Emanuele Fratto Rosi Grippaudo[*]

THE RIGHT OF ACCESS TO ENVIRONMENTAL INFORMATION IN THE ITALIAN LEGAL SYSTEM

Abstract: This article traces how the right of access to environmental information has developed in the Italian legal system. After having explained the notion of access to environmental information, this article splits into three sections, each dedicated to a different legal source regulating the right of access to environmental information in Italy. In the section dedicated to international law, this article briefly introduces the Aarhus Convention, where the right of access to environmental information was first established. In the section dedicated to EU law, this article examines EU Directive 2003/4/EC which regulates the right of access to environmental information in the EU.

1. — *Introduction.*

On the occasion of the 35th anniversary of *legge no. 349/1986* (Act number 349/1986)[1], this article will trace how the right of access to environmental information has developed in the Italian legal system. The aforementioned Act, which is entitled "[I]*stituzione del Ministero dell'ambiente e norme in materia di danno ambientale*" ("Establishment of the Ministry of the Environment and rules on the environmental damage[2]"), is the first in Italy to introduce the right of access to environmental information[3]. This article provides a thor-

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[*] Luiss Guido Carli University of Rome.

[1] *Legge 8 luglio 1986*, no. 349, at *normattiva.it*.

[2] Translated by the author.

[3] See article 14(3) of *legge no. 349/1986*.

ough overview of the legal sources concerning the passive form of access to environmental information in Italy. This includes international law, European Union law and Italian legislation which transposes the European Union law.

First, section two explains what the right of access to environmental information is. Section three goes on to introduce the Aarhus Convention which establishes the right of access to environmental information as one of the three procedural environmental rights which are indispensable to the practical application of environmental democracy. Section four explores the creation of the European Union's legal framework on access to environmental information after its accession to the Aarhus Convention in 2005. The EU's framework contains two separate sets of rules for information held by EU institutions and bodies, and for information held by the Member States' public administrations. Section four goes on to examine case law of the Court of Justice of the European Union that analyse the meaning of certain terms used in EU law in regulating the regime of access to environmental information. Section five shifts focus to the Italian regime concerning transparency and access to environmental information. This section begins with a reflection on the normative evolution that has characterized the topic of access to environmental information over the last 30 years. This section investigates the Italian provisions regulating access to environmental information. This section compares this with the regime for access to non-environmental information, which has also evolved over the last 30 years. Thereafter, case law from the Italian administrative courts and doctrinal works are shown to expose some practical problems affecting environmental transparency in Italy, such as the disorganization of public administration. In the end, section six contains the conclusions of the article, which evidence how, despite the successful transposition of EU law in domestic law, the Italian system of implementation is still affected by some practical problems.

2. — *The concept of access to environmental information.*

The right of access to environmental information entails the possibili-

ty for every individual or organization with legal personhood to access, at no cost, information concerning the environment which is held by public authorities[1]. It is a tool which aims to ensure the highest possible degree of transparency, thus representing a prerequisite for effective public participation in environmental decision-making processes of governments[2]. Complete public participation requires an informed and proactive citizenry, armed with the appropriate information regarding potential endangerment to human life and health and the environment. From this perspective, the right of access is a manifestation of principle 10 of the 1992 Rio Declaration on environment and development[3], according to which «[e]nvironmental issues are best handled with the participation of all concerned citizens».

Environmental information may be disclosed passively or actively. Active disclosure entails a duty imposed on public authorities to act affirmatively by disseminating environmental information. Passive disclosure requires the establishment of a dedicated administrative procedure, but the relevant public authorities would not act until urged to do so by a request from the public. Therefore, *effective* transparency, based on the public availability of information, differs from *potential* transparency, based on accessibility. If a public administration is to be «as transparent as a glass house»[4], both forms of transparency must coexist and complement each other. To expand this metaphor, the publication of information is a window without shutters on the glass house. Accessibility is a window with shutters that are ordinarily closed, thus protecting other interests, especially private ones. These shut-

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[1] M. Dulong de Rosnay, L. Maxim, *Speaking and Governing through Freedom of Access to Environmental Information*, in A. Kenyon, A. Scott, *Positive Free Speech. Rationale, Methods and Implications*, London, 2020, p. 173 ss.

[2] M. Peeters, *Judicial Enforcement of Environmental Democracy: a Critical Analysis of Case Law on Access to Environmental Information in the European Union*, in *Chinese Journal of Environmental Law*, 2020, 4, p. 13 ss.

[3] Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, A/CONF.151/26 (Vol I).

[4] The metaphor was elaborated by the Italian deputy Filippo Turati during the parliamentary work of 1908. He declared that «where a superior public interest does not impose a momentary secret, the house of the administration should be made of glass».

ters may be opened, in whole or in part, if the applicant invokes a need for knowledge which trumps others' interests in confidentiality[5].

3. — *The right of access to environmental information in international law.*

The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (hereinafter "Aarhus Convention")[6] was signed in Aarhus (Denmark) on 25 June 1998 and entered into force on 30 October 2001. As of 16 October 2017, it has been ratified by 47 parties. The Convention was negotiated under the supervision of the United Nations Economic Commission for Europe. It is often praised as a unique international agreement because it adopted the prescriptive language of a human rights instrument rather than merely that of an environmental agreement[7]. This human rights-based approach is clear in the convention's objective set out in article one. This states «In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention».

This links the human right to a healthy environment with three associated environmental rights, also known as the "three pillars of Aarhus": access to environmental information, public participation in environmental decision-making and access to justice in environmental matters[8].

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[5] N. Vettori, *Valori giuridici in conflitto nel regime delle forme di accesso civico*, in *Diritto amministrativo*, 2019, 3, p. 539 ss.

