

Five Myths of European Union Transparency: Deliberation through the Looking Glass?

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1. Introduction

In trying to get the kitten to imitate the red queen, Lewis Carroll's Alice found that when she entered the fantasy world through the looking glass, things did not work quite the same way as in her familiar world. She had to modify her behaviour in order to get along in the similar, but not quite the same, looking glass world. In this paper we are not proposing that the Looking Glass House of the European Union is a fantasy world, but rather that the world we find at the other side is not necessarily what it appears to be with things occasionally even going the other way. To what extent is the world beyond the EU Looking Glass different to what we might have expected to find on the basis of the assumptions we carry with us from our own familiar world? Is the concept and practice of "transparency" in the context of the evolving political system of the EU in fact being used rather cleverly by bureaucrats and politicians in order to construct and keep alive certain 'myths'?

As a term of art, transparency could well win the prize for most increased usage of any word in English in the past decade (Safire, 1998: 4). The word is becoming endemic in fields as diverse as the environment, financial markets and security studies; it permeates politics and economics at national and international levels of governance. Some argue that transparency appears to be entrenching itself as a norm of international behaviour, a new standard of behaviour for institutions from inter-governmental organizations such as the World Bank, the International Monetary Fund and the World Trade Organization to more supra-national organizations such as the European Union, to national governments and beyond to non-governmental organizations in their various forms (Florini, 1999). The term transparency is however is often referred to in such a loose fashion that it at times can seem to resemble a "garbage-can" of different concepts and principles. The EU is certainly no exception when it comes to the loose fashion in which the term has been bandied about by various actors for over a decade now. In fact the lack of rigour in the use of the term transparency in the EU context is only matched by the vigour with which actors of all shapes, sizes and political leanings rush to support it. Thus, the aim of achieving more transparency in the functioning of public EU institutions is lauded by the European institutions themselves, the politicians and bureaucrats, the members of parliament, the judiciary and (organized) civil society.

In the short time frame of its emergence as a fundamental guiding principle of the political system of the EU, it has been presented as a type of holistic medicine designed to remedy many of the ailments the body of the EU is perceived to have. Thus, we are told, it will increase the legitimacy of the EU, increase the understanding of the citizens on what the EU is about, stimulate deliberation about policy-matters and enable participation by citizens and their representatives. Concepts such as public access to information, e-government, citizen participation, consultation of experts or citizens, the need to have reasoned decisions, open decision-making processes have all in their time been presented as crucial aspects of the concept of transparency. Some authors view transparency as limited to one or two of these issues (eg, access to information and open meetings), others take a broader approach and view for example the right to be heard before a decision is taken (participation) as an important part of transparency. Most recently in the text of the Constitutional Treaty itself, the Preamble informs us of the symbolic value of transparency since "a reunited Europe intends to ...deepen the democratic and transparent nature of its public life".

It can be argued however that the language and rhetoric of “transparency” is used by bureaucrats and politicians to construct certain “myths”. The Oxford Dictionary of English defines “myths” as “a widely held but false notion”. In cultural approaches to social sciences, myths are defined as stories embedded with meaning and they clearly play an important role. Myths anchor values, guide the behaviour of social actors, tell them what is important and how to act. Myths also have an important function in public administration. In that sense, it is readily understandable that the European Union urgently needs myths. Myths, in this perspective, are needed to guide those involved through important changes and to help them in making sense of these changes.¹

Myths can however be darker in their implications and are not always positively regarded. In his analysis, Edelman (1977) presents a cynical interpretation of myths. He stresses that myths are used to structure complex problems in ways and words that suit policy-makers to distort the perceptions of citizens. The construction of myths gives power to those that control them since people can only experience politics, policies, problems and solutions through language and stories. Bureaucrats and politician use ‘language’ and ‘rhetoric’ to tell a story about the necessity of changes. This reveals dangerous aspects of myths about transparency in the European Union: they may be constructed by bureaucrats and politicians to increase their power.

Not everyone, however, presents such a pessimistic interpretation of myths. In organizational science, myths are described as more or less institutionalised or taken-for-granted images that serve as sense-making devices around which organizational members may rally and create a shared identity (Modell, 2004: 40). This approach is directly related to March and Olsen’s (1989) institutional approach of public administration. They emphasize that researchers should focus on the ‘rules’ that guide the behaviour and interactions of individuals, groups and organizations in and around public administration. Myths are an expression of these rules and form a frame of reference which is shared among the members inside and outside the organization. This common frame of reference expresses common values, norms and experiences and enables people to coordinate and integrate their behaviour in a sensible way. In this perspective, myths about transparency in the European Union are useful for coordinating the behaviour of those working in or with the EU.

