

Openness of Public Data and Transparency of Administrative Action*

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ABSTRACT This article has a two-fold objective: (i) firstly, it aims to present the main features of the Regulation (EU) 2018/1807 on a framework for the free flow of non-personal data in the European Union; (ii) secondly, it seeks to reflect on how those may affect public administrations – one of the most relevant players in the European data economy.

1. Transparency as an Instrument of Administrative Democracy

It has become essential to guarantee transparency in public action and in the way administrations carry out their functions. This necessity is the result of the legal and social evolution that has characterised certain Western European countries, such as Italy,¹ Spain,² France³ and, to a lesser extent, Germany.⁴ These countries, unlike the Anglo-Saxon⁵ or Scandinavian states,⁶ did not in the past have regulations implementing general measures of administrative transparency.

Over the last ten years, various laws and regulations have been enacted to strengthen administrative transparency and encourage citizen participation. This movement, which led to an ‘explosion’ of transparency⁷

regulations, has overturned legal traditions based on the secrecy and impenetrability of public authorities.

The year 2013 seems to have been pivotal in this area, with the enactment of Spanish law no. 19/2013 of 9 December 2013, entitled ‘Transparencia, acceso a la información pública y buen gobierno’, and the adoption in France of loi organique no. 2013-906 of 11 October 2013 concerning ‘Transparence de la vie publique’.

The year 2013 was important even in Italy because the government enacted a legislative decree concerning administrative transparency.⁸ This decree was approved following a path which timidly began in 2009 with the ‘Brunetta’ reforms.⁹ The legislative decree was adopted on the basis of a delegated law enacted in the autumn of 2012¹⁰ to combat the proliferation of corrupt practices. This was in fact the so-called ‘Anti-Corruption Law’.

This Legislative Decree presents a certain idea of transparency that breaks with the previous Italian tradition, according to which access was necessary to protect individuals from the power of public authorities. Access was considered a tool for citizens affected by the effects of some administrative decisions to be able to set up the appropriate means of defence (including jurisdictional) against administrative acts that infringed upon their prerogatives. On the contrary, the new type of access provided for by Legislative Decree no. 33/2013 responds to the need to guarantee knowledge of the reasons that inspire the actions of administrations. So, the new concept of transparency embodies the idea of collaboration with administrations, based on

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¹ A.G. Orofino, *La trasparenza oltre la crisi. Accesso, informatizzazione e controllo civico*, Bari, Cacucci, 2020.

² J. Valero Torrijos and M. Fernández Salmerón (eds.), *Régimen jurídico de la transparencia del sector público. Del derecho de acceso a la reutilización de la información*, Cizur Menor, Aranzadi, 2014; I.M. Delgado (ed.), *Transparencia y acceso a la información pública de la teoría a la práctica*, Madrid, Iustel, 2019; E. Guichot and C. Barrero Rodríguez, *El derecho de acceso a la información pública*, Valencia, Tirant lo Blanc, 2020.

³ G.J. Guglielmi and É. Zoller (eds.), *Transparence, démocratie et gouvernance citoyenne*, Paris, Editions Panthéon-Assas, 2014.

⁴ J. von Luche and K. Gollasch, *Open Government. Offenes Regierungs- und Verwaltungshandeln – Leitbilder, Ziele und Methoden*, Cham, Springer, 2022, 25. Adde F. Schoch and M. Klopfer, *Informationsfreiheitsgesetz (IFG-ProfE): Entwurf eines Informationsfreiheitsgesetzes für die Bundesrepublik Deutschland*, Berlin, Duncker & Humblot, 2002.

⁵ P. Birkinshaw, *Freedom of Information. The Law, the Practice and the Ideal*, 4th ed., Cambridge, Cambridge University Press, 2010.

⁶ D.E. Pozen and M. Schudson, *Troubling Transparency. The History and Future of Freedom of Information*, New York, NY, Columbia University Press, 2018.

