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TRANSPARENCY IN TENSION: BETWEEN ACCOUNTABILITY AND LEGITIMACY

a cura di
Benedetto Ponti

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Indice

Note e commenti

In this issue

Paolo Mancini

This is another issue of our journal «Etica pubblica. Studi su legalità e partecipazione» written completely in English. It is in line with our original project to publish a genuinely international journal looking at the Italian situation in a comparative perspective: the essays that Benedetto Ponti has collected on the theme of transparency are inspired by this aim. Moreover they confirm another feature of our journal: the interdisciplinary approach. The theme of transparency is discussed here by scholars of different disciplines: students of law, political scientists, philosophers. I believe that in this way we may offer a more comprehensive view of an «opportunity» to improve our democracies.

Indeed, there is no doubt that transparency can be named «an opportunity» as it is an instrument for the participation of the citizens to the life of the community: discussing the problems that transparency still meets in different contexts can contribute to improve citizens participation.

At the same time, transparency is an «obligation» too: as stated in almost all of the essays collected in this issue it is a necessary qualification of a democratic regime. Such as Immanuel Kant suggested, there is no democracy without transparency.

The essays of this present issue do not hide that transparency faces many problems: their investigation represents the contribution that «Etica Pubblica. Studi su Legalità e Partecipazione» may offer to the community of scholars and citizens.

In this issue of the journal Benedetto Ponti takes care also of our section «Note e commenti» (usually edited by Nando dalla Chiesa) with an intervention of a journalist that passed through a «difficult» transparency experience.

«Letti e riletti», edited by Francesco Clementi, collects reviews of the books of four associates of the journal: Enrico Carloni, Donatella Della Porta, Nando dalla Chiesa e Alberto Vannucci.

The transparency mix: an introduction

Benedetto Ponti

Foreword

It may seem a necessary choice for a journal concerned with public ethics to dedicate a whole issue to the topic of transparency. Certainly, the topics of visibility, legitimacy and the supervision of public power are one of the elective fields of the project of the journal. However, the approach that we have taken is not merely celebrative, one reason being that the paradigmatic[1] value/principle of transparency continues to be problematic in theory and in application, as confirmed by the literature investigated by the authors of this issue. It is therefore worthwhile continuing to discuss transparency, despite the fact, or perhaps for the very reason, that as a value it is generally recognised, accepted and promoted. Transparency also continues to be disputed and pressed by events, which show that its relationship with the interests it confronts remains precarious, transient, questionable and disputed. It suffices to mention the institutional events triggered by the pandemic (from policies to limit spread of the virus to those for recovery and resumption of economic growth), where transparency often had to stand back for other more cogent questions (e.g. vaccine supply contracts and recovery measures). We can also reflect on the secrecy that (inevitably?) characterises political options linked to the war happening in Europe, events that more directly and immediately involve mature democracies, where the value of transparency seems to have taken root.

A multidisciplinary approach to the topic has enabled this reflection from different points of view and has allowed a focus on different aspects, while maintaining a unitary thread. Briefly, since transparency is a vehicle both of the legitimacy of power and its control, it has ontological elements of internal tension that make informed use advisable. The user should in first place be aware of interactions between the aims and instruments

of transparency. The existence of significant trade-offs makes it practically and theoretically impossible to maximise all the objectives in every circumstance. This also leads to an appreciation of margins of choice in the articulation, organisation and hierarchy of the aims and the utility of transparency. This choice is explicitly and implicitly political, at its core. The abovementioned awareness also leads, however, to reflect on the width of the domains of application of the value/instrument *transparency*. The close link between democracy and transparency remains unchanged, transparency being «ruling of public power in public»[2]. Nonetheless, the borders within which exceptions to the rule of transparency should be confined are less certain, stable and uncontroversial, if one recognises a margin of choice between the different aims for which it is used. Hence the more general indication to continually re-examine transparency, considering the institutional, political, cultural, economic and social contexts involved, without taking for granted or accepting what worked in the past, especially in view of the formidable impact of technological innovation.

In the opening essay, Alberto Pirni sketches a fundamental shift that occurred in the modern age: from power as *dominion* with *secrets* to *public* power that is visible and supervised from outside. He goes on to examine the molecular nature of the concept of transparency. Like atoms, transparency always occurs «in nature» combined with other elements. Thus, he draws attention to the ontologically *plural and instrumental* nature of transparency, and its *uncountable* aims.

The essay by Benedetto Ponti and Agustí Cerrillo-i-Martinez describes the many trade-offs activated by the plurality of these aims. Drawing inspiration from the success of transparency as an instrument for preventing and opposing corruption, the essay shows that here again there is a significant trade-off between accountability and trust. The trade-off shows the intrinsic tensions of the principle, considering its plural and granular nature, as well as the contingency of balances achieved, linked to context and to the awareness with which the instruments are predisposed and used.

The contribution by Hélène Michel concerns the context of EU institutions. In the evolution of EU law, transparency was introduced and developed as a remedy for the democratic deficiencies of its extraordinary institutional system. The author underlines two essential limits of this strategy. First, the fact that transparency cannot solve the legitimacy problems of those who operate in EU institutions. This has made transparency a sort of cover-up rather than an effective proxy for democratic-representative legitimacy. Second, a transparency bureaucracy

has been created, the consultations and decisions of which are only effectively open to those with the necessary rich professional and financial resources. This circumstance contributes to alienate from the EU citizens and associations, instead of bringing them closer.

The paper by Fabrizio Di Mascio and coauthors illustrates the results of a study aimed at verifying the degree of application of the instruments of transparency (especially FOIA access) in Italian municipalities with populations of over 30,000. The research shows the many factors affecting observance of FOIA rules at municipal level. These include organisational (size of the organisation and its catchment area), geographical (southern municipal council have the lowest observance) and cultural factors. In the case of cultural factors, the general absence of online information on how to appeal when access is denied is a concern; this situation regards the websites of all the administrations investigated, irrespective of geographical location. The author indicates the crucial nature of context in assessing the performance and the implementation difficulties of the policies and institutes of administrative transparency.

From this viewpoint, the contribution of a journalist who exploits transparency provisions for inquest journalism, is particularly helpful. Antonio Grizzuti (freelance journalist who has written for La Verità, HuffingtonPost.it, Startmag, Il Foglio and other magazines) reports that the possibilities offered by FOIA mechanisms (at EU and Italian level) are severely hampered by slowness of response and above all by the margin of discretion allowed to the authorities in assessing applications for access to information. The gaze of a professional user reveals in detail the immanent tension between *accountability* and *legitimacy* in the law and its application.

As recalled by Pirni in the introductory paper, power becomes public as we enter the modern age, both because it is distinct from private questions (in first place, from King's private patrimony) and because it is no longer secret, but public, i.e., visible and verifiable by the people, who when power becomes public, cease to be subjects becoming citizens. In the paper by P.J. «Paddy» Leerssen, the tools of administrative transparency are used to compare the advantages and risks of using transparency as a way to govern the large platforms that dominate contemporary global markets. This is a particularly interesting attempt which shows how an important new field of study (*platform governance transparency*) can draw precious indications from a more mature and consolidated area of study, as administrative transparency. The broader theme of the reasons justifying application of the transparency paradigm to private platforms

forms an ever-present background. In this case, does invocation of transparency by legislators depend on the fact that the platforms are framed as *powers*, or is it because they *perform tasks of general interest*? This is a theme to explore and a further sign of the vitality and persistent interest for transparency studies.

Note

[1] E. CARLONI, *Il paradigma trasparenza. Amministrazioni, informazione, democrazia*, il Mulino, Bologna 2022.

[2] See N. BOBBIO, *La democrazia e il potere invisibile*, in ID. *Il futuro della democrazia*, Einaudi, Torino 1995, also cited by PIRNI in this issue.

ETICA PUBBLICA
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Saggi

At the roots of transparency: a public-ethics perspective

Alberto Pirni

Among the broken promises of democracy,
the worst, the most ruinous, is the transparency of power.

(Norberto Bobbio)

In this essay I explore some of the semantic roots of the concept of transparency in order to identify a set of challenges for its present and future use as the founding principle of public administration. After a methodological premise showing sometimes evocative and elusive use of the term (§ 1), I concentrate on its etymology and fundamentally on the history of its denial, which since the dawn of western modernity has been a sort of guarantee for the exercise of power (§ 2). I shed light on certain defining historical features that help make transparency the fundamental principle that has legitimated judicial and political power since the second half of the eighteenth century (§ 3). This is the premise for identifying some of the challenges that still accompany its use and link it with other values and principles necessary for democratic coexistence (§ 4).

1. The known and the unknown – a premise

In the introduction to one of his main works, *The Phenomenology of Spirit*, Hegel wrote a passage that would remain paradigmatic: «What is familiar and well known [*Das Bekannte*] as such is not really known [*erkannt*] for the very reason that is familiar and well known. In the case of cognition, the most common form of self-deception and deception of others is when one presupposes something as well known and then makes one's peace with it»[1].

Although that expression was used in a different context, it seems applicable to ours. The concept of transparency seems to fit the same paradigm, namely that sort of universal *familiarity* that often prejudices deeper, fuller and more critical *knowledge*. Transparency is undoubtedly a familiar concept. To a first approximation, one could say that transparency suggests the linearity of the behaviour an individual who «says what he does» and therefore «does what he says». It is a term in common usage which connotes interpersonal relations but extensively is one of the most recurrent terms in current debate on innovations in the public administration, with reference to public relations or public service, and hence to the linearity, simplicity and efficacy of how the public administration interprets, conducts and reports that service.

However, the fact that the term is used and applied to almost all possible lines of action of the public administration calls for a definition of the object and field it refers to. To mention just some of the more explicit references, one can speak of transparency with reference to access to documents, processes, results, balances, contracts and criteria for assigning functions and payment. With more direct reference to Italy, it is also worth recalling that one of the most challenging fields for the exercise of transparency is open government, and especially generalised civic access, introduced in Italy with legislative decree no. 97/2016, which finally brought national law into line with the *Freedom of Information Act* (FOIA), the law of reference on freedom of information and right of access to the acts of the public administration[2].

For a more theoretical idea, transparency is another of those peculiar concepts that can be termed «molecular», to indicate its form in common public discourse[3]. If we think of an ideal «social chemistry», it could be said that transparency is rarely found in nature in its elementary (pure, atomic) form. More often it is found in molecular form, namely combined with other concepts, such as *integrity, impartiality, responsibility, efficiency, efficacy* and so forth. These are definite combinations, primarily proposed by the legislator, and are widely plausible and acceptable, but often not completely evident or explicit in method or content.

The first assumption of this essay goes in this direction. These combinations are perhaps worth pondering, since they can confuse understanding and hinder critical knowledge of a term while favouring presumed or ambiguous familiarity, which tends to take for granted its meaning and assume that its problematic aspects are clear from the outset.

Here I re-investigate the original, historical-theoretical, «atomic» or etymological profile of transparency in order to remove its patina of presumed obviousness or the Hegelian *familiarity* that seems to surround it.

I therefore make a synthetic critical analysis of the term, to renew *knowledge* of it, since a better understanding of the history of a word and it theoretical profiles helps the work of transformation and accompanies the need for innovation.

2. *What is transparency*? A first framework

2.1 *Latent awareness*

The first step to go from presumed familiarity to a more cautious and certain knowledge of a term is to examine the original semantic root of the word, in this case the Latin root.

The word alludes directly to an optical effect. It is derived from the Latin verb *trans-pareo*, or «appear through». This is the action of a body that is evident to the sight of an observer, despite the fact that another material element lies between the two. In this first fundamental meaning, «transparency» indicates «the quality or state of being transparent», that, in turn, alludes to «the property of transmitting light without appreciable scattering so that bodies lying beyond are seen clearly»[4]. Transparency is therefore a natural property, but we can say that it is not very common: not many bodies and materials allow the passage of sufficient energy (in the form of light) to enable objects on the other side of them to be seen.

Although transparency may not be common in nature, it can certainly be created in relations between humans. It is therefore an artificial product in human institutions, created to organise coexistence. Indeed, it is tempting to say that it is a «product», a rather complex theoretical construction of recent constitution, affirmation and consolidation on the contemporary institutional scene, which however is the fruit of latent and ancient awareness within the history of ethics and politics.

2.2 *Obscurity as guarantee of power*

Let us recall that regarding the political sphere, the optical metaphor is constitutional of our cultural history. It can be traced back to the first and most organic treatise of political theory of western thought, Plato's

The Republic. Let us consider the cave allegory at the beginning of the seventh book[5]. A group of prisoners, chained in a cave, can only see shadows projected on the cave wall, by the light of a fire. The shadows are those of objects held up by others who are hidden from the prisoners' view. The symbolism and meaning of the myth are extremely complex. Plato alludes to the need of the philosopher (the only figure to have this task) to find a way out of the cave in order to see the sun, or to be free of his bodily chains and perceive the supreme idea that informs all others: the idea of good, the only idea that should guide and model the State. Throughout this fascinating work, which becomes a foundation stone of western political culture, Plato discusses the organisation of the State.

Apart from Plato's allegory, however, reference to the semantic area of *seeing* and the ideal of *visibility*, which we can only frame here from the viewpoint of its most expected consequence, i.e. control, constitutes a founding element for political theory and practice in subsequent centuries. This element becomes paradigmatic at the time of the most mature elaboration of the idea of State, on which various considerations are worthwhile. The point may be framed in the following terms: the concept of the modern State develops from full awareness of the risk that transparency poses for the exercise of power. To ensure the stability of his realm, the king and his court must be simultaneously *all-seeing* (able to control the life of his subjects in every important situation) and *invisible* (i.e. all the workings of his rule must be completely hidden from the people's sight and hence from all possible forms of control). The king's power lives and functions in full awareness of the crucial nature of the visual element for all forms of political management, which is why it must be held exclusively and asymmetrically: it means seeing everything and everyone and simultaneously not be seen by anyone, as concerns activities fundamental for ensuring the absolute, arbitrary and unverifiable nature of his command[6].

The principle of «State interest» first theorized by Giovanni Botero is framed in the same logic: «State is firm dominion over people and State interest is familiarity with the means to found, conserve and widen such dominion»[7]. A means of fundamental importance in the wide articulation of State interest is the systematic use of secrecy or even dissemblance and untruth.

Incidentally, reference to State interest constitutes what Arnold Clapman, in his famous essay *De arcanis rerum publicarum* (1605)[8], calls *ius dominationis*, or the sovereign's right to go beyond (or if necessary against) the ordinary *ius commune* in order to promote and ensure the good of his State. It is the clearest legitimation of exceptional *ex lege* use of

the sovereign's discretional power, whenever he considers it opportune to ensure the «supreme health of the *res publica*». This exercise of power serves the *arcana imperii* (secrets of power or principles of the state), the other key for understanding seventeenth century theory of the State. According to the definition elaborated by Clapman from the original words of Tacitus, with this key, the «intimate and hidden reasons and plans of those who command the State» must be understood («*intimae ed occultae rationes sive consilia eorum qui in republica principatum obtinet*»). Their aim is to conserve the sovereign's dominion and the existing form of the State.

These procedures are flanked by the *arcana dominationis*, which are further «reasons» and ways of preserving not so much the form of the State as the existing form of government, thus avoiding the process described as «degenerative». This seems to have been how the origin and management of power became wider, slowly asserting itself over the centuries: from monarchies to aristocracies to the various interpretations of democracy in the states of Europe.

3. *Publicity* and the rule of law: the origins of transparency

3.1 *The public nature of power*

So far we have seen the typical dynamics of power at the origin and during consolidation of the State in the modern and European sense of the term. We can say that sovereign power is based on exclusion from visibility and on refusal to account for its actions: it does not explain its conduct. Sovereign power attempts to avoid public visibility on its conduct, being decided by the few or very few and translated into command without giving any justification and imposed beyond any effective assumption of responsibility. This way the state system and the permanence of the king in absolute power becomes more solid.

This very trait is directly opposed, and punctually (though not easily) destroyed as the idea of constitutional State takes form and consolidates, and this makes the *public nature of power* its distinctive element and its fundamental criterion of legitimacy. The intrinsic complexity of the history of the word *transparency* can be understood in this sense. This history may sometimes be confused with the history of the idea of power, publicity, the public sphere and democracy. To foster

a more direct understanding, it is worth considering an apt definition by Norberto Bobbio who indicated the management of democracy as «the management of public power in public». In the same context, the philosopher specified:

> This pun is only apparent because «public» has two meanings depending on whether it is contrasted with «private», as in the classical distinction between *ius publicum* and *ius privatum*, transmitted to us by Roman jurists, or with «secret», in which case it means that it does not belong to the «*res publica*» or to the «state», but is «manifest», «clear», in other words «visible»[9].

Going back to where we started, it is therefore a specific characteristic of any democratic regime to establish another opposite relation with the optical perspective and the dimension of visibility. From this viewpoint, one could sustain that the link between the management of power and visibility remains unaltered in the passage from absolute State to democratic State, as if it were an insuperable obstacle, an ontological structure of the way we think and implement the organisation of coexistence. The «only» (but radical) thing that changes is the number of subjects included as personal holders of power. Since power is not held by a single person but constitutionally «comes from the people», the «capacity to see» the management of the *res publica* must be extended to the whole population, i.e. it must be able to extend to all citizens of a State.

Democracy can therefore be properly defined as «the rule of visible power» or as a system in which power is exercise by the people, with the people and for the people, through their representatives. The latter must therefore act with maximum transparency, i.e. they must ensure the possibility of explaining and motivating the decisions made and the objectives achieved. The same must be said for the procedures adopted, the means used, the subjects involved and the various costs sustained by the administration.

But one must also admit that it has not always been like this. Nor has the transition from absolute to democratic regimes been so immediate, sudden and clean. Indeed, it has been one of the longest transitions in western Europe, taking more than two centuries of its history. Here we cannot even sketch all its salient elements. I shall just mention two elements that are particularly significant. I include the first because it is too often unknown and in any case rarely present in the weave of histories and destinies linking the word *transparency* to the words *publicity* and

public sphere; I cite the second for the opposite reason: its presence and «familiarity» is so obvious, in a general sense, as again to run the risk described in Hegel's adage quoted earlier: the familiar, just because it is familiar, is not known.

3.2 *Publicity* in the judicial sphere - A historical root

The two elements hail back to the Enlightenment. We know that in this period, there was a special sensitivity for *publicity* regarding the judicial dimension, which marked a decisive point of no return. The position taken by Bernardo Tanucci, minister of the Kingdom of Naples at the time of King Ferdinand IV, was paradigmatic. From 1734, he sought to reform the administration of justice several times. His efforts culminated in the famous *Dispaccio* of 12th September 1774, which made it obligatory to motivate sentences, an idea considered unprecedented and almost revolutionary at the time[10].

Similar provisions were also declared in France (1790) and Prussia (1793)[11], but Tannucci's stand remained a point of reference and sparked heated debate, in which among others the celebrated jurist and philosopher of law Gaetano Filangeri played a primary role[12].

The obligation to motivate sentences, today completely *familiar*, even obvious, was a milestone towards the guarantee of the objectivity and impartiality of justice, as well as the accountability and if necessary the revisability of its exercise: since the motivations had to be published and printed, the sentence was exposed to the critical evaluation of public opinion (though still subject to many objective limitations)[13]. The outcome and the long-term repercussions are well-known: undoubtedly this obligation invited judges implicitly and explicitly to abandon discretionality, which was often at variance with simple application of the law and influenced by pressures of various kinds[14].

3.3 *Publicity* in the political sphere and in the production of laws - A historical root

The second element to underline here directs our attention to the same period but a different context. The greater profile of what we call the «public sphere» today, which began to take form in seventeenth century Europe, brought awareness that a State desiring to be seen as having the «rule of law» required what Kant called the «transcendental principle of the publicity of public right»: *publicity* of the topics discussed and the decisions taken[15]. The

author introduces this point in the second *Appendix* to his essay *Per la pace perpetua*, in a context focused on elaboration of a single legal bond and rational thread uniting the moral, political and legal spheres:

> One can cite the following proposition as the *transcendental formula* of public right: «All actions that affect the rights of other human beings, the maxims of which are incompatible with publicity, are unjust». This principle is to be understood as being not only *ethical* (as belonging to the doctrine of virtue), but also *juridical* (as concerning the rights of humans). If I may not *utter* my maxim explicitly without thereby thwarting my own aim, if it must rather be *kept secret* if it is to succeed, if I cannot *admit it publicly* without thereby inevitably provoking the resistance of all others to my plan, then the necessary and universal and hence *a priori* understandable opposition to me can be due to nothing other than the injustice with which my maxim threatens everyone[16].

Extending the Kantian revolution to this theme, the principle of State interest and the secrecy of public action considered above are completely overturned. The «observers» of the *res publica* can only be the citizens, and from their point of view, any public act at variance with the principle of *publicity* contradicts and substantially demolishes the legitimacy of any exercise of power.

At least three aspects are worth noting here. In first place, the author qualifies the principle of *publicity* as the transcendental principle of public right. To fully understand the implications of this expression implies turning to the most fundamental dictionary of Kant's ideas. First and foremost it is a «principle formula» i.e. a normative structure valid in any time and place. Not by chance did Kant repropose here a full consonance with the idea of the categorical imperative, which is embodied in a formula («act in such a way that your maxim can become the principle for a universal law») and institutes a command valid and obligatory for any thinking being, i.e. let us say a command of unchallengeable juridical reasonableness: «Always act so as to avoid any action whose maxim cannot be admitted publicly»[17]. It is also «transcendental» in the sense of not being derived or derivable from the history of some administration or from the personal experience of some public official; to the contrary, the purpose of the measure is to enable any future history or experience by setting it up and directing it according to said principle.

