] Conversely, in the case of formal access, "the access procedure must be concluded within a term of 30 days."[36] Within 10 days, the administration may suspend the term should it be necessary to supplement the documentation that turned out to be irregular or incomplete.[37]

The act whereby a formal request of access is approved is an administrative decision. Such administrative act "always comes with the indication of the office and the branch to which reference can be made, as well as with an appropriate period of time of no less than 15 days in which the relevant documents can be viewed or copies thereof can be obtained."[38] The documents must be viewed at the office indicated in the request approval administrative decision, during the working hours, before the staff in charge, if necessary.[39]

Finally, pursuant to the provisions of article 25 of Law No. 241/90 "The right of access shall be exercised by viewing and taking copies of the relevant administrative documents, in the ways and subject to the limitations established under this law. Document viewing is subject to no charge. Without prejudice to the provisions currently in force on stamp duties, as well as (re)search and survey rights, the issuance of a copy shall be subject only to payment of the copying costs incurred into." Therefore, no document can be taken away or altered in any manner. In addition to asking for copies of such documents subject to payment of the relevant copying costs, the person in point will only be allowed to take notes and transcribe the viewed documents in full or part thereof.

[35] Article 5 paragraph 3 of Presidential Decree No. 184/2006.
[36] Article 6 paragraph 4 of Presidential Decree No. 184/2006.
[37] Article 6 paragraph 5 of Presidential Decree No. 184/2006.
[38] Article 7 paragraph 1 of Presidential Decree No. 184/2006.
[39] Article 7 of Presidential Decree No. 184/2006.

2.3. Subject and Scope of the Right of Access

Pursuant to the provisions of article 22 letter d), as amended by Law No. 15/2005, "administrative documents include […] every graphic, photographic or filmed, or electromagnetic or any other kind of representation of the contents of acts, including internal documents or those not relating to a specific procedure, that are held by a public administrative body and concern activities of public interest, regardless of whether the substantive law governing them is public or private law."

In addition to confirming that access is granted also with reference to a pending administrative procedure and, hence, that the right can be exercised also on documents that are still internal to the administration (the so-called "access during the course of the procedure"), the aforementioned provision now points out that the right is also granted on documents that do not relate to a specific administrative procedure (the so-called informative access or "access outside of the course of the procedure.")[40] This confirms that the scope of the right of access is broader than that of the administrative procedure.[41]

As to the scope of the right of access, article 23 of Law No. 241/90 points out that the right of access may be exercised *vis à vis* administrative bodies, autonomous and special corporations, public bodies, and private parties operating public services. The right of access *vis à vis* independent regulatory and supervisory authorities shall be exercised within the framework of their respective regulations, in accordance with the provisions of article 24 of Law No. 241/90.

In this regard, it should also be pointed out that, while access is granted to all acts when it comes to public administrative bodies, including those governed by the private law,[42] when it comes to private parties, access to their activities is granted only limited to those that are of public interest and all other activities that may be instrumental thereto. In this respect, the Courts ruled that, for example, the documents relating to staff enrolment for "Ente Poste s.p.a." could be accessed since they are instrumental

[40] See M.A. Sandulli, *Accesso alle notizie e ai documenti amministrativi*, cit. at 12.

[41] G. Falcon (ed.), *Il procedimento amministrativo nei diritti europei e nel diritto comunitario: ricerche e tesi in discussione: atti del seminario di Trento, 8-9 giugno* (2007).

[42] Council of State, plenary section, Decision of 22 April 1999, No. 4.

to managing a service of public interest.[43]

The same remarks apply to economic public bodies.

2.4. Restrictions to the Right of Access

Pursuant to article 25, para 3, of Law No. 241/90, "Access may be denied, postponed, or restricted in the cases and to the extent established under article 24. The reasons for such denial, postponement or restriction must be stated."

Article 24 then lists a number of cases in which access to documents is excluded, namely: a) documents under State secret; b) tax proceedings, which remain governed by specific rules applicable to them; c) those activities of the public administration that are aimed at issuing regulatory, general administrative, planning, and programming documents, which remain governed by specific rules applicable to their finalization; d) selection procedures, in relation to administrative documents containing psycho-aptitude information on third parties.

