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DIRECT AND INDIRECT EUROPEANISATION OF NATIONAL ADMINISTRATIVE SYSTEMS. IMPLEMENTATION AND SPILLOVER EFFECTS OF THE ENVIRONMENTAL INFORMATION DIRECTIVES IN A COMPARATIVE PERSPECTIVE*

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Abstract

Until the 1980s, a culture of administrative secrecy prevailed in most European countries. This general approach only changed with the adoption of the first administrative procedure laws, which codified a right of access to files, albeit usually limited to the parties of an administrative procedure. At European level, a trend towards freedom of information started to evolve in the field of environmental procedure law on adoption of the two Environmental Information Directives 90/313/EEC and 2003/4/EC, of which the latter was itself a reaction to the adoption of the Aarhus Convention. This article analyses how these directives were implemented into national legislation and how this also gradually affected other areas of law. Taking examples from France, Germany and Italy, it is argued that the transposition of the Environmental Information Directives 'europeanised' these three national administrative systems not only directly, but also in other, more subtle and indirect ways.

Key words: Environmental information directives; europeanisation of national administrative systems; implementation of EU directives; spillover effects; 'no gold plating' policies; European Union.

EUROPEÏTZACIÓ DIRECTA I INDIRECTA DELS SISTEMES ADMINISTRATIUS NACIONALS. IMPLEMENTACIÓ I EFECTES INDIRECTES DE LES DIRECTIVES SOBRE INFORMACIÓ MEDIAMBIENTAL EN UNA PERSPECTIVA COMPARADA

Resum

Fins a la dècada dels anys vuitanta, una certa cultura del secret administratiu va prevaldre en la majoria dels països europeus. Aquesta realitat generalitzada tan sols es va superar amb l'adopció de les primeres lleis de procediment administratiu, les quals van establir el dret d'accés a arxius, si bé se solia limitar a les parts implicades en un procediment administratiu. En l'àmbit europeu, la tendència cap a la llibertat d'informació va començar a evolucionar en el camp de la normativa en matèria de procediment mediambiental amb l'adopció de les dues directives d'informació mediambiental 90/313/EEC i 2003/4/EC, l'última de les quals va ser una reacció a l'adopció de la Convenció Aarhus. Aquest article analitza com aquestes directives han estat implementades en les legislacions estatals i com això ha afectat gradualment altres àrees del dret. Per mitjà d'exemples a França, Alemanya i Itàlia es discuteix com la transposició de les directives d'informació mediambiental han europeïtzat aquests tres sistemes administratius estatals no tan sols de forma directa, sinó també d'una forma més subtil i indirecta.

Paraules clau: Directives comunitàries; directives mediambientals; medi ambient; europeïtzació; sistemes administratius; directives europees; efectes indirectes; 'no gold plating'; sobreregulació; Unió Europea.

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I Introduction: Culture of Administrative Secrecy as a Common Feature in Administrative Traditions Across Europe

The Swedish Freedom of the Press Act of 1766 is often cited as the world's first example guaranteeing public access to documents drawn up by government agencies. Since its main principles were included in the Constitution of 1809, freedom of information is guaranteed at constitutional level in Sweden. If, however, one looks into other administrative traditions across Europe, Sweden turns out to be merely the exception that proved the rule: instead of freedom of information, a culture of administrative secrecy prevailed until the 1980s in most European countries.[1]

In Germany for example,[2] administrative procedure was regarded as a confidential matter and access to documents was only conceded in exceptional cases. According to the principle of 'limited file publicity' (*beschränkte Aktenöffentlichkeit*), the granting of legal rights to affected parties had to be balanced with preservation of the effectiveness of official tasks and protection of the fundamental rights of third parties. It was only with adoption of the administrative procedure laws of the federal state (*Bund*) and the constituent states (*Länder*) in the 1970s that a right to access files was codified, albeit limited to the parties of an administrative procedure.[3] In Italy too, administrative activity was for a long time characterised by extensive secrecy that left little room for publicity of documents drawn up by government agencies. This changed only in 1990, when a general administrative procedure law was adopted under the title 'New Provisions on Administrative Procedure and Right of Access to Files', better known as the 'Transparency Act'.[4] The law defines two possibilities for the right of access to files. First, the parties involved in an administrative procedure are entitled to access the relevant case file (article 10), and second, anyone with an immediate, concrete and current interest related to a protected legal position may claim access to administrative files and documents (article 22(1) a).[5] In the United Kingdom, a similar culture of secrecy prevailed for centuries. The Official Secrets Act of 1911, for example, contained an extensive penal provision in section 2, according to which any unauthorised publication of administrative information could lead to up to two years of imprisonment.[6] The provision continued almost unchanged until 1989, when the scope of the information protected by criminal law was limited considerably.[7] A right of access to administrative information has not yet, however, been included.[8]

1 See Galetta, Diana-Urania. 'La trasparenza, per un nuovo rapporto tra cittadino e pubblica amministrazione: un'analisi storico-evolutiva in una prospettiva di diritto comparato ed europeo'. *Rivista Italiana di Diritto Pubblico Comunitario*, Issue 5 (2016), p. 1032.