In second place, the formula, still in consonance with the categorical imperative, implicates a maxim, namely what in Kantian terms

qualifies «the subjective principle of acting», the rule an individual chooses and on the basis of which he sets up his individual action. Again in this case, the ethical root of the formula is clear: *entrust* the concrete and stable adoption of the rule *to the responsibility of the individual*, whether it is commanded by administrative authority, or whether the motivation for its adoption originated autonomously in the actions of the public official.

In third place, it should be noted that through the incisive agency of those words, the principle of *publicity* - today we would say *transparency* - becomes an essential need in order to be able to speak of law or of any procedure (abstract) or activity (concretely pursued by public officials) directly related to that sphere. Everything that concerns the organisation and management of coexistence must be made known to the citizens themselves with the greatest possible evidence and continuity. Should someone consider it opportune to hide a fact of ordinary administration from the people (excluding questions that could threaten national security), he cannot avoid the stain of operating unjustly to favour some and damage others.

From this point of view, it is significant to go back in time and reflect on the same concern expressed in the context of the revolution of the Kingdom of Naples in 1799. A Catholic bishop and intellectual of the time, Michele Natale, who joined the Republic and became mayor of the municipality of Vico Equense, was executed in Naples on 20th August 1799, reflecting the difficult political moment. He wrote words of particular acumen in his *Catechismo repubblicano:*

> Is there nothing secret in Democratic Government? All the operations of the governors must be known to the people, except the odd public security measure, which must however be made known when the danger is past[18].

Although the author belonged and referred to a unique moment in history, these words seem surprisingly topical, especially today, when almost all world States are still struggling with the COVID-19 pandemic and with the complex phases of recovery from that upheaval. They certainly advise caution on the part of the public administration, perhaps in some cases postponement of the principle of transparency in relation to public health plans, but certainly not its abdication. Publicity remains the first rule, secrets (admitted only if of limited duration) are the exception and always confirm the rule.

4. The infinite task of transparency

At least since the Enlightenment, publicity or the public verifiable declaration of the procedures, contents and aims of the decisions that guide the actions of the State through its (central and peripheral) administrations and its representatives has been the principal theoretical pillar on which the legitimacy of public power in modern democracies is based[19].

This principle is clear, justified and completely reasonable. Since Kant, its ethical-public validity and inevitability has never been denied in the institutional history of the countries of the European Union. However, there is objective difficulty in implementing it in administrative practice. In other words, as we know, the passage from the *rhetoric* of assertion of a principle to its *pragmatic* implementation in all aspects of the practice of the public administration is difficult.

However, in coming to the attention of the public sphere in the broadest sense, and also in asserting itself as the principle of any political action that aims for legitimacy in democratic spheres, we rediscover the intrinsic «molecular» nature of transparency. Transparency attracts other dimensions of social living; it is open, available and needs to be part of a wider and more complex value system, typical of democratic coexistence[20]. Although this is not the context for discussing such a system, we can name at least three possible «molecular bonds» that transparency immediately regenerates and which are directions for further study.

On one hand, the call for transparency filters down to individual public officials in the same way as it affects the administration as a whole, as far as *trust* and *security* of action, and in acting, are concerned. In particular, if the official and the administration genuinely wish to pursue transparency, can they be more than mere «consumers» of trust, i.e. trustworthy subjects in whom trust is reposed by the citizen, but who repay him with a product vastly inferior to what he might expect? Can the official and the administration be «producers» of trust, generators of positive expectations on the part of the citizen, while observing security requirements and protecting their function and actions in the service of the State?

Moreover, does transparency in this sense open the possibility of reconsidering the definition of *responsibility* of the public administration, understood as a logic of response to demand for service, which has clear, albeit hard to distinguish, ethical and juridical profiles? If administrations are glass houses, or aspire to become such, also through the technological innovations that they are able to organise for the purpose, does it become even clearer who is responsible for what, or is there the risk of reproducing a «collective» respon-

sibility that promotes a weakening of trust and an increase in the perception that bureaucracy shields the administration from taking responsibility?

Last but not least, can transparency always ensure a new response to new demands for integrity? In other words, can it offer the most authentically horizontal, impartial and inclusive access to the workings of the public administration, without cognitive, social or procedural barriers, with continuous self-innovation in a subjective (of the official) and objective (of the administration) sense, substantial and on the merits, thus combining integrity with integration and innovation of new administrative procedures, methods and objectives[21]?

These questions are constitutively linked to the conceptual arch of transparency and must be asked with awareness of their theoretical and applicative depth. But they are also questions that indicate a need for the most effective further reflection, in order to be raised to the level of the challenges that our time, with almost paradoxical balanced transparency, asks us to tackle with unprecedented speed.

Note

[1] G.F.W. HEGEL, *Phenomenology of Spirit* [1807], ed. by T.P. Pinkard, Cambridge University Press, Cambridge 2018, p. 20.

[2] As can be expected, each of these fields has its specific underlying legislative framework and is the outcome of a specific public debate, which we cannot analyse here. For an overall picture of the topic, part of a broad scientific debate of judicial profile, see the following studies: F. MERLONI (a cura di), *La trasparenza amministrativa*, Giuffrè, Milano, 2008; A. BONOMO, *Informazione e pubbliche amministrazioni. Dall'accesso ai documenti alla disponibilità delle informazioni*, Cacucci, Bari 2013; B. PONTI (a cura di), *La trasparenza amministrativa dopo il d.lgs. 33/2013*, Maggioli, Rimini, 2013. With special reference to *open government,* see E. CARLONI, *L'amministrazione aperta. Regole, strumenti e limiti dell'Open Government*, Maggioli, Rimini 2014, and the essay by P.J. Leerssen (*Lessons learned? How open government research can inform platform transparency*), in the present issue of *Etica Pubblica*. Regarding generalised civic access, see G. GARDINI - M. MAGRI (a cura di), *Il FOIA italiano. Vincitori e vinti*, Maggioli, Rimini 2019; B. PONTI (a cura di), *Nuova trasparenza amministrativa e libertà di accesso alle informazioni. Commento sistematico al d.lgs. 33/2013 dopo le modifiche apportate dal d.lgs. 25 maggio 2016, n. 97*, Maggioli, Rimini 2016, and the essay by F. DI MASCIO (*Exploring Patterns of Implementation of the Freedom of Information Act (FOIA) in Local Government: The Case of Italy*) in the present issue of *Etica pubblica*.

[3] My first reflection on this qualification can be found in A. PIRNI, *Un binomio (im-)possibile? Alcune considerazioni preliminari su verità e potere*, in ID. (a cura di), *Verità del potere, potere della verità*, ETS, Pisa 2012, pp. 11-26.

[4] «Transparency» and «Transparent» [*ad Vocem*], on Merriam-Webster Dictionary (https://www.merriam-webster.com).

[5] PLATO, *The republic*. Edited by G. R. F. Ferrari; translated by Tom Griffith, Cambridge University Press, Cambridge texts in the history of political thought, Cambridge 2000 (3rd edition 2018), Book 7, 514a-520a, pp. 220-226.

[6] For an overall picture of this point, see N. BOBBIO, *La democrazia e il potere invisibile*, in Id. *Il futuro della democrazia*, Torino, Einaudi 1995[3], pp. 85-114. For an original critical-theoretical discussion on the topic, see V. SORRENTINO, *Il potere invisibile. Il segreto e la menzogna nella politica contemporanea*, preface by P. Barcellona, Dedalo, Bari, 2011, pp. 119-170 and 271-306.

[7] G. BOTERO, *Della ragion di Stato* [1589], ed. it. a cura di C. Continisio, Donzelli, Roma 1997, Appendice I [ed. del 1590], p. 231 (*The Reason of State*, ed. by R. Bireley, Cambridge, Cambridge University Press, 2017). For a specific deepening on this point see F. MEINECKE, *Machiavellism: The Doctrine of* Raison d'Etat *and Its Place in Modern History* [1963], ed. by D. Scott, Routledge, London 2017[2].

[8] A. CLAPMAN, *De arcanis rerum publicarum*, Ienae, Bircknerus 1605 (1665[2]).

[9] N. BOBBIO, *La democrazia e il potere invisibile*, cit., p. 86, our translation.

[10] Tannucci's *Dispaccio* was recently reprinted in appendix to M. TITA, *Sentenze senza motivi. Documenti sull'opposizione delle magistrature napoletane ai dispacci del 1774*, Jovene, Napoli 2000, pp. 135-137. For an overall picture of the debate it elicited and for an analysis of its legal-philosophical meaning, also with reference to the coeval European context, see P. BECCHI, *Da Pufendorf a Hegel. Introduzione alla storia moderna della filosofia del diritto*, Aracne, Roma 2007, spec. pp. 60-75.

[11] As underlined by Becchi (*Da Pufendorf a Hegel*, cit., p. 63), it is not irrelevant that this obligation cannot be found in the proceedings of legal systems of *common law* countries, though motivation is the practice.

[12] G. FILANGERI, *Riflessioni politiche su l'ultima legge del sovrano, che riguarda la riforma dell'amministrazione della giustizia* [1774], critical note by R. Ajello, Bibliopolis, Napoli 1982.

[13] Regarding the complex history of the public sphere as the place where public opinion is formed, the following studies remain as constant references: J. HABERMAS, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* [1962], transl. by T. Burger with the ass. of F. Lawrence, MIT Press, Cambridge MA 1989; and W. LIPPMANN, *Public Opinion*, Brace and Company, New York 1922.

[14] In his *Riflessioni*, Filangeri noted and underlined with particular political acumen, the *garantist* role that the obligation to motivate sentences could have: «Making the citizenry, i.e. public opinion, the recipient of judicial account meant revealing the *arcana iuris* and emancipating the citizen from the condition of subject. Thus the citizen acquired the right to know the mechanisms of power: overcoming the *arcana iuris* (secrets of law) also exposed the *arcana imperii* (secrets of power)» (P. BECCHI, *Da Pufendorf a Hegel*, cit., p. 66), our translation.

[15] AK VIII: 381-386. English translation: I. KANT, *Toward Perpetual Peace: A Philosophical Sketch* [1785], in ID., *Toward Perpetual Peace and Other Writings*

on Politics, Peace, and History, ed. and with an intr. by P. Kleingeld; transl. by D. L. Colclasure, Yale University Press, New Haven 2006, pp. 104-109. For a broad analysis of the topic, see G. MARINI, *La filosofia cosmopolitica di Kant*, Laterza, Roma-Bari 2007 and I. Kant, *Per la pace perpetua. Un progetto filosofico* (1795), in I. KANT, *Guerra e pace: politica, religiosa, filosofica. Scritti editi e inediti (1775-1798)*, a cura di G. Cunico, Diabasis, Reggio Emilia 2004. For an outline of Kant's reflections on cosmopolitical philosophy, see: A. PIRNI, *Kant e la filosofia cosmopolitica*, in B. HENRY, A. LORETONI, A. PIRNI, M. SOLINAS (a cura di), *Filosofia politica*, Mondadori, Milano 2020, pp. 107-124.

[16] I. KANT, *Toward Perpetual Peace*, cit., pp. 104-105.

[17] *Ibidem*.

[18] M. NATALE, *Credo in Dio e nella democrazia. Catechismo repubblicano per l'istruzione del popolo e la rovina de' tiranni* (1799), a cura di G. Acocella, Edizioni Lavoro, Roma 1998, p. 71.

[19] On this topic, see again W. LIPPMANN, *Public Opinion*, cit., spec. capp. II, VI, VIII; see also M.C. PIEVATOLO, *I padroni del discorso. Platone e la libertà della conoscenza*, Plus, Pisa 2003, spec. pp. 35-117.

[20] For a broader picture on this point see A. PIRNI, A. CHIESSI (eds.) «Fiducia, corruzione, legalità. Etica pubblica e logiche della convivenza democratica», *Lessico di etica pubblica / Lexicon of Public Ethics*, 2021, 12, n. 2.

[21] In F. MERLONI, A. PIRNI, *Etica per le istituzioni, Un lessico*, pref. di R. Cantone, Donzelli, Roma 2021, we offer a broader picture of this same problem.

The complex relationship between transparency, legitimation and accountability – some evidence from the fight against corruption

Agustí Cerrillo Martínez, Benedetto Ponti

As an institutional value, transparency has spread widely and become popular. The present essay underlines the many trade-offs linked to interaction of the instruments of transparency and the aims it pursues. Drawing inspiration from the success of transparency as a tool for preventing and fighting corruption, the authors also highlight a significant trade-off between accountability and trust in this sphere, revealing the tensions within the value-principle of transparency, due to its plural and granular nature, and the contingency of outcomes which depend on the context of reference and the awareness with which the instruments are set up and used.

1. A successful institutional value

The recent recognition of transparency as an institutional value has been enormous. If we consider the last 25 years, many elements bear witness to this success at global level. A first well-known element is the extraordinary acceleration of the legal tool of the right to access documents and information held by public bodies, which in symbolic and practical terms is a major vector of transparency[1]. The spread of this institution led to the emergence of a standard[2] which was then embodied in an instrument of international law, designed to consolidate it[3]. The «success» of the right of access to documents and information (also as a vehicle of transparency) is also evident in qualitative terms, since this right was declared of constitutional importance[4] and proposed as a basic human right[5], an interpretation finally accepted by the jurisprudence of regional courts of human rights[6].

A second element that has ensured the success of transparency as a value was its capacity to intercept and translate into policy the inherent

potential of the so-called digital revolution, especially the capacity of the internet to diffuse information at all levels, making it an extraordinarily effective instrument for implementing the «right to know» the information held by public bodies. This digital aptitude for transparency (which can also be considered a digital aversion for privacy) is encountered and implemented at various levels. The right to access information created a new institutional pathway alongside the traditional one: *reactive* transparency (where citizens request information they wish to know and use, also for the purposes of transparency) was coupled with *proactive* transparency, where it is a specific *duty* of public bodies, imposed by law, to actively make information available and broadcast it via the internet (so-called *compulsory disclosure*)[7]. But the inherent potential of information technology also impacted the understanding of public bodies, leading to promotion of *open government* as a paradigm and model for relating to citizens, a pillar of which is transparency itself[8]. It also impacted the realm of public data, likewise brought into the open paradigm and framed as «commons»[9], for which not only the right to know is claimed but also and above all, the right to re-utilise so-called *open government data*[10]. In this context, transparency has a double connotation: government is more transparent for embracing the paradigm of open data by virtue of the quantity, manner and value of the information provided[11]; on the other hand, the very use of that information produces transparency[12].

2. The reasons for transparency

The success of transparency as a value depends on the positive effects expected to flow from its pursuit and implementation. The list of objectives is long and has been declined in different ways. Here we refer to a formulation[13] that lists outcomes of transparency according to whether they affect citizens or the government. The former includes effects of legitimacy/trust in government, participation and satisfaction; the latter includes effects in terms of accountability, (less) corruption, (better) performance, (better) decision-making, (better) financial management, (better) collaboration between different government bodies. These objectives are particularly significant and explain why transparency as a value is commonly indicated as linked to and derived from the principles of democracy[14].

However, as pointed out in the literature, ascribing so many different virtues to transparency indicates that there has been enormous invest-

ment in this value[15]. This investment is further underlined by the latest studies, which show that as far as the three pillars of open government (transparency, participation, collaboration) are concerned, implementation concentrated mainly on instruments (mostly technological) to create transparecy, so that the implementation policies for the open government paradigm consists essentially in measures to promote transparency[16].

The results of this enormous investment have not always matched the expectations. One area in which promise met expectations is the fight against corruption (*see below*, par. 4-5). In other areas, effects and results were not always in line with assumptions. A thorough review of the empirical literature[17] indicates that as far as the effects on citizens are concerned, a non-negligible percentage had negative (16.6%) or mixed (22.2%) effects in terms of trust in government, while 33% of empirical research indicates uncertain and/or mixed effects in terms of legitimation. As far as effects on government are concerned, as many as 50% of studies reported mixed effects in terms of decision-making and 30% in terms of accountability. Only effects in terms of (*less*) *corruption* (100% of the empirical research analysed) and (*better*) *financial management* (80%) therefore seem fully in line with the expectations or virtues of transparency.

3. The tensions of transparency

These findings should not come as a surprise. Indeed, taking the double point of view on government and citizens, the effects in terms of effective application of transparency can hardly be maximised on both sides, except in an ideal world. Let us consider the pair *accountability* (*of the government*)/*legitimation* (*by the citizen)*. Transparency measures that effectively increase accountability are destined to show whether and to what degree the government was capable of producing results, of allocating and spending resources in an effective way. Since actions are unlikely to completely and efficiently meet the objectives, the failure rate will be all the more evident and visible in relation to the degree accountability achieved. So, in theory, given a certain failure rate of public policies, greater accountability means less legitimation. Besides, this trade-off between accountability and legitimation explains why some albeit more recent transparency laws have evident limits in terms of effectiveness and efficacy. This is actually a precise political objective which aims to achieve the positive effects in terms of legitimation de-

rived from adoption of pro-transparency laws, while avoiding (potential) negative effects (in terms of legitimation) linked to activation of effective accountability dynamics[18]. More generally, the literature underlines that pursuing transparency imposes an effective trade-off between seeking legitimation (*spinning narratives*) and effective accountability (*fair and balanced representations*)[19].

Similar considerations can be made regarding the other pair: *trust in government/better decision making*. Indeed, in this case it is transparency as a value that creates tension between the two elements. Transparency applied not to responsibility for the results (accountability) but rather to decision-making is not neutral because it tends to mean prying into issues subject to institutional secrecy or to discretion, normally managed away from the indiscreet eyes of outsiders. In this sense, asking for transparency to be applied to a decision-making process implies an often explicit declaration of lack of trust in the public decision-makers. Interestingly, this tension between trust and decision-making, when it refers to outcomes/effects of the principle of transparency with reference to public decision-makers, largely mirrors the tension between representative and direct democracy. However, in the case of technical-administrative decisions, the tension between these two elements reveals the crisis of legal/rational power, understood as non-bargainable specialist knowledge regarding the substance of the choices that are taken.

Note that these tensions manifest in a very particular and specific way in the EU legal system, characterised by a dated lack of democratic legitimation, even in the legislative process. Transparency is therefore proffered to make up for this legitimation gap, which only accentuates the above tensions[20]. It suffices to consider how often balancing between the reasons of legitimation and trust (sustained by the application of transparency measures) and the need to protect the decision-making process (by preserving a «space for frank discussion» far from the gaze of outsiders)[21] has been applied in the jurisprudence of the European Court of Justice. Thus, the indications provided by empirical studies reveal elements of contradiction and trade-off between the various outcomes of transparency, which are physiological and reveal its intrinsic complexity[22].

The tension between *accountability* and *legitimation* (like that between *trust and decision-making process*) is also subject to the effects of the dynamics elicited by *mediated transparency*, which involves re-elaboration of the data and information made available by the government (also as required by the open data paradigm). The essential operation of reducing and attributing meaning to an over-abundance of information, in order

to make it comprehensible[23], is the task of transparency mediators. This means that the more numerous, diversified and alternative the operations of mediation, the more the resulting accountability pleas emerge as fragmented, controversial and contested[24], without considering further asymmetrical effects related to the importance acquired by computational power, an eminent instrument in the mediation of information. Nor is it certain that there is less tension if the reduction and mediation operation for transparency purposes is carried out directly on the government side (i.e. without a third-party mediator). In such cases, the public body is charged with creating transparency and has to handle the trade-off between a complete and balanced account and an unbalanced spin more suited for boosting trust in the government of the day[25].

4. Transparency: a dual guard against corruption

There is a growing conviction that a purely reactive approach to corruption is limited and inefficient both in dealing with corruption that has actually taken place and in preventing corruption from emerging and flourishing[26]. There has therefore been a recent burgeoning interest in a preventive approach that attempts to cut short any conflicts of interest or potential malfeasance before they develop further[27].

In recent decades, new policies to prevent corruption have begun to develop. These are based on strengthening public integrity[28] and countering the traditionally reactive anti-corruption policies that have shown limited effectiveness over time. This approach sees transparency as an element that contributes significantly to integrity, and that can become a key instrument in preventing malfeasance[29].

On the one hand, transparency can turn public bodies into «glass houses»[30], allowing citizens to see what happens inside in great detail, and thus discouraging wrongdoing[31]. Transparency makes it easier to monitor the activity of public officials and employees, and makes it difficult for conflicts of interest and corruption to arise by doing away with the opacity and secrecy needed for them to flourish[32]. Transparency has a very clear effect in facilitating and ensuring integrity in public procurement processes, while it is widely recognized that a lack of transparency (opacity) is one of the main conditions for corruption to emerge. Transparency is thus an effective practice for preventing and fighting malfeasance[33]. It is crucial to ensure that information about all decisions made by public administrations, the motivations for those decisions and all procedures

used is widely available[34]. This helps improve the quality of democracy, constitutes a mechanism for good administration, and is also an effective means for preventing conflicts of interest and for fighting corruption[35]. From this perspective, transparency is a key element of legitimacy and makes it possible to generate public trust.

Another aspect of transparency is that it turns citizens into thousands of potential auditors, involving them in the fight against corruption[36]. In general, transparency makes it possible for public bodies to be monitored and held accountable[37]. In this way, it reduces corruption by preventing much of it from occurring in the first place[38]. When public officials or employees know they may be under public scrutiny, their behaviour tends to be more exemplary. In addition, transparency makes it possible to detect cases of malfeasance. Thus, transparency also stands as an element of control and accountability.

In view of all this, our starting point is that transparency can have two key effects as an instrument for preventing and fighting corruption: one regarding legitimation and trust, the other regarding accountability and control. To go beyond this first general conclusion, we must narrow our analysis to the different elements that define transparency mechanisms in order to confirm the extent to which these two effects are reflected in anti-corruption policies.

5. Regulating transparency and its impact on preventing and fighting corruption

In order for transparency to be effective in achieving its goals, the information that public administrations make available to citizens must help people understand what really goes on inside them. For this to happen, public information needs to be readily available and accessible, as well as being of high quality and re-usable. There also need to be mechanisms in place to guarantee that these characteristics are fully complied with.

