AVOSETTA ANNUAL MEETING:
"FREE ACCESS TO ENVIRONMENTAL INFORMATION"

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NATIONAL REPORT: ITALY

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Question 1: ***Constitutional frame, constitutionally guaranteed right of access to (environmental) information? Access to information as a fundamental (democratic) right?***

The right of access to environmental information is not directly recognized a "constitutionally guaranteed right" in the Italian legal order.

Until a few years ago, also the general right of access to information held by the public administration (administrative information), which is disciplined by Law (L.) 241/1990, was not held as a "constitutionally guaranteed right". However, the amendments made by L. 15/2005 to L. 241/1990 brought relevant changes in the discipline of the general right of access to information held by the public administration. Nowadays, pursuant to article 22 (2) of L. 214/1990,the general right of access to information held by the public administration constitutes a "constitutionally guaranteed right", guaranteed by Article 117 (2)(m) of the Italian Constitution. According to such a provision, the right of access represents a general principle relating to the public administration's activity and must be guaranteed by the State for the fulfillment of the civil and social rights of everyone.

As far as the discipline on access to environmental information is concerned, no specific reference or legal basis can be found in the Italian Constitution. The right of access to environmental information is disciplined by Legislative Decree (L.D.) 195/2005, which implemented in the Italian legal order Directive 2003/4. The Italian legislation transposes the EU Directive with no gold-plating and, generally speaking, does not contain any peculiar element of differentiation with respect to the former. The same was also true, in fact, of the now repealed Directive Legislative Decree 39/97, which had previously implemented the original Directive 90/313 on the right of access to environmental information.

Question 2: Other (national) legal acts providing access to information held by public authorities. Relations with laws transposing Dir 2003/98, on the re-use of public sector information

In the last few years, partly as a national initiative and partly following the adoption of relevant legal acts at EU level, a few legal acts concerning the matter of access to information held by public authorities have been adopted by the Italian legislator.

Originally, the matter concerning the re-use of public sector information was regulated by the Italian legislator by means of Legislative Decree 195/2005, which firstly

implemented the provisions of Directive 2003/98. However, such a national regulation did not recognize to a full extent the concept of "open-data", insofar it simply regulated the access to all data held by the public administration, but did not place a positive obligation on the latter to disclose all the data in its possession, possibly in electronic form, leaving instead an ample margin of discretion to each concerned public entity. In this sense, it may be argued that it was not fully in compliance with the relevant European legislation.

Such a situation has changed in recent times, thanks to the adoption of L.D. 33/2013, which has dictated a fully new and comprehensive discipline of the obligations regarding the publicity, transparency and diffusion of information held by the public administration. In particular, Article 1 of L.D. 33/2013 identifies the principle of transparency as the fundamental pillar upon which such a piece of legislation is based; in such a context, transparency means full accessibility of all the information held by the public administration, not only with regard to acts of the public administration or to documents held by the public administration, but extending to all information regarding its organization and its activities.

Article 2 of L.D. 33/2013 refers to the duty of the public administration to disclosein electronic formall the information regarding their organization and activities ("duty of publication"),through their institutional websites. Such a duty is matched by thecorresponding right of anyoneto have direct and immediate access to the information contained in such websites, without the need of any authentication and/or identification.Moreover, Article 3 prescribes that all the documents, information and data subject to the duty of publication are to be considered public data; from this qualification stems the general right (of anyone) to use and re-use them.

Finally, Article 5 contains the so-called "right of civic access"; according to such a provision, from the duty of publication imposed upon the public administration derives the right of anyone to ask for access all the documents, information and data subject to the duty of publication (without the need to show a specific interest) in casethey have not been duly published by the relevant public administration. Such a "right of civic access" cannot be subject to any limitation, and the public administration has the duty to make available the relevant information for free, within 30 days from the request. In case such an information is not made available within such a deadline, the requesting person has the right to file a compliant to the competent branch of the regional administrative court (*Tribunal AmministrativoRegionale* – TAR).

Finally, it should be mentioned a recent decision of the supreme administrative court (*Consiglio di Stato*) (*Consiglio di Stato*, VI, No. 5515/2013) has clarified the respective scope of application of the traditional right of access to information, disciplined by L. 241/1990, for which normally the requesting person has (still) to show a specific interest, as opposed to the new right of "civic access", which applies with respect to information falling under the compulsory duty of publication placed upon the public administration, for which no specific interest needs to be shown.