Para 5 of article 24 further specifies that documents containing information connected to the interests referred to in para 1 of the same article "shall be deemed secret solely within the limited scope of such connection" and that "to such end, if applicable, the public administrative authorities shall also establish, for each category of documents, the timeframe during which the right of access shall not be granted." However, para 6 of the same article provides that the Government may establish, via a regulation, other cases in which administrative documents shall not be accessible in order to protect one of the interests set forth therein (national security and defense, international relations, monetary and currency policies, protection of the public order, documents relating to the private life or confidentiality of third parties, etc.).

However, access is only denied as a last resort, namely "Access to administrative documents cannot be denied in cases in which it suffices to resort to the power of deferment."[44]

[43] Council of State, VI, Decision of 5 March 2002, No. 1303.

[44] Article 24 , para 4.

2.5. Right of Access and Privacy Protection

The most delicate issue regarding accessibility of documents is undoubtedly the relationship between the right of access and privacy protection. This issue was firstly solved via the interpretations given in the legal doctrine and Court rulings,[45] and later was formally regulated by the novel provisions of Law No. 15/2005.

In this specific regard, the new para 7 of article 24 states that whereas, on the one hand, access has to be guaranteed to those administrative documents whose knowledge is necessary in order to protect or defend legal interests (see indent 1), on the other hand (see indent 2) "In the case of documents containing sensitive or judicial data, access shall be permitted to the extent that it is strictly indispensable and within the terms established under article 60 of Legislative Decree No. 196 dated 30 June 2003, in the case of data that might reveal information on health conditions and sexual life."

However, the Court rulings seem to take a wavering position on the issue of the actual balance between access and privacy. As a matter of fact, extremely difficult and delicate comparative evaluations need to be made, which require "an accurate assessment to be made on a case by case basis as to the legal situations that are to be taken into consideration from time to time."[46] In light thereof, the solution seems to lie in the "limitation" of access referred to in article 25 para 3 (in addition to the cases of denial and deferment). Such limitation – as the Court rulings point out – may well consist in using, if necessary, "the wording "omissis/omitted" to replace the information that fall under the protection of the right to privacy.[47]

2.6. Protection of the Right of Access

Pursuant to Article 4 para 25, also amended by Law No. 15/2005, "Upon expiry of a thirty-day term as from the date of the request without any successful result, such request shall be deemed rejected." This is namely a case of the so-called "silence-

[45] For further details, see M.A. Sandulli, *Accesso alle notizie e ai documenti amministrativi*, cit. at 12.
[46] Council of State, V, 28 September 2007, No. 4999.
[47] Council of State, V, 28 September 2007 No. 4999.

denial."

When faced with a decision to explicitly or implicitly deny access or with the postponement thereof, two options can be pursued in accordance with article 25 para 4: one is to appeal to the Italian Administrative Tribunal (*Tribunale amministrativo regionale - TAR*), which decides following a special "ruling in chambers" within thirty days as from the expiry of the term established for lodging an appeal and after hearing the defense counsels, if thus requested by the parties. The decision of the Administrative Tribunal is not temporary or preparatory to any other judgment. Indeed, it settles the dispute and can be appealed, within thirty days as from the date of notification, to the Council of State, which will decide on the appeal following the same procedure and within the same timeframe as the Administrative Tribunal.

The second alternative option offered by article 25, para 5, is to appeal to the Ombudsman or to the Commission for Access referred to in article 27, if the case concerns official documents of the central and de-centralized state administrative bodies. In both cases the appeal will consist in asking for a reversal of the decision concerning access to documents taken by the administration responsible for granting access.

Should the thirty-day term for the decision on the appeal expire without any decision being taken, the appeal shall be deemed to be rejected (article 24, para 4).

Conversely, should the Ombudsman or the Commission for Access deem the denial or the postponement of access to documents to be unlawful, "they shall inform the applicant and notify the authority responsible for granting access thereof." Should the latter "fail to issue an act confirming and stating the reasons for its decision within thirty days as from receipt of the notification by the Ombudsman or the Commission, access shall be granted."