[6] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Aarhus, 2161 UNTS 447.

[7] At the first meeting of the parties in Lucca (Lucca Declaration 2004, para. 6), it the close relationship between human rights and environmental protection was recognised.

[8] P. Oliver, *Access to Information and to Justice in EU Environmental Law: the Aarhus Convention*, in *Fordham International Law Journal*, 2013, p. 1424 ss.

The Aarhus Convention regulates both the active and the passive forms of access to environmental information. Thus, article 5 examines the forms of collection and dissemination of environmental information (active), while article 4 establishes the structure of the administrative procedure for accessing environmental information (passive). Submitting an access request does not require proving an interest[9]. These requests must be submitted to the public authority holding the information. The public authority is given one month[10] to disclose the information in the form requested by the public[11] or to refuse the disclosure. Public authorities can refuse a request for environmental information on specific grounds, listed in article 4(3) and 4(4) of the Convention[12].

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[9] "Interest" refers to the reason the applicant requires the information or how they intend to use it, in J. EBBESSON et al., *The Aarhus Convention An Implementation Guide*, at *unece.org*, p. 80.

[10] As article 4(2), states, an extension of this period up to two months after the request is permissible only if the volume and the complexity of the information demands it, and after having informed the applicant of the reasons justifying it.

[11] Article 4(1)(b), of the Aarhus Convention contains two exceptions to the rule. These apply when it is reasonable for the public authority to make the information available in another form (in which case reasons shall be given for making it available in that form) and when the information is already publicly available in another form.

[12] According to article 4(3) «[a] request for environmental information may be refused if: (a) The public authority to which the request is addressed does not hold the environmental information requested; (b) The request is manifestly unreasonable or formulated in too general a manner; or (c) The request concerns material in the course of completion or concerns internal communications of public authorities where such an exemption is provided for in national law or customary practice, taking into account the public interest served by disclosure». According to article 4(4), «[a] request for environmental information may be refused if the disclosure would adversely affect: (a) The confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law; (b) International relations, national defence or public security; (c) The course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature; (d) The confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed; (e) Intellectual property rights; (f) The confidentiality of personal data and/or files relating to a natural person

The Aarhus Convention is analysed in further detail elsewhere[13]. This introduction has provided the necessary context to investigate the European Union's approach to access to environmental information.

4. — *The right of access to environmental information in the EU.*

The European Union ratified the Aarhus Convention through Decision 17 February 2005[14]. The first pillar of the Aarhus Convention has been applied on a matter already largely governed by European law in Directive 2003/4/EC[15] and Regulation 1049/2001/EC[16]. Directive 2003/4/EC

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where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for in national law; (g) The interests of a third party which has supplied the information requested without that party being under or capable of being put under a legal obligation to do so, and where that party does not consent to the release of the material; or (h) The environment to which the information relates, such as the breeding sites of rare species». Article 4(4) also provides that «[t]he aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment».

[13] See, for example: Karl-Peter Sommermann, *Transformative Effects of the Aarhus Convention in Europe*, in *Heidelberg Journal of International Law (HJIL)*, 2017, p 321 ss.; L. Kramer, *Citizens' rights and administration duties in environmental matters: 20 years of the Aarhus convention*, in *Revista catalana de dret ambiental*, 2018, 9(1), p. 1 ss.; E. Barritt, *Global Values, Transnational Expression: From Aarhus to Escazú*, in *TLI Think!*, Paper no. 11/2019; M. Mason, *Information Disclosure and Environmental Rights: The Aarhus Convention*, in *Global Environmental Politics*, August 2010, p. 10 ss.; A. Bárcea, *The Escazú Agreement: An Environmental Milestone for Latin America and the Caribbean*, in *cepal.org*.

[14] Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, at *eur-lex.europa.eu*.

[15] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, *eur-lex.europa.eu*.

[16] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, at *eur-lex.europa.eu*.

regulates access to environmental information held by public authorities of Member States. Regulation 1049/2001/EC regulates access to information held by the European Parliament, the Council and the Commission.

When the Aarhus Convention negotiations began, the European Union already had a regulation concerning access to environmental information held by Member States' administrations. Indeed, the transposition of Directive 90/313/EEC[17] by EU Member States created a mechanism for public access to environmental information held by public authorities. The aim of this directive was to «ensure freedom of access to, and dissemination of, information on the environment held by public authorities» (article 1). Accordingly, Member States were given dual responsibilities[18]: to disclose environmental information upon request and to spontaneously supply general information on the state of the environment to the public. This directive's definitions of "information regarding the environment" and of "public authorities" (article 2) are embryonic compared to the ones enshrined in article 2 of the Aarhus Convention. This is also true of the potential justifications for refusing access (article 3). Additionally, the directive did not make provision for access procedures, leaving this to the Member States to determine. However, the directive presents many similarities to the Aarhus Convention. This is because the Aarhus Convention was drafted in a context which reflects the European legal framework.

Although the European Union ratified the Aarhus Convention in 2005, it had already updated its legal system in compliance with the prescriptions contained in the Aarhus Convention. Thus, a few years after the Convention entered into force, Directive 2003/4/EC was adopted. However, as the Court of Justice of the European Union (hereinafter "CJEU") stated in a landmark ruling[19], this directive excludes some sectors where more specific

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[17] Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment, at *eur-lex.europa.eu*.

[18] M. Gavouneli, *Access to Environmental Information: Delimitation of a Right*, in *Tulane Environmental Law Journal*, 2000, p. 303 ss.

[19] In Case C-524/09, *Ville de Lyon v Caisse des dépôts et consignations* (2010) ECLI:EU:C:2010:822.

frameworks already existed regarding specific disclosure and confidentiality provisions.