Question 3: ***National legal situation before Dir 90/313/EC: has the EC/EU legislation had a major impact on the national law on access to information?***

It should be recalled here that Directive 90/313 was implemented in the Italian legal order with a considerable delay, by means of L.D. 39/97. The reason for such a delay was mainly due to the fact that the already mentioned Italian legislation which regulates the general right of access to information, namely L. 241/1990 makes the right of access to information subject to the need to show a specific interest by the requesting person. For several years, the Italian legislator tried to resist to the novelty brought by Directive 90/313, which introduced the right of access to environmental information with no need to show a specific interest. However, as already mentioned, L.D. 39/97 was finally passed in 1997, bringing the Italian legislation in compliance with the EU provisions.In general terms, therefore, it may be said that the introduction of a general right of access to information, not being subject to the need to show a specific interest by the applicant, had a major, although delayed, impact on Italian law, which however did not extend to other sectors, where the general principle for access to information remained related to the need to show a specific interest. Incidentally, however, it should be mentioned that when Directive 90/313 was updated and substituted by Directive 2003/4, the Italian legislator implemented such a new legislation in a much faster and straightforward way, by means of L.D. 195/2005.

Before the adoption of the above mentioned provisions, there was already in the Italian legal order an "embryonic" provision dealing with the right of access to environmental information. This isArticle 14 of L. 349/86, contained in the national act which firstly established the Ministry for the Environment in Italy. Such a provision introduced (for every citizen) a general right of access to environmental information held by public authorities, well beforethe adoption ofthe legislation regulating the general right of access to information, namely L. 241/1990. However, at a closer scrutiny, such a provision refers to the "right of access to information on the state of the environment", rather than to the more general "right of access to environmental information". Moreover, such a provision does not specify whether or not the requesting person has to show a specific interest or not. In general terms, the interpretation of such a right of access has always been interpreted in a quite restrictive way by the public administration. For all these reasons, the provision contained in Article 14 of L. 349/86 has been, in fact, rarely invoked and applied through the years and has become obsolete, despite not having been repealed so far.

Question 4: ***Statistical information about the use…Difficulties of the administration handling the number and/or the scope of applications.***

It was not possible to trace anygeneral and regular statistical information about the use of access to environmental information in Italy, despite the existence of a general duty to make available the information on the use of the right to access to environmental information, which is placed upon the Ministry for the Environment by Article 10 of L.D. 195/2005, which has implemented Directive 2003/4 In Italy. The absence of general statistical information about the use of the access to environmental information may be due to the fact that, beside the general competence of the Ministry for the Environment in environmental matters, environmental information is very dispersed among the 20 Regions, the over 100 Provinces and the over 8000 Municipalities existing in Italy. In principle, the right of access is regulated by the relevant national

legislation adopted at State level, although the practicalities regarding the exercise of such a right, with respect, for instance, to specific modalities for filing the request or the amount of the costs, may be decided with a certain flexibility by each public authority; in broad terms, however, it may said that costs for access to information aregenerally quite low in Italy.

Question 5: *Significant national law and jurisprudence on the definition of "environmental information" (Article 2para 1 Dir 2003/4/EC)*

The definition of environmental information is contained in Article 2(1) of L.D. 195/2005, which implemented Article 2(1) of Directive 2003/4 without any significant change.
Among the case law dealing with the interpretation of such a definition may be mentioned Decision No. 939/2000 of the *Consiglio di Stato*, which has focused in particular on the information regarding activities which may affect or are likely to effect the elements of the environment as a relevant criterion to decide which administrative acts may be falling under the scope of the environmental information concept.

Question 6:*Significant national law and jurisprudence on determining the access right holder ("without having to state an interest", Article 3 para 1 Dir 2003/4/EC)*

Article 3(1) of L.D. 195/2005 on the right of access without having to state an interest was implemented Article 3(1) of Directive 2003/4 without any significant change. The relevant Italian case law on the access to information without having to prove an interest generally confirms a very broad interpretation of this provision, according to which the requested person does not have to state an interest (*Consiglio di Stato*, VI, No. 3329/2012). On the same line of reasoning the Regional Administrative Court of Calabria has held that the interest to have access to environmental information must be considered to be in *re ipsa* for all human beings or any other entity representing them (*TAR Calabria*, Catanzaro, I, No. 1231/2011).
The few cases where the administrative courts have upheld refusals to provide the requested information regarded situations where the request was manifestly unreasonable or formulated in too general a manner (*Consiglio di Stato*, IV, No. 2557/2014).