⁷ J.M. Ackerman and I.E. Sandoval-Ballesteros, *The Global Explosion of Freedom of Information Laws*, in

Administrative Law Review, vol. 58, 2006, 85.

⁸ Legislative decree no. 33 of 14 March 2013.

⁹ Law no. 15 of 4 March 2009 and legislative decree no. 150 of 27 October 2009.

¹⁰ Law no. 190 of 6 November 2012.

participatory and administrative democracy.¹¹

The previous Italian law on administrative access¹² expressly prohibited general requests aimed at monitoring the entire work of public bodies.¹³ By contrast, the new legislative framework establishes a general principle of transparency. It specifies that this principle entails freedom of access to data, information and documents held by public administrations. This form of transparency aims to protect the rights of citizens but also to promote the participation of interested parties in administrative activity. So, it encourages widespread forms of control over the exercise of institutional functions and the use of public resources.¹⁴

2. Administrative Transparency in the Age of Mistrust

Legislative Decree no. 33/2013 has profoundly changed the meaning of transparency in Italy.¹⁵ This form of transparency meets various objectives in accordance with what is expressly stated in the texts of the legislative decree. In particular, it is supposed to contribute to the implementation of various principles. We are talking about democratic and constitutional principles of equality, impartiality, responsibility, effectiveness and efficiency in the use of public resources, and the principles of integrity and loyalty in the service of the nation.

It is also a condition for guaranteeing individual and collective freedoms, as well as civil, political and social rights. Finally, transparency integrates the right to good administration and contributes to the achievement of an open administration at the service of individuals. Consequently, the new transparency provisions apply not only to those who suffer an injury deriving from the adoption of administrative acts. On the

contrary, they apply to all citizens who are understood as holders of the sovereignty that the Constitution recognises to every citizen. Transparency thereby becomes a tool through which citizens can confront and communicate with administrations. The need for this new form of transparency is motivated by a deep mistrust of institutions¹⁶ which is exacerbated by the difficulties faced by citizens as a result of the economic and social crisis that characterises the current period.¹⁷

In Italy, as well as in other countries, the enactment of laws providing measures to increase transparency has been justified also by the revelation of scandals involving important political figures. Parliaments have felt the need to enact certain rules in response to these scandals.¹⁸ They have played into the hands of populists¹⁹ and fuelled 'anti-political' feelings which have ultimately undermined the democratic legitimacy of institutions.

In an ever-increasingly divided and deconstructed society,²⁰ trust based on consensus and credibility of administrations and their representatives has been replaced by a new form of trust based on the possibility of direct control and verification. All this can be interpreted as a sign of the new weakness of institutions.²¹

3. Open Data as an Instrument of Transparency

In the same way that anti-politics has used the Internet as a means of expressing dissent, public bodies have also had to resort to online communication channels to strengthen

¹⁶ P. Rosanvallon, *La contre-démocratie. La politique à l'âge de la défiance*, Paris, Seuil, 2006.

¹⁷ A.G. Orofino, *La trasparenza oltre la crisi. Accesso, informatizzazione e controllo civico*, 13.

¹⁸ A.G. Orofino, *Profili giuridici della trasparenza amministrativa*, Bari, Cacucci, 2013, 97. See also B. Nabli, *Fondements de la « moralisation-juridicisation » de la vie politique*, in *Pouvoirs*, no. 154, 2015, 149: 'À la suite de l'« affaire Cahuzac », le président François Hollande en a appelé à un « choc de moralisation » qui s'est traduit juridiquement par l'adoption des lois organique et ordinaire du 11 octobre 2013 relatives à la transparence de la vie publique'.

¹⁹ P. Rosanvallon, *Le Siècle du populisme. Histoire, théorie, critique*, Paris, Seuil, 2020.

²⁰ J. Chevallier, *L'État post-moderne*, IV ed., Paris, Lextenso, 2017, 91.