In this institutional approach, myths play an important role in processes of change. Meyer and Rowan (1977) show us the importance of ‘myths’ that legitimize the transformation of organizations to meet changing environmental conditions in order secure success, survival and resources. From that perspective, increased transparency adds to the legitimacy of the European Union towards its environment. Myths can thus be useful in guiding the EU into the future.

Why, then, do we develop in this paper a critical perspective of myths about transparency in the European Union? We acknowledge that rhetoric enables policy makers and politicians to mobilize people and organizations for their ideas. Myths can be seen as beacons, which show us the way to a desirable future, to a new and better European Union. The rhetoric about transparency in the European Union is important for mobilizing people and getting changes going. This strategy for mobilizing, however, also has a dangerous side to it. If we confront these rhetorical claims with the body of knowledge concerning the effects of transparency on effectiveness and legitimacy of public administration, we need to be careful not to raise our

¹ This description of myths is largely based upon Homburg (2005).

hopes too high. In addition we wish to highlight the fact that myths may also have dysfunctional effects. In certain cases, transparency will not strengthen the effectiveness and legitimacy of the EU but rather weaken them. Myths may mobilize the European Union into an unwanted situation. By deconstructing the myths, we hope to prevent perverse effects and to avoid the canonization of the myths of transparency by the EU.

The reconstruction of a number of ‘myths’ in this paper is mainly based on our study of EU policy documents. We focused in particular on the White Paper on Governance and on subsequent policy documents that dealt with themes presented in the White Paper. Additionally, we conducted a literature review to gather information about European transparency and legitimacy. We also studied the literature to present a historical overview of transparency in the EU. At this stage we did not investigate the extent of transparency of the EU nor measure its legitimacy. Our main objective was to reconstruct the discourse on transparency and legitimacy and present a critical perspective on this discourse. In this manner we hope to make a specific contribution to the broader topic of deliberative democracy and its discontents.

The structure of our paper is as follows. We first look at the manner in which the concept of transparency has been interpreted and defined in the context of the EU and place it within the broader framework of legitimacy (section 2). We then describe in rather impressionistic terms the manner in which the thinking on the concept of transparency has evolved in the EU placing particular emphasis on the shift from a more legal perspective to that of a more political perspective (section 3). In section 4 we distil, from the statements made by the EU political actors themselves, five fairly foundational “myths” of EU transparency in terms of what it will achieve, before drawing up a balance sheet as to what the empirical practice reveals in that regard (to the extent that such empirical evidence is available). Finally we draw some conclusions and place the subject of EU transparency, shorn of some of the rhetoric within the framework of a more deliberative approach to politics and decision-taking at the EU level (section 5).

2. Core concepts: transparency and legitimacy

2.1 The transparency discourse

The term “transparency” is quite simply the condition of being transparent. “Transparent” is defined in The Oxford Dictionary of English as an adjective used to connote the process of “allowing light to pass through so that bodies can be distinctly seen”. The result of the light shining through is that the composition of the space in question can be seen and understood. Indeed the origins of the term from Latin *transparere* suggest something appearing as a result of –light presumably- shining through. The result of the light shining through is that the composition of the space in question can be seen and understood. In the context of political systems and organizations the further leap to subjecting the system or organization to public scrutiny is made already in the Oxford Dictionary of English. So there are actually several components suggested. First, light must shine through; second, the space in question will then be more or less fully visible; third, this physical result will facilitate both greater intellectual understanding and greater scrutiny on the part of the observers. As one of the very fundamental assumptions underlying a more deliberative and more participatory understanding of democracy (one that has now even been enshrined in the text of the Constitutional Treaty itself) is that the requisite information is easily and publicly accessible, the issue of transparency can be considered an essential part of its operating system. Without transparency and readily available information on “visible” actors and policies no proper

deliberation and participation is feasible. *Brewers Politics* even defines the term “transparency” as “the catch word for the openness of the operations of the European Community to the public gaze” (Safire, 1998: 4).