Question 7: *Significant national law and jurisprudence on the realm and obligations of private persons as defined by Article 2 . 2 nº b and c of the Directive. (see ECJ 279/11 (Fish Legal)*

Article 2(2) (b) and (c) of Directive 2003/4 have been implemented in Italy by a single paragraph, namely Article 2(1) (b) of L.D. 195/2005, without any substantial modification.
In a recent case (*TAR Lazio*, Roma, III ter, No. 1153/2013), regarding a request of information for the assessment of possible risks to health caused by electromagnetic emissions deriving from the wi-fi connection available on high speed trains, the *TAR Lazio* has stated that, in case of public services provided by a private operator, which in the case at stake was a private railway operator (NTV), the relevant criterion to be used in order to determine the applicability or not of the provision on right of access to

environmental information is not represented by the legal nature of the entity in question, but rather by the nature of the relevant activities performed by such an operator. By applying such a criterion, in the case at stake, the concerned administrative court has surprisingly held that the railway operator NTV was not to be considered as an entity subject to the duty of providing environmental information, pursuant to L.D. 195/2005 implemented Directive 2003/4.

Question 8: National law and jurisprudence on the public authorities to be addressed ("information held by or for them") (Article 3 para 1 Dir 2003/4/EC)

Article 3(1) of Directive 2003/4 has been implemented by Article 3(1) of L.D. 195/2005. The only difference between the Italian provision and the Directive refers to the fact that the Italian norm does not contain a specific reference to the environmental information holder. Conversely the Directive specifically refers to environmental information "held by or for" public authorities. In this sense the Italian provision seems to be more restrictive, although the difference might be tempered by a contextual interpretation which takes into account the definitions of "information held by public authority" and of "information held for public authority" contained in Article 2(3) and 2(4) of the Directive as implemented by Article 2(c) of L.D. 195/2005.
To this respect, the *Consiglio di Stato* has restated that the request of information must be filed to the public authority which holds it, irrespective of whether the information has been directly produced by such an authority or received from elsewhere (*Consiglio di Stato*, V, 6494/2008). In a very interesting case, *TAR Lazio* has declared unlawful the refusal of the public research institute Enea to provide access to information concerning the air pollution emissions, which was based on the circumstances that such information were held by Enea "for a public authority". In the case at stake, the relevant public authority was the Italian Ministry for the Environment, which had commissionedEnea a specific research on air pollution emissions. In such a case, in particular, the administrative Court held that Enea could not invoke the applicationof the confidentiality of the commercial or industrial information, which is an exception available only to private entities and not to public authorities for which a specific research has been performed (*TAR Lazio*, Roma III ter, No. 5272/2006).

Question 9: Significant national law and jurisprudence on practices on access conditions (terms, "practical arrangements" (see Article3 paras 3 – 5 Dir 2003/4/EC)

Article 3(3) of Directive 2003/4 has been implemented by Article 5(1) of L.D. 195/2005 with no relevant modification.
Most of the relevant case law has been dealing with the determination of whether the request is formulated into general a manner or not. In this sense, Italian jurisprudence generally allows requests formulated in general terms, provided that there is a clear connection with the state of the elements of the environment (*TAR Lombardia*, Milano, I, No. 1970/2004). On the same line of reasoning, an administrative court has held that from a generic request of information on the state of the environment in a certain area derives a specific duty of the public authority to which to request is addressed to get all the relevant environmental information and transfer them to the applicant (*TAR Lombardia*, Brescia, I, No. 2229/2009).

Question 10: Law and practices/jurisprudence on charges for access (copying? administrative time?)

Article 5 of Directive 2003/4 on charges for access environmental information has been implemented in the Italian legal order by Article 6 of L.D. 195/2005.
The Italian legislation, likewise the EU Directive, states that examination *in situ*of the information requested shall be free of charge. However, with regard to the charge that the public authority may impose on the applicant for supplying environmental information, there is an interesting difference between the wording of the Directive and the one contained in the Italian legislation. In fact, while the Directive states in general terms that "such charge shell not exceed a reasonable amount", the Italian legislation specifies that such a charge must be "determined on the basis on the basic cost of the service". This means, in other words, that the charge applied by the public authority must be related to the cost incurred by the public authority to make the environmental information available.
Moreover, the Italian legislation foresees that the charges levied by the public authorities must be made public to applicants in advance, in line with the prescription of the EU Directive. The specific amount of the charges is to be determined autonomously by each public authority. In general terms, however, it may be said that the charges normally levied by public authorities are quite low. Therefore, this issue has not triggered any relevant case-law in Italy.