Special rules apply, however, if access is denied or postponed due to reasons concerning personal data referring to third parties. In such case, the Commission for Access shall decide upon prior consultation with the Data Protection Supervisor, which shall issue its opinion within ten days as from the request and which opinion shall be deemed to have been given, should such period of time expire unsuccessfully.

Pursuant to the last indent of article 25, para 5, all disputes concerning access to administrative documents shall submitted to the exclusive jurisdiction of the administrative judge.

As the decision of the administrative judge is concerned, "it shall order the production of the requested documents, provided that the applicable conditions are fulfilled."[48]

3. Transparency and Access: Between National Law and European Union Law

3.1. Lack of Connections between the Right of Access pursuant to Law No. 241/90 and Transparency, and Discrepancies with the European Union Law

European Union law identifies a fundamental connection between transparency, good governance, and right of access to public documents. The existence of such connection emerges quite clearly from several speeches that the first European Ombudsman, Mr. Jacob Söderman, delivered specifically on these issues.[49]

These concepts are also dealt with in the Treaty of Rome as recently amended by the Treaty of Lisbon, which entered into force on 1 December 2009. As a matter of fact, Article 15, para 1, of the Treaty on the Functioning of the European Union (TFEU), provides that "In order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices, and agencies shall conduct their work as openly as possible." Then, para 3 reiterates the provisions of old article 255 TEC, according to which "Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union institutions, bodies, offices, and agencies, whatever their medium"[50]

In this respect, there is a clear discrepancy between the approach chosen by the Italian legislator and the approach adopted by the European Union. As was outlined above, the

[48] Article 25, para 6.

[49] D.U. Galetta, *Transparency and Administrative Governance in European Law*, in M.P. Chiti (ed.), *General Principles of Administrative Action* (2006).

[50] See also J. Ziller, *Origines et retombées du principe de transparence du droit de l'Union européenne*, in G. Guglielmi & E Zoller (eds.), *Démocratie, transparence et gouvernance citoyenne*, (2014).

Italian legal system restricts access to all acts and documents – including the internal records – by means of which the administrative function is carried out, and while the latter is being carried out, to those persons who have a legitimate title thereto and have an interest therein for the protection of their title.[51] Therefore, in the Italian system such access is basically understood as a form of guarantee given specifically only to those subjects. Its purpose is that of putting them in a position to best exercise their rights of participation and/or of objection, by giving them a comprehensive representation of the factual and legal situation that they have a more direct interest in. Thus access to documents only indirectly enhances impartiality of administrative action, through the involvement of interested parties in the administrative procedure. So the goal of transparency in administrative action, while stated in general terms in article 22 para 2 of Law 241/90,[52] is therefore guaranteed only in special circumstances and with extremely weak effects on administrative impartiality.

As a matter of fact, the only element that really reflected the principle of transparency and which could be found in the context of Law No. 241/90, was related not to the right of access to documents of the administration, but to the much more limited duty to publish "directives, programs, instructions, circulars and every act that, in general, poses requirements for the organisation, functions, goals, and procedures of a public administrative authority, or which establishes the interpretation of legal rules, or provides for their implementation." [53]. However, this provision no longer exists as it was recently repealed by Legislative Decree 2013/33[54].

[51] See above, par. 2.1.

[52] According to para 2 of article 22, introduced by law No. 69/2009, "In light of its important goals of public interest, access to administrative documents shall constitute a general principle governing administrative activity with the aim of fostering participation and of guaranteeing its impartiality and transparency."

[53] Old article 26, para 1, of Law No. 241/90.

[54] See Art. 53, para 1, letter a) of Legislative Decree of 14.03.2013, n.33.

3.2. Italy's Journey towards Transparency as an "Open Data Policy": From Legislative Decree No. 150/2009 to Legislative Decree No. 33/2013

After the first approach in 2006,[55] with a legislation adopted to transpose Directive 2003/98/EC[56] on the re-use of public sector information, the first concretization of the principle of transparency in the Italian system is represented by the rules contained in the so-called Brunetta Decree No. 150/2009[57], "Implementation of Law No. 15 dated 4 March 2009 on the optimization of the productivity of public work and the efficiency and transparency of the public administration,"[58] whose objectives include "transparency of the public administrations also as a guarantee of lawfulness" (article 2, para 2).