In 1998, the European Ombudsman, Jacob Söderman defined the term transparency in a rather narrow fashion as mandating that : “the process through which public authorities make decisions should be understandable and open; the decisions themselves should be reasoned; as far as possible, the information on which the decisions are based should be available to the public.” (Söderman, 1998). The accent in this definition clearly lies on the legal dimension in the sense of the formal manner in which decisions are reasoned as well as on the issue of public access to information (Deckmyn, 2002: 35; Vesterdorf 1999: 903). According to Lord Nolan (1995: 14) openness is said to require that ‘holders of public office should be as open as possible about all decisions and actions they take’. They should, in his view, give reasons for their decisions and restrict information only when the wider public interest clearly so demands. It can be argued however that transparency not only incorporates the rather passive right of every citizen to have access to information (if they activate that formal legal right) but also the much broader and more pro-active duty of the administration itself to ensure that information about its policy and actions is provided in an accessible fashion. Moreover, the concept of transparency can in addition refer to more structural aspects in the sense of maintaining transparent decision-making processes and judicial protection systems as well as the fact that legislation must itself be coherent and clear (see, Klijnstra, 2000).

All of these varied aspects of the term transparency have cropped up in the context of the EU, especially in recent years. Indeed a very large group of themes have been organised under the umbrella of transparency in the EU. These themes include in any event the openness of the functioning of the Institutions, the simplification of the treaties, the simplification of the legislative procedures, the amelioration of the quality of the drafting and presentation of the legislation of the Union, the openness of the procedure to modify the treaties, the reinforcement of the role of the national parliaments in the decision-making process, the amelioration of the consultation of the interested public in the preparation phase of the processes, the elimination of jargon in the declarations of the Institutions and the issue of open meetings of, in particular, the Council of Ministers.

Transparency has however on the whole not been interpreted as including per se a right of participation. Some authors make a clear difference between transparency and interactivity. Moon, Welch and Wong (2005) discuss these terms in an article about e-governance. According to them, transparency refers to the availability of information for navigating a large-scale social system. Interactivity represents a measure of the level of convenience or degree of immediate feedback. Transparency is about the magnitude of online information available on official government websites while interactivity is more about the convenience of the citizens and the speed of communications between the agency and its clients. Web-based transparency is measured using different elements to interactivity. Transparency can be regarded as a sort of layman’s basic map of an organization and reveals the depth of access it allows, the depths of knowledge about processes it is willing to reveal, and the level of attention to citizen response it provides (Welch and Hinnant, 2002). In a sense one can say the more transparent an organization is (via its web site or otherwise), the more it is willing to allow citizens to monitor its performance and to participate in its policy processes. Interactivity is about allowing citizens to influence the development of policies or question organizations about past performance.

In this paper we will look at both the transparency and interactivity of the European Union and will analyse the discourse on both forms of openness. Often both are referred to as transparency. In our opinion transparency refers to openness in informational terms – can citizens (or other stakeholder) get access to information about decision-making and policy execution in the EU? – and interactivity relates to openness in communication terms – can citizens (or other stakeholders) present their views and opinions on policy issues? Of course we appreciate that both aspects are intensely inter-related: transparency is often a prerequisite for and directly coupled with interactivity.

Understanding the evolution of transparency as norms about (quasi-) voluntary disclosure of information by (political) actors involves issues of power and persuasion in an inherently political context. Although not always up-front, it seems that transparency in the sense of (voluntary) disclosure of information by public actors is generally closely connected to legitimacy. It is often argued that transparency (and deliberation) will enhance public acceptance of institutional structures. According to political theory, giving citizens the possibility of monitoring policymaking and scrutinizing its results will enhance the legitimacy of the institutional structures.

2.2 The legitimacy discourse

Within contemporary debates, legitimacy is more often invoked than described and it is more often described than defined. Legitimacy can in very general terms be said to represent an umbrella evaluation that, to some extent, transcends specific adverse acts or occurrences; thus legitimacy is resilient to particular events, yet it is dependent on a history of events (Suchman, 1995, at p.574). Over the years social scientists have offered a number of definitions of legitimacy, with varying degrees of specificity. First of all purely formal (legal) legitimacy in the sense of the manner in which a particular structure of authority was constituted and acts according to accepted legal rules and procedures. Although many political scientists and lawyers focus on formal legitimacy, some stress the primordial importance of what is termed social (empirical) legitimacy. Social legitimacy refers to the affective loyalty of those who are bound by it, on the basis of deep common interest and/or strong sense of shared identity. The theory is that when citizens know – or can find out – what the EU does, and even deliberate and participate in that process, their sense of being a European citizen may be strengthened. It is precisely with regard to social legitimacy that the EU has a long-standing problem (Weiler, 1991). However democratically legitimate the Member States may be in their own jurisdictions, a sense of social legitimacy will not be created simply by the attribution of rule making competences to common institutions – although the welfare gains through integration which should be made possible by the creation of those institutions can be expected to facilitate it. Social legitimacy will usually have to be created over time simply by the practice, and habit, of doing things together, and there is only so much that can be done to accelerate this process by symbol-building campaigns and communications strategies. In terms of the contribution transparency can make the idea is that it can facilitate the process of strengthening public confidence in the EU, thereby enhancing in the long run its social legitimacy.