The drafting of Directive 2003/4/EC has clearly been influenced by the principles of the Aarhus Convention. Consequently, the directive structures the right of access to environmental information in the same way as in the Aarhus Convention. This right is regulated in its passive form in article 3 and in its active form in article 7. Directive 2003/4/EC is more detailed than Directive 90/313/EEC, with more articulated definitions and rules for the access procedure. It also goes beyond the requirements of the Aarhus Convention in a number of ways[20]. First, the notion of "environmental information" is defined more broadly, to include questions of health and security as well as administrative measures, legal acts, reports and economic analyses concerning the environment. Second, the concept of "public authority" does not refer only to public administrations, as in Directive 90/313/EEC, but also to any natural or legal person performing public administrative functions or providing public services, being aligned with the functional understanding expressed in the Aarhus Convention[21]. Third, the form in which information is to be made available is not specified in Directive 90/313/EEC. Conversely, Directive 2003/4/EC is harmonized with the Aarhus Convention in this regard, and also supplements this with an obligation to «make all reasonable efforts to maintain environmental information held by or for them in forms or formats that are readily reproducible and accessible by computer telecommunications or by other electronic means». Fourth, Directive 2003/4/EC aligns with the Aarhus Convention concerning deadlines for making information available, improving on the

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[20] D. Blundell, *The Influence of Aarhus on Domestic and EU Law: Access to Information*, at *landmarkchambers.co.uk*.

[21] The definition of "public authority" is given in article 2(2), of Directive 2003/4/EC. This states that Member States may define public authority to exclude «bodies or institutions when acting in a judicial or legislative capacity». This exception has been explained in Case C-204/09, *Flachglas Torgau GmbH v Federal Republic of Germany* (2012) ECLI:EU:C:2012:71. In Case C-515/11, *Deutsche Umwelthilfe eV v Bundesrepublik Deutschland* (2013) ECLI:EU:C:2013:523, the court excluded bodies or institutions when adopting regulations that are of a lower rank than a law from the scope of this exception.

Directive 90/313/EEC deadline of two months. Fifth, the duties on national authorities for collecting or disseminating information, which Directive 90/313/EEC barely mentions, are more numerous than those stated in the Aarhus Convention. Finally, the grounds for refusing to provide access to environmental information are small in number in Directive 90/313/EEC. These are expanded in Directive 2003/4/EC in line with the Aarhus Convention. Both Directive 90/313/EEC and Directive 2003/4/EC take a similar approach to the issue of charges. Both directives align with the Aarhus Convention rule that these charges shall not exceed a reasonable amount[22].

Directive 2003/4/EC leaves little space for Member States discretion in implementation[23]. The Directive ensures precise transposition by formulating the right of access to information authoritatively. It ensures effective implementation through the imposition of a well-designed support structure. However, according to recital 24, Directive 2003/4/EC only establishes a minimum level of protection. Member States are permitted to go further. Additionally, the Member States may diverge from the directive's list of grounds for refusal, which are included only as suggestions (article 4).

National courts of the Member States have requested preliminary rulings under Article 267 TFEU of the CJEU to interpret article 4 of Directive 2003/4/EC. Those which have provided useful clarification will be explored here.

In Case C-619/19, *Land Baden-Württemberg v. D.R.*[24] concerning an article 4(1) justification[25], the German Federal Administrative Court sought a

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[22] In Case C-71/14, *East Sussex County Council v Information Commissioner and others* (2015) ECLI:EU:C:2015:656, the court stated the general principle that the charge should not exceed a reasonable amount according to the financial capacity of the person concerned.

[23] A. Ryall, *Access to Environmental Information in Ireland: Implementation Challenges*, in *Journal of Environmental Law*, 2011, p. 45 ss.

[24] Case C-619/19, *Land Baden-Württemberg v. D.R.* (2021) ECLI:EU:C:2021:35.

[25] According to article 4(1) «[m]ember States may provide for a request for environmental information to be refused if: (a) the information requested is not held by or for the public authority to which the request is addressed. In such a case, where that public authority is aware that the information is held by or for another public authority, it shall, as soon

definition of "internal communication" and clarification regarding the duration of the exception that allows public authorities to refuse the disclosure of internal communications. The CJEU contested the interpretation provided by the Aarhus implementation guide[26], stating that «there is nothing in the wording of article 4(1)(e) of Directive 2003/4 to suggest that the term 'internal communications' should be interpreted as covering only the personal opinions of a public authority's staff and essential documents or as not including information of a factual nature».

The CJEU referred to the argument in Case C-182/10[27] that the observations in the Aarhus implementation guide do not have the same binding force or normative effect of the provisions of the convention. Thus, it stated that the term "internal communication" must be interpreted in a way that «covers all information which circulates within a public authority and which, on the date of the request for access, has not left that authority's internal sphere – as the case may be, after being received by that authority, provided that it was not or should not have been made available to the public before it was so received».

The CJEU clarified that the internal communication exception is not subject to time limits. However, because use of this exception must be based on

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as possible, transfer the request to that other authority and inform the applicant accordingly or inform the applicant of the public authority to which it believes it is possible to apply for the information requested; (b) the request is manifestly unreasonable; (c) the request is formulated in too general a manner, taking into account Article 3(3); (d) the request concerns material in the course of completion or unfinished documents or data; (e) the request concerns internal communications, taking into account the public interest served by disclosure». On this last point, article 4(1) specifies that «[w]here a request is refused on the basis that it concerns material in the course of completion, the public authority shall state the name of the authority preparing the material and the estimated time needed for completion».