2 On this tradition of administrative secrecy in Germany more broadly Wegener, Bernhard. *Der geheime Staat. Arkantradition und Informationsfreiheit*. Göttingen: Morango, 2006.

3 For the relevant provision at federal level see section 29 of Administrative Procedure Act (Verwaltungsverfahrensgesetz – VwVfG) of 25 May 1976, in the wording last promulgated on 23 January 2003 (Federal Law Gazette I, p. 102), last amended by article 5 of the Law of 29 March 2017 (Federal Law Gazette I, p. 626). The provision comprises only files related to the actual administrative procedure and is limited to the time frame between initiation and closure of the procedure. In addition, section 29(2) VwVfG entails a comprehensive list of exceptions, and according to section 30 VwVfG participants are entitled to require that matters of a confidential nature, especially those relating to their private lives and business, shall not be revealed by the authority without their permission. Lastly, the right of access to files is granted only as part of the proceedings, i.e. isolated judicial review is not possible. Further provisions regarding publicity in the German administrative procedure law exist for planning procedures as well as for investment authorisation procedures which are subject to pollution control law, in the case of the latter both with regard to the documents to be publicly available as well as with regard to the right of access to files and in each case independent of participation in the procedure. Prior to 1992 access rights also existed for land use plans and emission cadasters, where proof of a legitimate interest was dispensable.

4 Law no. 241/90 of 7 August 1990 (Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi), Gazzetta Ufficiale, 18 August 1990, no. 192.

5 The application has to be limited to specific documents, since general control of the authority in question is excluded, see article 24(3). Cf. Clarich, Marcello. *Manuale di diritto amministrativo*. Bologna: Il Mulino, 2015, p. 138-139.

6 Official Secrets Act 1911, chapter 28, 22 August 1911.

7 Cf. Official Secrets Act 1989 of 11 May 1989, chapter 6. The addressees of the provision were, however, significantly expanded: in addition to public officials, journalists and editors receiving and publishing information were now also included.

8 With regard to environmental information, partial exceptions existed since the 1970s. One such example were environmental information registers, which could be accessed without claiming any special interest. The situation changed once more with the Local Government Act 1985 (chapter 51, 16 July 1985), which extended existing access rights to information in the field of municipal self-administration by granting access rights to protocols, agendas, and background reports.

II European Impulses Towards Freedom of Information: The Two Environmental Information Directives

First impulses that would slowly change this administrative culture of secrecy towards freedom of information emanated from new European policies in the 1980s, in particular the (first) European Community Action Programme on the Environment of 1987, which aimed at increasing the level of acceptance of environmental measures amongst the general population by promoting the commitment of individuals and non-governmental organisations.[9] This was followed by a resolution on the importance of concentrating Community action in certain areas, in particular better access to information on the environment.[10] Similarly, the European Parliament had also stressed that 'access to information for all must be made possible by a specific Community programme'.[11]

A first major attempt in that direction was the adoption of the first Environmental Information Directive 90/313/EEC in 1990.[12] Convinced that 'access to information on the environment held by public authorities will improve environmental protection',[13] Directive 90/313/EEC set forth an obligation in article 4 'to make available information relating to the environment to any natural or legal person at his request and without his having to prove an interest'. Although earlier legislation already contained partial arrangements for access to information and public participation in environmental law,[14] Directive 90/313/EEC for the first time granted domestic legal protection in cases where requests for access to environmental information were disregarded or denied by public authorities. Since the aim was not so much protection of an individual subjective right as that of the general interest, the right was designed as an everyman's right without requiring affected interests (like in Italy) or an associated administrative procedure (as in the case of Germany). In so doing, an informed public was expected to help reduce deficits in the realm of environment and provide preventive protection in order to avoid legal impairment.

A further step towards freedom of information was the European Union's ratification of the Aarhus Convention in 2005.[15] The treaty seeks to establish a link between freedom of information and participatory democracy by granting public rights regarding access to information, public participation and access to justice in governmental decision-making processes on matters concerning the environment. Its ratification as well as a report[16] (determining some shortcomings in the application of Directive 90/313/EEC in a number of Member States) published by the European Commission in the year 2000 made the adoption of a new directive necessary. New Directive 2003/4/EC[17] not only replaced its predecessor, but even went partly

9 See Blundell, David. 'The Influence of Aarhus on Domestic and EU Law: Access to Information'. Landmark Chambers, 8 February 2013. [Consulted: 25 January 2018].