The way each of these elements is shaped influences transparency and its effects. We see below that the information generally disseminated by public bodies facilitates trust on the part of citizens, making it an instrument of legitimation. However, sometimes this is not sufficient to be an effective instrument of accountability or monitoring of the actions of public officials and employees.

First, information must be readily available and complete. Public bodies must provide all the facts related to the decisions they make, as well

as the reasons why certain decisions have been made, and the procedures governing the process[39]. If there are greater risks of irregularities and malfeasance in certain fields of administrative activity, the information disseminated in those fields must be even more complete and detailed (examples are public procurement, urban planning, benefits and subsidies). This is already envisaged in most of the regulations concerning the dissemination of public information[40]. However, public bodies are often not required to disclose certain types of data that would facilitate the monitoring of public activity and that would in particular help flag situations that might give rise to or cover up a case of corruption. For example, this is the case of information related to public officials'and employees'assets, officials'public agendas, their contacts with lobbies, and lists of the gifts they may receive. This is also true of material regarding preparatory meetings prior to making public decisions; when there is corruption, this information is often gathered in informal or opaque environments (for example, notes, drafts or external reports)[41].

Secondly, what is made public must be quality information, i.e. it must be able to achieve its intended purpose: effectively facilitating citizens'knowledge of public activity and the monitoring of that activity[42]. In particular, when we refer to quality information, this means that it is objective, truthful, up-to-date and useful[43]. Some transparency laws set out different obligations in relation to high-quality information[44]. However, despite this, what is disseminated or provided by public bodies often does not meet these standards, for example because it contains errors, is not up-to-date, or is biased[45]. Such low-quality data may be impossible to analyse, or may generate unreliable results if it is indeed analysed[46]. In this way, public activity cannot be monitored in an ineffective way and although the information provided can aid legitimacy, it does not constitute a real monitoring and accountability mechanism.

Third, the information must be accessible. Standards must be followed that allow the data to be consulted by any person, regardless of their personal circumstances (for example, it must comply with the provisions of EU Directive 2016/2102 of the European Parliament and of the Council of 26 October 2016, on the accessibility of public sector organization websites and mobile applications). In addition, the information must be well organized, easy to find, freely accessible, and must include indexes, search functions, etc[47]. In recent times, different regulations on transparency have contemplated the creation of transparency portals. These are online platforms through which public bodies disseminate information[48]. Transparency portals disseminate a large quantity of data

in the same place, in an organized, easy-to-use manner[49]. Public bodies sometimes also produce information in clearly designed graphic formats in a language that the general public can easily understand, thus greatly facilitating access to it.

As well as being able to peruse material that has been proactively distributed by public bodies, citizens may request access to any other data held by those bodies, through provisions in the transparency regulations that ensure their right to access all public information. However, in practice, public bodies themselves may put obstacles in the way of certain material being disclosed. For example, it may avoid giving out information because it could lead to a case of corruption being uncovered. A request may also be hindered by not being replied to or receiving a delayed response.

Fourth, the data must be re-usable, i.e. it must allow citizens to analyse it and thus to supervise, monitor and oversee public activity. Citizens must also have the right to re-use public information to create new material that can be widely disseminated, allowing other citizens to learn about it. Open data has already been highlighted as an effective anti-corruption strategy with a significant impact on public integrity[50]. Indeed, as recognized in the G20 Anti-Corruption Open Data Principles, open data can contribute to preventing, detecting, investigating and reducing corruption. Because of this, all data must be distributed in formats that make it easy to re-use (for example, XML or CSV formats rather than PDF), and it should not be subject to any licensing or conditions that make it difficult to re-use (for example, it should not incorporate personal data or work protected by intellectual property laws).

These principles are provided for in Directive (EU) 2019/1024 of the European Parliament and of the Council, of 20 June 2019, on open data and re-use of public sector information. The EU standard states that public bodies must prepare and provide documents according to the principle of «open documents by design and by default», so that they can be freely used, re-used and shared by anyone for any purpose[51]. This complies with the provisions of the G20 Anti-Corruption Open Data Principles adopted during the Turkish presidency in 2015, which recognize that in order to contribute to the fight against corruption, data must be open by default.

Open data must be disseminated in an open format, i.e. «a platform-independent file format and made available to the public without restrictions that prevent the re-use of documents»[52]. Likewise, the data needs to be disseminated in machine-readable formats, that is, in «structured file formats that allow computer applications to easily identify, recognize

and extract specific data, including factual statements and their internal structure»[53]. To facilitate their re-use, attempts should be made to simplify access to data sets, for example by creating a single point where all the documents to which the directive applies can be retrieved; these should be in accessible formats, easy to find and re-usable by electronic means (article 9.2)[54].

Finally, mechanisms must be articulated to ensure application of the rules on transparency and access to public information, with special attention to preventing and fighting corruption. Most transparency laws designate independent bodies to oversee transparency guarantees. Sometimes these bodies also supervise the compliance of public bodies with obligations to disseminate public information and its re-use[55].

Alongside these mechanisms, public bodies must also provide channels for citizens to inform the competent authorities of cases of corruption that they might detect from perusal of public information they have accessed. In parallel, the necessary measures must be promoted to protect any whistle-blowers from possible reprisals[56].

6. Handle with care and awareness

Transparency has therefore proved to be an effective instrument for detecting and reducing corruption. However, the literature also indicates that exposure of corruption can have negative effects on legitimation and trust in government, if it is produced by transparency «from the outside» (*citizen auditor* effect), rather than «from within» (*casa di vetro-glass house* effect). For example, has been highlighted that «transparency reforms that reveal pervasive corruption may breed resignation and withdrawal from public and civic endeavours rather than induce and empower citizens to mobilize for better government»[57], and that in all cases the effect in terms of *confidence in government* is neutral[58].

These elements confirm that even where the efficacy of transparency manifests in clear and uncontroversial terms, namely with reference to the prevention/reduction of corruption, it is likely to elicit tensions and *trade-offs* between the *diverse outcomes* with which it is commonly associated (in this case: *less corruption*/*more trust in government*). Transparency is a value and an essential instrument, but must be managed with care and awareness, without taking for granted that in every context it can always manifest all the virtues for which it is appreciated and actively promoted.

Note

[1] J. M. ACKERMAN, I. E. SANDOVAL-BALLESTEROS, *The Global Explosion of Freedom of Information Laws*, in «Administrative Law Review», n. 58(1), 2006, pp. 85-130, http://www.jstor.org/stable/40712005; H.H. PERRITT, Z. RUSTAD, *Freedom of information spreads to Europe*, in «Government Information Quarterly», Vol. 17, Issue 4, 2000, pp. 403-417. ISSN 0740-624X, https://doi.org/10.1016/S0740-624X(00)00050-2.

[2] M. SAVINO, *The right to open public administration in Europe: emerging legal standards*, Paris, OECD-OCSE, Sigma Papers, 2010, n. 46, p. 1-41. ISSN: 2078-6581.

[3] The Council of Europe Convention on Access to Official Documents («Tromsø Convention»), signed in 2009 and in force in June 2020: https://www.coe.int/en/web/access-to-official-documents.

[4] See sentence no. 20/2019 of the Italian Constitutional Court and among others the comments of O. POLLICINO, G. REPETTO, *Not to be pushed aside: the Italian Constitutional Court and the European Court of Justice,* in «VerfBlog», 2019/2/27: 10.17176/20190324-205058-0 and of B. PONTI, *Il luogo adatto dove bilanciare. Il «posizionamento» del diritto alla riservatezza e alla tutela dei dati personali vs il diritto alla trasparenza nella sentenza no. 20/2019*, in «Istituzioni del Federalismo», n. 2/2019, pp. 525-547.

[5] P. BIRKINSHAW, *Freedom of information and openess: fundamental human rights?*, in «Administrative Law Review» n. 58, 1/2006, pp. 177–218. http://www.jstor.org/stable/40712007.

[6] See Inter-American Court of Human Rights, Case of *Claude Reyes et al. v. Chile*. Judgment of 19 September 2006, Series C no. 151; European Court of Human Rights, Case of Magyar Helsinki Bizottság v. Hungary (18030/11), Judgment of 8 November 2016.

[7] From this point of view, see among others the specific declinations of the law adopted in the UK (in force since 2005, with the mechanism of «publication schemes» alongside the «right to request information»), in Italy (NB where publication of many types of information is compulsory for all public bodies was introduced by d.lgs. no. 33 of 2013, and *precedes* inclusion of right of access to information by d.lgs. 97/2016), in Spain (*Ley 19/2013 de transparencia, acceso a la información pública y buen gobierno*) and in many German Lander.

[8] D. LATHROP, L. RUMA, *Open government: collaboration, transparency, and participation in practice*, ÒReilly media 2010; E. CARLONI, *L'amministrazione aperta. Regole e limiti dell'open Government*, Maggioli, Rimini 2014.

[9] M. A. HELLER, *The Tragedy of the Anticommons*, in «Harvard Law Review», January 1998; L. LESSIG, *The Future of Ideas: The Fate of the Commons in a Connected World*, Random House USA Inc New York 2001; E. OSTROM, *Reformulating the Commons*, in «Swiss Pol. Sci. Rev.», 1999, vol. 6, p. 29 ss.

[10] K. JANSSEN, *Open Government Data and the Right to Information: Opportunities and Obstacles*, in «Journal of Community Informatics», Vol. 8 n. 2, 2012; B.S. NOVECK, *Rights-based and tech-driven: Open data, freedom of information,*

and the future of government transparency, in «Yale Hum. Rts. & Dev.», vol. 19, 2017, pp. 1-10.

[11] G. MAGALHAESA, C. ROSEIRA, *Open government data and the private sector: An empirical view on business models and value creation*, in «Government Information Quarterly», Vol. 37, Issue n. 3, 2020, pp. 101-248, http://dx.doi.org/10.1016/j.giq.2017.08.004; J.C. BERTOT, P.T. JAEGER, J.M. GRIMES, *Using ICTs to create a culture of transparency: E-government and social media as openness and anti-corruption tools for societies*, in «Government Information Quarterly», vol. 27, issue 3, 2010, pp. 264-271, http://dx.doi.org/10.1016/j.giq.2010.03.001.

[12] R. MATHEUS, M. JANSSEN, *A systematic literature study to unravel transparency enabled by open government data: The window theory*, in «Public Performance & Management Review (PPMR)», vol. 43, issue n. 3, 2020, pp. 503-534; B. PONTI, *Open Data and Transparency: a Paradigm Shift*, in «Informatica e Diritto», vol. 1-2, 2011, pp. 305-320, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2087397.

[13] M. CUCCINIELLO, G.A. PORUMBESCU, S. GRIMMELIKHUIJSEN, *25 Years of Transparency Research: Evidence and Future Directions*, in «Public Administration Review», vol. 77, 2017, pp. 32-44, https://doi.org/10.1111/puar.12685.

[14] F. MERLONI, *Trasparenza delle istituzioni e principio democratico*, in ID. (ed.), *La trasparenza amministrativa*, Milano, Giuffrè, 2008, pp. 3-28.

[15] A. FUNG, M. GRAHAM, D. WEIL, *Full disclosure. The perils and promise of transparency*, Cambridge University Press, Cambridge 2007; C. HOOD, *Transparency in Historical Perspective*, in C. HOOD, D. HEALD (eds.), *Transparency: The Key to Better Governance?*, Oxford University Press, Oxford 2006.

[16] K.-T. TAI, *Open government research over a decade: A systematic review*, in «Government Information Quarterly», Vol. 38, Issue 2, 2021, https://doi.org/10.1016/j.giq.2021.101566.

[17] M. CUCCINIELLO, G.A. PORUMBESCU, S. GRIMMELIKHUIJSEN, cit., pp. 39-40.

[18] The case of the FOIA legislation adopted in the last 20 years by countries in the western Balkans is paradigmatic: the need for legitimization (related to the process of joining the EU) also led to adoption of formally very advanced laws (the extreme case being the Serbian law of 2003, long considered the most advanced in the world), but very weak from the point of view of practical *performance*, and later reformed in order to make it weaker: M. KMEZIĆ, *Rule of law and democracy in the Western Balkans: addressing the gap between policies and practice*, in «Southeast European and Black Sea Studies», 2020, vol. 20, pp. 183-198, DOI: 10.1080/14683857.2019.1706257; D. MILOVANOVIĆ, M. DAVINIĆ, AND V. CUCIĆ, *Free access to Information in Serbia*, in D.C. DRAGOS, P. KOVAAND, A.T. MARSEILLE (eds.), *The Law of Transparency in Action, A European Perspective*, 2019, p. 501 ss. BIRN *Freedom of Information and Journalists in the Western Balkans: one step forward, two steps back*, 2019, available at https://bird.tools/publications/freedom-of-information-and-journalists-in-the-western-balkans-one-step-forward-two-steps-back/. Similar moves, albeit less intense, to make laws weaker can also be found in consolidated democratic contexts: see B. WORTHY, *The politics of freedom of information*, Manchester University Press, Manchester 2017.

[19] S. GRIMMELIKHUIJSEN, *'Being transparent or spinning the message? An experiment into the effects of varying message content on trust in government'*, in «Information Polity», 2011, vol. 16, pp. 35-50; S. PIOTROWSKI ET AL., *Numbers over Narratives? How Government Message Strategies Affect Citizens'Attitudes*, in «Public Performance & Management Review», 2019, vol. 42, pp. 1005-1028, DOI: 10.1080/15309576.2017.1400992.

[20] See contribution by Hélène Michel in this volume. See also: J. LODGE, *Transparency and Democratic Legitimacy,* in «J. Common Mkt. Stud.», vol. 32, 1994, p. 343; P. LEINO-SANDBERG, M. Z. HILLEBRANDT, I. KOIVISTO, (eds.), *(In) visible European Government: Critical Approaches to Transparency as an Ideal and a Practice*. (UACES Contemporary European Studies), Routledge, 2022.

[21] D. ADAMSKI, *How wide is 'the widest possible'? Judicial interpretation of the exceptions to the right of access to official documents revisited'*, in «Common Market Law Review», 2009, vol. 46, pp. 521-549.

[22] P RICHTER, *Es werde Licht! Und es ward Licht? - Zur Wirkung von Transparenz auf die Legitimität öffentlicher Verwaltung*, Politische Vierteljahresschrift», no.58 (2), pp. 234-257.

[23] B. PONTI, *La mediazione informativa nel regime giuridico della trasparenza: spunti ricostruttivi*, in «Diritto dell'informazione e dell'informatica», 2019, 2, pp. 383-421; M. KASSEN, *Open data and its intermediaries: a cross-country perspective on participatory movement among independent developers*, in «Knowledge Management Research and Practice», 2018, vol. 16, issue n. 3, pp. 327-342.

[24] B. WORTHY, R. HAZELL, *Disruptive, Dynamic and Democratic? Ten Years of FOI in the UK*, in «Parliamentary Affairs», vol. 70, issue 1, 2017, pp. 22–42, https://doi.org/10.1093/pa/gsv069; there is a significant statement (later regretted) by prime minister Tony Blair who promoted introduction of FOIA in the UK: «The truth is that the FOI Act isn't used, for the most part, by «the people». It's used by journalists. For political leaders, it's like saying to someone who is hitting you over the head with a stick, «Hey, try this instead», and handing them a mallet. The information is neither sought because the journalist is curious to know, nor given to bestow knowledge on «the people». It's used as a weapon» (T. BLAIR, *A Journey*, Random House, Hutchinson 2011, p. 516).

[25] S. GRIMMELIKHUIJSEN, *Being transparent or spinning the message? An experiment into the effects of varying message content on trust in government*, cit.; S. PIOTROWSKI et al., *Numbers over narratives? how government message strategies affect citizens'attitudes*, cit.; B. PONTI, *La trasparenza come fattore abilitante della cittadinanza amministrativa*, in A. BARTOLINI, A. PIOGGIA (eds.), *Cittadinanze amministrative, Studi per il 150° anniversario delle leggi di unificazione - Vol. VIII*,Firenze University Press, Firenze 2016, pp. 215-235.

[26] F. MERLONI, L. VANDELLI, *La corruzione amministrativa. Cause, prevenzione e rimedi*, Pasigli, Bagno a Ripoli 2010; COMMISSION DE RÉFLEXION POUR LA PRÉVENTION DES CONFLITS D'INTÉRÊTS DANS LA VIE PUBLIQUE, *Pour une nouvelle déontologie de la vie publique*, La Documentation française, Paris 2011.

[27] Here we would like to repeat Kaufmann's enlightening words, here reduced to reflecting our topic: «You don't fight corruption by fighting corruption» (D. KAUFMANN, *Myths and Realities of Governance and Corruption*, in «Working

Paper Series. The Brookings Institution», November 2005). In the words of Jiménez Asensio, «prevention is better. It is the authentic essence of institutional integrity» (R. JIMÉNEZ ASENSIO, *Cómo prevenir la corrupción. Integridad y Transparencia*, La Catarata, Madrid 2017).

[28] Public integrity is an instrument to foster good administration (OECD, *Trust in Government. Ethics Measures in OECD Countries*, OECD, Paris 2000) and is an instrument to prevent corruption (E. BETH, J. BERTÓK, *Integrity and Corruption Prevention Measures in the Public Service: Towards an Assessment Framework,* in OECD*, Public sector integrity. A framework for assessment*, OECD, Paris 2005; A. D. MOLINA, *A Systems Approach to Managing Organizational Integrity Risks: Lessons From the 2014 Veterans Affairs Waitlist Scandal*, in «American Review of Public Administration», n. 1, 2018).

[29] Different empirical studies show that higher levels of information lead to a reduction in levels of corruption. S. ROSE-ACKERMAN, *Governance and Corruption*, in B. LOMBORG (eds.), *Global Crises, Global Solutions*, Cambridge University Press, Cambridge 2004.

[30] This «Glass house» was the expression coined in the early 1900s by Italian member of parliament Filippo Turati in his speech to the Italian Chamber of Deputies on 17 June 1908 (*Acts of the Italian Parliament*, Chamber of Deputies, sessions 1904-1908, June 17, 1908, page 22962).

[31] In the words of the US judge Louis Brandeis, «Sunlight is said to be the best of disinfectants» (L. BRANDEIS, *Other People's Money-and How Bankers Use It (cap. V)*, 1914).

[32] OECD, *OECD Principles for Integrity in Public Procurement*, OECD, Paris 2009. Maor affirms that corruption does not arise where there are witnesses (M. MAOR, *Feeling the Heat? Anticorruption Mechanisms in Comparative Perspective*, in «Governance», n. 17, 2004).

[33] A. CERRILLO, I. MARTÍNEZ, *Transparencia administrativa y lucha contra la corrupción en la Administración local*, in «Anuario del Gobierno Local 2011», 2012.

[34] For all these, see C. LINDSTEDT, D. NAURIN, *Transparency is not Enough: Making Transparency Effective in Reducing Corruption*, in «International Political Science Review», n. 31, 2010. However, we cannot ignore that some authors question the real positive impact of transparency in the fight against corruption. Bauhr and Grimes observe that transparency can generate resignation and citizens withdrawing from political life (M. BAUHR, M. GRIMES, *Indignation or Resignation: The Implications of Transparency for Societal Accountability*, in «Governance», n. 27, 2014). Bac also notes that in certain circumstances, greater transparency can even have a negative impact on the fight against corruption (M. BAC, *Corruption, connections and transparency: Does a better screen imply a better scene?*, in «Public Choice», n. 107, 2001).

[35] M. VILLORIA MENDIETA, *La transparencia, la imparcialidad y la calidad de la democracia*, in «Dilemata», n. 27, 2018.

[36] D. KAUFMANN, *Transparency, Incentives and Prevention (TIP) for Corruption Control and Good Governance Empirical Findings, Practical Lessons, and Strategies for Action based on International Experience*, Beijing 2002.

[37] L. VANDELLI, *Etica pubblica e buona amministrazione. Quale ruolo per i controlli?*, FrancoAngeli, Milano 2009.

[38] F. MERLONI, B. PONTI, *La trasparenza*, in F. MERLONI, L. VANDELLI (eds.), *La corruzione amministrativa. Cause, prevenzione e rimedi, Passigli Editori, Firenze-Antella 2010*. However, we cannot ignore that this idea is based on the assumption that citizens are able to process information effectively and act accordingly. This, for Etzioni, constitutes one of the limits of transparency (A. ETZIONI, *Is Transparency the Best Disinfectant?*, in «Journal of Political Philosophy», n. 18, 2010).

[39] Soylu reminds us that «transparency and accountability require giving citizens and companies much more data with the possibility of easily connecting relevant data sets (e.g. spending and company data), both within and beyond national borders and languages, allowing extended and deeper analyses» (A. SOYLU, Ó. CORCHO, B. ELVESÆTER, C. BADENES-OLMEDO, F. YEDRO-MARTÍNEZ, M. KOVACIC, M. POSINKOVIC, M. MEDVEŠČEK, I. MAKGILL, C. TAGGART, *Data Quality Barriers for Transparency in Public Procurement*, in «Information», n. 13, 2022).

[40] See, for example, the dispositions of Spanish law 19/2013, since 9 December, on transparency, access to public information and good governance or the Italian Legislative Decree no. 33 of 14 March 2013. On this, A. CERRILLO, I. MARTÍNEZ, *La difusión de información pública como instrumento para la prevención de la corrupción: una aproximación desde la legislación autonómica*, in «Revista Catalana de Dret Públic», n. 52, 2016 and E. CARLONI, *Il paradigma trasparenza. Amministrazioni, informazione, democracia*, il Mulino, Bologna 2022; F. LOMBARDI, *La trasparenza tradita*, Edizioni Scientifiche Italiane, Napoli 2021.