Article 11 of the Brunetta Decree points out that "transparency has to be understood as *full accessibility*, including by publishing information on the institutional websites of the public administration bodies." This provision generates a qualified legal position for each and every citizen who is now entitled to obtain public information, which, unlike the provisions that apply to the right of access to public acts,[59] is patently aimed "at fostering widespread forms of monitoring so as to make sure that the principles of efficiency and impartiality are complied with" (article 11 para 1).[60]

As far as the pursued goals are concerned, transparency – as regulated by the legislator in 2009 – aims at pursuing two main

[55] Legislative Decree No. 36 of 24 January 2006, published in the Official Gazette of 14 February 2006.

[56] Directive 2003/98/EC of the European Parliament and Council of 17 November 2003 on the re-use of public sector information, at http://www.eurlex.eu. Directive 2003/98/EC was recently amended by Directive 2013/37/EU of the European Parliament and Council of 26 June 2013, at http://www.eurlex.eu.

[57] Brunetta was Minister for Public Administration and Innovation from 2008 till 2011, during the fourth Berlusconi's Government

[58] Legislative Decree No. 150 of 27 October 2009.

[59] See above par. 2.1, where a reference is made to article 24 para 3, according to which "no request of access made with the intention of generally monitoring the work of public administrative bodies shall be accepted." On this specific point see F. Patroni Griffi, *La trasparenza della pubblica amministrazione tra accessibilità totale e riservatezza*, 8 Federalismi.it 12 (2013).

[60] See on this point: S. Pignataro, *Il principio costituzionale del "buon andamento" e la riforma della pubblica amministrazione* (2012).

goals. The first goal is to enhance the efficiency of the public administration and is pursued through the transparency of the performance of the administration and of public services. The second goal is to prevent corruption and is pursued through the transparency of the procedure and of the organization.[61]

The goal of preventing corruption is actually the special focus of the subsequent Legislative Decree No. 33/2013, whose specific aim – pursuant to law No. 190/2012[62] - is to prevent and eradicate illegality in the Public Administration.

More specifically, public administration authorities are obliged to comply with the transparency requirements set forth in Decree No. 33/2013 and applicable to all of their activities, mainly by using the "institutional website" of each individual administration as a privileged instrument. Indeed, any user may access such website to look for any information regarding the activity and the organization of the public bodies without having to go through an authentication process or being identified in any manner.

As a matter of fact, the aforementioned information must be published on the home page of the institutional websites in the section on "Transparent Administration". Furthermore, "the administrative bodies cannot implement filters or other technical devices aimed at preventing web-based search engines from indexing and searching this section."

In this regard, Decree No. 33/2013 also provides for the replacement of article 54 of the e-Government Code entitled "Contents of the websites of public administrations," which, in its amended version, provides that the "websites of public administrations shall contain the data set forth in the legislative decree that redesigns the legislation concerning the duties of

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[61] In accordance with the provisions of article 9 of the United Nations Convention against corruption, stating that "taking into account the need to combat corruption, each State Party shall, in accordance with the fundamental principles of its domestic law, take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes, where appropriate". https://www.unodparaorg/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf. Accessed on 10 June 2014.

[62] Law No. 190 of 6 November 2012 establishing rules on the prevention and repression of illegality in the PA, phenomena to fight also through transparency in the administrative activity.

disclosure, transparency, and dissemination of information on the part of public administration bodies, which has been implemented pursuant to article 1, paragraph 35, of law No. 190 dated 6 November 2012."

Specific limitations to transparency are defined with a view to guaranteeing some balance between the transparency obligation and the need to protect privacy. Indeed, full accessibility is excluded for sensitive and legal data.[63] On the other hand, exceptions to transparency are admitted also in cases of public grants allotted to specific categories of beneficiaries due to their critical personal conditions – including economic, family and health-related situations – since disclosing such information would imply a severe, patent, and unjustified violation of personal or even sensitive data.[64]