10 Resolution of the Council of the European Communities and of the representatives of the Governments of the Member States, meeting within the Council of 19 October 1987 on the continuation and implementation of a European Community policy and action programme regarding the environment (1987-1992), Official Journal C 328/1, 7 December 1987.

11 Official Journal C 156/138, 15 June 1987.

12 Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment, Official Journal L 158/56, 23 June 1990.

13 Ibid., Recital 4.

14 Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, Official Journal L 175/40, 5 July 1985.

15 United Nations Economic Commission for Europe, Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), United Nations Treaty Series 2003, p. 447. The European Community signed the Convention on 25 June 1998 and ratified it on 17 February 2005. It entered into force on 30 October 2001. Cf. Von Danwitz, Thomas. 'Aarhus-Konvention: Umweltinformation, Öffentlichkeitsbeteiligung. Zugang zu den Gerichten'. *Neue Zeitschrift für Verwaltungsrecht*, 2004, p. 272. Caranta, Roberto; Gerbrandy, Anna; Müller, Bilun. *The Making of a New European Legal Culture: The Aarhus Convention*. Amsterdam: Europa Law Publishing, 2018. Oestreich, Gabriele. 'Individualrechtsschutz im Umweltrecht nach dem Inkrafttreten der Aarhus-Konvention und dem Erlass der Aarhus-Richtlinie'. *Die Verwaltung*, Volume 39 (2006), p. 29. Albanese, Fulvio. 'Il diritto di accesso agli atti e alle informazioni ambientali'. Legambiente, 2 October 2015. [Consulted: 19 February 2018].

16 Report from the Commission to the Council and the European Parliament on the experience gained in the application of Council Directive 90/313/EEC of 7 June 1990, on freedom of access to information on the environment, COM/2000/0400 final.

17 Directive 2003/4/EC of the European Parliament and the Council of 28 January 2003 on Public Access to Environmental Information and Repealing Council Directive 90/313/EEC, Official Journal 2003 L 41/26.

beyond the requirements set forth in the Aarhus Convention.[18] One could even go so far as to say that Directive 2003/4/EC not only guarantees freedom of information, but transforms it into a right of access to information.[19]

Directive 2003/4/EC ensures the right of public access to environmental information, both on request and via active dissemination. To that end, it urges the Member States 'to ensure that public authorities are required […] to make available environmental information held by or for them to any applicant at his request and without having to state an interest' (article 3(1)), but also that the 'active and systematic dissemination' of this information is ensured to the effect that it 'progressively becomes available in electronic databases which are easily accessible to the public through public telecommunication networks' (article 7(1)).[20] Additionally, Directive 2003/4/EC requires the Member States to ensure that practical arrangements are defined to guarantee that the right to access environmental information can be effectively exercised and therefore suggests the establishment of 'registers or lists of the environmental information held by public authorities […] with clear indications of where such information can be found' (article 3(5)).

Compared to its predecessor and in line with the Aarhus Convention, the legal definitions of 'environmental information' and 'public authority' in Directive 2003/4/EC have been refined and expanded. Subjectively, individuals and the public concerned, in particular environmental organisations, have been granted extensive information powers; objectively, the concept of information has been formulated quite comprehensively. In the first Environmental Information Directive 90/313/EEC, the term 'public authorities' as the addressee of the right of public access to environmental information was defined as 'public administration with responsibilities, and possessing information, relating to the environment' (article 2 sub (b)). By contrast, the new paragraph is phrased in a much broader sense, defining the term 'public authorities' irrespective of their responsibilities.[21] Moreover and corresponding with the functional understanding of 'public authority' taken in the Aarhus Convention, 'any natural or legal person performing public administrative functions under national law […] in relation to the environment' as well as those 'having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person' falling under the first two categories are included.[22] The term 'environmental information' is also formulated in a broad way and goes far beyond the conceptual content of 'environment' in the strict sense. It is normative in nature and includes administrative measures and legal acts (including plans and programmes) in the sphere of environment, but also questions of health and security.

III Direct Europeanisation and 'No Gold Plating' Policies

When analysing how these European impulses affected national administrative systems in the EU, it is important to note at the outset that quite a number of Member States pursue so-called 'no gold plating'

18 In particular, Directive 2003/4/EC defines the terms 'environmental information' and 'public authority' in a broader sense than the Aarhus Conventions, has more detailed provisions concerning the form in which information is to be made available, requires shorter deadlines for making the information available, makes stricter limitations on the operation of the exceptions, places additional duties on national authorities for collecting or disseminating information; and makes more expeditious reviews by national authorities or by courts of law available, cf. Blundell, 2013, op. cit., p. 7.

19 Pianta, Silvia. 'Il diritto di accesso alle informazioni in materia ambientale nel diritto internazionale ed europeo'. In: Dell'Antonio, Paolo; Picozza, Eugenio (eds.). *Trattato di diritto dell'ambiente. Tutele parallele norme processuali*. Padova: CEDAM, 2015, p. 1017.