[41] For example, Spanish transparency legislation states that requests for information that is auxiliary or support information, e.g. notes, drafts, opinions, summaries, communications and internal reports, are inadmissible (article 18.1.b).

[42] Expressed from the opposite perspective, as by the UN, «Without high-quality data providing the right information on the right things at the right time, designing, monitoring and evaluating effective policies becomes almost impossible» (UNITED NATIONS, *A world that counts. Mobilizing the data revolution for sustainable development*, 2014).

[43] See, for example, the provisions of Spanish Law 19/2013, of December 9, on transparency, access to public information and good governance (article 5) or Italian Legislative Decree no. 33 of March 14, 2013 (article 6).

Different actors have highlighted the importance of good quality information. For example, Transparency International considers that «It is important to point out how vital it is, especially in this extraordinary situation, that public information is available in real time and that it is checked, ranked and evaluated so that citizens and different interest groups can access content easily and clearly» (TRANSPARENCIA INTERNACIONAL ESPAÑA, *Transparencia y publicidad activa: COVID-19 y estado de alarma en España. Recomendaciones para la transparencia y prevención de la corrupción en el sector público y privado*, 2020).

[44] See, for example, the provisions of Spanish Law 19/2013, of December 9, on transparency, access to public information and good governance (article 5) or Italian Legislative Decree no. 33 of March 14, 2013 (article 6).

[45] As the National Commission for Markets and Competition says: «There remains another fundamental problem for quantitative analysis in this area: data quality. The information published on the different procurement platforms contains a number of inconsistencies and missing data that are not negligible» (COMISIÓN NACIONAL DE LO MERCADOS Y LA COMPETENCIA, *Overview of Public Procurement Procedures in Spain*, Comisión Nacional de los Mercados y la Competencia, Madrid 2019). Some papers confirm that the quality of public procurement data is low: M. FAZEKAS, *Assessing the quality of government at the regional level using public procurement data, European Commission*, Directorate-General for Regional Policy, Brussels 2017; M. MENDES, M. FAZEKAS, DIGIWHIST *Recommendations for the Implementation of Open Public Procurement Data. An Implementer's Guide*, Brussels 2018.

[46] A. SOYLU, Ó. CORCHO, B. ELVESÆTER, C. BADENES-OLMEDO, F. YEDRO-MARTÍNEZ, M. KOVACIC, M. POSINKOVIC, M. MEDVEŠČEK, I. MAKGILL, C. TAGGART, *Data Quality Barriers for Transparency in Public Procurement*, cit.

[47] Similarly, Spanish Law 19/2013, of December 9, on transparency, access to public information and good governance sets out that information must be disseminated in a structured manner (article 5), or Italian Legislative Decree no. 33 of March 14, 2013 (article 9).

[48] For example, this is set out in the provisions of Spanish Law 19/2013, of December 9, on transparency, access to public information and good governance (article 10) or Italian Legislative Decree no. 33 of March 14, 2013 (article 9).

[49] Villamil observes that «data on economic activity and transactions, especially adjacent to the public domain, are becoming increasingly well-organized and available» (I. VILLAMIL, J. KERTÉSZ, J. WACHS, *Computational Approaches to the Study of Corruption*, in «arXiv preprint arXiv:2201.11880», n. 2022).

[50] HAUTE AUTORITÉ POUR LA TRANSPARENCE DE LA VIE PUBLIQUE, *Open data & intégrité publique. Les technologies numériques au service d'une démocratie exemplaire*, 2016.

[51] Article 3.

[52] Article 2.

[53] Article 2.

[54] M. MENDES, M. FAZEKAS, *DIGIWHIST Recommendations for the Implementation of Open Public Procurement Data An Implementer's Guide*, 2018 has observed that the current situation in Europe regarding the re-usability of information is problematic.

[55] In Spain, the Council for Transparency and Good Governance is responsible for guaranteeing compliance with transparency obligations and obligations related to the right of access to public information. In France, the Commission d'accès aux documents administratifs is also assigned functions regarding the re-use of public information.

[56] See in this regard the provisions of Directive (EU) 2019/1937 of the European Parliament and of the Council, of October 23, 2019, regarding the protection of persons who report violations of European Union laws.

[57] H. PARK, J. BLENKINSOPP, *The roles of transparency and trust in the relationship between corruption and citizen satisfaction*, in «International

Review of Administrative Sciences», 2011, vol. 77, pp. 254-274; https://doi.org/10.1177/0020852311399230; see also A. PERSSON, B. ROTHSTEIN, J. TEORELL, *The Failure of Anti-Corruption Policies: A Theoretical Mischaracterization of the Problem*, in «Quality of Government Working Paper» University of Gothenburg, Gothenburg 2010, n. 19.

[58] I. BRUSCA, F. MANES ROSSI, N. AVERSANO, *Accountability and Transparency to Fight against Corruption: An International Comparative Analysis*, in «Journal of Comparative Policy Analysis: Research and Practice», 2018, vol. 20, pp. 486-504, DOI: 10.1080/13876988.2017.1393951

Transparency in the EU system of governance: the successes and pitfalls of a new pre-requisite for democracy

Hélène Michel

Transparency has become one of the European Union's watchwords and one of the main responses to very different threats to democracy (corruption, conflicts of interest, influence peddling, lobbying, poor public trust, abuse of fundamental rights...). How is it that transparency has become the only successful response to such a varied range of problems? How does the transparency solution, when reduced to just being the obligation to disclose and publish information, affect the way the EU functions? In the tradition of political sociology, the article examines the political and social forces that have given shape and form to transparency that is reduced to just making information publicly available. By focusing on the various uses of transparency, it sheds light on the paradoxical effects of transparency on access to information, the clarity of procedures and political participation. More generally, the article shows that disclosure of information is not enough and may lead to unintended consequences such as development of bureaucracy, exclusion of citizens, and promotion of lobbying.

1. Introduction

Transparency has become one of the European Union's watchwords. Former European Commission President Jean-Claude Junker made it a key objective of his presidency in his first State of the Union speech[1]. The European Commission, which had already started providing information through its new Transparency Portal in 2012[2], pursues its efforts by making a whole range of information available to the public. For its part, the European Parliament also calls for greater transparency by recommending that MEPs publish their agendas and meetings with interest representatives[3]. Even the Council of Ministers, often considered to be the least

transparent institution, offers the possibility to follow live public sessions and has committed itself to transparency by making many documents and sets of open data available on line[4]. Other EU institutions, such as the regulatory agencies, are also being urged to be more transparent by the European Ombudsman, which has pursued this issue at length in its enquiries and policy initiatives[5].

The notion of transparency has therefore gained in importance, both in the discourse emanating from the European institutions and in the various different measures adopted, to the extent that any practice involving secrecy is denounced and sometimes condemned by the Court of Justice. However, although transparency is primarily defined as being in opposition to secrecy, it also encapsulates two other dimensions. The first of these is the need to make the functioning of the EU easier to understand, which would require more streamlined procedures, as reformers of the European system of governance have attempted to do with various «better regulation» programmes since the beginning of the 2000s. The second concerns the participation of citizens in the shaping and implementation of public policies, which has been encouraged in order to bring the European institutions closer to them. Nowadays theorists of democracy and analysts of institutional reforms[6] consider that these different dimensions go hand-in-hand and that they all help to strengthen democracy. However, they have their roots in very distinct lines of thought, which have only come together over time. Access to documents, which is perceived as a fundamental right of citizens, is only marginally linked to the codification of the way the EU functions, as advocated by European treaty architects and law specialists. Similarly, efforts to control financial flows seem to have little to do with citizen participation issues, particularly given that the latter necessitates more lobbying. And while the lifting of secrecy is a key issue in decision-making and deliberation processes[7], the exact measures taken will differ depending on whether the purpose is to gain citizens' trust, to enforce ethical practices among decision-makers[8], to improve efficiency[9] or to keep influences at play in check[10]. Transparency cannot therefore just be reduced to just the disclosure of information. Calls for transparency are made with different objectives in mind, which can even sometimes be contradictory, for example when the participation of citizens, promoted as part of open government, engenders and institutionalises lobbying. This is why certain authors tend to talk about the «complex dynamics of transparency»[11], developed jointly with stakeholders. Some suggest that the specific variety of transparency should be clearly identified[12],

and that participation should even be considered as something clearly separate from transparency[13], while others see them as going together[14]. The notion of transparency is therefore heterogenous in nature, as are the policies it affects.

Although individual measures taken to promote transparency respond to distinct needs, they ultimately combine these different objectives. Having access to documents, knowing how decisions are taken, by whom and on which grounds, and being able to participate in policy-making is now achieved through the disclosure and publication of information and data. However, this transparency is not used for the same purposes and it does not respond to the same problems. In certain cases, it is necessary in order to throw light on the problematical relationships between those with public responsibilities and the representatives of private interests. In others, it helps to protect citizens in face of the power of government administration. And in yet other instances it ensures that elected officials can be held to account and keeps a check on the decisions they take. It is therefore astonishing that transparency is perceived as a single response to very different threats to democracy, namely corruption, conflicts of interest, influence peddling, lobbying, poor public trust, abuse of fundamental rights and so on.

This article will not therefore provide yet another review of transparency theories and issues, similar to those already provided by certain handbooks[15]. Neither will it offer a new history of this notion[16], and nor will it seek to discuss the supposed benefits of transparency measures proposed by European organisations (OECD, Council of Europe, European Union) with a view to improving democracy, public trust or to promoting accountability, integrity and legitimacy. This has already been covered thoroughly, even though most studies focus on specific areas such as lobbying, finance, administrative transparency, citizen participation and so on. Hence, to complement these studies and offer a new perspective, this article adopts an original approach using political sociology[17] to analyse transparency based on the different purposes for which it is used. It will examine both the organisations who agitate for greater transparency and the people within European institutions whose working practices are having to evolve as a result of the requirement to disclose information. In light of this notion of the plurality and heterogeneity of definitions of transparency, two main questions will thus be addressed. Firstly, how is it that transparency has become the only successful response to such a varied range of problems? Secondly, how does the transparency solution, when reduced to just being the obligation to disclose and publish information, affect the way the EU functions?

To answer these questions, this article will focus on and examine the political and social forces that have given shape and form to transparency in making it a key element of European democracy. In the tradition of political sociology, Part 1 will refrain from giving a fixed initial definition of transparency, and instead use the range of definitions that co-exist with one another and compete in determining reforms. Part 2 will explore beyond the theoretical definitions and examine the way in which political and social actors have seized upon transparency and used it to pursue their political demands. By focusing on the historical conditions, it will show how the diffusion of transparency has occurred in European circles over time. Part 3 will explain how the disclosure and publication of information has become a central dimension of transparency. It will then shed light on the paradoxical effects this effort has on access to information, the clarity of procedures and political participation. More generally, the article will show that «transparency first» tends to promote general oversight before anything else, relegating elections and collective debate to the background.

2. The plurality of issues covered by the watchword «transparency»

It is difficult to say precisely when the European institutions became concerned with the issue of transparency. On the one hand, this is because use of the term is not concurrent with specific practices. Sometimes it has heralded them and sometimes it has just been empty rhetoric. On the other hand, the term has variable meanings depending on when it is used and which institution is using it. So, rather than using as a starting point the texts that include the term «transparency» in their title, this part will attempt to shed light on and distinguish between the different meanings of the word transparency and different issues involved.

Of the various transparency-related topics, access to documents was made a priority at the Maastricht Summit in 1991 and the Birmingham and Edinburgh Summits in 1992. The notion of access to documents refers explicitly to the fight against secrecy. The authorities not only provide information to the press and to citizens, but they also accept that information provided should be verified by means of documents that make it possible to follow discussions and to set out the data used to make specific decisions. Following various communications from the European Commission and the Council[18], the communicability of documents

has gradually been established as a standard of «good administration» with which the European Ombudsman will try to ensure compliance. At around the same time, and in a complementary manner, access to documents became a right guaranteed by Article 42 of the Charter of Fundamental Rights in December 2000. Thus Regulation 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents is rightly identified as representing an important step forward. The procedure for requesting access has now become well established and is increasingly known to the public, including journalists, activists and researchers. Thanks to the development of information technology and data systems, accessibility has been hugely enhanced. Information is increasingly accessible directly from online databases. The provision of information firstly concerns public decision-makers, who must publish their CVs, calendars and any gifts and invitations. But it also concerns the various actors involved in the decision-making process: lobbyists must appear on the public transparency register, contributions sent in response to public consultations are published, the beneficiaries of calls for tender and European funds are known, the members of expert groups are listed in the relevant register, and the lists of experts used by the agencies are published together with their declarations of interest.

The proliferation of information, which has been encouraged by public policies aimed at opening up data[19], is linked to another, much older and less spontaneously mentioned transparency issue, which is the need to streamline decision-making processes. The first texts that mention transparency respond to this need. It is not just a matter of having information on who everyone is, who sits on which committee, who receives subsidies and how much money they receive. It is also important to understand the respective competences each actor has, how each one participates in decisions, according to which prerogatives, and governed by which provisions. Here, transparency means streamlining procedures so that decision-making can be overseen and arbitrary decisions thus avoided. This objective also entails providing information about the process, so that greater visibility can keep a check on any infringements and enhance accountability. This issue of clarity and the need to streamline procedures is sometimes dealt with from a constitutional point of view, as in the 1990s and in the early 2000s during the work of the Convention on the Future of Europe, which finished drafting the Treaty establishing a European Constitution in 2004[20]. At other times it is dealt with from the point of view of the reform of European governance, as with the publication of the White Paper of 2001[21],

and the reforms of regulatory policy (Better Regulation in 2002, Smart Regulation in 2010 and the REFIT Regulatory Fitness and Performance programme in 2014). The purpose of this series of reforms, which was part of an international trend initiated by certain EU member states and the OECD[22], was to cut and simplify existing regulations. To this end, a regular review of existing provisions and a prior assessment of proposed regulations now have to be carried out. The objectives of streamlining and promoting simplification are thus reflected in the development of increasingly detailed procedures to rationalise decision-making and to oversee administrative and political practices.

Lastly, alongside wider debates about «open government», transparency increasingly goes hand in hand with the notion of participation[23]. In order to take citizens more fully into account, the 2001 White Paper established «civil society participation» as a principle of good governance. This led to a «participatory turn»[24] with the institutionalisation of consultation practices. To widen the circle of participation, calls for consultations are published and the periods during which contributions can be submitted are specified[25]. To generate responses and to encourage reactions, if not debate, contributions are published unless their authors formally object. Online consultations thus enable directorates-general of the European Commission to gather opinions on various documents (green papers, white papers, initiatives, roadmaps, etc.), on legislative proposals and even on evaluations. Sometimes consultations are integral to the stakeholder assessment process. Public consultations are sometimes organised in addition to and even in place of the «structured dialogue with interest groups» established by the European Commission in 1992[26]. Aside from seeking to involve civil society organisations and encouraging them to express themselves, they shed light on those who have participated and their respective points of view[27]. Consultations made public show whether and how the European Commission takes these opinions into account. Transparency in the sense of participation goes hand in hand with transparency in the sense of fighting secrecy and opacity.

Transparency can thus be said to have three distinct dimensions, which have evolved simultaneously, albeit separately. However, these are gradually converging in favour of the disclosure and publication of information, which is now the common thread around which the plurality of transparency issues can be articulated. How has this convergence been possible?

3. Convergence of interests around the need for disclosure

To understand how the notion of European transparency has evolved, it is necessary to consider the social and political actors who have mobilised in favour of transparency and to analyse the uses they have made of it. Two series of political and social mobilisations marked the 1990s and 2000s. The first, in the mid-1990s, focused on citizenship, «civil society» and participation issues. The second, in keeping with the trends of the 2000s, pushed hard for information to be made publicly available. Although both sorts of mobilisation campaigned for a democratic Europe, they did not defend the same principles. Neither did they call for the same measures to achieve it. Nevertheless, both supported the objectives of those were advocating a «new European governance», which perceives streamlined procedures and the oversight of practices to be the key democratic challenge, rather than the election of decision-makers by citizens.

3.1 *Access to documents and citizens' access*

In the 1990s, mobilisations in the European arena focused on civic issues. They were initiated by networks of NGOs and associations campaigning for civil liberties. The British NGO Statewatch, set up in 1991, was at the forefront of this movement, which sought to have the right of access to documents written into the treaties and their provisions as early as 1992. Its representative Tony Bunyan was well known to the Court of Justice, to which he regularly submitted appeals, as well as to the European Ombudsman, to whom he lodged thirteen complaints between 1993 and 2014[28]. Thanks to the support of a small number of EU administration officials, and the Swedish Presidency of the Council of the EU[29], the coalition of associations he led succeeded in having Regulation 1049/2001 adopted. It was also very active in fighting the Commission's plan to revise the regulation in 2005, which was finally abandoned in 2012. The associations involved in this movement made extensive use of it and helped citizens to request documents. Access Info Europe, for example, set up its AsktheEU platform[30], which helps citizens with their requests to European institutions for access to documents.

At the same time, demands related to European citizenship increased, driven by federalist movements promoting a «Europe for citizens». Beyond securing a legal definition of citizenship, which conferred new rights (to vote, stand for election and lodge complaints to the Ombudsman, etc.), there were demands for more concrete efforts to take citizens, their

aspirations and actions into consideration. Several associations joined forces within the EU Civil Society Platform, seeking to forge a new collective body[31]. They argued that the EU needed to be closer to citizens and that civil society should be able to play a role in its workings. The governance experts in the taskforce responsible for preparing the White Paper on European Governance gave them a sympathetic hearing[32]. They were eager to promote forms of consultation based on the model of social dialogue involving employees' and employers' representatives. They considered civil society associations as intermediaries who would be capable of forging links between institutions and citizens. However, efforts to promote «civil society participation» risked ending up being just empty talk unless specific participation mechanisms were adopted[33]. The desire to set up a «civil dialogue» met with resistance from representatives of the European Economic and Social Committee[34] as well as MEPs. Nevertheless, no sooner had the work on the new system of governance been completed than the associations were getting involved in the Convention for the Future of Europe to lobby for Article 11 on «participatory democracy». This would allow one million citizens to launch a «citizens'initiative»[35].

At the time, these different mobilisations for access to documents and for civil society participation had little to do with the reform projects that legal specialists were working on to make the EU more transparent by streamlining decision-making processes and procedures. But they were not far removed from them. On the one hand certain actors were calling for a procedure to access information in the name of the right to know. On the other hand actors interested in political participation were demanding mechanisms to allow them to contribute to the decision-making process.

3.2 *Visibility of data and publicity of procedures*

It was not however until the mid-2000s that these different mobilisations converged. The European Transparency Initiative (ETI), launched in 2006 by Commissioner Siim Kallas, not only brought them together, it also brought them into contact with projects aimed at reforming European governance[36]. The ETI had three main objectives: the disclosure of information on the beneficiaries of European funds to permit their identification and the monitoring of financial flows; the review of consultation procedures to ensure they are carried out according to minimum standards and with respect for pluralism; and to regulate lobbying by listing all interest representatives on a public register, including consult-

ants, lawyers, NGO activists, trade unionists or managers of business associations. For these three objectives, publication is the preferred solution. Publishing information on line would make it possible to give the public access to information that had previously been reserved for administration officials, who used the directory of interest groups to find out who to consult and how to contact them[37], who had access to contributions from «civil society» and who distributed grants after examining the responses to calls for projects. Publication of information also made it possible to monitor a whole range of European governance actors and to regulate their practices (consultations, meetings, interventions, etc.). This made it possible to verify these actors' intentions to ensure they behave in accordance with expectations, as they would have to list themselves on the transparency register, publish the dates of their meetings, make their contributions public and so on. This would show they were acting honestly and had nothing to hide. The actors concerned supported these different transparency objectives.

However, by the 2000s, the organisations and activists occupying centre stage had changed. Federalist associations that had campaigned for the participation of civil society in the 1990s lost some of their importance. They gave way to new organisations, which had also emerged from the drive to promote a Europe for citizens. The civil society representatives of the 1990s, who had been broadly supportive of European integration, were replaced by more critical groups that did not hesitate to point out the EUs failures[38]. Both types of organisation called for transparency. However, while the first type focused on participation as a means of achieving a compromise between representative democracy and citizens' rights, the second type focused on the need for disclosure, to strengthen the procedural dimension of democracy, which was the key objective of EU reformers. This has been the case for the Dutch NGO Corporate Europe Observatory (CEO), which was set up in 1996. It condemns the «dangerous links» between European institutions and industry[39]. Another example is ALTER-EU, the Alliance for Lobbying Transparency and Ethics Regulation, which was set up in 2005 by 150 organisations close to the anti-globalisation movement. These organisations are less concerned with promoting citizen participation than they are with questioning the hidden relationships between institutions and economic actors. By demanding that light should be shed on lobbying in order to know who does what and how, and by demanding information on expert groups, to a certain extent they pursue the same cause as those who defend the right to know and access to documents. However, their demands are also on a

par with reformers' desire to regulate practices (lobbying, expertise and consultation) and to rationalise decision-making processes in order to limit political and social contestation[40]. The latter group are particularly satisfied with this convergence of interests as they see these NGOs as a valuable ally in monitoring and controlling the different actors.

This convergence between activists who are critical of the EU and reformers of European governance has contributed to the success of transparency. Nevertheless, there is a special twist to this success, because the disclosure and publication of information has become both the objective and the means of transparency policies.

4. Transparency in the making: the practices at issue

The act of disclosure at the heart of transparency measures has thus enabled progress to be made in providing information, making data available and opening up the decision-making process. However, although positive, these achievements eclipse a number of other transformations that reflect a particular approach to the governance and functioning of the EU. These transformations may well limit the potential improvements transparency can make in terms of democracy and trust.