3.3. Implementation of Transparency Rules: The Transparency Officer, Sanctions, and Public Access

Pursuant to the explicit provisions of Legislative Decree No. 33/2013, public administrations shall have to guarantee the quality of the information published on the institutional websites in compliance with the duty of disclosure established by the law, ensuring that such information is intact, currently updated, comprehensive, timely, user-friendly, easily understandable, easy to access, true to the original documents held by the administration, and indicating its origin and re-usability.[65]

The transparency officer is the key subject, which was instituted *ex novo* under Decree No. 33/2013, in charge of monitoring that the public administrations comply with the applicable provisions.[66] The duties of this subject include the obligation to update the Three-Year Program for transparency and integrity – which also provides specific monitoring measures on the fulfilment of transparency duties and further measures and initiatives aimed at promoting transparency in coordination with the Anti-Corruption Plan, – and to report any failure or delay in

[63] Referred to in article 4, para 1, letters d) and e) of Legislative Decree No. 196 of 30 June 2003. See also article 4 of Legislative Decree No. 33/2013

[64] Article 26 para 4 of Legislative Decree No. 33/2013.

[65] Article 6 et seq. of Legislative Decree No. 33/2013.

[66] See article 43 of Legislative Decree No. 33/2013.

complying with the disclosure duties to the policy-making body, the Independent Assessment Body (*Organismo indipendente di valutazione* - OIV), the National Anti-Corruption Authority, and, in the most severe cases, the disciplinary office.

In this regard, section VI of Legislative Decree No. 33/2013, which governs the supervision of the implementation of provisions and sanctions, is particularly important. Indeed, the Italian legislator was stricter here than it was in the past as it introduced sanctions in case of failure to comply with the applicable rules, which provide for disciplinary, management, and administrative responsibilities, as well as the application of administrative sanctions, publication of the relevant measures, and cancellation of resources previously allocated to agencies or bodies.[67]

The applicable sanctions apply both to the transparency officer, with reference to his/her specific duties, and to the managers of the Public administration and political bodies that are required to supply data in order to finalize the publication. In addition to the sanctions that are applicable to individual subjects, there are sanctions that are applicable to the relevant administrative decision, thus making it ineffective.[68]

A remarkably peculiar sanction is that of the so-called public access, which is established under article 5 of the Decree. This provision explicitly states that "the obligation established under the legislation in force for the public administration to publish documents, information, or data implies the right for anyone to request such documents, information or data in case of failure to publish them." Especially this provision makes one thing clear: that the very meaning of transparency, in the intentions of our domestic legislator, is to allow a form of citizen's control over what governments do and how they use public resources.

4. Conclusions

The limitation of the right of access to administrative documents only to private parties having a "direct, concrete and existing interest corresponding to a legally protected situation that

[67] See article 46 et seq. of Legislative Decree No. 33/2013.

[68] See article 15, para 2; article 26, para 3; article 39, para 3 of Legislative Decree No. 33/2013.

is linked to the document to which access is requested" (article 22, para 1b) was introduced, first by way of interpretation of the existing provisions by the Italian administrative Courts (TAR and Consiglio di Stato)[69] and then by the Italian legislator itself (with the reform of 2005 of art. 22 of the Italian Law No. 241 of 1990 on administrative procedure) in order to avoid 'organizational problems' to the public administration.

This limitation was therefore aiming at a goal, which is very different from that of "transparency" also introduced in art. 1, para 1 of Law No. 241/90 with the same reform of 2005[70], next to the principle of publicity. The goal at which the limitation of the right of access was aiming is, nevertheless, expressly mentioned (as well and from the very beginning) in art. 1, para 1, of Law No. 241/90: it is "economy of action" and "effectiveness"[71] which are, like publicity and transparency, criteria by which "administrative activities shall be governed".[72]

Faced with the coexistence (within the same legal text) of principles (and values) so different and potentially conflicting with each other, the role of the doctrine has been till now decisive in order to identify and maintain this balance. But, as a matter of fact, in the last decade in the reasoning of the Italian legal doctrine, as well as in the Courts rulings, the accent on efficiency requirements of administrative action has gained a major weight. So the hope (my hope!) is that we will not be faced, in the coming years, with a total reversal of roles between the legislator and the legal doctrine: with the latter just endorsing this 'substantive approach' of the national Legislator, all geared to the speed of the administrative action and the preservation of the administrative result (the administrative act), at the expense of the guarantee of a proper exercise of the administrative function and of the protection of personal rights.