Question 11: Do any public authorities claim copyright in the material supplied, and impose conditions relating to use of information under copyright law (such as due acknowledgement and user fees in case of re-publication)?

Under Italian legislation, public authorities cannot claim any copyright in the material supplied. Quite on the contrary, for all information subject to the duty of publication under Article 2 of L.D. 33/2013 mentioned above, Article 3 specifically prescribes that all the documents, information and data subject to such a duty of publication are to be considered "public data". With respect to such data,there is a general right (of anyone) to use and re-use them and therefore no copyright may be asserted upon them.

Question 12: National law and jurisprudence on the role of affected third parties in access procedures esp. concerning trade secrets and personal data (designation of trade secrets, consultation prior to release of information, etc)

The role of affected third parties in access procedures is not specifically regulated by L.D. 195/2005 on access to environmental information. Therefore, one has to refer to the provisions of Article 22(1) (c) and Article 25 of Law 241/1990, which regulate the right of third parties. In general terms, such provision determines that third parties who may be affected by a request of access to information must be duly informed in order to enable them to participate to the administrative proceedings (Consiglio di Stato, VI, No. 5060/2010).

Question 13: Significant national law and jurisprudence on exceptions (Article 4 Dir 2003/4/EC).More specifically: (a) Confidentiality of commercial or industrial information; (b) Confidentiality of the proceedings of public authorities / internal communications /(c) Approach to the disclosure of:"raw data'), etc.

Article 4 of Directive 2003/4 has been implemented in Italy by Article 5 of L.D. 195/2005, without any relevant modification.
With respect, in particular, to the exception regarding the confidentiality of commercial or industrial information, a case decided by the *Consiglio di Stato* (*Consiglio di Stato*, VI, No. 1699/2007) deserves a particular mention. In such a circumstance, the main Italian energy company, Enel, challenged before the Supreme Administrative Court the refusal of the Ministry of the Environment to disclose some information contained in the national plan (National Allocation Plan, NAP) foreseen by EU Directive 2003/87 establishing the EU ETS (Emission Trading Scheme). The *Consiglio di Stato* found that, in such a case, the Ministry could not oppose to Enel the exception related to the confidentiality of commercial or industrial information, in so far such matter did not regard the process and production methods of the applicant's competitors and therefore could not negatively affect competition. As a consequence, in such a case, the general interest related to the public access to environmental information should prevail.

Question 14: Judicial control of access-decisions (a) Have specialised administrative appeal bodies (information officer etc) been set up? How do they work? Are their opinions respected?;(b) Court review: "in-camera"-control? Standing of parties affected by decisions denying or granting access?

Under the relevant Italian legislation on access to environmental information no specialized administrative appeal body has been set up.
However, a specialized administrative appeal body is foreseen by Article 27 of Law 241/1990, as amended by L. 15/2005. Such an appeal body consists in the so-called Commission on access to administrative information (*Commissione per l'accessoaidocumentiamministrativi*), which plays the role of an Ombudsman with respect to the acts and activities belonging to the competence of the central State, as opposed to the local public authorities (Regions, Provinces and Municipalities), which have their own Ombudsman entities. Anyone who has been denied access to administrative information has the right to appeal the above mentioned Commission. The possibility of such an administrative review does not affect the right of the applicant to judicial review before administrative courts.

Question 15: How do states fulfill the duty to make information actively available?

Article 8 (in general) and Article 10 (more specifically) of L.D. 195/2005 place a duty on public authoritiesto make environmental information actively available.
In order to do so, public authorities should make information available preferably in electronic form, in connection with the provisions of L.D. 82/2005, as amended by L.D. 195/2005, the so-called Digital Administration Code (*Codicedell'amministrazionedigitale*).
Moreover, as mentioned above, the duty to make information actively available is reinforced by the norms of L.D. 33/2013, which introduced a very broad duty of the public administration to disclose in electronic form all the information regarding their organization and activities ("duty of publication").