A second way of looking at the legitimacy challenge is through the lens of input legitimacy versus output legitimacy. Output legitimacy means that people agree that a particular structure should exist, and even participate in rule making, because of the benefits it brings. Social acceptance is thus instrumental and conditional, as well as independent of an affective relation. Input legitimacy, on the other hand, means that social acceptance of the structure in question derives from a belief that citizens have a fair chance (however understood) to

influence decision-making and scrutinise the results. The ability to influence and hold accountable can be realised either through forms of representation which are held to be legitimate, through direct participation and deliberation which is held to be meaningful – or some combination of the two. On the whole the legitimacy of the EU and its decisions has tended to be focussed on the output side of the equation (see, in particular, Scharpf, 1999 and Majone, 1996) rather than on the input side.

2.3 An overview of the myths linking transparency and legitimacy

In this paper we will present five myths in section 4, all of which concern the relation between transparency and legitimacy but put an emphasis on different aspects and interact in different ways. An overview of the five myths can be presented as follows.

Table 1: Myths linking types of transparency to types of legitimacy

	<i>Transparency</i>	<i>Legitimacy</i>
<i>Myth 1</i>	Interactivity	Input legitimacy
<i>Myth 2</i>	Interactivity	Output legitimacy
<i>Myth 3</i>	Transparency	Input legitimacy
<i>Myth 4</i>	Transparency	Input and output legitimacy
<i>Myth 5</i>	Transparency	Social legitimacy

Prior to describing the evolution of the five specific myths in the EU context and presenting our critical perspective on this discourse, we first locate the broader parameters of the debate on transparency in the EU and in particular we emphasise the fact that it is possible to divide the manner in which it has evolved across two relatively distinct periods in terms of time and in terms of overall approach.

3 The Evolution of Transparency in the EU

3.1 The first period: dominated by the law, lawyers and bureaucrats

If one looks at the evolution of thinking on ‘transparency’ within the context of the political system of the EU it is possible to discern at least two periods, both periods reflecting a different emphasis on the type of accountability at stake. The first period was clearly dominated by a legal understanding of what transparency could be said to mean and in particular the focus on what was termed (and limited to) rather quickly the principle of access to information. This built on existing -rather technical-legal case law on the right to be heard, the right to have reasoned decisions and to have access to a file (see, Ragnemalm, 1999; Vesterdorf, 1999 and Bradley, 1999). It gave further substance to the already quite developed legal accountability mechanisms within the framework of the EU. It is based on the specific responsibilities of three institutions (Commission, Council and European Parliament) that have now been laid down in increasingly “hard” legal instruments and the interpretation by the European courts of legal standards laid down in such measures.

The focus in this first time period was very much on gradually constructing a right of access by the public to certain categories of documents held by the three main decision-making institutions of the EU, namely the Council of Ministers, the Commission and the European Parliament. This rights based approach was counter-balanced by a system which recognised that the institutions could refuse access to their documents for a number of reasons, including most controversially the right to refuse access where this would be contrary to their institutional interest in the “confidentiality of their own proceedings”. In this first period the

European courts played a crucial role. They effectively built in a short period of time a body of case-law which on the whole kept pressure on the institutions to behave fairly and to devise adequate systems of scrutiny. They tended to interpret rather generously the scope of the legal provisions so that for example specific institutional arrangements did not operate to reduce the reach of the access provisions. Thus in the very first case to reach the European courts the Guardian journalist, John Carvel, successfully challenged the Councils refusal to grant him the agendas and minutes of various Council meetings including those relating to the new and sensitive area of justice and home affairs policy making. Later the Swedish Union of Journalists challenged the refusal of the Council to reveal documents relating to the establishment of Europol, using the more generous Swedish Freedom of Information Law to highlight the unnecessary degree of secrecy that prevailed at the European level.