The vital need to ensure transparency, which concerns all actors involved in the workings of the EU, eclipses the matter of the legitimacy of those who conduct public affairs. This is deemed to have less importance than the monitoring of their practices. Whether they be elected or appointed, members of the administration or private consultancy firms, appointed experts or invited interest representatives, all are put on the same level and invited to prove in the same way that they comply with ethical standards, as if their status or their professional obligations were not enough. It is precisely because they have different profiles that their practices must be constantly monitored. Granting numerous appointments to a lobbyist who has filled in their identity details in the transparency register does not seem to pose a problem. Taking into account the opinions of different interest groups participating in a consultation is even welcomed as it is deemed to have been public and open to all. Entrusting the drafting of an impact study to a consultancy firm seems normal and even desirable as long as the service provider publishes its contract and respects the specifications using the requested methodology. Transparency thus appears to have the virtue of dissipating the risk of decisions being manipulated and decision-makers corrupted. Nevertheless, it diverts from the need to

question the legitimacy of those who participate in the decision-making process. By making the various data on which a decision is based central to the merits of public policies, according to an evidence-based policy approach, it limits discussion and removes consideration of major policy alternatives from the debate. The emphasis placed on the role of impact assessment is characteristic of this drive to rationalise public action. This is why some MEPs, and even more so members of the Council, have opposed the use of impact assessment to justify amendments or to support their proposals. They point out that politics and diplomacy cannot (and should not) be reduced to such criteria. Organising more consultations on impact assessment will not help us to move on from this narrow conception of democracy, which Vivien Schmidt has described using the notion of «throughput legitimacy»[41]. This is firstly because more consultation risks leading to more lobbying and secondly because the value of decisions and public policies is not measured by the transparency of the decision-making process but rather by broad objectives such as the achievement of a just society, harmonious growth or a healthy environment. Political parties and their elected representatives promote such objectives and this gives rise to collective discussions. While transparency offers a means of guaranteeing the quality of political and administrative work and can limit any challenges to decisions taken, it cannot be reduced to just being about making data and public policy actors more visible.

Transparency has hugely increased the amount of information and data available[42], and this should not be forgotten. How then can we identify the information that is useful and avoid being overwhelmed by this abundance of data? In the long run, the proliferation of data risks making the functioning of the EU even more impenetrable, contrary to the initial aim of making things clearer. It also risks encouraging the emergence of a more informal decision-making process whereas the initial purpose of transparency was to govern practices within a framework of rules[43]. With public declarations of interest, it is now easy to verify links and prevent conflicts of interest. With the publication of calendars on line, it is easy to count the number of meetings held with particular lobbyists and to compare this with others. The publication of contributions submitted in the framework of consultations makes it possible to identify those that have been taken into account in the Commission's legislative proposals. The lists of funding beneficiaries make it easier to monitor spending and determine what is actually done with EU funds.

However, not everyone knows where to find this information, not everyone has the means to process it and, most importantly, not everyone

knows how to analyse it. At present, most of the organisations collecting and processing this data are NGOs committed to greater transparency. Their work proves that access to this information is useful and can provide arguments to support mobilisations. For example, LobbyWatch has succeeded in using the data to ensure that lobbying is perceived as a problem and to demonstrate that the self-regulation of lobbying actors is far from satisfactory[44]. Similarly, by monitoring the careers of certain elected representatives and administration officials, Corporate Europe Observatory has campaigned on the phenomenon of the revolving door[45]. It has urged the European Commission to limit the number of officials moving between the private and public sectors and to ensure that this is supervised more closely. Other watchdog organisations are doing similar work in areas such as finance (Finance Watch, Bankwatch), medicines (Eurosfordoc)[46] and corruption (Transparency International). However, they have a tricky task because the scandals they uncover may well generate even more criticism and condemnations of the EU, despite they fact that their work enables them to hold the public authorities to account. Access to information and data is therefore not enough on its own, and intermediaries are needed to collect and process them. However, the work of objectifying and analysing the functioning of the EU should not just be the preserve of a few organisations. Otherwise there is a risk that the benefits of transparency will end up being used solely for monitoring purposes, which would be tantamount to putting these NGOs on the same level as rating agencies and management controllers.

Requests for the disclosure and publication of information made to various actors are part of the process of transforming the rules of the EU game. But this is not necessarily leading to greater inclusion and openness. On the contrary, new transparency rules are making access to the «field of Eurocracy»[47] more difficult and selective. Didier Georgakakis defined this field as a political and administrative space where EU actors are positioned according to their capacity to play by these rules. This capacity is determined by the resources of the different actors as well as their position relative to other actors in the field. However, some of them lack the knowledge and know-how necessary to enter and evolve within it. «Bureaucratic capital», that is, the resources available to actors in this field, is not equally distributed among them. Those who understand the procedures best, such as the «professionals of Europe»[48] who are familiar with the rules and practices of the EU, will be more advantaged by new procedures[49] than weakened by transparency obligations. Lobbyists and those representing large companies have sufficient staff and corporate

compliance support to enable them to comply with the administration's requests. This is not the case for many citizens' associations, which are still relatively unprofessional and have limited resources when it comes to complying with transparency requirements and the administration's demands for expertise and participation. Who is able to respond to public consultations? Who is able to give a relevant opinion on a particular aspect of comitology? Participation in the decision-making process requires a good knowledge of administrative language, the ability to formulate a proposal in the expected form and a good command of the intricacies of the decision-making process. To be able to present an opinion «well», it is essential to have been socialised in the ways of the EU and to have taken on board its «modes of perception». As with the obligation for transparency, the opening of the decision-making process ultimately risks excluding actors such as citizens and the associations that represent them, unless they are able to benefit from protection for their efforts to make revelations, as happens for whistleblowers[50]. They also need to be able to access channels to shape public opinion, through collaboration with actors such as the International Consortium of Investigative Journalists (ICIJ)[51]. The expected benefits of transparency are strongly conditioned by the uses to which they are put.

It is not certain that the latest Better Regulation initiative launched by the Junker Commission and its Vice-President Frans Timmermans[52] will make it possible to avoid these pitfalls as far as transparency is concerned. In fact, by constantly asking the administration to do more to ensure transparency, there is a risk of creating some resistance. Even if they are in favour of it, officials responsible for gathering information and putting it on line do not necessarily have the human resources available to do so. How many officials are there across the various DGs and within the Secretariat-General to respond to the 6,200 applications for access to documents, of which 250 to 340 are confirmatory[53]? To administer the Transparency Register and keep a check on the 13,300 organisations registered, the administrative team of three Commission and three Parliament officials is insufficient, even with the three extra people seconded from the Council since 2021. As for making contributions made further to consultations available on line, this can entail the processing and reading of thousands of pages in order to draw up a summary document. The resources available for doing this differ across DGs. Administrative officials unfortunately receive little help when it comes to implementing the transparency policy and they will no doubt be criticised for the time it takes them to do so, their supposed lack of enthusiasm and the mistakes

they make because they do not have the capacity to manage the publication of such a huge mass of data. However, the biggest problem is the fact that EU officials have no control over a significant amount of data.

This is the case for tax information held by national administrations, information on lobbyists' clients which they do not wish to divulge, and more generally all of the information companies have at their disposal in their respective sectors, which gives them considerable power, for example concerning the composition of food products or data on financial products. For all of this information, EU officials can only make recommendations, prepare the most user-friendly declaration forms possible and help private actors to fill them in. However, they are still dependent on their cooperation and it is they who will be criticised for not having achieved the transparency objective.

The achievement of transparency is still broadly dependent upon the purposes which it will serve as well as those who have to implement it, both within the administration, and among those who call for and use the results of transparency, such as NGOs, consultancy firms, companies and, to a lesser extent, citizens. Paradoxically transparency is also dependent upon the very same actors, because they are the ones who demand it and can comply with it, but at the same time they are also the ones who make its implementation problematical.

5. Conclusion

Transparency is nowadays proffered as a solution to the various ills from which the EU is said to suffer and which contribute to its poor image. Naturally, shedding light on the places where decisions are taken out of sight and therefore beyond democratic control represents an attempt to regain control of a process that eludes citizens. With this in mind, we must welcome the various initiatives aimed at revealing secrets and, more broadly, the trend to make information and data publicly available, just as we must be concerned about the rival effort to protect secrets and resist those who reveal them. However, it must be borne in mind that the disclosure and publication of information is not enough and may lead to unintended consequences[54]. It is a means to an end, not an end in itself. If transparency is reduced to just making information publicly available, it risks excluding citizens who have neither the means to process this information nor the capacity to monitor decision-making processes. It will benefit those actors with the greatest capacity to pro-

duce data and process information and with the most means to comply with transparency requirements. On the other hand, if transparency is treated as a means that can be used by actors acting in the interests of citizens, it can contribute to a form of democratisation of the EU. But citizens must not be reduced to the role of overseers. They must be able to access information in order to discuss it collectively and then elect representatives to defend their choices. This implies that transparency, whose parameters and objectives need to be redefined depending on the purposes for which it is used[55], cannot be monopolised by activist organisations who fight the administration, by administrative officials who seek to gain an advantage over elected representatives, or by lobbyists who aim to substitute themselves for civil servants. The achievements of transparency will depend on the way in which actors use it to insist upon the need for legitimacy, collective discussion and shared choices based on public interests. Otherwise, transparency risks becoming just a stopgap solution for democracy, focusing solely on its procedural dimension, and all that is left when elections, public debate and shared decision-making have disappeared.

Note

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Exploring patterns of implementation of the Freedom of Information Act (FOIA) in local government: the case of Italy

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Legislative decree no. 97 of 25 May 2016 introduced the right of citizens to view and acquire data, documents and information held by Italian public bodies. This right, which can be exercised by anyone and is not subject to a fee, has been called *generalised civic access*. Thus, the Freedom of Information Act (FOIA), that appeared in the 1960s in the United States and then spread throughout the world, was adopted in Italy, albeit with much delay.

The aim of the present article is to determine the level of implementation of generalised civic access provisions in the 307 Italian municipalities having a population over 30,000. The research first investigated the level of publication of the information necessary for citizens to exercise this right on municipal websites. Then an experiment was conducted which involved sending a request for access to the various municipalities. Overall, the empirical study showed that a substantial percentage of municipalities had not implemented FOIA dispositions. The lowest levels of implementation were found in smaller municipalities and in those situated in Southern Italy.

1. Introduction

In the course of the twenty-first century, the principle of transparency, understood as «availability of information about an actor that allows other actors to monitor the workings or performance of the first actor»[1], inspired administrative reforms in the context of the worldwide spread of the paradigm of open government[2]. In combination with the digitalisation of government, the quest for openness led to a multiplication of the varieties of transparency

that include reactive forms, i.e., activated by citizen request, and proactive ones, i.e., providing direct civic access to information even in the absence of an explicit request.

The most widespread form of transparency on a global scale is that ensured by the Freedom of Information Act (FOIA) which grants citizens right of access to information held by public bodies in order to ensure their participation in the democratic process, foster trust in government and prevent corruption. The key features[3] of FOIA are:

1. identification of exceptions and limits to access, e.g., regarding national security or protection of personal data;
2. specification of the powers and responsibilities of public bodies regarding oversight and monitoring of the effective implementation of the right to know;
3. publication of instructions on how to apply for access and how to appeal against denial, with an indication of costs, forms and deadlines for response;
4. listing the types of information that public bodies are obliged to provide on its websites as part of the civic right of access.

The last feature has particular importance in Italy, where FOIA is only one of three different forms of access to government information[4].

The first form is *documentary access* which was recognised in the context of the law on general administrative procedure (law no. 241 of 7 August 1990). This form of access is granted only to subjects who can demonstrate a direct, concrete and current interest, which refers to a legally protected situation linked to the document requested.

The second form of transparency is based on public bodies' legal duty to publish an increasing variety of types of information on their websites in a section known as «Transparent administration» (legislative decree no. 33 of 14 March 2013). If this duty is not or is inexactly fulfilled, citizens can apply for *simple civic access* in order to obtain actual implementation of the right of all citizens to information.

These two forms of access were maintained after the introduction of FOIA, giving rise to a complicated system of government transparency. Indeed, legislative decree no. 97/2016 ensures *generalised civic access* to data and documents different from those that public bodies are obliged to publish on their websites. Like the provisions of FOIAs that spread from English-speaking countries to the rest of the world, application for generalised civic access does not require any motivation, and Italian

public bodies are obliged to reply within 30 days of application with an express and motivated provision.

Paradoxically, the multiplication of forms of transparency has not reduced the traditional opacity of Italian government[5]. Transparency reforms have been layered over each other, with the result that the three forms of access have different procedures, involving different bodies, for exercising the corresponding rights[6]. Recent public consultations conducted by the Italian government showed that this stratification of forms of access has made implementation of transparency onerous both for applicants and administrations[7].

On the side of the applicants, many citizens are unable to distinguish one type of access to information from the others. This has often made it difficult to qualify their requests, causing uncertainty in the application of the transparency laws. The dispute caused by such uncertainty prompted the Supreme Administrative Court of Italy, in sentence no. 10/2020 of its Plenary Assembly, to express the principle under which public bodies have the power and duty to reply to requests formulated without any explicit reference to a specific form of access. The court ruled that it is up to public bodies to assess the premises for recognising one of the forms of access.

In practice, this orientation of the case law generated an onus for public officers to examine requests for access with reference to the different forms of transparency. This was accompanied by a dearth of indications on how FOIA was to be applied, due to the absence of an oversight body charged with deciding requests for re-examination of access applications. The only coordination between the different forms of transparency is ensured by the guidelines of the National Anticorruption Authority – ANAC (Deliberation no. 1309/2016) which give practical indications about the adoption of provisions, which may be in the form of an internal regulation, on how to apply the three forms of access in the specific context in which public bodies operate. ANAC also recommended concentrating the knowledge and skills needed for implementing transparency in a single specialised structure, in order to coordinate the handling of access requests by different offices of a given administration.

For the purposes of our investigation, it is worth underlining that ANAC, on the basis of its competence in the regulation of proactive transparency, also adopted guidelines on implementation of publication obligations (Deliberation no. 1310/2016). This instituted a subsection of the «Transparent administration» section of the website of Italian public bodies to explain what citizens have to do to exercise their right to generalised civic access[8].

The first objective of the present research is to determine the level of effective publication of such information on the websites of Italian municipalities. We analysed the institutional websites of 307 Italian municipal councils over a certain size. The results are reported in the next section of the paper.

The second objective is to determine the effective application of generalised civic access by municipalities. This was done by means of an experiment in which we sent each municipality a request for access, in order to verify the number and quality of the responses received. The results are reported in Section 3. In Section 4 we discuss the practical implications of the results of our research, which found patchy application of FOIA by Italian councils. In the concluding section we discuss the implications of our results for the international research agenda on FOIA.

2. Proactive transparency of FOIA in Italian municipalities

The Italian system of transparency leaves to individual administrations the definition of how requests for access to information have to be presented and managed. Unlike countries such as Mexico and the United States of America, Italy did not set up a single national portal for all requests and for providing citizens with data on the performance of FOIA in terms of positive and negative responses and waiting times. As a consequence, each administration in Italy enjoys complete autonomy in designating the offices to receive requests and in publishing how the three forms of access are applied and the results of implementation of the transparency laws.

To reduce the risk of confusion between the different forms of access, the already mentioned guidelines contained in Deliberation no. 1310/2016 of ANAC were adopted and followed by two circulars (nos. 2/2017 and 1/2019), in turn adopted by the Ministry for Public Administration. These documents contain operative recommendations about technological solutions for the presentation and handling of requests for access to information, with the aim of simplifying access for citizens and the work of handling them for administrations. These two circulars were adopted in the context of a broader disposition of the Ministry aimed at improving the capacity of local administrations to implement the generalised civic access law.

Overall, the recommendations of ANAC and the Ministry for Public Administration regulated publication of the following data and documents in the section of institutional websites dedicated to generalized civic assess:

1. information on FOIA procedure;
2. contact information of the office to which to send requests for access;
3. the form for requesting access;
4. the form for requesting re-examination;
5. the «Access Register» with the processing times and outcomes of access requests.

To examine compliance of municipalities with the ANAC and Ministerial recommendations, in July 2019 we analysed the generalised civic access section of the institutional websites of 307 Italian municipalities with populations exceeding 30,000. Our aim was to determine the level of proactive publication of the data and documents indicated by the recommendations.

Our attention fell on municipalities because comparative studies on the actuation of FOIA showed that a large proportion of access requests were lodged with councils, as the latter are closer to citizens[9]. We excluded smaller municipalities because they often do not have the staff or resources necessary to ensure publication of the data and documents on their websites[10]. Table 1 shows the distribution of the municipalities by size (population) and geographic macro-area (north, centre, south and islands).

Tab. 1 – Distribution of the municipalities studied by population and geographical area (absolute values)

Population	*North*	*Centre*	*South and islands*	*Total*
30,000-50,000	61	37	65	163
50,000-100,000	26	22	51	99
100,000-250,000	17	6	10	33
>250,000	6	2	4	12
Total	110	67	130	307

Table 2 shows the main results of analysis of the institutional websites. It lists the data and documents on management of generalised civic access that ANAC and the Ministry for Public Administration recommend be published on the websites. For each element, the table indicates the percentage of municipalities (distinguishing them by geographical macro-area) which effectively publish it. In other words, the table shows

the rate of compliance of municipalities to the ANAC and Ministerial recommendations regarding publication of data and information concerning FOIA.

The results suggest three main considerations. The first is that a significant percentage of councils do not publish the recommended data and documents. The second is that reluctance to publish is especially high for the *form for requesting re-examination* to be used by citizens who are not satisfied with the response received from the council. The third is that the rate of compliance generally varies by macro-area, being lowest in municipalities of Southern Italy.

Tab. 2 – Rate of compliance of municipalities with ANAC and Ministerial recommendations regarding publication of data and documents concerning FOIA (percentages by macro-area)

	North	*Centre*	*South and islands*	*Total*
Information on FOIA	76	75	62	70
Office contact details	70	70	61	66
Request form	74	78	61	69
Re-examination form	27	33	20	25
Access Register	75	70	68	71

Table 3 shows the rates of compliance recalculated on the basis of municipal population. Larger councils emerge as complying with all recommendations except publication of the form for requesting re-examination, which was absent from the websites of 1/3 municipalities with populations over 250,000. Small councils emerged as having more difficulty in complying with the recommendations, presumably due to having fewer resources.

Tab. 3 – Rate of compliance of municipalities with ANAC and Ministerial recommendations regarding publication of data and documents concerning FOIA (percentages by population class)

	30,000-50,000	*50,000-100,000*	*100,000-200,000*	*>250,000*	*Total*
Information on FOIA	63	75	79	100	70
Office contact details	57	74	79	92	66
Request form	62	77	70	100	69
Re-examination form	16	31	39	67	25
Access Register	67	76	73	92	71

We also focused on the quality of publication of the Access Registers, which ought to ensure accountability of the implementation of FOIA by municipalities. Indeed, the Access Registers contain data, publication of which is crucial for citizens and control bodies, who can verify whether, how and how quickly the municipalities respond to requests for access, but also for scholars wishing to examine how FOIA is applied[11].

Table 4 shows the results of our analysis of the quality of publication of the Access Registers, based on three criteria:

1. the presence of a register on the council website that had been updated in the course of the year prior to the study;
2. a precise link in the register between requests and their outcomes;
3. qualification of the requests received by the council in relation to the three forms of access contemplated by the Italian system.

The table presents the data in such a way as to display the percentage of councils in the different macro-areas that meet the three criteria presented above. The data collected suggests that about half of the municipalities do not publish an up-to-date register and do not qualify the requests published. The link between requests and outcomes was indicated in 62% of municipalities under investigation. Also in this case the rate of compliance with national recommendations shows a patchy geography, with municipal councils of Southern Italy showing lower compliance than those in Central and especially Northern Italy.

Tab. 4 – Rate of compliance of municipalities with ANAC and Ministerial recommendations regarding publication of registers of requests under FOIA (percentages by macro-area)

	North	*Centre*	*South and islands*	*Total*
Updated Register	66	51	46	54
Link between requests and outcomes	66	61	58	62
Qualification of requests	57	52	41	49

Table 5 shows a re-elaboration of the above data, distinguishing municipalities on the basis of their population. The best-performing municipalities for publication of Access Registers turned out to be larger ones, whereas smaller municipalities showed greater difficulty in complying with the quality standards recommended by ANAC and the Ministry for Public Administration.

Tab. 5 – Rate of compliance of municipalities with ANAC and Ministerial recommendations regarding publication of registers of requests under FOIA (percentages by population class)

	30,000-50,000	*50,000-100,000*	*100,000-200,000*	*>250,000*	*Total*
Up-dated register	50	55	61	92	54
Link between requests and outcomes	56	65	70	92	62
Qualification of requests	45	53	45	83	49

3. Experimental analysis of the efficacy of requests for access

Requests under FOIA are increasingly often used to conduct experiments to determine compliance of public bodies with transparency laws. Some recent experiments used FOIA requests to study how applicant identity influences response[12]. Other experiments have shown that how the request is formulated influences the response[13]. Others have shown that the size of councils and their geographical macro-area influences the rate of response[14].

Our study belongs to the latter line of research on the implementation of FOIA. To examine compliance of Italian local government with the transparency laws, our experiment was designed to determine, in the case of information requested by a citizen, whether the rate of response increases when the request is lodged with:

1. a municipality in south, central or northern Italy;
2. a large municipality.

