

OPEN GOVERNMENT DATA: A CITIZEN'S RIGHT OR A CONCESSION OF PUBLIC AUTHORITIES?

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In this paper we present a necessarily brief overview of the legal and regulatory aspects of Open Government Data in Italy. The thesis of the article is that in Italy some regulatory issues and a still inadequate culture do not allow this innovation to fully develop its potential. Despite those critical elements, in the last few years a growing number of local governments have opened up their public data and published them on the web, allowing users to reuse them for broad purposes. In this regard, the paper considers the example of the strategy of opening up public sector information of the Autonomous Province of Trento.

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1 Introduction

While performing their official duties and service to the community, Governments and agencies constantly produce and collect data and documents, in order to ensure that citizens have complied with the law and to prove they have respected it themselves (Morando, 2012, p. 13). They have always ruled that way, even before the pervasive impacts of the digital revolution on society, economics and politics. In this period of economic and financial crisis, Governments are under unprecedented pressure to achieve more efficiency in their administrative action: with fewer resources, people expect them to do more and better, which represents a hard challenge. There is also a growing distance between citizens and the institutions which makes it more difficult for them to fulfil their institutional tasks (Bentivegna, 2006, p. 169). This is what British sociologist Giddens defines as the paradox of democracy: «*[o]n the one hand, democracy is spreading over the world [...]. Yet in mature democracies, which the rest of the world is supposed to be copying, there is widespread disillusionment with democratic processes*»¹.

Governments and agencies could partially reduce this gap and enhance their relationships with citizens if they made an effort to pursue greater transparency in their administrative action, showing citizens and stakeholders what they have done and how they have done it (European Commission, 2012). This can be accomplished with ease by opening the data and documents the public sector daily produce and collect and publishing them on the web with the assistance of the Information and Communication Technologies (ICT). An open and more transparent Government inspires more trust and gain more acceptance by the citizens, because they become more aware about its work and thus they are favourably disposed towards it. Opening Public Sector Information (PSI) is one of the essential principles of open government, a new model of governance which Governments use in order to build a new type of relationship with citizens based on openness and transparency.

In this paper we present an overview of the legal and regulatory constraints that are currently in force and which must be taken into account in the operations of opening up public data. The work is organized as follows. In Section 1 we illustrate a summary of the international scenario. Section 2 shows what are the benefits of opening up public sector information and what are the obstacles that stand in the way of the achievement of this goal. In Section 3 we describe the Italian scenario, showing its diversity in comparison to the international scene. In same section we also discuss briefly the experience of the Autonomous Province of Trento opening up its government data. Finally, in the

¹ BBC News | Reith-99 · http://news.bbc.co.uk/hi/english/static/events/reith_99/week5/week5.htm (accessed on 3rd April 2014).

conclusions we express our opinion on the state of the art of open government data in our country.

2 The international scenario

Open government had a massive spread in 2009 due to President Obama's Memorandum "Open Government Directive", an act which contains tasks and procedures that executive departments and agencies must adopt in order to create a more open and trustworthy government². In order to gain popularity and trust and to strengthen democracy, Government should be transparent, participatory and collaborative. In the Memorandum "Transparency and Open Government", President Obama declares: «*[m]y Administration is committed to creating an unprecedented level of openness in Government*»³. In that case, it is essential that users can access and reuse the data opened by Governments and agencies.

At the end of the last century, as a result of the process of computerization and digitalization that has affected the whole society, public sector information has started being available in a digital format. Digital information can be reproduced and distributed with ease, it does not decay after consumption and it can be accessed simultaneously by multiple users without them interfering with each other (Pollock, 2009, p. 5). That is the reason why public sector information has then become a huge informational resource which therefore seems right it should be properly exploited.

What are the benefits of opening PSI? First of all, it provides more administrative transparency of the Governments, whose work could be therefore more rationally evaluated by citizens, businesses and stakeholders. Aware of operating in a more transparent environment, Governments are expected to feel bigger pressure and trustworthiness towards the citizens: those incentives, in the long run, could make the Governments more efficient and more reliable. Opening up public sector information could in addition encourage a more active and conscious participation of citizens in public decision-making. If citizens are being asked to take part in such processes, they could become more lucid actors of the decision-making and no longer passive and powerless consumers of public services. In addition, PSI is the raw material for the development of economic and social value-added products and services (Morando, 2012, p. 15).