The technique of legal interpretation used by the Courts during this foundational period involved a type of teleological reasoning which placed the Code of Conduct adopted by the three decision-making institutions in the context of its broader democratic purpose. The Courts tended to emphasise the underlying purpose of access to information, namely to provide the “public”, the “citizens” with a means of controlling abuse of power and corruption as well as on general notions of public control of the activities of public institutions. Thus, the courts developed what can be termed a constitutional perspective on access to information provisions *avant la lettre*. Only later were these “rights” given an explicitly constitutional foundation, first in the Charter on Fundamental rights and later in the Constitutional Treaty.

This tendency was also underpinned by the complementary work of the Ombudsman who too adopted what might be called a rather legal approach in his work, although his emphasis was more on more structural aspects of the manner in which certain institutions (mainly the Council and the Commission) made information available or not. Thus, the first Ombudsman tended to focus on putting flesh on what he termed “good administrative behaviour” in a manner which was highly complementary to the more formal judicial interpretation of the courts (Magnetite, 2003). Indeed, it can be said that the work of the Ombudsman helped to move the understanding of transparency in the EU context away from a more individual and passive focus on the legal right of every citizen to have access to certain documents to a much broader and pro-active duty of the EU administration to ensure that information about its policies and actions is taken in a genuinely accessible fashion.

This legal phase in a sense culminated with the adoption of a new and binding legal instrument, Regulation 1049/2001 which entered into force on 3 December 2001.² This Regulation was meant to introduce more transparency into the work of the EU institutions. In several aspects it clearly did. The extension of the rules to documents authored by third parties constitutes a significant increase in transparency in principle, although there are potentially significant restrictions placed upon it. But in many respects too the new Regulation was considered disappointing by many commentators (see, Peers, 2002 and De Leeuw, 2003). Quite apart from the provisions in the new Regulation which set a lower standard than the prior rules, the EU institutions arguably spent their greatest political capital defending their existing practices, and therefore missed the opportunity to examine whether those practices should be reconsidered. In particular, the Regulation does not explicitly reduce the extent to which the Council can keep a large number of documents secret during the legislative procedure on the grounds that they reveal member states’ positions, or the

² OJ L 2001 145/43 (31 May 2001).



Commission's ability to insist upon the secrecy of all documents relating to infringement proceedings even after the close of those proceedings. While it is possible that the case law interpreting the new Regulation will ultimately chip away at these practices, the Regulation obliges advocates of greater openness and transparency to fight for such an interpretation through the Ombudsman and the Courts, rather than entrenching those changes at the outset.

What is noteworthy since the adoption of the Regulation is that those seeking greater access to information have on the whole not been very successful. Thus, whereas in the early years the European courts ruled in favour of the applicants in seven out of the first ten cases, the courts agreed with the institutions on all but three of the next 13 cases (ie. in 10 out of the next 13 cases). The Court of First Instance has heard five cases concerning the new regulation and has ruled in favour of the member states' right to veto Council documents on three occasions and the Council's right to protect the confidentiality of its legal service opinions in another (the only victory concerned the Commission's decision to withhold a very large file on that ground).³ One might begin to query whether the Court is now not more intent on protecting the institutional balance as negotiated in the text of the regulation than in facilitating the citizen to perform task in a checks and balances perspective.

In conclusion the legal-constitutional approach can, some ten years after its commencement, be considered solidly anchored in legal texts, including at the most fundamental level of the Constitutional Treaty. The provisions on public access to documents clearly have caused changes by giving citizens a tool to obtain the documents they wish to obtain, albeit with a considerable and significant time-lag. It is certainly true that those who use the access legal provisions have tended to be professionals with some of the required expertise needed to understand a highly complex and multi-layered political and legal system, namely journalists, lawyers and academics.⁴ For this reason one commentator has recently dismissed the exercise of the formal legal right of access to information as insignificant and almost anecdotal in the first ten years of its life (Cotino, 2005). But one can however argue that those early challengers seeking to go through the EU Looking Glass were given the tools to enable them to peer into previously dark rooms and to force the institutions to justify their behaviour and more often than not modify their behaviour in a rather structural fashion.