[26] «The second part of this exception concerns "internal communications". Again, Parties may wish to clearly define "internal communications" in their national law. In some countries, the internal communications exception is intended to protect the personal opinions of government staff. It does not usually apply to factual materials even when they are still in preliminary or draft form», in J. Ebbesson et al., See supra note 11, p. 85.

[27] See Case C-182/10 *Solvay and Others* (2012) ECLI:EU:C:2012:82.

a balance of the involved interests, the exception can be invoked «only for the period during which protection of the information sought is justified».

With reference to the refusal justification in article 4(2)[28], in a landmark ruling[29] the CJEU focused on the importance of the circumstances in which the confidentiality of the environmental information can be invoked. These circumstances must be expressly defined in national law with a definition of the article 4(2)(a) reference to "proceedings". This should not be left to be unilaterally determined by public authorities.

In a different case, the CJEU interpreted the justification for denying access to information based on a negative effect on the confidentiality of commercial or industrial information[30]. The CJEU stated that this does not require, for its application, the presentation of a request for confidential treatment ahead of the application for disclosure. According to the CJEU, the competent authority which received the request for information can deny disclosure if the applicant did not request confidentiality in relation to the same procedure. Therefore, the CJEU concluded that «that authority must be able to examine, as appropriate on the basis of that applicant's objection, whether

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[28] According to Article 4(2) «[m]ember States may provide for a request for environmental information to be refused if disclosure of the information would adversely affect: (a) the confidentiality of the proceedings of public authorities, where such confidentiality is provided for by law; (b) international relations, public security or national defence; (c) the course of justice, the ability of any person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature; (d) the confidentiality of commercial or industrial information where such confidentiality is provided for by national or Community law to protect a legitimate economic interest, including the public interest in maintaining statistical confidentiality and tax secrecy; (e) intellectual property rights; (f) the confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for by national or Community law; (g) the interests or protection of any person who supplied the information requested on a voluntary basis without being under, or capable of being put under, a legal obligation to do so, unless that person has consented to the release of the information concerned; (h) the protection of the environment to which such information relates, such as the location of rare species».

[29] See Case C-204/09, in supra note 24.

[30] Case C-442/14, *Bayer CropScience SA-NV and others v College voor de toelating van gewasbeschermingsmiddelen en biociden* (2016) ECLI:EU:C:2016:890.

that disclosure would adversely affect the confidentiality of commercial or industrial information and whether that request should not be refused pursuant to point (d) of the first subparagraph of article 4(2) of that directive».

When considering refusal of an access to information request, public authorities must always carefully balance the public interest in disclosure with competing interests indicated by article 4 of Directive 2003/4/EC. These interests must be interpreted restrictively[31]. However, an important exception included in the Aarhus Convention is that "emissions into the environment" should always be disclosed[32]. The CJEU interpreted this broad concept in a ground-breaking ruling which establishes three principles of law[33].

First, the CJEU declared that distinctions between "emissions", "discharges" and other "releases" are irrelevant and artificial when considering the objectives of Directive 2003/4/EC. Indeed, the CJEU stated «emissions of gas or substances into the atmosphere and other releases or discharges such as the release of substances, preparations, organisms, micro-organisms, vibrations, heat or noise into the environment, in particular into air, water or land, may affect those various elements of the environment».

Furthermore, the CJEU recalled that in many European Union acts[34]

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[31] «Parties and public authorities must interpret the exceptions in a "restrictive way". For example, if an official refuses to release information by claiming one of the exceptions, he or she could be required to go through a process to ensure that the decision to use the exception is not arbitrary and that in each case the release of information would lead to actual harm to the relevant interest», in J. EBBESSON ET AL., See supra note 11, p. 90.

[32] According to Article 4(2) of Directive 2003/4/EC, «[t]he grounds for refusal mentioned in paragraphs 1 and 2 shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure. In every particular case, the public interest served by disclosure shall be weighed against the interest served by the refusal. Member States may not, by virtue of paragraph 2(a), (d), (f), (g) and (h), provide for a request to be refused where the request relates to information on emissions into the environment».

[33] See supra note 33.

[34] The ruling contains a list which includes: Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions; Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage;

the notions of "emissions", "discharges" and "releases" are mostly used interchangeably.

Second, the CJEU established that the concept of "emissions into the environment" should not be restricted to emissions covered by Directive 2010/75/EU. This directive does not define emissions to include those emanating from a product being sprayed in the air or applied to plants, in water or on land. The CJEU recalled that neither the Aarhus Convention nor Directive 2003/4/EC interpret the notion of "emission into the environment" as restricted to emissions emanating from determined industrial installations. The CJEU clarified that "emissions into the environment" must be limited to "non-hypothetical emissions", meaning «actual or foreseeable emissions from the product or substance in question under normal and realistic conditions of use».

Third, the CJEU provided an interpretation of "information on emissions into the environment" which states «information on emissions into the environment within the meaning of the second subparagraph of Article 4(2) of Directive 2003/4 must be interpreted as covering not only information on emissions as such, namely information concerning the nature, composition, quantity, date and place of those emissions but also data concerning the medium to long-term consequences of those emissions on the environment».

Turning now to the right of access to documents of the EU institutions, bodies, offices and agencies, this right is provided by primary European law. Before the Treaty of Lisbon, which entered into force in 2009, it was provided by Article 255 of the Treaty of the European Community. Now, it is provided by article 15 TFEU, and by article 42 of the Charter of Fundamental Rights of the European Union. The right of access is implemented in Regulation 1049/2001, which regulates both active and passive provision of information. This Regulation is supplemented by Regulation

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Regulation EC no 166/2006 of the European Parliament and of the Council of 18 January 2006 concerning the establishment of a European Pollutant Release and Transfer Register and amending Council Directives 91/689/EEC and 96/61/EC.