According to the Open Knowledge Foundation's definition, «*open data is data that can be freely used, reused and redistributed by anyone – subject*

² Open Government Directive | The White House - <http://www.whitehouse.gov/open/documents/open-government-directive> (accessed on 31st March 2014)

³ Transparency and Open Government | The White House - http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment (accessed on 31st March 2014)

only, at most, to the requirement to attribute and sharealike»⁴. Opening up government data does not entails opening and publishing on the web unconditionally all the data and documents that Governments and agencies have produced and collected during their institutional duties. The protection of personal data, state secrets, national security are just some of the exceptions established by the law to the government data that can be legitimately opened (cf. Section 24 of Law no. 241/1990). Nevertheless there is an enormous amount of public government data, coming from different sectors and domains, which can be opened and reused according to law, making them open government data.

In 2007 a working group met in Sebastopol (California) to confer about open government data as an essential tool for democracy: the outcome of the meeting was a set of 8 principles that have become the starting point for evaluating the level of openness of public sector information. In order to be properly open government data, data must meet the following criteria and be⁵: complete, primary, timely, accessible, machine processable, non-discriminatory, non-proprietary, and license-free.

When opening up government data, the leitmotif should be “*raw data, now!*”, a catchphrase particularly widespread among the community of open data. Raw data are data published in the exact same condition in which they are found in public archives, with no need of converting or processing them. Raw data are also not combined or aggregated with other data because such operations reduce their informational possibilities. It would be better to say “*raw open data, now and for free!*” (Morando, 2012, p. 19): open, because it should be possible to reuse the data not only technically but also legally; now, because when the interval of time between the publication of the data and the time to which they refer increases, their value on the other hand decreases, especially if they relate to dynamic phenomena; for free, because Governments and agencies should resist the temptation, flattering in times of crisis like this one, to demand the payment of a fee to the users to access the data, therefore encouraging greater opportunities for the re-use. Moreover, charging users to access to the open government data originates new costs which are related to the management of monetary transactions, which may even be more than the expected income, making it, in fact, uneconomical to open up data.

The Italian lawmakers have confirmed that it is legitimate to open up government data, provided that this is done according to the law, in particular to the discipline of personal data protection and copyright. However, the main constraint when opening up government data is the law that regulates citizens access to public documents. In the European Union the ability to access the acts of the public sector bodies is a citizen's right included in the Charter of

⁴ Open Data – An Introduction | Open Knowledge Foundation - <http://okfn.org/opendata> (accessed on 28th February 2014)

⁵ 8 Principles of Open Government Data - https://public.resource.org/8_principles.html (accessed on 1st April 2014).

Fundamental Rights of the EU and can be consequently submitted to the Court of Justice. Moreover, public sector information is considered by the Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information *«an important primary material for digital content products and services [...] Wider possibilities of re-using public sector information should inter alia allow European companies to exploit its potential and contribute to economic growth and job creation»* (recital 5). However, the Directive 2003/98/EC, which was adopted by all EU Member States, *«does not contain an obligation to allow re-use of documents. The decision whether or not to authorise re-use will remain with the Member States or the public sector body concerned»* (recital 9). In order for re-use of PSI to contribute to economic growth and social commitment, the EU decided that there was need for greater uniformity among Member States concerning the decisions whether to authorize or prohibit the re-use of PSI, *«which cannot be achieved by leaving it subject to the different rules and practices of the Member States or the public sector bodies concerned»* (recital 3 of the Directive 2013/37/EU). That's the reason why the EU issued the Directive 2013/37/EU of the European Parliament and of the Council of 26 June 2013 which established that *«Directive 2003/98/EC should therefore be amended to lay down a clear obligation for Member States to make all documents re-usable unless access is restricted or excluded under national rules on access to documents»* (recital 8).

With its directives the European Union has therefore decided to promote the re-use of public sector information between Member States, for commercial or non-commercial purposes, other than the one the data were originally produced or collected for. Thus, there is a market of open government data, whose width in the European Union has not been estimated yet in a rigorous way, ranging from twenty-six billion of euro annually (Dekkers *et al.*, 2006, p. 15) to nearly seventy billion euro (Pira International, 2001, p. 16).