20 Paragraph 2 of article 7 sets forth the minimum requirements for this dissemination obligation. It includes, *inter alia*, international, national, regional and local legislation as well as policies, plans and programmes related to the environment (a–b); data derived from the monitoring of activities affecting the environment (e); environmental impact studies and risk assessments concerning the environment (g).

21 Article 2 no. 2 sub (a) of Directive 2003/4/EC. In addition, new article 2 no. 2 includes '(b) any natural or legal person performing public administrative functions under national law […] in relation to the environment' as well as '(c) any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within (a) or (b)'.

22 Cf. article 2(2) of the Aarhus Convention: "'Public authority" means: (a) Government at national, regional and other level; (b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment; (c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above […]'.

policies, i.e. political guidelines asking to implement EU directives not beyond the minimum necessary to comply.[23] In particular the United Kingdom and Germany, but also the Netherlands, are regularly mentioned as examples where such policies exist. The British 'Transposition Guidance' states for example that the guiding principle for the implementation of EU directives is to 'ensure that (save in exceptional circumstances) the UK does not go beyond the minimum requirements of the measure which is being transposed'.[24] Early implementation shall also be avoided.[25] In Germany, Chancellor *Angela Merkel* said in one of her first government declarations: 'We resolved to implement EU directives in principle only one to one'.[26] The coalition agreements of 2009 and 2013 contain similar passages, according to which 'implementation beyond the EU requirements or a link with other legal measures' should in principle be avoided.[27] And in the latest agreement of 7 February 2018, '1:1 implementation of EU directives' is stated as a guiding principle for the new government and mentioned several times in the text itself.[28] Similar guidelines exist in other Member States of the European Union, which raises the question of how such policies affect transposition of EU directives.[29] Since a thorough implementation analysis of the two Environmental Directives in all Member States is beyond the scope of this article, examples from Germany, France and Italy might suffice here to illustrate how 'no gold plating' policies can lead to a very restrictive transposition, and at times even to non-compliance with EU law.

In light of the long tradition of 'limited file publicity', it comes as no surprise that the implementation of the Environmental Information Directive into German national legislation has been very modest. Already in 1998, the European Court of Justice (ECJ) branded Germany's restrictive interpretation of the notion of 'environmental information' as non-compliant with EU law.[30] In the case before the court, Wilhelm Mecklenburg sought to obtain a copy of the statement of views submitted by the competent countryside protection authority in connection with planning approval for the construction of a road section. The request was rejected on the grounds that the authority's statement of views was not 'information relating to the environment' within the meaning of article 2(a) of Directive 90/313/EEC, since it was merely an assessment of information already available to him and because, in any event, the development consent procedure must be regarded as 'preliminary investigation proceedings' and as such, the criteria for refusal set out in article 3(2), third indent would apply.[31] However, according to the then applicable version of section 7(1) no. 2 of the German national law implementing the directive, the *Umweltinformationsgesetz* (UIG), no right of access to files existed 'while the administrative procedure was ongoing'. In this context, the ECJ stressed that 'a statement of views given by a countryside protection authority in development consent proceedings' may be covered by the right of access to information 'if that statement is capable of influencing

23 A coherent definition of this phenomenon is yet to be established. The most popular definition is probably the one by the British government: 'Gold-plating is when implementation goes beyond the minimum necessary to comply with a Directive, by: extending the scope, adding in some way to the substantive requirement, or substituting wider UK legal terms for those used in the Directive; or not taking full advantage of any derogations which keep requirements to a minimum (e.g. for certain scales of operation, or specific activities); or retaining pre-existing UK standards where they are higher than those required by the Directive; or providing sanctions, enforcement mechanisms and matters suchs as burden of proof which are not aligned with the principles of good regulation; or implementing early, before the date given in the Directive'. *Transposition guidance: how to implement European Directives effectively*. London: UK Government, February 2018, p. 8.

24 Ibid., p. 3.

25 Ibid., p. 13.

26 Regierungserklärung von Bundeskanzlerin Dr. Angela Merkel vor dem Deutschen Bundestag am 30. November 2005 in Berlin. [Consulted: 13 August 2017].

27 Koalitionsvertrag zwischen CDU, CSU und FDP, 17. Legislaturperiode, Berlin, 26 October 2009. [Consulted: 13 August 2017]. Koalitionsvertrag zwischen CDU, CSU und SPD, 18. Legislaturperiode, Berlin, 14 December 2013, p. 15. [Consulted: 13 August 2017].

28 Koalitionsvertrag zwischen CDU, CSU und SPD. Berlin, 7 February 2018, p. 13, 57, 64, 137. [Consulted: 13 February 2018].