1367/2006[35] which extends the provisions regarding access to environmental information of the Aarhus Convention to EU institutions and bodies. Thus, the right of access to environmental information held by EU bodies suffers from the absence of a distinct legal measure which deals exclusively with it[36]. This particular form of access is analysed elsewhere in the literature[37]. This article will now move to focus on the transposition of Directive 2003/4/EC in Italian law.

5. — *Transparency and access to environmental information in the Italian legal system*.

The establishment of a right of access to environmental information was ground-breaking in contexts like 1980s Italy where administrative secrecy dominates legal culture. The following three decades saw information disclosure grow into a broader legal trend. *Legge no. 349/1986*, still in effect today, contains the substantial right of access to environmental information, stating that the relevant administrative procedures are exercised in accordance with the laws in force[38]. However, in 1986 there was no law regulating

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[35] Regulation (EC) no 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, at *eur-lex.europa.eu*.

[36] S. Wolf, *Access to EU environmental information: EU compliance with Aarhus Convention*, in *ERA Forum*, 2013, p. 475 ss.

[37] See, for example: J. Bazyli\ska-Nagler, *The right of access to environmental information in the light of the case C-673/13 P of 23 November 2016 – European Commission v Stichting Greenpeace Nederland*, in *Wroclav Review of law, administration and economics*, 2018, p. 66 ss.; H. Labayle, *Openness, transparency and access to documents and information in the European Union, European Parliament Policy Department: Citizens' Rights and Constitutional Affairs*, 2013, at *europarl.europa.eu*; F. Deana, *Democrazia ambientale ed eccezioni al diritto fondamentale di accesso alle informazioni detenute dagli organi dell'Unione europea*, in *Rivista italiana di diritto pubblico comunitario*, 2020, 1, p. 1 ss.

[38] For a thorough overview of the access regulations in Italy in the nineties, see M.T. Paola Caputi Jambrenghi, *Lineamenti sul diritto di accesso ai documenti amministrativi nell'ordinamento comunitario*, in *Rivista Italiana di diritto pubblico comunitario*, 1997, p. 705 ss.

the administrative process for access to environmental – or any other information – held by public authorities.

The earliest law regulating the administrative process for access to environmental information is *legge no. 241/1990* ("act no. 241/1990")[39]. This law regulates general administrative procedure and the right of access to administrative documents held by public authorities in Italy at large[40]. However, from 1990 to 1997, it was also used to regulate access to environmental information procedures. Thereafter, the European Union adopted many normative acts which affected the national legal system and promoted public awareness and citizens' participation by making information broadly available.

In light of this EU normative production, two specific legal acts have followed *legge no. 241/1990*. First, *decreto legislativo no. 39/1997* ("legislative decree no. 39/1997")[41], which implements European Directive 90/313/CEE. Then, *decreto legislativo no. 195/2005* ("legislative decree no. 195/2005")[42], which implements European Directive 2003/4/CE and replaced *decreto legislativo no. 39/1997*. Hence, as also stated by article 3-*sexies* of the Italian Environment Code[43], access to environmental information is now regulated by the provisions contained in *decreto legislativo no. 195/2005*. In particular, articles 3 to 7 regulate the passive right to information while article 8 regulates the active right to information[44]. Where *decreto legislativo no. 195/2005* does not find application, the general provisions of *legge no. 241/90* do so. In the Italian legal system, administrative courts have exclusive jurisdiction in matters of access to information[45].

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[39] Legge 7 agosto 1990, no. 241 at *normattiva.it*.

[40] See article 22 ss.

[41] Decreto legislativo 24 febbraio 1997, no. 39 at *normattiva.it*.

[42] Decreto legislativo 19 agosto 2005, no. 195 at *normattiva.it*.

[43] *Decreto legislativo 3 aprile 2006, no. 152* ("legislative decree no. 3/2006"), at *normattiva.it*.

[44] Space does not permit an exhaustive examination of the various forms of dissemination of environmental information regulated by the Italian decision makers. These are listed in the fourth update of the national report of Italy on the implementation of the Aarhus convention, adopted on 20 January 2017, at *unece.org*.

[45] See article 133(1)(a) of *Decreto legislativo 2 luglio 2010, n. 104* (legislative decree no.

As most of Italian and European normative acts, *decreto legislativo no. 195/2005* provides some definitions before dealing with the matter of access to environmental information. These definitions, contained in article 2, align with those contained in article 2 of Directive 2003/4/EC. The notion of "environmental information" has been clarified several times by Italian administrative courts to align with the CJEU jurisprudence. Italian administrative courts stated that, if necessary, public authorities should process and simplify information before disclosing it to make it accessible to the requester[46]. This will allow the requester to understand the content of the environmental information and utilize it for their purposes. Italian administrative courts also specified that the provisions contained in *decreto legislativo no. 195/2005* only apply to information concerning the state of the environment (air, underground, natural sites, etc.) and factors which may affect the environment (substances, energies, noise, radiations, emissions), health and human safety. This excludes all facts and documents which have no environmental relevance[47]. However, the definition of "information concerning the state of the environment" has been considerably expanded by the case law[48] to include, for example, protection of the landscape and hunting[49].

104/2010). Italian administrative courts of first instance are *Tribunale amministrativo regionale* ("Regional administrative Court", hereinafter "T.A.R."), one or two seats of which are based in every region and in the two autonomous provinces of Trento and Bolzano. The Italian appeal administrative court is *Consiglio di Stato* ("Council of State", hereinafter "Cons. Stato"), based in Rome. Sicily has its own administrative court of appeal, which is *Consiglio di giustizia amministrativa per la Regione siciliana*.