²¹ J. Bröhmer, *Transparenz als Verfassungsprinzip Grundsatz Und Europäische Union*, Mohr Siebeck, 2004, 8: 'Das Aufkommen des Transparenzthemas in der öffentlichen Diskussion hat auch zu tun mit einer zu beobachtenden Veränderung der Rolle des – westeuropäische – Staates. Der Staat verliert zunehmend seine Rolle als Prinzipale politische Gestaltungsinstanz'.

¹¹ J.-B. Auby, *Remarques préliminaires sur la démocratie administrative*, in *Revue française d'administration publique*, 2011, 137; J. Chevallier, *De l'administration démocratique à la démocratie administrative*, in *Revue française d'administration publique*, 2011, 217.

¹² See articles 22 et ff. of law no. 241 of 8 August 1990.

¹³ A. Bonomo, *Informazione e pubbliche amministrazioni. Dall'accesso ai documenti alla disponibilità delle informazioni*, Bari, Cacucci, 2012.

¹⁴ See art. 1 of legislative decree no. 33/2013.

¹⁵ On the existence of different variations of the principle of transparency, see R. Feik, *Zugang zu EU-Dokumenten. Demokratie durch Transparenz*, Wien-Graz, Neuer Wiss, 2002, 13.

political consensus and, consequently, the legitimacy of public authorities. It is for these reasons that the recent Italian regulations on transparency provide for the online dissemination of data, documents and information inherent to the exercise of public functions.

In particular, Legislative Decree no. 33/2013 created what is known as ‘accesso civico’ (civic access). As mentioned above, it gives the possibility for citizens to access certain documents, data or information held by administrations. This is possible even when the request is not motivated by a particular interest or reason.

In some cases, access requires a request from citizens. In other cases, and for certain information mentioned by the law, dissemination is by publication on the Internet. In this case there is no need for any requests from citizens.

Under the terms of legislative decree no. 33/2013, administrations have the duty to publish a wide range of data and information. These relate to contracts signed by public authorities, organisation of offices, information on town planning and environmental issues, etc.

This is a large amount of data. When it is subject to mandatory publication it must be published in open format²² and be reusable.²³ The reuse can be made without any restrictions other than the obligation to cite the source and respect the integrity²⁴ of the information. All data must be processed in a way that it can be indexed and tracked by search engines.²⁵

The Digital Administration Code also deals with open data.²⁶ It defines open data as being that which is: (a) available under licences or normative provisions allowing use by any person, even in a disaggregated format, (b) is accessible in open formats and suitable for automatic processing by computer programs, (c) and made available via computer networks free of charge or at very low cost. An entire section is devoted to public-administration data (Chapter V, Section I). It establishes the obligation to manage data held by administrations in such a way as to allow re-

use by different administrations where use is necessary for the performance of certain institutional tasks. This must be done within the limits set for the protection of privacy by the GDPR or by other regulations. This provision therefore implies that all data published by all public authorities is considered to be open data unless expressly exempted.²⁷

Italian legislation therefore seems to explore the idea that open data is a tool that helps to increase the transparency of administrations as already expressed in the Open Data Charter signed in 2013 by the G8 leaders.²⁸

4. Open Data as a Tool for Good Administration

Open data certainly contributes to the creation of participative administrations. Thanks to a deeper knowledge of the facts on which the institutions are called upon to decide, it can also be used as a tool to guarantee greater efficiency in the performance of activities. This perspective is clearly affirmed in recent EU acts dealing with the re-use of public sector information.²⁹

The importance of the cognitive activity carried out by the administrations has been emphasised on several occasions by legal scholars, including those that analysed this topic in the first decades after enacting the Italian Constitution.³⁰ The use of powerful

²⁷ Art. 52 of legislative decree no. 82/2005.

²⁸ The Open Data Charter states that ‘open data can increase transparency about what government and businesses are doing. Open data also increase awareness about how countries’ natural resources are used, how extractives revenues are spent, and how land is transacted and managed. All of which promotes accountability and good governance, enhances public debate, and helps to combat corruption. Transparent data on G8 development assistance are also essential for accountability’ (the document is available at <https://opendatacharter.net>).