3 The Open Government Data as a growth factor and the obstacles to a successful outcome

Opening up public sector information is therefore an opportunity both for companies, which can take advantage of the open government data as a raw material with almost zero supply costs to develop value-added services and products, both for Governments, which may benefit of taxation on income derived from the re-use of public data for commercial purposes. The services developed by businesses and individuals from the re-use of the open government data could be supplementary to or, if better, even replace those provided by public authorities and local governments, thereby saving resources in the public sector.

The Directive 2003/98/EC states that the information and documents opened

by Governments and agencies are the raw material for the development of new sectors of activity and new districts of the intangible economy, in addition to the traditional system of production which is currently in trouble: in fact, opening up government data, says Neelie Kroes, Vice-President of the European Commission responsible for the Digital Agenda, «*provides the fuel for a future economy. That's why I say that data is the new oil for the digital age*» (European Commission, 2012). Opening government data also creates important social benefits in terms of greater transparency of Governments and public authorities and more active participation of citizens in public life.

However, opening up public sector information requires a radical cultural change to be welcomed and embraced at all levels of the central and local Governments. In the first place, the Government should change its perspective and give up considering itself the owner of public data, instead recognizing their value as common goods. In fact PSI is produced, collected and preserved thanks to resources coming from the taxation of citizens and businesses: they have, therefore, already paid for the data that now are being asked to be opened and made available to (Morando, 2012, p. 20).

The main task of Governments and local authorities is not only to open up their public data but also to encourage users to reuse them. Hence, the idea is not to provide new or improved services to citizens, but to put at their disposal the instruments to evaluate the Government's work and also to produce substitute or complementary services to those provided by the public sector bodies. Explaining the previous concept with a metaphor, rather than providing citizens with fish already caught, public authorities and local governments provide them with the tools to build fishing rods and the maps to reach the sea, in order for them to fish by themselves, while respecting certain rules to avoid that someone might take advantage of the situation and fish illegally.

As regards the obstacles to the widespread use of open government data in Italy, first of all there is the lack of a unified national policy capable of exploiting the different operations of opening government data within a unitary strategy⁶. By sharing legal and technology standards, different initiatives on opening up government data are not likely to be isolated and to waste resources. Although there is a lively debate about open government data, in Italy there are still few local governments that have enacted laws in order to regulate the publication and re-use of government data at their administrative level. Without a unified national strategy, governed and coordinated at the central level, these initiatives lack cohesion and harmony.

Moreover, the regulatory action of the legislator is often slow when it comes to legislate on technical issues, which instead change rapidly and make any

⁶ PanelPA "Open data: l'Italia s'è desta?" | Saperi PA - http://saperi.forumpa.it/sites/all/files/documents/file/panelPA/Presen-tazione_Panel_open_data.pdf (accessed on 13rd February 2014).

law on the subject quickly obsolete, thus creating a temporal asynchrony that could only be reduced with faster reaction times by the courts.

Another possible interference to an extensive development of the open government data at the national level is the probable enactment of laws of mere principle, which are not really intended to implement those principles contained in them⁷. In fact, there is an actual risk that such laws are enacted to follow a trend or just to not fall behind in comparison to other public sector bodies. It is then easily understandable why Governments and agencies often publish on the web meaningless data, data that have a limited utility in achieving the objectives of transparency, participation in public decision-making or creation of value-added services. The reasons of this conduct are, first of all, the opposition of Governments and agencies to undertake a change towards greater transparency and, on the other hand, their lack of awareness of the potential of open government data.

Opening up their data could lead public authorities and local governments to review their internal procedures in the direction of greater efficiency and effectiveness and discourage them also from taking wrong decisions in the public resources administration. Greater transparency in the work of the public sector can perhaps regain credibility and trust of citizens and companies. In order for this to happen, Governments and agencies should make available on the web those data whose publication might have the effect of encouraging them to improve themselves and they should as well agree to be judged by citizens and companies, as a signal of their intention to create an open and participated government.