A clear evidence of this trend followed by the Italian legislator is also, in my opinion, the brand new para 1 of art. 97 of

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[69] See R. Leonardi, *Il diritto di accesso ai documenti amministrativi: a proposito dei soggetti attivi per un'azione amministrativa trasparente, ma non troppo*, in 6 Foro amm. TAR (2012) 2155.

[70] Precisely with art. 1, para 1a, of Law of 11 February 2005, n. 15.

[71] See A. Massera, *I criteri di economicità, efficacia ed efficienza*, in M.A. Sandulli (ed), *Codice dell'azione amministrativa* (2011).

[72] See full provision of art.1, para 1, of Law No. 241/90, quoted above at 21.

the Italian Constitution[73], according to which "General government entities, in accordance with European Union law, shall ensure balanced budgets and the sustainability of public debt". This provision, as a matter of fact, puts all the attention on the principle of economy of administrative action, shifting therefore the focus of art. 97 of the Italian Constitution from impartiality to good administration, but the latter merely understood as an 'economic administrative action'[74].

A likewise bitter debate was raised by the limitation, in 2005, of the right of access to administrative documents. Such restriction, quite understandably, disappointed those who did believe that it would be more consistent with the very meaning of the right of access to administrative documents to provide for a right of access connected to the need for informational-social control of the administrative action, regardless of the participation in a specific administrative procedure, or of the link with the adoption of an administrative decision in which the person is individually involved.[75]

In this respect, the "journey towards transparency" outlined in Legislative Decrees No. 150/2009 and No. 33/201 (and in the dozens of other rules which, over time, have chaotically introduced various disclosure requirements) did not produce the desired change. In fact, beyond the option of principle contained in Legislative Decree No. 150/2009,[76] and despite the fact that article 5, para 2, of Decree No. 33/2031 provides that "the request for public access is not subject to any limitation as to the subjective right of the applicant and should not be motivated," it is

[73] Introduced with the Constitutional reform of April 2012.

[74] The provision raised a bitter debate in Italy, and not only in relation to the fact that it is considered as inappropriate. See on this: A. Brancasi, *L'introduzione del principio del c.d. pareggio di bilancio: un esempio di revisione affrettata della Costituzione*, 1 Quad. Cost. (2012) 108.

[75] See G. Pastori, *Il diritto d'accesso ai documenti amministrativi in Italia*, cit. at 10; G. D'Auria, *Trasparenze e segreti nell'Amministrazione italiana*. 1 Pol. Dir. (1990) 111; M. Alberti, *L'accesso ai documenti amministrativi*, in M. Alberti (ed.), *Lezioni sul procedimento amministrativo* (1992); A. Pubusa, *L'attività amministrativa in trasformazione. Studi sulla l. 7 agosto 1990, n. 241* (1993); A. Romano Tassone, *A chi serve il diritto di accesso. Riflessioni su legittimazione e modalità di esercizio del diritto di accesso nella legge n. 241 del 1990*, 1 Dir. Amm. 318 (1995).

[76] In article 11 quoted above, in para 3.2.

nevertheless clear that such "public access" is limited[77] only to "documents, information, or data" for which Legislative Decree No. 33/2013 provides a disclosure obligation[78] and is not extended to all documents, information or data held by the public administration. It is therefore not likely to compensate for the restriction of the right of access to documents introduced in 2005.

Therefore the "journey towards transparency" in Italy was undertaken in the direction of transparency understood not as free access, on request, to the data of the public administration, but rather as an obligation to disclose a set of information in the context of the so-called open data policies.[79] Transparency is thus ensured via publication of a large amount of information on institutional websites [80] and not via general accessibility (right to access) to documents, information, or data held by public administration.