[46] Ruling no. 645, made by the second chamber of T.A.R. Calabria on 5 November 2018, in *Foro amministrativo*, 2018, 11, p. 2079. Ruling no. 3206, made by the first chamber of T.A.R. Lazio – Roma on 7 March 2017, in www.giustizia-amministrativa.it, last accessed March 2021.

[47] Ruling no. 2557, made by the fourth chamber of Cons. Stato on 20 May 2014, in www.giustizia-amministrativa.it, last accessed March 2021. Ruling no. 9878, made by the first chamber of T.A.R. Lazio – Roma on 21 September 2016, in *giustizia-amministrativa.it*.

[48] Ruling no. 4727, made by the sixth chamber of Cons. Stato on 9 August 2011, in *giustizia-amministrativa.it*.

[49] Ruling no.1870, made by the second chamber of T.A.R. Toscana on 30 July 2008, in *giustizia-amministrativa.it*.

According to article 3 of *decreto legislativo no. 195/2005*, public authorities shall grant access to environmental information to any applicant who requests it, whether or not they can prove an interest. This permits the widest possible access to environmental information[50]. However, Italian administrative courts stated that, in order to access the requested information, the applicant has the burden of demonstrating that the interest they intend to pursue is an environmental interest, as qualified by *decreto legislativo no. 195/2005*, and is therefore aimed at protecting the integrity of environmental matrices[51]. Therefore, the applicant who aims at obtaining the disclosure of information should demonstrate the functional link between that particular information and the elements of the environment or the factors affecting or likely to affect the environment. E.g., if the applicant is asking for the disclosure of an administrative measure, they should demonstrate the functional link between that particular administrative measure and the elements of the environment or the factors affecting or likely to affect the environment[52]. Thus, these courts do not permit this right of access, specific to environmental law, to be used for different purposes, such as to pursue economic interests[53].

Another clarification provided by the courts is that the applicant does not need to specify the documents in which the information is enshrined. They may provide a general request for information regarding a particular environmental issue to the administration holding the information which will have an obligation to acquire all relevant information for preparation

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Ruling no. 577, made by the first chamber of T.A.R. Marche on 17 June 2009, in *giustizia-amministrativa.it*.

[50] Ruling no. 5511, made by the sixth chamber of T.A.R. Campania – Napoli on 22 November 2019, in *Foro amministrativo*, 2019, p. 1920.

[51] Ruling no. 2724, made by the fifth chamber of Cons. Stato on 21 giugno 2016, in *giustizia-amministrativa.it*.

[52] Ruling no. 2131, made by the sixth chamber of Cons. Stato on 8 May 2008, in *Foro amministrativo CDS*, 2008, 1(5), p. 1526.

[53] Ruling no. 4636, made by the third chamber of Cons. Stato on 5 October 2015, in *Foro amministrativo*, 2015, p. 2487.

and communication to the applicant[54]. However, while the request may be formulated non-specifically, it cannot be so vague as to amount to a general inspection of the activities carried out by a public administration[55]. In accordance with the principles of proportionality, cost-effectiveness and reasonableness, only requests for access which do not result in a disproportionate burden on the administration, such as to jeopardise its management efficiency, are allowed[56].

The public authority receiving the request has 30 days to provide the information. If the volume and the complexity of the information is such that the public authority cannot comply with the abovementioned thirty-day period, the public authority shall disclose the information within 60 days after the receipt of the request. In the latter case, the public authority shall timeously, and in any case before the end of that thirty-day period, inform the applicant about the extension and provide an explanation. If a public authority receives a request that is too vague, they may ask the applicant, within 30 days, to specify the terms of the request. The applicant may be assisted in this by the public authority. The public authority may provide the applicant with information about the use of public registers in its possession containing the list of types of environmental information that can be requested. Unless the information is already publicly available in another form or format or it is reasonable for the public authority to make it available in another form or format, the public authority shall disclose the information in the specific form or format the applicant has required.

Article 5 of *decreto legislativo no. 195/2005* lists the grounds for refusal, which almost perfectly align with those listed in Directive 2003/4/EC article 4. Thus, legitimate refusals have been considered by administrative courts to include cases where the documentation requested does not ex-

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[54] Ruling no. 996, made by the sixth chamber of Cons. Stato on 16 February 2011, in *giustizia-amministrativa.it*.

[55] R. Porrato, *Informazione ambientale e trasparenza: due discipline a confronto*, in *Il piemonte delle autonomie*, 2016, 3.

[56] Ruling no. 68, made by the first chamber of TA.R. Campania – Napoli on 12 January 2010, in *giustizia-amministrativa.it*.

ist[57] and cases where the request is so vague that it would be excessively burdensome to the work of the administrative bodies due to the amount of complex information requested[58]. One example of this was a request for epidemiological and health data on the incidence of disease for citizens living within a two-kilometer range of an incinerator[59]. In some other cases, administrative law judges refused access to information to protect the ability of a public authority to conduct enquiries of a criminal nature. One example of this was a request for data concerning a police investigation on a landfill and the surrounding land[60]. On other occasions, administrative courts consented disclosure of environmental information despite the presence of a conflicting interest. One example of this was a request for environmental information containing industrial and confidential data that was proposed in order to protect the applicant's right to health and respect for noise emission limits of production activities[61].

Article 7 of *decreto legislativo no. 195/2005* regulates remedies given to the Italian State to applicants who have had their request for access to environmental information denied or ignored. This article implements the provisions contained in article 6 of Directive 2003/4/EC and article 9 of the Aarhus convention. The argument relates to the third pillar of the Aarhus convention (access to justice) and therefore it will not be considered here.