²⁹ See in particular the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 19 February 2022 COM(2020) 66 final on a European Data Strategy. See also Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information. Further information on the European Data Strategy can be found on the EU website at: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/european-data-strategy_en#data-governance.

³⁰ V. Ottaviano, *La comunicazione degli atti amministrativi*, Milan, Giuffrè, 1953; F. Levi, *L’attività conoscitiva della pubblica amministrazione*, Turin, Giappi-

²² Art. 7 of legislative decree no. 33/2013.

²³ Legislative decree no. 36 of 24 January 2006.

²⁴ Art. 7 of legislative decree no. 33/2013.

²⁵ Art. 7 bis of legislative decree no. 33/2013.

²⁶ Art. 1, lett. i), of legislative decree no. 82 of 7 March 2005.

knowledge tools makes this cognitive activity more effective. Such tools have obvious advantages in terms of the quality of the work conducted by administrations and also enhances the transparency of the activities carried out. The principle of transparency is in fact applicable to rules aimed at guaranteeing adequate investigation and assessment of the facts to enable conscious and careful decision to be made.³¹

This is why Italian legislation provides for the creation of various databases, to facilitate the sharing of information between administrations. The most important of these is probably the 'Piattaforma digitale nazionale dati' (National Digital Data Platform). It is intended to serve and facilitate the exchange of public information by all the institutions that need to access them in order to carry out their tasks.

There are also plans to create sectoral databases, such as the national register of people assisted by the national health service.³² This will make it possible to control spending in the health sector, speed up the process of automating the management of health needs and improve health-protection services. For evidence of the efficiency of these tools, suffice it to think of the number of models and algorithmic predictions that have been used during the health emergency to forecast trends in pandemic curves. Other sectoral databases include the National Public Procurement Database³³ and the Education Database.³⁴

The availability of information within shared platforms requires the identification of technical solutions that guarantee data accessibility, protection, integrity and confidentiality, as well as the operational continuity of systems and infrastructures. To this end, the Agenzia per l'Italia Digitale

(Agid) should play a particularly important role both by adopting appropriate guidelines to regulate the production and exchange of public data and by supervision.³⁵

5. Some Concluding Remarks

The discussion so far clearly shows that the subject of transparency is linked to that of open data from two perspectives. First, from the viewpoint of citizens for whom transparency becomes an instrument of participation and civic control. This is sometimes exercised directly and sometimes exercised through operators such as journalists and associations that pursue statutory objectives of civic protection in certain sectors. Secondly, it must be considered that it is a fundamental tool for the administrations to be able to process data both manually and digitally. It enables them to make better informed and more careful decisions and, consequently, better verifiable ones.

The administrative environment is often characterised by the isolation of administrative bodies which work without dialogue or exchange of experience. So, the lack of information sharing has often been at the root of mistakes made by institutions as well as episodes of maladministration. The exchange of useful data to improve the performance of public functions can only benefit the administrations themselves.

chelli, 1967.

³¹A. Police, *Trasparenza e formazione graduale delle decisioni amministrative*, in *Diritto amministrativo*, 1996, 229.

³² Art. 62 *ter* of legislative decree no. 82/2005.

³³ Art. 62 *bis* of legislative decree no. 82/2005.

It may be appropriate to point out that also in France, Article L. 3131-2 du *Code de la commande publique* states that the concessionaire of a public service must provide the contracting authority, in electronic form and in a freely reusable open format, the data and databases collected and produced during the course of performance of the contract. See T. Bassi, *Les données collectées par le concessionnaire de service public*, in *Aida*, 2019, no. 9, 496.

³⁴ Art. 62 *quater* of legislative decree no. 82/2005.

³⁵ For an indication of the various initiatives taken by Agid in this area, see the page: www.dati.gov.it/fare-open-data/Strumenti-per-gli-Open-Data.