29 On this question more broadly Socher, Johannes. 'Annäherung nationaler Verwaltungssysteme trotz 'no gold plating'-Politiken?'. In: Fraenkel-Haeberle, Cristina; Galetta, Diana-Urania; Sommermann, Karl-Peter (eds.). *Europäisierung und Internationalisierung der nationalen Verwaltungen im Vergleich*. Berlin: Duncker & Humblot, 2017, p. 67.

30 ECJ, Judgement of 17 June 1998, Wilhelm Mecklenburg v Kreis Pinneberg – Der Landrat, Case 321/96, ECLI:EU:C:1998:300.

31 Ibid., paras. 9-10.

the outcome of those proceedings as regards interests pertaining to the protection of the environment'.[32] The court furthermore stated that the term 'preliminary investigation proceedings' used in article 3(2) of the Environmental Information Directive has to be understood in a stricter sense, encompassing only the proceeding that 'immediately precedes a contentious or quasi-contentious procedure'.[33] Subsequently, the European Commission initiated infringement proceedings with regard to the proper implementation of the Environmental Information Directive in Germany; and this time the ECJ explicitly asserted non-compliance of the above-mentioned provision, refusing the right to access during ongoing administrative procedures.[34]

Germany's restrictive approach towards implementation of the Environmental Information Directives can also be observed when looking at the interpretation of another key term of the directives, i.e. the notion of 'public authorities'. According to the official reasoning of the first UIG of 1994, only authorities whose main task is environmental protection should be obliged to grant access to environmental information.[35] It took twenty years and two judgements of the ECJ to expand the addressed authorities in compliance with EU law:[36] as of November 2014, section 2(1) of the UIG was finally amended in accordance with the directives and now only 'the supreme federal authorities, so far and as long as they operate within the scope of legislation', continue to be exempt from the obligation of granting access to environmental information.[37] It is the reasoning for this (late) compliance that is particularly interesting. The main objective of the draft law was 'complete implementation one to one' of article 2 of the Environmental Information Directive,[38] or in other words: not to broaden the scope of the addressed authorities beyond the absolute minimum required by the directive.

Another noteworthy example with regard to questions of direct europeanisation through implementation of the Environmental Information Directives is the case of France, where implementation of Directive 90/313/EEC was also insufficient, albeit for different reasons. Here, the French legislator considered the already existing Law no. 78-753 of 17 July 1978 as even broader in scope than required by Directive 90/313/EEC and thus saw no need for amending the existing provisions.[39] The European Commission however took the view that the French provisions actually hindered the objectives of the directive and initiated infringement proceedings. In its subsequent judgement of 26 June 2003, the ECJ accepted the Commission's complaints almost entirely.[40] First, France had failed to fulfil its obligation under the directive by restricting the requirement to supply information on 'administrative documents' within the meaning of Law no. 78-753. Second, this law provided for an additional exception ('secrets protected by legislation'), which was not included in the directive and risked to undermine its scope. Third, the national legislation failed to include a provision under which environmental information is to be supplied. Fourth, France also failed to fulfil its obligations under the directive by not introducing, in cases of implied refusal of a request for environmental

32 Ibid., no. 1 of the operative part.

33 Ibid., no. 2 of the operative part.

34 ECJ, Judgement of 9 September 1999, Commission of the European Communities v Federal Republic of Germany, Case C-217/97, ECLI:EU:C:1999:395; cf. also ECJ, Judgement of 12 June 2003, Eva Glawischnig v. Bundesminister für soziale Sicherheit und Generationen, Case C-316/01, ECLI:EU:C:2003:343.

35 Bundestag printed paper 12/7138, p. 11. An amendment introduced during the deliberations, which sought to involve 'every authority which carries out tasks of environmental protection or other tasks by virtue of environmental protection legislation', was rejected in the Bundestag, see Bundestag printed paper 13/4108, p. 106. In practice, the narrow wording was often adduced as justifying a correspondingly narrow interpretation. The German Federal Ministry of Transport for example was initially of the opinion that the UIG did not apply to road construction authorities (circular of 28 August 1994, as cited in Röger, Ralf. 'Regelungsmöglichkeiten und -pflichten der Landesgesetzgeber nach Inkrafttreten des Umweltinformationsgesetzes des Bundes'. *Natur und Recht*, 1995, p. 181. This view was rejected by the Commission, which deemed it non compliant with the directive (Official Journal, Case C 6/23, 9 January 1995), and was eventually abandoned.

36 ECJ, Judgement of 14 February 2012, Flachglas Torgau v Federal Republic of Germany, Case C-204/09, ECLI:EU:C:2012:71; ECJ, Judgement of 18 July 2013, Deutsche Umwelthilfe e.V., Case C-515/11, ECLI:EU:C:2013:523.

