

Journalism and the active use of transparency tools both at European and national level: lights and shadows

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Access to public information plays a key role in democracy. According to Unesco, «democratic participation depends on people who are well-informed, this being a pre-condition for their effective monitoring and assessment of their leaders' performance, as well as for their meaningful engagement in public debate and decision-making processes that impact their lives»¹. The main purpose of this article is to describe the experience as an Italian journalist in the active use of the transparency tools both at European and national level.

Legislative framework at a glance

Freedom of information (FOI) is regulated at European and national level by different laws. On its official website² the European Commission explains that «under Article 15 of the Treaty on the Functioning of the European Union (TFEU)³, citizens and residents of EU countries have a right of access to the documents of the European Parliament, the Council and the European Commission. This means citizens can obtain documents held by the Commission and other institutions, including legislative information, official documents, historical archives and meeting minutes and agendas». Actually the «principles, conditions and limits on ground of public or private interest governing the right of access to European Parliament, Council and Commission [...] documents» are regulated by the Regulation (EC) No 1049/2001⁴ which is in effect from the 3rd of June 2001. Under the aforementioned Regulation, the European institutions have to give an answer within 15 days. Whilst this Regulation basically gives «any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State» the right to access the documents of the institutions, at the same time it poses significant caveats.

The Article 4(1) says in fact that «the institutions shall refuse access to a document where disclosure would undermine the protection of: a) the public interest as regards: public security, defence and military matters, international relations, the financial, monetary and economic policy of the Community or a Member State; b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data». The Article 4(2) gives institutions the right to refuse access to documents if they «would undermine the protection of: commercial interests of a natural or legal person, including intellectual property, court proceedings and legal advice, the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure». Under the Article 4(3) «access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure». Finally, when the request for information somehow involves third parties (i.e. «any natural or legal person, or any entity outside the institution concerned, including the Member States, other Community or non-Community institutions and bodies and third countries») the institution «shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed», Article 4(4) states.

When it comes to the national level, FOI is granted and regulated in Italy by the Legislative Decree no 97/2016⁵. The so-called *accesso civico generalizzato* gives anyone the right to access data and documents held by the institutions. When asked, the institutions must answer within 30 days with a «reasoned opinion» (Article 6, sixth subparagraph). In case of refusal, or when the answer by the institution asked is missing, the submitter could present a request for a review («riesame») of the FOI (Article 6, seventh subparagraph) to which the institution asked must answer with a «reasoned opinion» within 20 days. If the access to information is denied, or it is missing, the submitter could appeal to the Tribunale Amministrativo Regionale (Article 6, eighth subparagraph). Of course, as well as the European regulation, also the Italian law provides some caveats. The institutions are allowed to refuse the request if it might affect public safety, national security, defence and military matters, international relations, financial stability, investigations about crimes and inspecting activities (Article 6, tenth subparagraph). Furthermore, the FOI request could be

refused if there is a threat for one or more of the following private interests: privacy matters, freedom and secrecy of correspondence, economic and commercial interests including intellectual property, copyright and commercial secrets (Article 6, eleventh subparagraph).

Two case studies in the use of transparency tools

Below are described two emblematic case studies about different matters and the difficulties triggered by the FOI requests.

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Request for a detailed report of a Eurogroup/Euro Summit

The ESM is an intergovernmental organization located in Luxembourg City and is «part of the EU strategy designed to safeguard financial stability in the euro area»⁶. It was established in 2012 to prevent systemic financial crisis and to help those EU countries in need of financial assistance. In fact the ESM could borrow itself the money when a member State applies for a financial request. Each member State contributes to the ESM according to a principle of proportionality named capital key. At the end of 2018, the European countries started a discussion about ESM reform. The Italian Parliament voted on the 19th of June 2019 a document⁷ that bound the Government to inform the Chambers about ESM Treaty reform proposals «in order to allow the Parliament to express itself [...] consequently to suspend any definitive determination until the Parliament has pronounced». On the 4th of December 2019 the Ministers of Finance of the Euro (the Eurogroup) «discussed the package of legal documents related to the ESM reform, based on the revised ESM Treaty provisions broadly agreed last June, the further strengthening of the Banking Union, including a European Deposit Insurance Scheme, and taken stock of the pending issues on the budgetary instrument for convergence and competitiveness (BICC) for the euro area»⁸. Then, on the 13th of December 2019 the Heads of States and the Prime Ministers of the Euro Area held a meeting usually known as Euro Summit. The agenda of that meeting⁹ included the revision of the European Stability Mechanism (ESM) Treaty. Italian parties argued about the position of the government about this matter. The opposition blamed the Prime Minister Mr Giuseppe Conte and the Minister of Finance Mr Roberto Gualtieri to have negotiated unfavorable conditions for Italy with the European institutions, without informing the Parliament as stated with the resolution approved in June 2019. On the 17th of December 2019 I have submitted to the Council of the European Union two different request for information. The first one¹⁰ asked for