It was only the implementation in practice of the obligation to make available and maintain a register of documents on each of the three main decision-making (legislative) institutions that has however enabled the "public" to know what sorts of documents they might want to have access to. At the same time the availability of such registers make absolutely clear the sheer complexity of the institutional configuration of the EU decision-taking arena and the impossibility for the lay-man or woman to follow. As a result those who use the access provisions have indeed tended to be professionals with some of the required expertise (journalists, lawyers, academics) and the legal arena of rights and principles has only to a very limited extent empowered the "public" in any meaningful sense.

3.2 The second period: dominated by politics, bureaucrats and politicians

³ See for further details the "Statewatch Observatory on EU Freedom of Information –Case law", <http://www.statewatch.org/caselawobs.htm>

⁴ See, for example, the information contained in the Report from the Commission on the review of the operation of the regulation: COM (2004) 45 from January 2004 and the Council Annual Report on access to documents, 2003, <http://ue.eu.int/uedocs/cmsUpload/RapAnCons.en03.pdf>

The best way of understanding the legal contribution to the transparency discourse is that it has made (certain of) the institutions themselves more aware of how they can pro-actively make their own information available to a broader public using the medium of ICT and that this can in the long run assist them in the process of obtaining some more social legitimacy. The next phase in the debate on “transparency” has thus come from the institutions themselves albeit prompted and at times pushed by certain applicants seeking to push back the frontiers of openness. Thus, Statewatch, a British civil liberties organisation during the late 1990’s mounted a concerted strategy of challenging practices of the Council in particular before the Ombudsman on the manner in which they made their information available to the public. The result is that the Council today maintains an extensive and on the whole accessible Register of its documents on the Internet. For those with the expertise, time and courage to wade through the masses of documents placed on the Internet it is possible to engage in a process of some scrutiny and deliberation on the multifarious activities of the Council in its diverse configurations. Another more recent example is provided by the sceptic Danish MEP Jens Peter Bonde who over a period of several years kept pressure on the Commission to produce a complete list of all its working groups which it finally did in 2004. Thus a revised list of some 1684 working groups active in 2004 has now finally been made available to the public via Internet.⁵

The Commission in particular during the run up to and implementation of its White Paper on Governance (European Commission, 2001), reached way beyond a “simplification” agenda (part of the constitutional process) to a more overtly political agenda inspired it seems by a more “democratic” vision. In effect the perspective that has dominated at least overtly and rhetorically the Commissions approach and practice in (very) recent years is the democratic perspective which enables those holding public office to be held to account in some fashion. The manner in which the Commission in particular has devised new data bases which makes available on the Internet previously confidential information such as for example who actually sits on committees, how many there are, when their meetings take place, the agendas of meetings etc. is a measure of how much more “open” the interstices of decision-taking within the EU has become, compared to earlier years. Steps have been taken to make more transparent the workings of the many advisory groups currently contributing to the Commission’s policymaking (for example: both the composition of the groups and the advice they deliver are made publicly available on the Internet).⁶

The Council too has already for some years maintained an extensive and on the whole accessible Register on the Internet.⁷ For those with the expertise, time and courage to wade through the masses of documents placed on the Internet it is possible to engage in a process of some scrutiny and deliberation on the multifarious activities of the Council in its diverse configurations. The Council has however been less forthcoming in ordering its information in a user-friendly fashion, perhaps because it has more difficulty in being terribly up-front about the scope of its expanded executive-type tasks in recent years (see further, Curtin, 2004).

In this second and more overtly political phase of the development of transparency in the EU, transparency is perceived not only as a goal in itself but also as a tool for a more democratic

⁵ See further, http://www.europa.eu.int/comm/secretariat_general/docs/expert_groups_final.doc

⁶ See for a list of all the consultative bodies: http://europa.eu.int/comm/civil_society/coneecs

⁷ See the web address of the Council: <http://ue.eu.int/docCenter.asp?lang=en&cmsid=245>

way of working and reaching decisions. The Commission has unquestionably taken the lead, in particular in its White Paper on Governance, in presenting the goal of greater openness as a means of achieving more democracy. The Commissions' White Paper on Governance also suggests that more transparency will lead to a better involvement in the processes of EU policy-making. Thus the Commission also makes the link with increasing the citizen's sense of belonging in Europe: "Democracy depends on people being able to take part in public debate. To do this, they must have access to reliable information on European issues and be able to scrutinise the policy process in various stages. The Commission maintains that "providing more information and more effective communication are a pre-condition for generating a sense of belonging to Europe" (European Commission, 2001: 11). This is basically an argument that transparency will enhance public acceptance of the institutional structures of the EU. Although not always up-front, it seems that transparency in the sense of disclosure of information by public actors is generally closely connected to legitimacy. Although not always up-front, it seems that transparency in the sense of disclosure of information by public actors is generally closely connected to legitimacy. The political theory is that when citizens have the possibility to monitor policymaking and scrutinize its results, the legitimacy of institutional structures is enhanced.