37 Gesetz zur Änderung des Umweltinformationsgesetzes, Federal Law Gazette I, p. 1642, 27 October 2014.

38 Bundesrat printed paper 156/14, p. 3.

39 Loi nº 78-753 de 17 juillet 1978 portant diverses mesures d'amélioration des relations entre l'administration et le public et diverses dispositions d'ordre administratif, social et fiscal, Official Gazette, 18 July 1978, p. 2851.

40 ECJ, Judgement of 26 June 2003, Commission oft the European Communities v French Republic, Case C 233/00, ECLI:EU:C:2003:371

information, the obligation for public authorities to state their reasons within two months, as required by the directive.[41] After this judgement and in transposition of Directive 2003/4/EC, the French environmental code (*Code de l'environnement*) was amended accordingly. Provisions L124-1 to L124-8 and R124-1 to R124-5 now govern the right to access environmental information. Thus, a more favourable provision was introduced compared to the provisions in Law no. 78-753, which continues to be the general framework for public access to administrative documents in France.[42] In this context it is interesting to note that the Counsel of State expressed its concerns with regard to provision L124-1 of the environmental code, because it envisaged an exception to the obligation to provide environmental information contained in documents on which administrative decisions are based, whereas Directive 90/313/EEC only foresees this in cases of incomplete documentation (article 3.3).[43]

In Italy, the starting point with regard to freedom of information was similar compared to the situation in France, since a right of access to files already existed prior to adoption of the first Environmental Information Directive 90/313/EEC. Law no. 349 of 198644 explicitly mentions the right to access of files and the principle of transparency.[45] According to article 14(3) of this law 'every citizen has a right to access information regarding the environment held by public authorities'. However, this regulation was always regarded as being of a programmatic character (similar to *Staatszielbestimmungen* in German legal terminology), since it did not provide for any compensation in case of refusal.[46] After the general Administrative Procedure Law entered into force, the procedural provisions regarding the right to access files and the corresponding legal process (exclusive jurisdiction of the administrative courts) were expanded to the realm of the environment.[47] In this regard, the Constitutional Court of Italy noted that access to environmental information is not part of environmental law, but of 'access law', which it considered to be a principle of general administrative law that the state has to ensure as an 'essential performance standard' in the sense of the Italian Constitution (article 117(2) m).[48] In another judgement, the same court stressed that the general right to access environmental information envisages 'diffuse control', and is therefore a subjective public right that the public authorities are obliged to provide.[49] Against this background it is interesting to note that despite this relatively progressive attitude towards freedom of information, the Italian legislator restricted itself to the minimum required by the Environmental Information Directives when transposing them into national law. Legislative Decree no. 39/1997, which transposed Directive 90/313/EEC, guarantees the right of access to environmental information irrespective of a 'qualified interest', which had to be met otherwise under the general Administrative Procedure Law. It was designed as an everyman's right to access environmental information, leading to an 'objectification' of the right to access files, albeit limited to the realm of environmental information. This restrictive approach can also be observed when looking into Legislative Decree no. 195/2005, which transposed Directive 2003/4/EC. The wording of 'environmental information' for example – and thereby the scope of the right to access them – was transposed almost word for word. Nevertheless: although the Italian

41 Cf. Delaunay, Bénédicte. 'Liberté d'accès à l'information en matière d'environnement: manquement de la France dans la transposition de la directive 90/313/CEE du 7 juin 1990'. *L'actualité juridique: droit administratif*, Issue 10 (15 March 2004), p. 543; ECJ, Judgement of 21 April 2005, Hoisieaux, Case C 186/04, ECLI:EU:C:2005:248, where the Court stated that the failure of a public authority to respond within a period of two months was deemed to give rise to an implied refusal and that such a decision not accompanied by reasons had to be regarded as unlawful after the expiry of the two-month time-limit.

42 Law no. 2005-1319 of 26 October 2005 portant diverses dispositions d'adaptation au droit communautaire dans le domaine de l'environnement, Journal Officiel no. 251 of 27 Octobre 2005, p. 16929.

43 Conseil d'État, Judgement of 7 August 2007, Case no. 266668.

44 Law no. 349 of 8 July 1986, Istituzione del Ministero dell'ambiente e norme in materia di danno ambientale, Gazzetta Ufficiale, 15 July 1986, no. 162.

45 Cf. Grassi, Stefano. 'Procedimenti ammnistrativi e tutela dell'ambiente'. In: Sandulli, Maria Alessandra (ed.). *Codice dell'azione ammnistrativa*. Milano: Giuffrè, 2017, p. 1305.

46 Ferroni, Maria Vittoria. 'Diritto all'informazione ambientale nell'ordinamento nazionale'. In: Dell'Antonio, Paolo; Picozza, Eugenio (eds.). *Trattato di diritto dell'ambiente. Tutele parallele norme processuali*. Padova: CEDAM, 2015, p. 983.