a «detailed report of Eurogroup held on the 4th of December 2019 in Bruxelles, including: all minutes (and other notes) of discussion about European Stability Mechanism reform; and in particular, a full disclosure of Italy's Minister for Economic Affairs and Finance, Roberto Gualtieri, declaration and hints to the discussion about European Stability Mechanism reform». The second one¹¹ asked for a «detailed report of Euro Summit held on the 13th of December 2019 in Bruxelles, including: all minutes (and other notes) of discussion about European Stability Mechanism reform; in particular, a full disclosure of Italy's participant(s), declaration and hints to the discussion about European Stability Mechanism reform». On the 23rd of January 2020 the Directorate-General Communication and Information – COMM (DG COMM) answered both the request to access to documents. About the Eurogroup meeting the DG COMM noted that «however that Regulation (EC) 1049/2001 regarding public access to European Parliament, Council and Commission documents is not directly applicable to the Eurogroup, which is an informal gathering of Finance Ministers of the Euro area Member States as provided by Protocol 14 of the Treaty on the functioning of the European Union¹². Moreover, according to Eurogroup's Working methods¹³, the proceedings of the Eurogroup are confidential. Therefore no minutes or verbatim of discussions during the Eurogroup meetings can be provided to the public». About the Euro Summit, the DG COMM noted that «under the Rules for the organisation of the proceedings of the Euro Summits¹⁴, the deliberations of the Euro Summit are covered by the obligation of professional secrecy. Therefore no minutes or verbatim of discussions during the Euro Summits can be provided to the public». It has to be said that the transparency of the Eurogroup had already been criticized in the past. «What exactly the Eurogroup is, what decisions it takes (if any), and how it operates are questions that are still all too unclear», stated in a report¹⁵ published in 2019 the anti-corruption movement Transparency International EU. The former European commissioner Pierre Moscovici himself claimed in 2017 that the Eurogroup «is a rather pale imitation of a democratic body». Unfortunately, the answer provided by the European Council did not allow to retrace the political position of the Italian government. On the 30th of January 2020 the newspaper «La Verità» published a long article¹⁶ which described the unfruitful request for information.

Request for the number of deaths due to Covid-19 by place of death

Italy has been hardly hit by Covid-19 pandemic. The cumulative number of deaths relative to population is far higher than other European countries which are similar for number of inhabitants, healthcare

system and gross domestic product. In order to limit the spread of the pandemic since March 2020 the Italian government introduced a number of restrictions including a hard lockdown which lasted until May 2020. Then, in October 2020 the government introduced a colors system based on white/yellow/red areas depending on the number of new Covid-19 cases and hospitalization rate. The first (Spring 2020) and second wave (Fall/Winter 2020/21) deeply stressed the healthcare system, and especially the Intensive Care Units (ICUs) were almost fully occupied by Covid-19 patients. Press reported lots of cases and huge losses also in nursing homes. On the 18th of November 2020 I asked the Italian Minister of Health to provide the number of deaths due to Covid-19 by place of death (hospital/ICUs, nursing homes, houses) starting from the 1st of January 2020 up-to-date. On the 2nd of December 2020 the Minister of Health forwarded the request for information to the Istituto Superiore di Sanità (ISS), which is responsible for monitoring Covid-19 pandemic. In absence of an answer within the terms provided by law, on the 12th of January 2021 I have asked ISS for a review of the request. On the 2nd of February 2021 ISS wrote me that the answer to the review had been forwarded by the ISS itself to Minister of Health on 22nd of January 2021. The day after I wrote to Minister of Health noting that I have never had any answer from them. On the 5th of February 2021 finally Minister of Health answered to the request of review, stating that «the ISS informed the Minister of Health that does not own any information about place of death (intended as setting: hospital, nursing homes, houses). Therefore it is not possible to provide the information requested». An article¹⁷ published on 11th of February 2021 explained the three months long blame game played by the Minister of Health and ISS. At a later date I have submitted the request for information to every Italy region, but just a few answered. Luckily, thanks to the regions that have chosen to share their data it had been possible to estimate the number of deaths by place of death for a large percentage of Italian population.

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Conclusions

Freedom of information and journalism are strictly linked indeed. Unfortunately, things in practice often don't go smoothly. When it comes to sensitive matters, such as monetary policy or healthcare, or when journalists ask certain government agencies, submitting a FOI request could reveal quite a frustrating experience. The two cases reported here prove

that both at European and national level officers do apply a high degree of discretion. Journalists that intend to submit a FOI request should prepare to face long waits, bureaucratic issues and of course failures. Nevertheless the right to access to information, together with the ability of journalists to tell people whether the institutions refuse to answer, undoubtedly represent one of the pillar of our democracy.

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¹ *Unesco concept note for World Press Freedom Day 2010 conference opening ceremony* in «Freedom of information: the right to know», 2011, p. 14.

² https://ec.europa.eu/info/about-european-commission/service-standards-and-principles/transparency/freedom-information_en

³ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E>

⁴ <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX-%3A32001R1049>

⁵ <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2016-05-25;97>

⁶ https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/financial-assistance-eu/funding-mechanisms-and-facilities/european-stability-mechanism-esm_en

⁷ <https://aic.camera.it/aic/scheda.html?numero=6-00076&ramo=C&leg=18>

⁸ <https://www.consilium.europa.eu/media/41870/20191204-summing-up-letter-inclusive-format.pdf>

⁹ <https://www.consilium.europa.eu/en/meetings/euro-summit/2019/12/13/>

¹⁰ https://www.asktheeu.org/en/request/detailed_report_eurogroup#incoming-24747

¹¹ https://www.asktheeu.org/en/request/detailed_report_euro_summit#incoming-24748

¹² <https://www.consilium.europa.eu/media/20422/protocol-14-en.pdf>

¹³ <https://www.consilium.europa.eu/media/21457/08-10-03-eurogroup-working-methods.pdf>

¹⁴ https://www.consilium.europa.eu/media/20377/qc3013400enc_web.pdf

¹⁵ <https://transparency.eu/wp-content/uploads/2019/02/TI-EU-Eurogroup-report.pdf>

¹⁶ A. GRIZZUTI, *Il governo mente sul Mes? L'Europa mette il segreto*, in «La Verità», 30th January 2020, p. 9.

¹⁷ A. GRIZZUTI, *Speranza non sa dove si muore di Covid*, in «La Verità», 11th February 2021, p. 11.