In other words, our experiment aimed at investigating whether demographic and geographic factors that influence compliance with ANAC and Ministerial recommendations are also relevant for the rate of response to requests for generalised civic access. On October 23(rd) 2020, we sent certified emails to the 307 municipalities under investigation, requesting access to data on the number of electronic and hard-copy identity cards issued in 2018. The aim of the request was decided on the basis of its non-controversial nature, calculated not to fall foul of exceptions or limits regarding protection of major public and private interests. In other words, the request did not oblige the municipalities to interpret transparency laws, nor did it pose a challenge as might requests related to compliance with anticorruption or performance management laws. Requests such as ours do not threaten the reputations of local governments. The aim of our request for generalised civic access was therefore calculated to minimise the influence of typical government resistance to implementing transparency laws when the information provided can damage third parties or threaten the reputation of public officials[15]. This would enable the influence of the factors we were interested in, namely the size and macro-area of the municipalities, to be investigated.

Moreover, the object of our request was clear with regard to the office competent to decide whether or not to grant access. Indeed, in all municipalities, the civil registry office holds the information about the number of identity cards issued. For all municipalities, our request for civic access was sent not only to the email address of the civil registry office but also to those of the protocol office that receives and records correspondence, and to the public relations office, which as contemplated by legislative decree no. 97/2016, can forward such requests to all other offices indicated by the municipalities in the «Transparent administration» section of their institutional websites.

Once the requests had been sent, the responses received in the following 30 days were recorded. This is the term for response indicated by the law. In relation to their content, responses were coded in four categories:

complete response; partial response; negative response (including all interlocutory replies, requests for further details and denials); no response.

Table 6 shows the distribution of categories of response by geographic macro-area. The latter emerged as important for total absence of response (just over 16% in the north versus 36% in the south) and for complete response (72% in the north versus 60% centre and 52% south). The poor transparency of southern municipalities was made even more evident by the low percentage of partial responses (3.8%) and the high percentage of denials (7.7%).

Tab. 6 - Outcomes of the experiment by geographic macro-area (percentages by geographic macro-area)

	No response	*Negative response*	*Partial response*	*Complete response*
North	16.4	5.5	6.4	71.8
Centre	28.4	4.5	7.5	59.7
South and islands	36.2	7.7	3.8	52.3
Total	27.4	6.2	5.5	60.9

As shown in Table 7, the distribution of responses also showed an association with population (Table 4). In the case of municipalities with populations over 250,000, no denials were recorded, and the percentage of complete and partial responses was the highest. In the case of other municipalities, the percentage of «no responses» was significantly higher than for municipalities with populations over 250,000. The percentage of complete responses decreased with decreasing population.

Tab. 7 - Outcomes of the experiment by size of municipality (percentages by population class)

	No response	*Negative response*	*Partial response*	*Complete response*
30,000-50,000	29.4	5.5	6.1	58.9
50,000-100,000	26.3	9.1	4.0	60.6
100,000-250,000	27.3	3.0	3.0	66.7
>250,000	8.3	0.0	16.7	75.0
Total	27.4	6.2	5.5	60.9

Analysis of the responses provided by the municipalities also made it possible to determine the compliance of reception of the requests for generalised civic access with ANAC and Ministerial recommendations. In particular, circular no. 2/2017 of the Ministry for Public Administration expressly provided that the office holding the data or documents requested has the competence to decide whether or not to receive a request for civic access. This implies that other offices competent to receive such requests, namely the public relations office and any other office indicated by the municipality at the «Transparent administration» section of its institutional website, are bound to transmit the requests without delay to the office that holds the data or documents. Since the information requested in our experiment concerned electronic identity cards, the office competent to meet our request was the civil registry office. As shown in Table 8, most of the responses received came from that office, with substantially similar percentages in the three macro-areas.

However, the fact that we also received responses from other offices shows margins of uncertainty in the handling of the requests in a minority of municipalities scattered in all three macro-areas. In the first place, in some municipalities the public relations office not only receives the requests but also replies to citizens. In second place, in some municipalities the general affairs office replies to citizens. Since ANAC recommends that an office specialised in transparency be set up in each public administration, we suppose that this office has been located in the general affairs area. In third place, in the municipalities analysed, it seems evident that the indications of the law regarding the tasks entrusted to the officer in charge of transparency and of preventing corruption have been implemented. According to the law, this officer is excluded from examining requests for access to information, since he has the exclusive role of dealing with re-examination requests. Finally, a minority of municipalities show uncertainty in the handling of requests for access, allowing a number of offices to reply at the same time or not indicating a specific office. Such uncertainty can confuse the process of re-examination of requests by making it difficult to identify the office responsible for the municipality's decision in the first place.

Tab. 8 – Offices from which we received responses by geographical macro-area (percentages by macro-area)

	North	*Centre*	*South and islands*	*Total*
Public relations	3.23	6.25	3.57	4
Civil registry	80.65	79.17	79.76	80
Transparency and Corruption	0	0	1.19	0.44
General affairs	5.38	0	3.57	3.56
Other	1.08	2.08	1.19	1.33
More than one	2.15	2.08	0	1.33
Unspecified	7.53	10.42	10.71	9.33
Total	100	100	100	100

As shown in Table 9, municipal population is a factor affecting the forwarding of requests for generalised civic access. Specifically, the critical threshold of administrative capacity is a population of 100,000. Indeed, below this threshold, a smaller percentage of responses come from the civil registry and we see a multiplication of offices offering responses to access requests.

Tab. 9 – Offices from which we received responses by municipal population class (percentages calculated on a population basis)

	30,000-50,000	*50,000-100,000*	*100,000-200,000*	*>250,000*	*Total*
Public relations	5.98	2.74	0	0	4
Civil registry	76.92	79.45	91.67	90.91	80
Transparency and Corruption	0	1.37	0	0	0.44
General affairs	3.42	4.11	4.17	0	3.56
Other	1.71	1.37	0	0	1.33
More than one	2.56	0	0	0	1.33
Not specified	9.4	10.96	4.17	9.09	9.33
Total	100	100	100	100	100

4. The practical implications for implementation of FOIA

The results of our research confirm a patchiness in the application of the transparency laws by Italian municipalities. This unevenness has already been pointed out in the international literature[16], including studies on compliance with the obligations of online publication contemplated by the proactive transparency laws in Italy[17]. In first place, our research confirms the importance of the size of municipalities as a proxy for resource availability, which not only influences publication of data and documents on the procedure of generalised civic access, but also the rate of response to access requests. In second place, the results showed the importance of the geographical macro-area of the municipalities. In particular, the lowest actuation of FOIA was recorded in southern municipalities which historically have had lower institutional performance, due partly to their lower social capital[18]. This not only reflects on the capacity of administrations to offer data and information, but also on the capacity of civil society to request data and information through generalised civic access procedures, and in so doing, favouring widespread control on institutional functions and the use of public resources, as well as promoting participation in public debate.

The results of our research have implications for practitioners interested in the reform of transparency in Italy. We confirmed that a large percentage of councils do not have the capacity to comply with the duties envisaged by the law and this capacity deficit is presumably even more pronounced in the many municipalities with populations under 30,000, especially where citizens are inclined to lodge access requests that would raise bureaucratic resistance.

The implementation of the Italian FOIA is based on a highly decentralised organisational model in which publication of the data on access procedure and the handling of access requests are left in the hands of single administrations. In this model, coordination is not ensured by an oversight body competent in deciding the merit of re-examination requests, nor does ANAC oversee compliance with the indications regarding publication of FOIA procedure data. Indeed, ANAC cannot check implementation of these indications by thousands of administrations, since it has to oversee compliance with a broader range of publication obligations, for example concerning public contracts and social benefits, as well as organisation of the public administration. The resources available for capacity-building initiatives, initiated by the Ministry for Public Administration and largely concerning central Italian administrations, are also limited.

In light of such macroscopic limits to the organisational model of implementation of FOIA, which make it easy for bureaucracy to passively resist the transparency laws, it is even comforting that a majority of large Italian municipalities have implemented generalised civic access in a context where oversight is weak and capacity-building initiatives are inadequate.

The results of our research also offer practical implications for making transparency measures effective. In first place, the dearth of capacity of local government requires that the burdens associated with implementation be lightened. In particular, our study contributes to the call for a reduction in the number of proactive disclosure obligations[19]. This number may have been justified before the introduction of generalised civic access, when among other things it had already been ascertained that a large proportion of the publication obligations concerned categories of data and documents for which citizens were unlikely to demand transparency[20]. Evidence in the Access Registers of the tiny number of requests for *simple civic access* lodged with councils in recent years shows that the demand for proactive transparency continues to be low[21]. Faced with this low demand, and since introduction of FOIA in 2016, keeping the number of publication obligations unchanged amounts to leaving local government and the central bodies responsible for transparency policy – ANAC and the Ministry for Public Administration – exposed to a chronic deficit of administrative capacity that threatens implementation of the new institute of generalised civic access.

In second place, to ensure coordinated handling of access requests, there is a need for a web platform, managed by ANAC and/or the Ministry for Public Administration, along the lines of the portals introduced in Mexico and the United States (only at federal level in the latter case). This recommendation is also based on the results of studies that showed that access requests lodged via web platforms elicited higher response rates[22]. The platform, to which all local government and their institutional websites should be connected, should provide citizens with clear information on how to exercise their right of access and should also receive access requests. Once the requests are processed, individual councils should document the outcome on the central platform. Introduction of a web platform would reduce costs through uniform information on access procedure, avoiding the need for thousands of councils to set up special pages for generalised civic access on their websites. This reduction in costs for local government would also help reduce uncertainty regarding qualification of requests in terms of the different forms of ac-

cess. Introduction of a platform would moreover be a strong deterrent to non-response, since non-compliance would be readily visible to central control bodies, ensuring rapid up-dating of the access registers. Introduction of a platform would also imply that access registers are published in machine-readable formats, facilitating the dissemination and analysis of open data on the demand for transparency in Italy and on the capacity of administrations to meet it. This would produce evidence useful for monitoring and re-designing transparency policies.

Finally, a technological solution like that of a special FOIA portal should be accompanied by capacity-building initiatives in local government and civil society[23]. With regard to local government, our analysis showed that Italy is not lacking in good practice in the implementation of FOIA. The experience of councils that have actuated FOIA should be the basis for programmes for building capacity based on transfer of know-how between peers. As far as civil society is concerned, the Italian government could adopt recommendations from the literature demonstrating the efficacy of initiatives to promote citizens' awareness of their access rights through public communication and transparency policy «infomediaries».

5. Conclusions

An aim of this research was to determine the level of implementation of the 2016 reform introducing generalised civic access in large municipalities in Italy. The results contribute to two streams of the international literature on FOIA. The first regards the «transparency of transparency», namely the proactive disclosure of data and documents regarding right to access and how it is exercised[24]. The second regards experimental study of the implementation of FOIA based on analysis of responses to a request sent to a series of municipalities. The results showed the influence of two factors – size and geographic position – on the publication of data and documents about FOIA and on the responsiveness of administrations to access requests.

Since our study concerned only one type of administration in a single country, it is an explorative study of the implementation of FOIA provisions. Future empirical studies on the institutional websites of administrations in other countries may consolidate the literature on «transparency of transparency» by more articulated examination of the determinants of proactive disclosure of data and documents concerning the FOIA procedure. Further

investigations may also delve into the mechanisms by which the geographical position of municipalities affects implementation of FOIA. For example, it would be possible to study the influence of exchange of know-how on the implementation of FOIA in given geographical areas. In fact, our analysis was unable to determine whether council compliance was influenced by reputational pressure from awareness that other administrations in the same geographical area had implemented the law[25]. Finally, a more detailed analysis of how administrations handle access requests may clarify the organisational resources (IT systems, staff specialised in transparency, internal rules for handling requests, and so forth) that sustain implementation of FOIA.

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Lessons learned? How open government research can inform platform transparency

Paddy Leerssen

The emerging field of platform regulation is taking on transparency as one of its core principles. How does this new project relate to the existing body of research around public transparency and open government? This essay offers some preliminary reflections. First, it reviews common disclosure policies for platforms and compares them to government transparency precedents. Second, it discusses important differences and commonalities between transparency and accountability in these two respective domains. Platform transparency, I argue, should take heed of the critical turn in government transparency research over the last two decades, and adopt the same focus on compliance, usage and impact as important topics for (empirical) research. Looking forward, researchers across both fields should aim to develop hybrid perspectives, which combine government and platform transparency resources with a view to charting the interactions between these entities, not as strictly rival powers but as frequent collaborators.

1. Introduction

If the government transparency ideal attained «quasi-religious significance» around the turn of the new millennium, two decades hence the faith might be losing its fervor. In that time, a growing body of research and a slew of failed policy experiments have pointed to transparency's limitations and failure modes. Over that period, policymakers are now championing transparency as a core tenet on the new frontier of platform governance. A flurry of new lawmaking in this field continues to focus on disclosure and data access. Could this movement be repeating past mistakes? How can the open government literature inform new attempts at platform transparency?

And what differences must open government experts keep in mind when the topic shifts to platforms?

Those are big questions and this is but a modest essay. What follows is not an exhaustive review, but a general overview - an early attempt to start connecting dots between these two literatures, and highlight what I consider important commonalities and differences between these two domains of transparency.

2. Context: Contemporary governance as platform governance

Why compare private platforms to public powers? The ideal of transparency in government can be traced back at least as far as Enlightenment thinkers such as Immanuel Kant and John Stuart Mill[1]. Transparency of corporations came later. On some US accounts corporate transparency has its roots the interbellum Progressive Era's anti-trust movement, and Justice Brandeis' call for «sunlight» as the best disinfectant[2]. Other accounts take as starting point the post-Reagan era of privatization and globalization, as part of the broader turn to «governance» through private and non-state forms of regulation[3]. In both timelines, the trend is clear that private actors have started to face calls for transparency as their power concentrates and become recognized as exercising state-like regulatory functions.

This turn to non-state governance coincided with a renewed interest in transparency stemming from new digital technologies, which promised ever greater capacities to store, transmit and process information[4]. That promise of «openness», in its modern usage as digitally-inflected variant on transparency, inspired not only the «open government» movement in public administration but also non-state domains of internet-based transparency such as the Open Software and Open Knowledge movements. At the intersection of these trends—privatization of regulatory functions, and their digitalization—stands the platform.

Though internet technology initially promised a decentralization of power, it soon resulted in its *re*centralization in the hands of dominant platform services: from Airbnb in short-term rental to Amazon in retail and YouTube in audiovisual media[5]. The digital markets these services occupy tend towards monopoly, and a handful of the most powerful players—Google, Apple, Facebook, Amazon and Microsoft, known collectively as 'GAFAM'—have furthermore been able to leverage and agglomerate this power across different markets and services[6]. In ever more domains, our information society is a platform society[7].

A corollary to the platform society is that contemporary governance, in ever more domains, is platform governance[8]. Whereas the decentralized web of the 1990s was often considered resistant to public regulation – due its dispersed, cross-border and anonymous structure – the platform now occupies an influential gatekeeping position with detailed (datafied) knowledge and finegrained technological control over their users[9]. Platforms exercise this control for their own commercial purposes, but also in response to government demands. For these governments, enlisting the cooperation of platforms may the only feasible strategy to regulate online behavior effectively. In ever more domains, therefore, governance consists in the governance of and by platforms[10]. And in keeping with their growing influence, these 'new governors' are facing calls for greater transparency and accountability[11]. As we'll see below, many of these proposals find precedents or resemblances in government transparency.

3. Platform transparency policies and their public predecessors

We now see the first legislation addressing transparency in online platforms. Robert Gorwa and Timothy Garton Ash have already discussed some important features of platform transparency, with a greater emphasis on voluntary and self-regulatory aspects[12]. This contribution examines state-imposed transparency law and regulation, focusing on the EU and its Member States.

Some analyses of platform transparency legislation might start with the EU General Data Protection Regulation (GDPR) of 2016. This complex framework imposes many different obligations on the processing of personal information, and many of its provisions relate to transparency – primarily towards the individual data subjects affected[13]. Transparency is indeed mentioned as one of the GDPR's core goals, and as one of the fundamental principles – «lawfulness, fairness and transparency» – with which all data processing must comply[14]. Whilst certainly significant to platform practices and business models, however, it should be noted that the GDPR is not exclusively focused on platforms in particular, nor indeed on digital services in general. The GDPR is a horizontal instrument that applies to all sectors and even to most government entities[15]. The same can be said for more recent efforts such as the AI Act, Data Act and Data Governance Act: relevant to platforms, but not specific to platforms.

Transparency rules aimed specifically at platforms are more recent still. The EUs flagship instrument is the proposed Digital Services Act

(DSA), scheduled for a final vote in 2022. Many more niche sectoral instruments have cropped up besides, such as the revised Audio-Visual Media Services Directive, the Platform-to-Business Regulation[16]. Platform regulation is also high on the agenda in many other countries across the globe, with Canada and Australia being relatively proactive[17]. For its part US congress has proposed a flurry of platform-related bills, but it may be some time yet before any of these passes the Capitol's partisan[18]. One reason to focus on the EUs rules is that their proposals may well come to serve as global standards – the «Brussels effect» which can already be observed for the GDPR[19].

Many of these proposals for platform regulation contain disclosure rules which resemble established principles of government transparency. The DSA's new transparency rules for «content moderation», i.e. platforms' enforcement of content rules, can be likened to legality and due process requirements. Indeed, scholars including Evelyn Douek liken content moderation to public administration, and expressly draw on due process as a regulatory model[20]. Hence, echoing the due process principles of legality, foreseeability and accessibility, the DSA requires platforms to codify content rules clearly and unambiguously in their Terms of Service[21]. Likewise, the governmental duty to give reasons is echoed in the DSA's Statement of Reasons which platforms must provide for each content removal decision[22]. In self-regulation, Facebook has taken things a step further with their Oversight Board, which is modeled on judicial oversight and interpretation of rules – though critics have rejected this self-regulatory model as a performative mimickry, or «transparency theater», compared to binding due process requirements grounded in public law[23].

But platform transparency law is not limited to the due process model of individual rights protection. Other rules bring us closer to something resembling open government. Generally, open data demanded of platforms is far more modest than the categorical transparency expected of public bodies. There is no equivalent of a FOIA law granting general access rights to information held by platforms[24]. At most, data subjects under the GDPR can demand access to personal data relating to them as individuals[25]. It is worth noting that this access right was not initially conceived of as a FOIA-type watchdog instrument but rather as a means for individual empowerment. However, data protection researchers such as Jef Ausloos and René Mahieu now emphasize that its main contribution in practice may be to enable new forms of academic and journalistic research, in a way not dissimilar from public records laws[26].

Rather than generic access rights, most transparency rules for platforms instead focus on proactive disclosure obligations for designated datasets. Perhaps the most established and commonplace format is content moderation reporting: the release of periodical reports documenting aggregate statistics about content deletion and other gatekeeping decisions[27]. These reporting rules are prevalent in the DSA as well as national legislation such as the German *Netzwerkdurchsetsungsgesetz,* known in the Anglosphere as the «Network Enforcement Act» or «NetzDG»[28]. Other proactive disclosure requirements in the DSA include the following: platforms will be required to publish databases of all (political) advertisements sold on their service; to provide explanations of their recommender systems to users; and to publish periodical reports about their diagnosis and mitigation of certain «systemic risks» surrounding content moderation[29].

Bucking this general trend towards proactive transparency, perhaps the most significant development in recent legislation is the novel idea of generic, reactive access rights for regulators and researchers. Article 40 of the DSA, on «data access and scrutiny», allows competent regulators to request access to data held by platforms, either for their own usage or for study by academic researchers[30]. In the US, the draft Platform Transparency and Accountability Act (PATA) takes a very similar approach[31]. These proposals are not limited in terms of their subject matter, casting a wide net across different platform policies and functions. These frameworks foresee confidential access by trusted researchers under secure conditions, which will allow them to analyze privacy-sensitive personal data but may also prompt complex, technical disagreements about the reliability and replicability of their findings[32].

Those familiar with the open government literature might view this new frontier in transparency regulation with some weariness. As I mentioned above, the ideal of transparency has recently been undergoing a major reappraisal in public administration scholarship and in governance literature more generally. This shift was already presaged as early as 2006 by Christopher Hood's widely-cited observation that transparency, in its turn-of-the-millenium heyday, had attained a «quasi-religious significance»[33]. This characterization spoke not only in the fervor of transparency advocates, but also to the lack of (empirical) evidence for many of their beliefs. Since then, a growing literature, including empirical work on usage and effects, has served to dampen the enthusiasm for transparency in government and in other domains, pointing to its many failures, costs and limitations[34]. This critical turn in transparency studies, though not

discrediting the ideal entirely, has swung the pendulum back to a position of uneasy, cautious ambivalence. Any endorsement of transparency is increasingly hedged and qualified. Does platform transparency risk repeating the same old mistakes? What can be learned from experiences with government?

4. How platform transparency differs

Before seeking out commonalities and analogies between platform and government transparency, I would first like to reflect on some important differences.

First, platform transparency, in contrast to open government, does not pursue economic goals. For government data, «unlocking» its commercial value is often considered an important or even primary purpose[35]. But such considerations have not yet entered explicitly into platform transparency, which is conceived of exclusively in terms of accountability and regulatory principles such as individual autonomy and empowerment. A parallel, economic program for commercial access to platform data can be found in competition law instruments such as the Digital Markets Act (DMA), but it remains in its own silo[36]. Whereas open government often conjoins these economic and political purposes, with platform transparency they remain rather clearly separate.

Second, it is important to note that platforms are not accountable to the same mechanisms as (democratic) states. Of course, platforms lack the electoral accountability of elected governments, as well as their constitutional constraints. As publicly listed corporations, their constituency, if any, is the meeting of shareholders. Compared to most private entities, platforms can also be even more resistant to national laws and regulations (owing not only due to their size and influence but also due to their cross-border service provision and jurisdictional arbitrage)[37]. Market-based accountability mechanisms such as user choice should not be overstated either, since platform markets suffer from several failures and externalities that undermine competition, including supply-side returns to scale, demand-side returns to scale (i.e. «network effects»), and user lock-in[38]. These considerations should prompt us to problematize, even more so than one already might for governments or for other corporations, any expectation that these «new governors» will be responsive to public opinion or other forms of social and public accountability – or indeed even to consumer demand[39]. Relatedly, it suggests that transpar-

ency of platforms might serve a primarily *monitorial* function, with lesser opportunities for deliberative and participatory usage explored in open government research[40].