47 Parallel to the 'classic' right to access, it is the ombudsman who is competent in case of rejection or administrative omission to act upon the request (Art. 116 D. Livo no. 104/2010).

48 Corte Costituzionale, Judgements 398 and 399/2006. Cf. Sau, Antonella. 'Profili giuridici dell'informazione ambientale e territoriale'. *Diritto Amministrativo*, 2009, p. 131.

49 Corte Costituzionale, Judgement 233/2009.

approach in transposing the Environmental Information Directives appears to be as minimalistic as in the cases of France and Germany, the implemented changes meant the almost revolutionary introduction of an 'actio popularis', an otherwise foreign concept in the Italian administrative system.

IV Indirect Europeanisation and Spillover Effects

Unlike direct europeanisation, indirect europeanisation concerns legal changes that cannot directly be traced back to explicit requirements set forth in EU directives, but are somewhat linked to them (so-called 'spillover effects').[50] At first glance, the existence of 'no gold plating' policies seems to exclude such over-implementation. However, as will be shown in this section, the freedom of information principle is an example of how a hesitant direct transposition of EU laws may nevertheless 'nudge' national legislators to implement similar principles in other areas of law.

If we examine the German example again, there is broad consensus among scholars that the legislation on access to environmental information has been the starting point of a broader development of transparency legislation in Germany.[51] In particular, Freedom of Information Laws (*Informationsfreiheitsgesetze*) at *Bund*[52] as well as at *Länder*[53] level now provide for transparency rights beyond issues concerning the environment by granting a general right of access to public information. Some *Länder* laws go even further. The Transparency Law of Hamburg for example imposes an active obligation to publish information.[54] The same is true for the Transparency Law of Rhineland-Palatinate,[55] which links the right of access to environmental information according to EU law with the right to access to 'public information', i.e. 'all records made for public purposes'.[56] In doing so, this innovative law overcomes the dual regulation of environmental information law and freedom of information law. Furthermore, it provides for the set-up and operation of an electronic platform where the public administration has to offer information *ex officio*.[57] This also includes an anonymous feedback function which allows platform users to evaluate the offered information and make suggestions for improvement.[58] Similar regulations were introduced in the adjacent field of consumer protection law.[59] Fearing that the different laws could give rise to confusion, some scholars even suggested drafting a single law on freedom of information in the public administration that could coordinate and systematise the different rights to access information.[60]

50 See Sommermann, Karl-Peter. 'Veränderungen des nationalen Verwaltungsrechts unter europäischem Einfluss – Analyse aus deutscher Sicht'. In: Schwarze, Jürgen (ed.). *Bestand und Perspektiven des Europäischen Verwaltungsrechts*. Baden-Baden: Nomos, 2008, p. 195.

51 See e.g. Maurer, Hartmut; Waldhoff, Christian. *Allgemeines Verwaltungsrecht*. München: C. H. Beck, 2017, MN 31; Wegener, Bernhard. 'Aktuelle Fragen der Umweltinformationsfreiheit'. *Neue Zeitschrift für Verwaltungsrecht*, 2015, p. 609.

52 Gesetz zur Regelung des Zugangs zu Informationen des Bundes of 5 September 2005, Federal Law Gazette I, p. 2722.

53 With the exception of Baden-Württemberg, Bavaria, Hesse, Lower Saxony and Saxony, all *Länder* in Germany enacted respective laws. Even statutes of local communities dealing with access to information have been enacted recently, as for example the *Satzung zur Regelung des Zugangs zu Informationen in weisungsfreien Angelegenheiten* of the city of Leipzig, Official Journal of the City of Leipzig, no. 2 of 26 January 2013, cf. Götze, Roman. 'Aktuelle Entwicklungen im Umweltinformationsrecht'. *Landes- und Kommunalverwaltung*, Issue 6 (2013), p. 242.

54 Official Gazette of Hamburg I, 2012, p. 271, para. 30.

55 Official Gazette of Rhineland-Palatinate, 2015, p. 383.

56 Ibid., paragraph 5 section 2.

57 Ibid., paragraph 2 section 1.

58 Ibid., paragraph 6 section 3.

59 Gesetz zur Verbesserung der gesundheitsbezogenen Verbraucherinformationen of 17 October 2012, Federal Law Gazette I, p. 2166, 2725. Cf. Schoch, Friedrich. 'Neuere Entwicklungen im Verbraucherinformationsrecht'. *Neue Juristische Wochenschrift,* 2010, p. 2241. Böhm, Monika; Lingenfelder, Michael; Voit, Wolfgang. 'Verbraucherinformation auf dem Prüfstand'. *Neue Zeitschrift für Verwaltungsrecht*, 2011, p. 198.