There has not been a review of the implementation of Aarhus Convention provisions on access to environmental information in Italy. According to the fourth update of the national report of Italy on the implementation of

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[57] Ruling no. 3206, made by the first chamber of T.A.R. Lazio – Roma on 7 March 2017, in *giustizia-amministrativa.it*.

[58] Ruling no. 663, made by the first chamber of T.A.R. Lazio – Latina on 24 December 2018, in *giustizia-amministrativa.it*.

[59] Ruling no. 12, made by the first chamber of T.A.R. Lazio – Latina on 16 January 2019, in *giustizia-amministrativa.it*.

[60] Ruling no. 9878, made by the first chamber of T.A.R. Lazio – Roma on 21 September 2016, in *giustizia-amministrativa.it*.

[61] Ruling no. 949, made by the first chamber of T.A.R. Liguria on 22 September 2016, in *Dirittoegiustizia.it*., 2016, 7 November.

the Aarhus convention, this problem is due to «the large number of public authorities in the Country and the non-homogenous modes and procedures implemented at local level». The few information available is provided by individual reports published by public authorities. One of these reports is the annual report made by the Public Relations Office (hereinafter "PRO") of *Istituto superiore per la protezione e la ricerca ambientale* (hereinafter "ISPRA")[62] which contains the number of requests for access to environmental and non-environmental information. The PRO also has the function of assigning the access to information requests to the specific public authority that holds the requested documents. In the 2019 report, ISPRA's PRO has recorded a total of 1201 requests for access to documents and information both in environmental matters and related to the organization and functions of the authority, of which 1190 (89%) were processed or sorted by the competent structures[63], ten were rejected and only one partially accepted[64].

The report notes clear interest in "air" issues and that the information provision complies with the deadlines set out in law. It also states that the majority of applicants are satisfied with the access to environmental information service provided by ISPRA's PRO[65]. This office submits a high number of requests to the competent structures, which provide feedback to the users and provide information on the outcome of the access procedure to the PRO. However, the competent structures did not provide the PRO with information on the outcome of 137 of the abovementioned requests. The report states that these requests «are directly presumed to be met in

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[62] ISPRA is a public research institution in charge of disseminating environmental information. ISPRA also coordinates the *Sistema informativo nazionale ambientale*, which is the main national environmental information system for the collection and monitoring of environmental information.

[63] Every region has its own agency for environmental protection, named *agenzia regionale per la protezione dell'ambiente*. The autonomous provinces of Trento and Bolzano have their own provincial agencies for environmental protection, named *Agenzia provinciale per la protezione dell'ambiente*.

[64] ISPRA's 2019 *Report sulle richieste di accesso alle informazioni ambientali e agli atti documentali*, in *isprambiente.gov.it*.

[65] *Ibidem*, p. 17.

the absence of complaints from the applicant». What is stated in the report unequivocally proves widespread malfunctioning of Italian public administration. A virtuous public body like ISPRA finds itself having to work with other public bodies that sometimes are not cooperative. This negatively affects the outcome of the ISPRA report, insofar as it cannot evaluate the outcome of all the requests of information. Thus, the report is partly founded on mere presumptions instead of being based on actual facts.

Italian public administration combines malpractice with structural deficiencies, such as a lack of public relations offices. [66] Also, some citizens find it difficult to access online platforms, where information is kept. These deficiencies place a burden on the public administration which must assist citizens in accessing information that is already publicly available on the internet.

Regardless, the work carried out by the Italian decision makers is reputed by some authors to be a particularly good example of transposing Directive 2003/4/EC. Additionally, the "spillover effects" following implementation in Italy transformed citizen access from being a mere concession to a standalone right.[67] Since the entry into force of *legge no. 241/1990* and until the reform of 2013, free and unconditioned access to information held by the public administration has been guaranteed only for environmental matters. Indeed, according to the provisions contained in *legge no. 241/1990*, the right to access and copy any administrative document held by a public authority was granted only to those natural or legal persons who can prove the existence of a real, direct and current interest corresponding to a legally protected interest. This was the only exception to the secrecy of administrative acts in Italy. The right of access to administrative documents was considered more like a participation instrument – granted only to certain subjects – than a means for monitoring the exercise of administrative power. Thus,

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[66] F. Carpita, *El aceso a la enformación ambiental en el marco de la Convención de Aarhus: desafíos pendientes*, in *Revista Española de la Transparencia*, 2019, p. 199 ss.

[67] C. Fraenkel-Haeberle, J. Socher, *Direct and indirect europeanisation of national administrative systems. Implementation and spillover effects of the environmental information Directives in a comparative perspective*, in *Revista Catalana de Dret Públic*, 2018, p. 125 ss.

transparency was conceived only to ensure the visibility, knowledge and comprehensibility of the operating methods and structural arrangements with which public administration operates in the performance of its tasks of concrete care of the public interest.

Although their effects were limited to the environmental field, *legge no. 349/1986* and *decreto legislativo no. 195/2005* introduced a ground-breaking form of right of access to information, characterized by gratuitousness and universality. The right of access to environmental information has become a testing ground for the protection of citizens and the creation of more advanced and modern procedural guarantees of transparency and impartiality in administrative action[(68)]. The European framework on access to environmental information has taken steps to advance the Italian approach to information disclosure more broadly. The direction of movement is away from the rule of secrecy and toward fundamental rights of access to information to ensure proper institutional functioning, correct use of public resources and participation in public debate.