The open government data that have been published so far, both in the national catalogue of open data both in the regional ones, however, do not seem to have the significance and the value to make the Governments and public institutions improve themselves. Making available on the web, in an open format, the dataset “Typical Trentino’s recipes” does not make the public sector more transparent: it simply means to allow anyone to reuse those data, even for commercial purposes, but it’s not an incentive for the Government to improve its efficiency and effectiveness in order to regain public’s trust. And so it will be until Governments and agencies, as a result of a cultural change, will not have the audacity to publish on the web their data more embarrassing, i.e. those capable of eliminating the privileges illicitly acquired and the inefficient practices of the public sector. Information is power: information accessible to everyone should then create a more democratic and just society. The publication of performance indicators or data concerning the absences of public workers of the different structures of the same public body could help citizens, companies

⁷ Open Data: dalla Basilicata un modello di Foia da esportare | LSDI (updated 2012/03/14) - <http://www.lsd.it/2012/basilicata-open-data-un-modello-da-esportare> (accessed on 3rd April 2014).

and stakeholder become more aware of the public sector's work and the comparison between offices could also act as a stimulus for quality improvement within the administration.

There still seems to be a strong aversion by public institutions to exhibiting data related to the use and management of public resources. This would be one of the the main causes for the reluctance of public sector bodies to open their public government data in our nation. Opening the doors to the society requires, in fact, the courage and the willingness to be exposed to criticism and justify choices that might be deemed wrong or controversial. For this reason there is need to affect cultural awareness, spreading the belief that the public sector data belong to the community and therefore they should be returned to the people and that opening up data for a Government means greater efficiency.

In addition, open government data could allow citizens and businesses not only to evaluate the performance of the public sector bodies more clearly, but also to take part in public decision-making more consciously, if they were asked to. Encouraging them to play a more active role in public life, public authorities and local governments could then benefit from the access to such knowledge which is widespread in the society. A more active involvement of citizens in public decision-making, however, seems unlikely to be achieved in the short term and, above all, the open government data do not seem the most appropriate tools to achieve it.

A critical factor might be that the positive effects of greater openness and more active participation could be seen, at first, only by the wealthier classes of the population, those who can connect to the Internet easily, and by those with higher culture, which enables people to perceive the positive intangible aspects. Another critical element is moreover the double meaning of transparency: on the one hand, greater transparency means greater ability to control the behaviour of public managers and employees, on the other hand, it could be likely to result in unjustified reduction of personal freedom, with the dangers that are connected to it (Di Donato, 2010, p. 26).

4 The Italian scenario

In Italy, the only legislation in Europe to have these characteristics, the citizen's right to access to documents produced by Government and agencies is subject to the existence of a direct interest of the citizen to be protected, i.e. in the event of an appeal or a judicial action (Guazzo *et al.*, 2013, p. 43). The Law no. 241/1990 states that «[n]on sono ammissibili istanze di accesso preordinate ad un controllo generalizzato dell'operato delle pubbliche amministrazioni»⁸ (Item 3 of Section 24 of Law no. 241/1990).

⁸ "Access applications made with the aim of generally monitoring the work of public authorities shall not be admissible".

Since its first appearance into the Italian legislation in 1990, the concept of transparency has then evolved. With the Legislative Decree no. 150/2009, transparency has been related to the concept of full accessibility, through the publication on institutional web sites of certain information concerning the Government's work in order to «[...] *favorire forme diffuse di controllo del rispetto dei principi di buon andamento e imparzialità*»⁹ (Item 1 of Section 11 of Legislative Decree no. 150/2009). Given that the concept of full accessibility is not compulsory and that therefore there are no sanctions if not complied with, it is not possible to constrain the behaviour of public authorities and local governments: in other words, what is explicitly denied by the Italian law is the *raison d'être* of the rules in force in most Western countries¹⁰.

Although the legislator is silent, in Italy there are a few initiatives underway of those local governments that, in increasing numbers and spontaneously, have undertaken the legal proceedings to enact laws for the publication and re-use of government data. To date, regional laws on open data have been enacted in Piedmont, Lazio, Campania, Apulia and in the Autonomous Province Trentino, while bills on the same subject are currently being considered by the local authorities in the regions of Lombardy, Umbria, Marche, Basilicata and Sicily.

According to the literature, the main consequences of opening up government data are the possibilities that they could be reused by individuals, companies, associations and other public bodies for purposes other than the ones the data were originally produced or collected for. As stated by the Directive 2003/98/EC, public sector information is the raw material for the development and the production of new value-added services that can positively stimulate the economy. This is therefore the primary reason, rather than the expected advantages in terms of transparency, for which public authorities and local governments such as the Autonomous Province of Trento decided to launch their open government data strategy. Since the development of innovation projects is supposed to enhance local competitiveness, the local government of Trentino decided to assign priorities to these projects in public spending (Giunta Provinciale, 2011, p. 90). Trentino's strategy of opening up public sector information is an example, then, of how open government data can be adopted in strategies for economic growth and the development of a region and of its competitiveness.