60 Zschiesche, Michael; Sperfeld, Franziska. 'Zur Praxis des neuen Umweltinformationsrechts in der Bundesrepublik Deutschland'. *Zeitschrift für Umweltrecht*, 2011, p. 71; Turiaux, André. 'Das neue Umweltinformationsgesetz'. *Neue Juristische Wochenschrift*, 1994, p. 2319.

The Italian case is a particularly good example if one looks for more 'spillover effects' following the implementation of the Environmental Information Directives in other Member States, and it is therefore worth mentioning in more detail. A first development which can be linked to European impulses is the enactment of Legislative Decree no. 150/2009 in 2009, which prescribed 'transparency as an unlimited right to access, also in the form of an obligation to publish on the institutional website of the public authority'. The development was further intensified in 2013 with the enactment of Legislative Decree no. 33/2013, which aimed at transparency and fighting corruption in the public administration.[61] The decree marks a fundamental shift compared to the classic right to access, because the obligation to publish was expanded to all information related to the organisation and acts of the public administration. According to the decree, information has to be actively disseminated electronically, thereby creating a link between transparency and the obligation to publish information. Article 43 of the Legislative Decree 33/2013 furthermore provides for a 'person responsible for transparency', who has the duty to ensure that the rules regarding transparency are met. Moreover, article 5 obliges public authorities to publish all public information online. If a public authority fails to do so, the same article establishes a 'citizen access right', a right of all private citizens to access this information. Lastly, the most recent regulation dealing with transparency is the 'Transparency Decree' (Legislative Decree no. 97/2016), which aims at a 'complete right to access' of public information irrespective of a legally protected position (article 7), using exactly the same wording as in Directive 2003/4/EC. To this end, article 2(1) of the Transparency Decree prescribes 'free access for everyone to data and documents held by the public administration'. Thus, while Legislative Decree no. 33/2013 was still limited to matters regarding the general transparency of the organisation and activity of public administration and acts through active electronic dissemination, article 2(1) of the Transparency Decree now provides for a comprehensive right of access to files and documents of the public administration on demand. This newly introduced right of access to information is completely independent of any legally protected position, exactly in the same way as the right of access to environmental information. Citizen access is no longer a concession, but an independent right. It is an *everyman's right*, recognised not only to Italian citizens, but to everyone.[62]

V Concluding Remarks

By looking at different examples from three Member States, this article has illustrated how the need to adequately implement two EU directives on access to environmental information has gradually 'europeanised' the national administrative systems of France, Germany and Italy with regard to freedom of information. First, approaches towards implementation were restrictive, and in the case of France and Germany judgements of the European Court of Justice were necessary to make the national legislator comply with the EU requirements. In the following years after implementation, however, and notwithstanding contrary 'no gold plating' policies, the development did not stop at the minimum necessary to comply with the two directives, but 'spilled over' and gradually affected other areas of law as well. General 'Freedom of Information' laws were enacted or, as in the case of Italy, a general right of access to information independent of any legally protected position was introduced. What started as an exceptional right of access to information in the realm of environmental matters gradually became the rule for *all* public information. This development can also be seen as part of a broader trend towards transparency. According to article 15 of the Treaty on European Union '[e]ach institution, body, office or agency shall ensure that its proceedings are transparent', and in the Charter of Fundamental Rights of the European Union the principle is enshrined as part of the right to good administration and access to documents (articles 41 and 42).[63] Although transparency law has its own rules, purposes and is much broader in scope than mere access to information, it will nevertheless be interesting to see if transparency legislation will follow the path of environmental information legislation or if it will take a different route going beyond that. If the latter turns out to be the case, could it then be used to fill the gaps

61 Legislative Decree of 14 March 2013, no. 33 (Riordino delle disciplina riguardante gli obblighi di pubblicità, trasparenza e diffusione delle informazioni da parte delle pubbliche amministrazioni), Gazzetta Ufficiale, 5 April 2013, no. 80.

62 Galetta, Diana-Urania. 'Accesso civico e trasparenza della Pubblica Amministrazione alla luce delle (previste modifiche) alle disposizioni del D. Lgs. n. 33/2013'. Federalismi.it, 2 March 2016, p. 16.

63 See also article 10(3), 11(2) and (3) Treaty on European Union; article 298(1) Treaty of the Functioning of the European Union. In the white paper on good governance, the Commission also stressed the importance of transparency and participation, see 'European Governance. A White Paper'. Brussels: European Commission, 25 July 2001, COM(2001) 428.

in environmental legislation, when necessary? *Vice versa*, it will be interesting to continue to observe how legislation on access to environmental information is applied. What lessons could be learnt for transparency law from the path taken so far after so many years of implementation of Directives 90/313/EEC and 2003/4/EC? More analysis of the latest reports and court decisions on the implementation of the Aarhus Convention and the two Environmental Information Directives promise to shed more light on these interesting questions.

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