From this point of view, Legislative Decree No. 33/2013 - which first entered into force at the end of April 2013 and is therefore still in a phase of first application - is a clear example of an open data policy chosen, to its extreme consequences, from a political class which is lately possessed by sort of a "transparency mood," sometimes bordering voyeurism.[81] Nevertheless, this idea of providing transparency by publishing, on the home page of the public administrations, a large amount of information held by the latter,[82] has very little to do with making information not only

[77] Along this line, see the recent decision of the Council of State stating that the provisions of Legislative Decree No. 33/2013 concern situations that neither expand nor are similar to those that allow access to administrative documents in accordance with Article 22 et seq. of Law No. 241 of 7 August 1990 (Council of State, VI, No. 5515, of 20 November 2013).

[78] Along this line, see para 1 of article 5 of Legislative Decree No. 33/2013, quoted at the end of para. 3.3.

[79] On this point, see specifically F. Patroni Griffi, *La trasparenza della pubblica amministrazione tra accessibilità totale e riservatezza* cit. at 59.

[80] In this regard, P. Canaparo, *La via italiana alla trasparenza pubblica: Il diritto di informazione indifferenziato e il ruolo proattivo delle pubbliche amministrazioni*, 4 Federalismi.it 39 (2014), uses the paradigmatic expression "wide crowd of disclosure requirements."

[81] See M.G. Losano, *Trasparenza o privacy? Due recenti polemiche italiane*, 5 Dir. Info. 471 (2008).

[82] F. Merloni, *Trasparenza delle istituzioni e principio democratico*, in F. Merloni, & G. Arena (eds.), *La trasparenza amministrativa* (2008).

downloadable, but also *useable* and *meaningful*.[83] Paradoxically, this "transparency by publishing" (plenty of information on the websites) may confuse the citizens as a result of an excessive amount of information and, therefore, generate "opacity for confusion."[84]

To conclude, when evaluating the latest trend in the Italian legislation concerning transparency, at least two problematic issues should be underlined. On the one hand, there is still the problem of transparency as detached from accountability, understood in the etymological meaning of the term: where "to account for" means "to explain." This idea of accountability, in relation to which transparency should aim at strengthening the democratic character of the institutions, is basically replaced by the idea of "spreading information," which information is not necessarily "clear" by itself and, even more so, needs an "explanation."

On the other hand, a real risk lies also in the possible detachment of the Italian open data policy from the principles of protection of personal data. Indeed, this was clearly underlined by the Italian Data Protection Supervisor in its opinion on the draft Legislative Decree,[85] which, unfortunately, was largely disregarded[86].

While transparency of the Public Administration is certainly an important issue for modern democracies, it still cannot be understood as a value in itself and its consistency with other founding values, such as privacy and data protection, has to

[83] See P. Canaparo, *La via italiana alla trasparenza pubblica: Il diritto di informazione indifferenziato e il ruolo proattivo delle pubbliche amministrazioni*, cit. at 79. See also G. Napolitano, *L'attività informativa della pubblica amministrazione: 'less is better'*, in F. Manganaro, & A. Romano Tassone (eds.), *I nuovi diritti di cittadinanza: il diritto d'informazione* (2005), and, along the same line, the comment of J. Raines on the most innovative US Transparency Act: *The Digital Accountability and Transparency Act of 2011 (DATA): Using Open Data Principles to Revamp Spending Transparency Legislation,* 57 N.Y.L. Sch. L. Rev. 342 (2012-2013).

[84] E. Carloni, *La trasparenza (totale) delle pubbliche amministrazioni come servizio*, 1 Munus 198 (2012).

[85] Opinion of the Italian DPS No. 49 of 7 February 2013, doc web. No. 2243168.

[86] See, in this vein, the negative remarks contained in the "Final Report 2013" of the Italian DPS (titled: *Data protection in the change. Big data, transparency, oversight*), in http://www.garanteprivacy.it.

be guaranteed at all times[87]. Furthermore, if the ultimate reason for national transparency policies is to ensure accountability of the Public Administration, the extent to which transparency, understood as a mere open data policy, can actually deliver on its revolutionary potential has also to be called into question.[88]

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[87] See the speech of the Italian DPS (Speech of Antonello Soro, Rome, June 11, 2013, para. 2), in http://www.garanteprivacy.it.

[88] See also D.U. Galetta, *Alcuni recenti sviluppi del diritto amministrativo italiano (fra riforme costituzionali e sviluppi della società civile)*. 1-6 Giust. Amm. 6 (2014).

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