The benefits of this progressive expansion of transparency became clear in 2013 when the Italian government adopted *decreto legislativo no. 33/2013* ("legislative decree no. 33/2013")[(69)]. This decree, at article 5(1), creates a new right of access to information held by public authorities, named *accesso civico semplice* ("simple civic access"). The decree obliges public administrations to publish on their website certain categories of data, information or documents, making them accessible to users. The right of "simple civic access" is granted to any natural or legal person, permitting them to freely access data, information or documents held by public authorities in cases where their mandatory publication has been omitted. Therefore, the right of "simple civic access" results in an *actio popularis* with a "corrective" purpose[(70)].

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(68) M. Ciammola, *Il diritto di accesso all'informazione ambientale: dalla legge istitutiva del ministero dell'ambiente al d.lg. no. 195 del 2005*, in *Foro amministrativo CDS*, 2007, p. 657 ss.

(69) Decreto legislativo 14 marzo 2013, no. 33, in *normattiva.it*.

(70) V. Torano, *Il diritto di accesso civico come azione popolare*, in *Diritto amministrativo*, 2013, p. 789 ss.

Further evolutions in transparency occurred in 2016 when the Italian government adopted *decreto legislativo no. 97/2016* ("legislative decree no. 97/2016")[71]. This decree amends *decreto legislativo no. 33/2013*. It conceives of transparency as total access to data and documents held by public administrations in order to protect natural or legal person's rights, promote participation of interested parties in administrative activities, and encourage anyone interested to exercise widespread forms of control over the pursuit of institutional functions and the use of public resources. Transparency is guaranteed by a new right of access to information held by public authorities, named *accesso civico generalizzato* ("generalised civic access"). This functions to meet "objective" principles, such as of democracy, transparency and good performance[72]. The 2016 reform, which is inspired by the logic of the United States Freedom of information act, gives to any natural or legal person the right of access to data, information or documents held by public authorities that are not subject to mandatory publication, while respecting the limitations related to the protection of legally relevant public and private interests[73].

Article 40 of *decreto legislativo no. 33/2013*[74] excludes from the scope of the reform the provisions contained in *decreto legislativo no. 195/2005*, considered to be of greater protection. The purpose of this exclusion is to avoid possible overlaps between the regulation provided for in *decreto legislativo no. 33/2013* and that provided for in *decreto legislativo no. 195/2005*. This was acknowledged by the Italian administrative courts, which stated that the relationship between *decreto legislativo no. 195/2005* and *decreto legislativo no. 33/2013* can be qualified in terms of identity and mutual integration, so that any request for access to environmental information can be qualified as civic access[75].

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[71] Decreto legislativo 25 maggio 2016, no. 97, in *normattiva.it*.

[72] M. Savino, *Il FOIA italiano e i suoi critici: per un dibattito scientifico meno platonico*, in *Diritto amministrativo*, 2019, p. 453 ss.

[73] G. Corso, *Manuale di diritto amministrativo*, Torino, 2020, p. 255.

[74] I.A. Nicotra, *Dall'accesso generalizzato in materia ambientale al Freedom of information act*, at *www.federalismi.it*, 6 June 2018.

[75] Ruling no. 2158, made by the sixth chamber of Cons. Stato on 9 April 2018, in *giustizia-amministrativa.it*.

In light of the above considerations, it is clear that the right of access to environmental information improved efforts to ensure transparency in connection with public power in Italy. The right to generalised civic access grants accessibility to information in all fields, expanding the accessibility introduced for environmental information 30 years ago. Now, the relationship between the right of access to environmental information and the right to generalised civic access is such that the latter is a general rule adaptable to all types of data and information and the former relates exclusively to environmental data and information. Although article 40 of *decreto legislativo no. 33/2013* prohibits overlap between the right of access to environmental information and the right to generalised access, it is no longer clear which legislative act (*legge no. 241/1990* or *decreto legislativo no. 33/2013*) contains the general rules on access to information.

Some authors argue that generalised civic access has an all-embracing nature. In fact, it joined pre-existing forms of access to information rather than absorbing them[76]. Now, the existence of various access to information procedures (access to administrative documents, simple civic access, generalised civic access) risks creating delays and malfunctions in administrative activity[77]. Furthermore, there is possibility for overlap between the right to generalised access and the right of access regulated in *legge no. 241/1990*. Administrative courts are aware of this problem and, in a recent ruling, acknowledged the obligation of the public administration to fully examine requests for access to information even when they are not specific to the form of access referred to in the request[78]. Now that the Italian legal system has finally recognised the right of access as an

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[76] I. Piazza, *L'organizzazione dell'accesso generalizzato: dal sistema di governance all'attuazione amministrativa*, in *Diritto Amministrativo,* 2019, p. 645 ss.

[77] A. Moliterni, *La via italiana al «FOIA»: bilancio e prospettive, in Giornale di diritto amministrativo*, 2019, p. 23 ss.

[78] Ruling no. 10, made by the Adunanza Plenaria ("plenary session") of Cons. Stato on 2 April 2020, in *giustizia-amministrativa.it*.

instrument of democratic control over all administrative functions [79], it is desirable that the decision makers should streamline the existing access to information procedures.

6. — *Conclusion*.

Despite the successful implementation of the provisions contained in the Aarhus Convention and in Directive 2003/4/EC, the Italian system of implementation is still affected by some practical problems. First, there is widespread malpractice in Italian public administration, with a lack of co-operation between offices. Second, there are some structural deficiencies affecting public bodies. The coexistence of multiple procedures to access information held by public authorities does not adversely affect access to environmental information, the scope of which is well defined by the laws in force. However, the difficult coexistence between some forms of access should encourage decision makers to reform with a view to consolidating and simplifying the entire subject of the right of access to information.

[79] A. Cauduro, *Il diritto di accesso a dati e documenti amministrativi come promozione della partecipazione: un'innovazione limitata*, in *Diritto amministrativo*, 2017, p. 601 ss.