In addition, and perhaps most significantly in the framework of this paper has n the emphasis put on enabling the public to actively deliberate on issues before decisions are taken in a definitive form by those "representing" the people (Curtin, 2003). The range of such public "input" stretches from mere "consultation" to providing formal windows of active participation in the decision-taking process itself. Moreover, the concept of "civil society" has been rediscovered in the discourse led by the Commission since its White paper on the relationship between democracy and governance (Armstrong, 2002 and De Schutter, 2002). The text as signed of the Constitutional Treaty includes a specific article (art I-46) which spells out for the first time at the level of constituent texts that the Union institutions shall, *inter alia*, "maintain an open, transparent and regular dialogue with representative associations and civil society". Further, the Union institutions are to "give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action". Both these paragraphs suggest that the Union institutions themselves in a rather top-down fashion are under an obligation (of sorts) to create and maintain "spaces" for deliberation by a wide range of interested actors at various stages of the decision-making process.

Table 2: Two periods of transparency in the EU

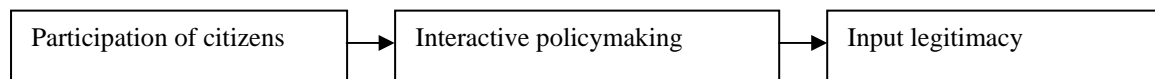
	<i>Years (roughly)</i>	<i>Dominant discourse</i>	<i>Advocates</i>	<i>Passive/active</i>	<i>Objective</i>	<i>Transparency/interactivity</i>
<i>Period 1: Thin Transparency</i>	1993–present	Legal	Outside EU (journalists, lawyers, academics)	Passive	Controlling abuse of power and understanding the process of decision-making	Transparency
<i>Period 2: Thick Transparency</i>	2000 - present	Political	Inside EU (bureaucrats, politicians)	Active	Enhancing democracy and legitimacy	Transparency and interactivity

4. The Five Myths of EU Transparency

4.1 First Myth: Participation of citizens in policymaking increases the input legitimacy of the EU

This first myth concerns the relation between interactivity and input legitimacy. The basic idea is that more interactivity in the sense of deliberation and participation of citizens in (interactive) policymaking can increase the input legitimacy of the European Union (see figure 1). Input legitimacy of the EU is often considered as structurally very limited at the EU level due to the fact that citizens only directly participate in voting at the European level at elections for the European Parliament. The problem is that such elections are considered on the whole as “second-rate” elections with consistently low turnout among the citizens in the various Member States. It is further well recognised that even when citizens vote at the EP level they are generally voting on national issues and in relation to the national political arena. When the same citizen’s vote at national elections in their own countries there is of course only an indirect link between national elections and European policymaking carried out by autonomous actors (see generally, Mair, 2005). The thinking is that if citizens were to participate in some form directly in the policy-making processes at the European level this could form an important additional and direct manner of enhancing the overall input legitimacy of the European Union.

Figure 1: The First Myth



Consultation is a two-way relation in which citizens provide feedback to government. It is based on the definition by government of the issue on which citizens’ views are being sought and requires the provision of information (OECD, 2001: 23). Yet transparency is often considered as not including a right of participation as such but rather more weakly as including the provision of some consultation mechanisms. Transparency was indeed proclaimed in the European Union without its complement: the recognition of concrete rights of participation. As Frost (2003: 96-98) indicates, referring to the earlier legislation, it is ‘a notable absence’ that the right of access to information is not accompanied by the right of participation, so that transparency is almost merely symbolic. It was only in the terms of the Constitutional Treaty that an explicit ‘right’ of participation has been formulated, in rather abstract terms, for the first time. Moreover, in the Constitutional Treaty a title was included with the name ‘The democratic life of the EU’. The final article of this title (Article I-50) declares: ‘In order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible’.