How, if at all, are platforms accountable? The platform governance literature observes that government regulation is an important driver for reform[41]. More specifically that even the threat of future regulation has an important disciplinary effect on platforms, which typically try to pre-empt such threats through their own «voluntary» measures[42]. This threat of regulation plays an important factor in explaining why platforms do sometimes respond, under certain conditions, to public opinion; not out of any direct political accountability towards this public, but instead out of the indirect commercial or regulatory risks associated with negative publicity. Of course, transparency can also engage «harder» forms of accountability such as triggering the enforcement of existing laws[43].

Another important difference between platforms and states is their degree of digitization. In open government, a major barrier for many organizations has been the costs of digitising relevant data for purposes of dissemination[44]. Platforms, by contrast, are born digital. Indeed, their very business models revolve around the datafication and commodification of user behavior[45]. This model makes platforms ideal instruments of surveillance, but also contains within it the promise of more «open» and transparent governance. In their present design, platforms stand accused of being asymmetric «one-way mirrors», which expose their user to extensive surveillance without revealing their own inner workings[46]. As a counterexample, open platforms such as Wikipedia illustrate how digital platforms can invert this relationship and provide far-reaching transparency as to their own operations[47]. Mikkel Flyverbom has warned against the limitations of such a project, since platform datafication imposes its own epistemic biases which colour and distort our view rather than offering any immediate, or objective access to truth[48]. For related reasons, Bernhard Rieder and Jeanette Hoffman propose a reorientation from «transparency» to a more cautious principle of platform «observability», as an ideal of regulated, programmatic, and real-time access to platform data and analytical tools of platform outputs. Along these lines, recent scholarship warns against excessive or uncritical reliance on platforms' own datafication logics and epistemologies. Still, the problems of platform transparency are primarily problems of access and interpretation, more so than problems of registration or collection. Whereas governments are often hard-pressed to pro-

duce meaningful data, platforms do so abundantly – then hoard it as a monetizable asset.

5. Connections and Resemblances

Despite these differences, I suggest that the open government literature has much to teach platform regulation.

Compared to platform transparency, the literature on open government has a better view on usage and impact. In both fields, transparency policies have often been premised on the expectation that on-line netizens would eagerly seize at the available data. A key lesson from two decades of open government research is that this image of the «armchair auditor» is overly optimistic, if not downright naïve. Even the academic literature can be accused of some idealism here, with a literature review by Safarov et al showing that the benefits of transparency are often asserted in theory but rarely tested empirically[49]. What evidence we do have shows that the majority of public datasets are rarely used, if at all[50]. And where usage does occur, such as with FOIA, unintended (commercial) usages may in fact predominate over the intended accountability usage by public watchdogs[51]. The open government literature has also grappled with methodological limitations regarding the study of usage, which may be diffuse and difficult to measure[52]. The open government literature now advocates a more user-oriented philosophy in transparency policymaking and design, which accounts more proactively for user demands[53]. This body of work might be a source of inspiration for platform research, where there has been relatively little study of transparency usage and impact. In a recent article I have taken a tentative first step in researching to journalistic usage of Facebook's Ad Library[54]. But such empirical investigations of usage are still few and far between, and there is much research yet to be done.

Related to these demand-side concerns – If you build it, will they come? – the open government literature has hosted a lively debate on active versus passive transparency. Since proactive publication of data often fails to reach an audience, it has been argued that the more effective method is to disclose only on request, or «passively», as in the case of many public records laws[55]. This passive approach helps to tailor disclosures towards content in which at least one person is actually interested. Yet US critics of FOIA underscore that these reactive approaches struggle with enforcement and transaction costs; the regulated entity is often able

to undermine its efficacy by overinterpreting relevant exceptions and protracting appeals processes, each on a case-by-case basis[56]. This leads some to advocate for proactive transparency as a possible fix[57]. In this light, expert opinion remains somewhat divided, but in any case this discourse may be instructive for comparable debates now taking place as regards platforms.

Related to the above, the open government literature has observed a risk of commercial co-optation, not only in FOIA-type public records but also for other policies such as open meeting requirements[58]. This has prompted debate as to whether certain instruments such as FOIA should grant priority to journalistic and other watchdog usages. In platform governance, commercial co-optation should be especially concerning since commercial usage is rarely taken into consideration as an express policy goal. As discussed, many open government policies expressly pursue or at least tolerate commercial usage. But in many areas of platform transparency the prospect of commercial usage has barely entered the discussion at all. For instance, in the context of platform advertisement archives, there appears to be commercial usage with which relevant policymaking does not appear to have reckoned[59].

Finally, the open government literature provides a template to study the risk of manipulation and strategic compliance by the disclosing party. Even democratic governments have proven resistant to transparency regulation, often ignoring requests, complying only partially, or ignoring the spirit of the law («compliance without concordance»)[60]. Compliance tends to be especially weak for politically sensitive topics, where the disclosing party might refuse disclosure, or appeal in bad faith to exceptions and limitations, or disclose selectively or inaccurately. As platforms begin to face binding disclosure duties, similar research methods and concepts could find fruitful application here too. Given the profit-driven nature of platforms, their incentives to oppose and undermine transparency regulation may be even greater than for states. A key challenge will be to distinguish good faith objections on such issues as privacy and security from platforms' bad faith avoidance of accountability. An added complication is that platforms often engage in «voluntary» transparency policies going beyond their obligations under the law, which have often proven to be incomplete to distract from more sensitive areas of platform governance – prompting accusations of «transparency washing»[61]. The extreme scale and complexity of platforms' (algorithmic) operations, coupled with their fine-grained control over data access infrastructures such as APIs and graphic

interfaces, further enhances their capacity for misleading or otherwise manipulative disclosure[62]. Platforms thus exhibit stronger motives and greater capacities for strategic «management of visibilities» than do governments[63].

6. Concluding remarks: Chimera, not Charybdis

In closing I will add that platforms and governments, though commonly juxtaposed as rival powers, more often work in tandem. Our prospect is not so much the difficult choice between two competing powers – either the Scylla of state or the Charybdis of tech – but rather a chimerical melding of the two. Governments can leverage platform power to achieve their regulatory goals. And since platforms often find it in their interest to appease governments, this usually results in quasi-voluntary arrangements outside the purview of conventional public rulemaking[64]. In turn, platforms litigate and lobby state power to work in their favor[65]. The result is a «hybridisation» or «privatised regulation», where responsibility is dispersed and entangled between public and private power[66]. This entanglement affects transparency too; platform transparency may depend on government transparency, and vice-versa. Disclosures from governments might reveal their dealings with platforms, and create a more complete picture of platform governance[67]. Conversely, disclosures from platforms might also serve as a window onto the role of government in digital ecosystems. It will be no small feat, but only by combining government and platform transparency research can we hope to tame this strange beast.

Note

[1] C. HOOD, *Transparency in Historical Perspective*, In C. HOOD, D. HEALD (eds.), *Transparency: The Key to Better Governance?*, Oxford University Press, Oxford 2006; A. Meijer, *Government Transparency in Historical Perspective: From the Ancient Regime to Open Data in The Netherlands*, in «International Journal of Public Administration», vol. 38, 2015, pp.189-199.

[2] D. POZEN, *Transparency's Ideological Drift*, in «Yale Law Journal», vol. 128, 2018.

[3] A. MEHRPOUYA & M.-L. SALLES-DEJLIC, *Seeing like the market; exploring the mutual rise of transparency and accounting in transnational economic and market governance*, in «Accounting, Organizations & Society»,Vol. 76, 2017 (distinguishing «liberal» and «neoliberal» models of transparency).

[4] H. MARGETTS, *Transparency and Digital Government*, In C. HOOD, D. HEALD (eds.), *Transparency: The Key to Better Governance?*. cit.

[5] Y. BENKLER, *Degrees of freedom, dimensions of power,* in «*Daedalus*», vol. 145, 2016, pp. 18–32.

[6] T. BARWISE, L. WATKINS, *The evolution of digital dominance: how and why we got to GAFA*, in M. MOORE, D. TAMBINI (eds.), *Digital Dominance: The Power of Google, Amazon, Facebook, and Apple*. Oxford University Press, Oxford 2018.

[7] J. VAN DIJCK, M. DE WAAL, T. POELL, *The Platform Society: Public Values in a Connective World*, Oxford University Press, Oxford 2018.

[8] R. GORWA, *What is platform governance?*, in «*Information, Communication & Society*», vol. 22, 2016, p. 6 ss.

[9] J. VAN DIJCK, M. DE WAAL, T. POELL, *The Platform Society*, cit.

[10] T. GILLESPIE, *Governance of and by platforms*, in J. BURGESS, T. POELL, A. MARWICK (eds.), *SAGE Handbook of Social Media,* SAGE Publishers, Thousand Oaks, California 2017.

[11] K. KLONICK, *The New Governors: The People, Rules and Processes Governing Online Speech*, in «*Harvard Law Review*», vol. 131, 2018, p. 1598 ss.; J. VAN HOBOKEN, R. FAHY, *Smartphone platforms as privacy regulators*, in «*Computer Law & Security Review*», vol. 41, 2021.

[12] R. GORWA, T. GARTON ASH, *Democratic Transparency in the Platform Society*, In N. PERSILY, J. TUCKER (eds.), *Social Media and Democracy: The state of the field and prospects for reform, Cambridge University Press*, Cambridge 2020.

[13] Disclosure obligations can be found *inter alia* in Section III.1 of the GDPR ('Transparency and modalities').

[14] GDPR, Recital 31 and Article 5(1)(A).

[15] GDPR, Article 2.

[16] Other examples include the Platform-to-Business Regulation («P2B»), the Audiovisual Media Service Directive and the recently proposed Regulation on Political Advertising.

[17] Australia's Media Bargaining Code (AMBC) is one relatively ambitious attempt at platform regulation, which led to a controversial service stoppage by Facebook. Bossio et al (2022) note that the AMBC's algorithmic transparency rules were some of its most contentious provisions. D. BOSSIO, TERRY FLEW, J. MEESE, T. LEAVER, B. BARNET, *Australia's News Media Bargaining Code and the global turn towards platform regulation*, in «*Policy & Internet*», 2022, *in press*.

[18] Relevant proposals in the US include the the Honest Ads Act, the Platform Transparency and Accountability Act, the Filter Bubble Transparency Act, and the Dangerous Algorithm Act. At the time of writing, none has been enacted.

[19] S. GUNST, F. DE VILLE, *The Brussels Effect: How the GDPR Conquered Silicon Valley*, in «*European Foreign Affairs Review*», vol. 26, 2021, pp. 437-458.

https://kluwerlawonline.com/journalarticle/European+Foreign+Affairs+Review/26.3/EERR2021036

[20] E. DOUEK, *Content Moderation As Administration. Forthcoming* in «*Harvard Law Review*», vol. 136, 2022. In this piece, DOUEK is responding to earlier

work characterizing platform regulation as a constitutional project. See, e.g.: N. SUZOR, *Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms*', in «*Social Media + Society*», 2018.

[21] Such a principle is enacted in Article 12 of the proposed DSA, on «Terms and Conditions».

[22] Such a principle is enacted in Article 15 of the DSA, on the «Statement of Reasons» for content moderation decisions.

[23] See, generally: E. DOUEK, *Facebook's «Oversight Board»: Move Fast with Stable Infrastructure and Humility*, in «N.C. J. L. & Tech», vol. 21, 2019, pp. 1-79 describing Facebook's policymaking as a «legislative» process.

[24] M. KARANICOLAS, *A FOIA for Facebook: Meaningful Transparency for Online Platforms*, in «St Louis University Law Journal», n. 66, 2021 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3964235

[25] GDPR, Article 15.

[26] J. AUSLOOS, M. VEALE, *Researching with Data Rights,* in «Technology and Regulation», 2021, pp. 136-157, available at https://techreg.org/index.php/techreg/article/view/61; R. MAHIEU, H. ASGHARI, M. VAN EETEN, *Collectively Exercising the Right of Access: Individual Effort, Societal Effect*, in «Internet Policy Review», vol. 7, 2017, available at https://policyreview.info/articles/analysis/collectively-exercising-right-access-individual-effort-societal-effect.

[27] See, generally: D. KELLER, P. LEERSSEN, *Facts and where to find them: empirical research on internet platforms and content moderation*, in N. PERSILY, J. TUCKER (eds.), *Social Media and Democracy: The State of the Field and Prospects for Reform*, Cambridge University Press, Cambridge 2020; N. SUZOR, S. MYERS WEST, A. QUODLING, J. YORK, *What Do We Mean When We Talk About Transparency? Toward Meaningful Transparency in Commercial Content Moderation*, in «*International Journal of Communication*», vol. 13, 2019, p. 1526 ss.; B. WAGNER, K. ROZGONYI, M. SEKWENZ, J. COBBE, J. SINGH, *Regulating transparency?: Facebook, Twitter and the German Network Enforcement Act*', in *FAT* '20: Proceedings of the 2020 Conference on Fairness, Accountability, and Transparency*, 2020, pp. 261-271.

[28] The DSA's reporting rules can be found in Articles 13, 23 and 33. For discussions of the NetzDG's transparency provisions, see: B. WAGNER et al, *Regulating Transparency? op. cit.*; H. TWOREK, P. LEERSSEN, *An Analysis of Germany's NetzDG Law. Working Paper of the Transatlantic High-Level Working Group on Content Moderation and Freedom of Expression*. https://www.ivir.nl/publicaties/download/NetzDG_Tworek_Leerssen_April_2019.pdf

[29] See Articles 27-30 DSA (proposed). On ad archives more generally, see: P. LEERSSEN, J. AUSLOOS, B. ZAROUALI, N. HELBERGER, C. DE VREESE, *Platform ad archives: promises and pitfalls*, in «Internet Policy Review», vol. 8, 2019, p. 4 ss.

[30] P. LEERSSEN, *Platform research access in Article 31 of the Digital Services Act: Sword without a shield?*, Verfassungsblog, 2021 https://verfassungsblog.de/power-dsa-dma-14/; J. AUSLOOS, P. LEERSSEN, P. TEN THIJE, *Operationalizing Research Access in Platform Governance*, AlgorithmWatch, 2020 https://dare.uva.nl/search?identifier=90e4fa77-d59a-49f1-8ccd-57d0725122bd.

[31] The US PATA legislation draws extensively on the work of legal scholar Nathaniel Persily. See, e.g.: N. PERSILY, *Opening a window into tech: the challenge*

and opportunity for data transparency, Stanford Cyber Policy Center, 2021 https://fsi-live.s3.us-west-1.amazonaws.com/s3fs-public/cpc-open_windows_np_v3.pdf

[32] *Ibidem* J. AUSLOOS et al, *Operationalizing Research Access in Platform Governance*, cit., K. DOMMETT, R. TROMBLE, *Advocating for platform data access: challenges and opportunities for academics seeking policy change*, in «*Politics and Governance*», vol. 10, 2022.

[33] C. HOOD, *Transparency in Historical Perspective*, *op. cit*.

[34] I. SAFAROV, A. MEIJER, S. GRIMMELIKHUIJSEN, *Utilization of open government data: A systematic literature review of types, conditions, effects and users*, in «*Information Polity*», vol. 22, 2017, pp. 1–24. https://doi.org/10.3233/IP-160012; G. MICHENER, *Gauging the Impact of Transparency Policies*, in «Public Administration Review», vol. 79, 2019; M. CUCCINIELLO, G. PORUMBESCU, S. GRIMMELIKHUIJSEN, *25 Years of Transparency Research: Evidence and Future Directions*, in «Public Administration Review», vol. 77, 2016. D. POZEN, *Transparency's Ideological Drift*, cit., p. 100; S. BAUME, Y. PAPADOPOULOS, *Transparency: from Bentham's inventory of virtuous effects to contemporary evidence-based scepticism*, in «*Critical Review of International Social and Political Philosophy*, vol. 21, 2018.

[35] See, for instance, the EUs Public Sector Information Directive. Directive 2013/37/EU of the European Parliament and of the Council of 26 June 2013 amending Directive 2003/98/EC on the re-use of public sector information*, OJ L 175, 27.6.2013, p. 1–8.*

[36] See, generally: I. GRAEF, *Data as Essential Facility*, 2016, PhD Thesis. Available in open access at: https://limo.libis.be/primo-explore/fulldisplay?docid=LIRIAS1711644&context=L&vid=Lirias&search_scope=Lirias&tab=default_tab&lang=en_US&fromSitemap=1

[37] E. POLLMAN, *Tech, Regulatory Arbitrage, and Limits*, in «European Business Organization Law Review», vol. 20, 2019, pp. 567-590.

[38] T. BARWISE, L. WATKINS, *The evolution of digital dominance: how and why we got to GAFAM*, in M. MOORE, D. TAMBINI (eds.), *op. cit.*

[39] M. BOVENS, *Analysing and assessing accountability: A conceptual framework*, in «*European Law Journal*», vol. 13, 2007, pp. 447-468. https://doi.org/10.1111/j.1468-0386.2007.00378.x

[40] E. RUIJER, S. GRIMMELIKHUISJEN, A. MEIJER, *Open data for democracy: Developing a theoretical framework for open data use*, in «*Government Information Quarterly*», vol. 34, 2017, pp. 45-52.

[41] C. MARSDEN, *Internet co-regulation and constitutionalism: Towards European judicial review. International Review of Law*, in «*Computers & Technology*», vol. 26, 2012; D. TAMBINI, D. LEONARDI, C. MARSDEN, *Codifying Cyberspace: Communications Self-Regulation in the Age of Internet Convergence*, Routledge, London 2007.

[42] E.g. B. WAGNER, *Free Expression? Dominant Information Intermediaries as Arbiters of Internet Speech*, in M. MOORE, D. TAMBINI (eds), *op. cit.*

[43] BOVENS, M., *Analysing and assessing accountability: A conceptual framework*, in «*European Law Journal*», vol. 13, 2018, pp. 447–468. https://doi.org/10.1111/j.1468-0386.2007.00378.x

[44] E.g. F. BANNISTER, R. CONNOLLY, *The Trouble with Transparency: A Critical Review of Openness in e-Government*, in «Policy & Internet», vol. 3, 2011.

[45] J. VAN DIJCK, M. DE WAAL, T. POELL, *The Platform Society: Public Values in a Connective World*, *op. cit*.

[46] F. PASQUALE, *The Black Box Society: The Secret Algorithms That Control Money and Information*, Harvard University Press, Cambridge, Massachusetts 2016; J. AUSLOOS, P. DEWITTE, *Shattering One-Way Mirrors. Data Subject Access Rights in Practice*, in «International Data Privacy Law», vol. 8, 2018.

[47] Y. BENKLER, *From Utopia to Practice and Back*, in *Wikipedia@20*, 2019, arguing that «*Wikipedia remains a critical anchor for working alternatives to neoliberalism*». https://wikipedia20.pubpub.org/pub/3wt2fy6i/release/2

[48] M. FLYVERBOM, *The Digital Prism: Transparency and Managed Visibilities in a Datafied World*, Cambridge University Press, Cambridge 2019.

[49] I. SAFAROV, A. MEIJER, S. GRIMMELIKHUIJSEN, *Utilization of open government data: A systematic literature review of types, conditions, effects and users*, in «Information Polity», vol. 22, 2016, pp. 1–24.

[50] P. LOURENCO, *Evidence of an open government data portal impact on the public sphere*, in «International Journal of Electronic Government Research», vol. 12, 2016, pp. 21-36 https://doi.org/10.4018/IJEGR.2016070102

[51] M. KWOKA, *FOIA, Inc.,* in «*Duke Law Journal*», vol. 65, 2016, pp. 1361-1437.

[52] P. LOURENCO, *Evidence of an open government data portal impact on the public sphere*, in «International Journal of Electronic Government Research», vol. 12, 2016, pp. 21–36. https://doi.org/10.4018/IJEGR.2016070102; G. MICHENER, *Gauging the Impact of Transparency Policies*, *Public* in «Administration Review», vol. 79, 2019; S. KREIMER, T*he Freedom of Information Act and the Ecology of Transparency*, in «University of Pennsylvania Constitutional Law Review», vol. 10, 2008; J. HAMILTON, *Democracy's Detectives: The Economics of Investigative Journalism*, Harvard University Press, Cambridge, Massachusetts 2016.

[53] E.g. E. RUIJER, S. GRIMMELIKHUIJSEN, A. MEIJER, *Open data work: understanding open data usage from a practice lens*, in «International Review of Administrative Sciences», vol. 86, 2020; B. WILSON, C. CONG, *Beyond the supply side: Use and impact of municipal open data in the U.S*, in «Telematics and Informatics», vol. 58, 2021.

[54] P. LEERSSEN, T. DOBBER, N. HELBERGER, C. DE VREESE, *News from the ad archive: How journalists use the Facebook Ad Library to hold online advertising accountable*, in «Information, Communication & Society», 2021. https://doi.org/10.1080/1369118X.2021.2009002

[55] A. MEIJER, *Transparency*, in M. BOVENS (ed.), *Oxford Handbook on Public Accountability*, Oxford University Press, Oxford 2014.

[56] M. KWOKA, *FOIA, Inc.*, *op. cit.*

[57] D. POZEN, *Transparency's Ideological Drift*, *op. cit.*, p. 100.; D. POZEN, *Freedom of Information Beyond the Beyond the Freedom of Information Act*, in «University of Pennsylvania Law Review», vol. 165, 2017, p. 1097 ss.; M. KWOKA, *Saving the Freedom of Information Act*, Cambridge University Press, Cambridge 2021.