As a demonstration of the fact that the policy of opening up public data in Trentino has not yet had much positive impact in terms of economic growth, in the website *dati.trentino.it*, the technological platform designed to contain the open government data of the province of Trento, since its launch in March

⁹ “[...] promote widespread forms of monitoring compliance with principles of good conduct and impartiality”.

¹⁰ FOIA.IT - Iniziativa per l'adozione di un Freedom of Information Act in Italia - <http://www.foia.it> (accessed on 24th February 2014).

2013, there are currently eleven applications available, based on the re-use of those data. In order to maximize the potential benefits of open government data is therefore necessary that individuals do not miss the opportunities related to the re-use of public sector information. For this reason, the province of Trento has been making great efforts in raising awareness and training the users, organizing and running meeting with small and medium-sized enterprises, in order to make them immediately ready to accept and win the challenge of reusing PSI. In order to continuously improve its administrative action, in Trentino the local government also encourages honest feedbacks from the users of the open data catalogue of Trentino.

Conclusion

Given that central and local governments are adverse to new ideas and fearful that opening up their data might lead to the loss of privileges or to a more efficient reorganization of their tasks and procedures, for a wide diffusion of open government data may be needed a regulatory intervention by the central Government, capable of creating an harmonized environment in which the initiatives disunited on the Italian territory become more coordinated and thus their value increases. A change is therefore required: open government data should no longer be given as a concession of the public sector bodies, because they might change their mind from one moment to another, but they should be instead a right of citizens and businesses, and therefore an obligation for governments and institutions¹¹.

Given that there is no agreement on the actual size of the public sector information market, although several studies have made optimistic estimates for its future, it is perhaps still too early to judge the actual benefits of opening up government data in terms of economic and employment growth. Therefore, given that the operations of opening PSI have a rather limited cost to Governments and agencies and that, if they are performed in compliance with the laws, there are no negative consequences expected, it seems thus appropriate to open up government data and encourage the most extensive re-use of them.

Although it is difficult to predict whether or not open government data will be actually able to make Governments and public authorities more transparent, improving therefore the relationship between citizens and institutions, or if they will manage to provide a positive economic impact, it seems then necessary for an extensive spread of the model and its sustainability a regulatory intervention by the central Government, in order to compel public sector bodies to publish their data on the web in an open format, rather than leaving them free,

¹¹ Mappa delle leggi regionali in materia di Open Data (updated 2012/03/09) - <http://blog.ernestobelisario.eu/2012/03/09/mappa-delle-leggi-regionali-in-materia-di-open-data/> (accessed on 13rd March 2014)

as they are now, to open up open government data in a discretionary manner. A legislative measure designed to open and reuse public sector information not only would give a strong impulse to the widespread deployment of open government data, but also would have those positive consequences that result from operating in a unified strategy, capable of enhancing the various initiatives of opening up public data in the frame of a shared project.

Governments and agencies have, therefore, two options: they can carry on keeping their doors closed to the society or they can start to open up and exploit their information assets. Citizens, properly trained, should instead exploit the opportunities and challenges arising from the implementation of this model, assuming a critical and proactive role, always keeping in mind that the publication on the web of a balance sheet does not necessarily mean transparency. Public sector information, in the meantime, should be published: if citizens and businesses will not immediately be able to properly reuse open government data, it will be then appropriate to improve data literacy (Council on Foreign Relations, 2013, p. 2).

Few would have been able to predict that the enormous amount of data and documents that Governments and public bodies keep producing and collecting could ever become a valuable resource. From the archives of the public sector may, therefore, come out the tools to combine democracy, transparency and entrepreneurship, and to make a social contract with. As the associate justice on the Supreme Court of the United States Louis Brandeis once said «*[s]unlight is said to be the best of disinfectants*»¹².

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¹² Other people's money – Chapter V | The Louis D. Brandeis Collection · <http://www.law.louisville.edu/library/collections/brandeis/node/196> (accessed on 26th February 2014).

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