[58] D. POZEN, *Transparency's Ideological Drift*, *op. cit.*

[59] This claim is based on my personal analysis of commercial advertising websites describing their usage of the Facebook Ad Library. The overall scope of this phenomenon has not yet been subject to detailed research.

[60] E.g. S. GRIMMELIKHUIJSEN, P. JOHN, A. MEIJER, B. WORTHY, *Do Freedom of Information laws increase transparency of government? A replication of a field experiment*, in «*Journal of Behavioral Public Administration*», vol. 1, 2018, pp. 1-10; B. WORTHY, P. JOHN, M. VANNONI, *Transparency at the Parish Pump: A Field Experiment to Measure the Effectiveness of Freedom of Information Requests in England*, in «Journal of Public Administration Research and Theory», vol. 27, 2017, pp. 485-500.

[61] M. ZALNIERUTE, *«Transparency Washing» in the Digital Age: A Corporate Agenda of Procedural Fetishism*, in «Critical Analysis of Law», vol. 8, 2021.

[62] The use of machine-learning problems raise its own particular transparency challenges, germane to both platforms and governments. See: M. ANANNY, K. CRAWFORD, *Seeing without knowing: Limitations of the transparency ideal and its application to algorithmic accountability*, in «New Media & Society», vol. 20, 2016; M. WIERINGA, *What to account for when accounting for algorithms: a systematic literature review on algorithmic accountability*, in *Proceedings of FAT* '20: Proceedings of the 2020 Conference on Fairness, Accountability, and Transparency:* https://doi.org/10.1145/3351095.3372833

[63] This concept is drawn from the work of Mikkel Flyverbom. See: M. FLYVERBOM, *The Digital Prism: Transparency and Managed Visibilities in a Datafied World*, *op. cit.* For a relevant case study, see: B. WAGNER, K. ROZGONYI, M.T. SEKWENZ, J. COBBE, J. SINGH, *Regulating transparency?: Facebook, Twitter and the German Network Enforcement Act'*, *op. cit.*

[64] One example out of many is the EU Code of Practice on Disinformation. https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation

[65] J. COHEN, *Between Truth and Power: The Legal Constructions of Informational Capitalism*, Oxford University Press, Oxford 2019.

[66] See, e.g. B. WAGNER, *Free Expression? Dominant Information Intermediaries as Arbiters of Internet Speech*, *op. cit.*

[67] One interesting example is the practice of Internet Referral Units (IRUs). These are police teams that flag content for online platforms, in a non-binding manner, for consideration as to whether they might like to remove it. These IRUs have been criticized for failing to provide proactive transparency and also for poor compliance with FOIA requests. See: B. CHANG, *From internet referral units to international agreements: censorship of the internet by the UK and EU*, in «Columbia Human Rights Law Review», vol. 49, 2018.

ETICA PUBBLICA
STUDI SU LEGALITÀ E PARTECIPAZIONE

Letti e riletti

a cura di Francesco Clementi

La corruzione come sistema. Meccanismi, dinamiche, attori

Di Donatella Della Porta & Alberto Vannucci

(Bologna, il Mulino 2021)

Enrico Campelli

Il volume costituisce il più recente approdo di una tradizione di ricerche e studi che i due autori - ciascuno con il proprio background disciplinare - perseguono da tempo, e che ha già consegnato alla comunità scientifica contributi pregevoli ed ampiamente utilizzati. Si tratta dunque della convergenza - e dell'integrazione - di sensibilità diverse ma complementari, dalla scienza politica alla sociologia politica e dei movimenti collettivi. Il risultato è ben più che la semplice ricostruzione analitica delle emergenze di un fenomeno tanto diffuso, quanto piuttosto la messa a punto di una vera *teoria* dell'agire corrotto. Il lavoro consiste infatti nella costruzione di un sistema argomentativo che - precisamente in quanto teoria scientifica - si propone di connettere saldamente elaborazioni teorico-interpretative di diversa origine - dalla teoria dell'azione razionale alla teoria dei giochi - ad una base empirica particolarmente ampia (atti giudiziari, articoli di quotidiani nazionali e locali, cronache su un gran numero di casi di corruzione di rilievo giudiziario) al fine di pervenire a una base inferenziale sufficiente a consentire la formulazione di modelli esplicativi, e in qualche misura - nonostante l'ovvia imprevedibilità delle singole fattispecie - anche *predittivi,* e dunque capaci di orientare opportune misure di contrasto.

Il percorso prende l'avvio dall'analisi delle principali implicazioni derivanti dall'applicazione della teoria dei costi di transazione allo studio del mercato della corruzione, guardando alle principali caratteristiche del sistema economico e politico che influenzano le configurazioni della governance dello scambio corrotto. Con specifica attenzione al caso italiano si considerano poi i diversi equilibri di corruzione sistemica osservabili a partire da quanto emerso nei tre decenni successivi alle inchieste Mani Pulite, sia per quanto riguarda le dinamiche generative che le «evoluzioni» in termini delle *skills* necessarie per navigare con successo nel sistema corruttivo. Sezioni di analisi particolarmente interessanti riguardano

poi il nuovo – ma ancora decisivo - ruolo dei partiti e degli attori politici nelle reti di scambio occulto, la parte cruciale dei burocrati pubblici, per giungere poi al governo privato della corruzione, i cui protagonisti sono imprenditori, mediatori/faccendieri e professionisti, con il concorso di organizzazioni mafiose, spesso presenti in veste di garanti o di acquirenti di servizi, in grado di assicurare agli attori criminali impunità e protezione. In una costruzione di tanta ampiezza solo la lettura diretta del testo può consentire di cogliere adeguatamente i tanti elementi significativi, e nei brevi limiti di una recensione è inevitabile limitarsi a qualche flash di particolare interesse. Così ad esempio - per quanto riguarda i partiti - la capacità strutturante della corruzione, che permette il rafforzamento di singole correnti o di specifiche posizioni di potere a scapito di altre, le politiche di privatizzazione, liberalizzazione e deregolamentazione con la concessione a soggetti privati di attività e funzioni pubbliche, o il paradossale «effetto perverso» dell'azione giudiziaria, che finisce per sgombrare il campo dai corruttori meno avveduti - i «meno adatti» in questo singolare processo evolutivo - consentendo indirettamente il maggior successo degli attori più attrezzati.

Tornando ai problemi di ordine generale, gli autori affermano nelle prime pagine del testo che l'obiettivo è quello di «fornire un'analisi scientificamente fondata dei meccanismi che favoriscono la genesi e la stabilità delle reti di scambio tra gli attori della corruzione sistemica». Tale dichiarazione di intenti cela una sfida teorica preliminare, tanto interessante quanto in effetti impervia. Si tratta dei margini di difficile definibilità della nozione stessa di corruzione *sistemica*. Quando, e in quali condizioni, è possibile l'uso proprio di questa nozione? Quando, in altri termini, la corruzione presente in un sistema di scambi (o di relazione, o di governo) può essere considerata un elemento strutturalmente costitutivo del sistema stesso? Questo modo di impostare il problema suggerisce l'idea che esista una soglia da superare perché la corruzione *nel* sistema diventi corruzione *del* sistema. O piuttosto il problema va posto in termini «qualitativi», nel senso di supporre l'esistenza di «tipi» di corruzione - per così dire - dagli effetti più micidiali di altri, in relativa indipendenza dall'estensione di essa, quindi in termini di «qualità» di certe reti di corruzione - capaci di colpire gangli vitali del sistema - piuttosto che della «semplice» ampiezza di esse, magari significativa ma attiva in aree marginali. Si tratta dunque di un concetto di natura intensionale o piuttosto estensionale, o di un mix da precisare di entrambi gli aspetti? In ogni caso si pone appunto un doppio ordine di difficoltà, relativo, l'uno, al problema teorico della definizione, e l'altro - che attiene propriamente

alla ricerca - in ordine alla possibilità di individuare e precisare indicatori empirici adeguati. Un contributo importante in questa direzione è senz'altro fornito dagli autori quando modellizzano tre forme possibili di corruzione - *pulviscolare*, *reticolare* e *organizzata* - illustrandone con attenzione le caratteristiche tipiche e differenziali. L'analisi riesce infatti a precisare le diverse forme di equilibrio, di «regole», e di strutture di governance rilevanti nei diversi casi.

Rimane forse la possibilità che ciò riguardi la conformazione interna dei tre modelli, più di quanto non chiarisca le relazioni di ciascuno di essi con il sistema sociale e giuridico nella sua interezza, ma non vi è dubbio che, per quanto il fenomeno corruttivo si modifichi nel tempo e vada di pari passo con l'evolversi delle professionalità e del sistema istituzionale e politico, la messa a punto da parte degli autori di una vera e propria sistematizzazione dell'agire corrotto rappresenti uno strumento empiricamente utile non solo per la piena comprensione del fenomeno ma anche per il suggerimento di efficaci, e altrettanto agili, strumenti di contrasto.

Il paradigma trasparenza. Amministrazioni, informazione, democrazia

Di Enrico Carloni

(Bologna, il Mulino 2021)

Francesco Clementi

Lo studio di Enrico Carloni che qui si presenta è il frutto di un lungo percorso di studi dell'Autore in tema, prendendo le mosse infatti da un Prin dei primi anni Duemila, coordinato da Francesco Merloni, e dal conseguente volume del 2008 per i tipi Giuffré dal titolo «Trasparenza amministrativa».

Da allora l'A. ha proseguito in maniera intensa e costante a svolgere in tema le sue idee e riflessioni, soprattutto nella forma di interventi e saggi in riviste specializzate, che trovano oggi nei fatti, con questo volume, una completa sistematizzazione. Non a caso, d'altronde, il volume è corredato di un esplicativo sottotitolo che allarga e perimetra gli ambiti nei quali, quello che Carloni chiama «paradigma trasparenza», ritiene debba innanzitutto svolgersi.

In questo senso il volume, diviso in sette capitoli, cerca di affrontare il tema della trasparenza come un percorso nel quale esso diviene al tempo stesso mezzo e fine, superando tanto le criticità di un paradigma forse non sempre tale e forse mai così in sé assoluto ed ideologicamente puro come spesso taluni in questi anni lo hanno presentato, quanto così multiforme e polisemico, in quanto inevitabilmente dipendente dal contesto politico-istituzionale nel quale opera e si viene, più o meno bene, ad inverare.

Cosa ne emerge allora da questo studio? Almeno tre riflessioni importanti.

Vediamole.

In primo luogo, che la trasparenza amministrativa – perché è di questo prima e prima di tutto che si discute in questo volume – vive di caratteri e retaggi anche di tipo storico che, al loro fondo, non delineano nel nostro ordinamento, nonostante trent'anni di evoluzioni, di riflessioni, di analisi, un modello coerente ed omogeneo.

Così, nella ricostruzione dell'esperienza in tema del sistema istituzionale italiano, in particolare riguardo appunto a quella degli ultimi trent'anni, si percorrono, anche sulla scia di esperienze in tema di altri ordinamenti, tra modello continentale e modello anglosassone, strade confuse e ambivalenti, promettendo ciò che non si può mantenere e realizzando solo ciò che limitatamente può servire. In particolare questo appare assai evidente leggendo il capitolo III, soprattutto nella parte in cui l'A. viene a sottolineare le diverse «stagioni» del riformare italiano e le sue rilevanti aporie: quelle che rendono, nonostante

> «*il decennio che abbiamo alle spalle, forse davvero [sia stato] il decennio d'oro della trasparenza, capace di produrre quel cambiamento di paradigma da tempo annunciato, auspicato*»

in particolare in seguito alla c.d. legge anticorruzione (la n. 190 del 2012), quelle riforme comunque dentro

> *un'evoluzione operata per stratificazioni successive in un disegno del quale va ricercata una coerenza che non sempre è evidente*» (p. 141).

In secondo luogo, nell'ambito di una percorso di ricerche e di studi che via via con il tempo si è dilatato anche guardando a temi più ampi, Carloni sottolinea come il «diritto alla trasparenza» – dall'accesso documentale agli atti al diritto ad essere correttamente informati, così come dal diritto a conoscere alla tutela della privacy – viva, riprendendo la terminologia americana del *Freedom of Information Act*, di una «dissemination» sociale prima che giuridico-istituzionale, fatta in particolare non soltanto di diritti ma anche – a nostro avviso, soprattutto – di doveri.

Ne consegue per Carloni che la trasparenza «come modo di essere» proprio dell'Amministrazione dipenda innanzitutto da un rapporto tra cittadini ed istituzioni che viva in sé – come l'esperienza del FOIA americano appunto più volte sottolineato evidenzia – della presenza quindi

> «*di un polo esterno (i cittadini, gli interessati, la stampa. […]) che richieda, utilizzi, solleciti, la disponibilità di informazioni.*» (p. 151)

in assenza del quale, evidentemente, manca un lato della trasparenza. Da qui, allora, un dovere all'informazione che prescinda anche dal diritto all'informazione ma che nasca, si nutra e si alimenti dalla necessità ordinamentale, di tipo istituzionale insomma, di un «bisogno informati-

vo» – dal *right to know* al *need to know*, appunto -, del quale ovviamente non possono non essere protagonisti innanzitutto chi fa dell'informare e del divulgare una professione.

Di qui, il passo verso i doveri è naturalmente semplice. Ed è appunto doveroso che lo sia e che, in questa prospettiva, coinvolga innanzitutto come protagonisti quei soggetti che costituzionalmente sono parte dell'Amministrazione, cioè i funzionari e i dipendenti pubblici *tout court*: perché senza di loro ed il loro impegno in tal senso non vi è inevitabilmente alcuna forma di trasparenza, nonostante il miglior apparato normativo possibile.

In terzo luogo, nonostante le resistenze e le anomalie, con consapevolezza, Carloni affida al capitolo finale alcune riflessioni a più ampio spettro, toccando tanto il recupero di ciò che di positivo si è inverato in tutti questi anni quanto, sempre nell'ottica della trasparenza, il dibattito più recente da quello intorno al Piano nazionale di ripresa e resilienza a quello relativo all'assenza di una legislazione adeguata in tema di *lobbying* e *advocacy*. Nel fare ciò prende atto di alcuni limiti (le autorità anticorruzione non possono tutto…), di alcune storiche fragilità (il sistema amministrativo è ancora troppo incerto e claudicante nella sua conformazione), di alcune speranze tradite, sebbene – anche in un'ottica di forma di Stato, di «centro e periferia» – veda la possibilità di moltiplicare le soluzioni utili a risolvere il disegno generale anche attraverso la riscoperta dei percorsi a livello locale, proponendo «autorità della trasparenza» (sulla falsariga del britannico Information Commissioner), come – semplificando qui, ci si consenta - utili sentinelle locali sulle quali costruire una rete nazionale.

Di certo, al fondo, emerge chiaramente come la trasparenza sia lo specchio dell'amministrazione e viceversa. E dunque sia anche lo specchio dell'ordinamento in sé rispetto ai suoi cittadini: insomma, metro e misura di cittadinanza, facendoci tornare così all'inizio del volume che, citando in particolare il testo curato da Anne Peters e Andrea Bianchi, sottolineava come «la trasparenza si pone come "the New Norm", è "norma globale" oramai di diritto nel "Pantheon delle grandi virtù politiche"».

In un'epoca di attacco alla democrazia dall'esterno e di fragilità e di limiti, come è stato appunto evidenziato, dall'interno, per gli individui che vogliono essere davvero cittadini da fare, insomma, non manca.

Giovanni Falcone e Paolo Borsellino. Ostinati e contrari. La sfida della mafia nelle parole di grandi protagonisti

A cura di Nando dalla Chiesa

(Milano, Melampo 2022)

Paolo Mancini

Ha fatto bene Nando dalla Chiesa a raccogliere in un volume alcuni degli scritti di Giovanni Falcone e Paolo Borsellino. Ha fatto bene non solo perché questo volume rappresenta una dovuta celebrazione, ma soprattutto perché dal volume si può imparare molto e, confesso, io stesso ho imparato molto.

Innanzitutto ho imparato che tra Falcone e Borsellino c'era una continua e sostanziale concordanza di vedute sul fenomeno mafioso ed in particolare su alcuni punti principali: 1) sulle iniziative necessarie per combatterlo, 2) sulle deficienze dello stato, 3) sulle contraddizioni interne alla magistratura. Questi mi sembrano i tre temi che riassumono il senso dei discorsi che i due magistrati hanno tenuto in varie occasioni, lezioni a studenti, relazioni a convegni, e che appunto Nando dalla Chiesa ha riunito in un volume con una sua accorata introduzione.

Comincerò a discutere il libro partendo dalla concordanza di vedute tra i due magistrati: questa concordanza è qualcosa di sorprendente. Non so se i due si scambiassero informazioni e suggerimenti su cosa dire e cosa non dire, ma leggendo il loro singoli testi si potrebbe facilmente sbagliare su chi dei due ne sia l'autore dal momento che l'interpretazione e il giudizio che si dà su quanto discusso è assolutamente concorde. Forse proprio per questo la loro fine è stata la stessa. Erano nemici allo stesso modo dei mafiosi.

Non è un caso che tutti e due, più volte, nei loro scritti, ricordino il ben noto rapporto Franchetti su «Le condizioni politiche ed amministrative della Sicilia»: lì si ritrovano a distanza di decenni, dicono Falcone e Borsellino, molte delle cause dello sviluppo del fenomeno mafioso. E questa rivista, «Etica pubblica. Studi su legalità e partecipazione» al rapporto Franchetti ha dedicato in uno dei suoi primi numeri una sezione speciale con saggi di Loreto Di Nucci, Nando dalla Chiesa e Christina Jerne.

Dicevo che ho imparato molto dalla lettura di questo volume, ho imparato, ad esempio, o meglio ho capito bene, che cosa è la mafia. Infatti, in molte parti questo è un saggio sociologico sulla mafia. Il volume potrebbe essere stato scritto da un sociologo e non da due magistrati. Quando infatti i due parlano dei modi di combattere la mafia, essi partono sempre da un'analisi dettagliata del cosa essa sia. In altre parole, per combatterla occorre conoscerla e Falcone e Borsellino dimostrano in più parte di conoscerla a fondo. Di conoscere i suoi funzionamenti e i suoi linguaggi che spesso, invece sfuggono, a tanti altri magistrati. In più saggi i due si soffermano sul significato della parola stessa «mafia» e quindi sull'essenza della mafia siciliana in confronto ad altre «mafie», sia italiane che straniere.

Per combattere la mafia siciliana è dunque necessario conoscerla, ma è anche necessario un insieme di azioni, preventive e repressive, che lo stato italiano non ha mai voluto mettere in campo. Questa è la loro critica ai governi italiani. Una critica fortificata anche dal riferimento a nomi, come quelli di alcuni rappresentanti dei governi locali, vedi Salvo Lima o Vito Ciancimino. La mafia, si è sviluppata, dicono Falcone e Borsellino, perché c'è stata una diffusa e forse anche consapevole, tendenza a sottovalutarla da parte di tanti organi dello stato, compresa la magistratura. Come già si leggeva nel rapporto Franchetti. La mafia si è sviluppata, e forse questa è la causa prima del suo successo, perché è mancata, nel corso dei secoli, una sufficiente fiducia nello stato e nelle sue istituzioni. Fiducia nel suo operare al di fuori di vincoli particolaristici, ma anche mancata fiducia nel suo ovviare alle condizioni di povertà e disuguaglianza così tanto diffuse in Sicilia. Dice Borsellino: «la forza della mafia si basa soprattutto sulla capacità di offrire servigi che lo Stato non riesce a dare».

Non c'è dubbio che la parte più dolente e più critica dei saggi raccolti da Nando dalla Chiesa, stia nella discussione a proposito della magistratura stessa. Due i punti critici più volte toccati in questa raccolta: innanzitutto i due mettono in evidenza come gran parte della magistratura non abbia gli strumenti conoscitivi per combattere la mafia. Non si fanno molti nomi a questo proposito, ma emerge con forza la necessità che a combattere queste organizzazioni siano giudici competenti e preparati, cosa che, viene detto, sembra invece mancare. In una parte, peraltro, divertente di un suo intervento, Falcone fa riferimento alla cosiddetta «Regola di Frank Coppola». Il noto mafioso al magistrato che gli chiedeva cosa era la mafia, rispondeva «Signor giudice, tre magistrati vorrebbero oggi diventare procuratore della Repubblica. Uno è intelligentissimo, il secondo gode dell'appoggio dei partiti di governo, il terzo è un cretino,

ma proprio lui otterrà il posto. Questa è la mafia». Sulla questione della preparazione professionale della magistratura a proposito della mafia fa importanti riferimenti anche Nando dalla Chiesa nella sua introduzione.

L'aspetto che più colpisce riguarda però le divisioni interne alla magistratura stessa. Divisioni spesso espresse con linguaggio «curiale» e, appunto, «giuridico» che rimandano alle esperienze stesse che i due magistrati, ed in modo particolare Falcone, hanno attraversato, ma anche alle errate valutazioni che in più occasioni la magistratura stessa ha avanzato.

Insomma, questo è un volume «dovuto», ma anche un volume utile per capire meglio un fenomeno che ha rallentato lo sviluppo del Sud e non solo del Sud come dicono in più occasioni Falcone e Borsellino.

ETICA PUBBLICA
STUDI SU LEGALITÀ E PARTECIPAZIONE

Note e commenti

a cura di Benedetto Ponti

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

Antonio Grizzuti

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 website[2] 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 1049/2001[4] 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 97/2016[5]. 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, eight 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.

Request for a detailed report of a Eurogroup/Euro Summit

The ESM is an intergovernmental organization located in Luxemburg 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 document[7] 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 meeting[9] 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 one[10] 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 one[11] 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 Union[12]. Moreover, according to Eurogroup's Working methods[13], 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 Summits[14], 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 report[15] published in 2019 the anti-corruption movement Transparency Internation 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 article[16] 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 Januaty 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 article[17] 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.

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.

Note

[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.

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