The fact that participation in some form can be considered an important part of transparency is not very surprising. Policy affects citizens, often in a rather direct fashion, and therefore it is important for them to have the possibility to participate in policymaking. When citizens, companies, governments and other organizations in society have the possibility to participate in the preparation stage, decision stage, implementation stage and evaluation stage of policy, we speak about interactive policy (Pröpper and Steenbeek, 1999: 6). According to Frissen (1996: 107), the possibilities to participate in all stages of the process have increased in recent years. When participation of citizens in policy making is referred to this can be taken to

include the various stages of the policy process, namely agenda-setting, proposing policy options and shaping the policy dialogue.

In recent years the different institutions of the European Union have developed quite a far-reaching policy regarding consultation of citizens in policy-making processes. Thus, for example, the Commission in its White Paper recognised that: “What is needed is a reinforced culture of consultation and dialogue; a culture which is adopted by all European Institutions and which associates particularly the European Parliament in the consultative process, given its role in representing the citizen. The European Parliament should play a prominent role, for instance, by reinforcing its use of public hearings. (...) It should rather be underpinned by a code of conduct that sets minimum standards, focusing on what to consult on, when, whom and how to consult. Those standards will reduce the risk of the policymakers just listening to one side of the argument or of particular groups getting privileged access. These standards should improve the representativity of civil society organisations and structure their debate with the Institutions.” (European Commission, 2001: 14-17). The Commission indeed subsequently adopted minimum standards for consultation in the form of a code of conduct (see, European Commission, 2002a). The Commission has also adopted general principles and minimum standards for consulting non-institutional interested parties on the major policy initiatives it proposes. (European Commission, 2003: 14-16).

That consultation has some positive consequences for the policymaking process is accepted and will be explained in the second myth. At the level of the European Union the idea is that if citizens know that the European institutions are engaged in a process of listening to their wishes and taking their input into account, they may view the EU policymaking process as rather less remote and less technocratic. According to Deckmyn (2002: 242) a real debate between institutions of the EU and civil stakeholders will give EU policies much more credibility and legitimacy. Other authors also agree that increasing the possibilities for participation by citizens and other stakeholders will also lead to increased legitimacy (Peterson and Bomberg, 1999: 8)


In the internal discussions and preparation of the Commission’s White Paper on Governance it was emphasised that participation of civil society is important for the legitimacy of the policy (process)⁸. Consultative inputs are said to be crucial for the quality and legitimacy of EU policy. The aim should be that all members play a full role, institutions are open to contributions from outside players, and institutions have greater legitimacy in the eyes of those affected (Working Group 4B, 2001: 12; Working Group 5, 2001: 3-4). Research shows however in practice that political participation has the form of a pyramid: a lot of people participate little and few people participate a lot. Most people are missing knowledge to participate in the policymaking process. If only a small minority of citizens participate in policymaking, is it really possible to speak about legitimacy?

It is in any event very hard for citizens to participate in policymaking and to influence this process (Fischer, 1990: 29). Lacking the depth of knowledge, skills and access needed to participate in decision-making process, the vast majority of the public is cut off from a meaningful role in political activities. Most ‘normal citizens’ live far away from Brussels and will not go there to participate in policymaking processes. Even when electronic venues are

⁸ The preparation of the White Paper was organised in the form of six ‘working areas’ and twelve working groups. The papers of the different working groups are published on the Internet: http://europa.eu.int/comm/governance/prepa_lb_en.htm. In this paper, we refer to the number of the working groups. The references give the titles of the relevant documents.

created, it does not seem realistic to expect a significant proportion of citizens to participate in policymaking.

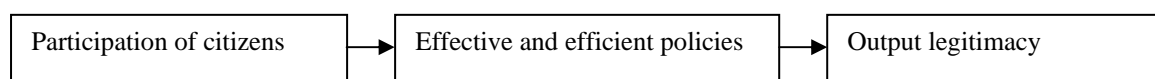
It must be recognized that the relationship between opportunities for participation and the input legitimacy of the European Union is not a simple one. Although participation can generally be regarded as an important element of democratic policymaking, not many citizens will as a matter of practice participate in EU policy processes. Participation will tend to be limited to a small group of experts from governments, private enterprise and social or civil society groups. A large majority of citizens will not be involved and this majority may even question the input legitimacy of the EU more when opportunities for participation are strengthened. Deliberative democracy may be strengthened at the cost of representative democracy and, in effect, this could result in a decline of input legitimacy. Citizen participation may (or may not) increase legitimacy at a local level but its effect on the European level is questionable.

One can further argue that participation at the European level is not about individual citizens but about civil society organizations. These organizations can represent citizens in a manner different to that of official representative bodies (parliaments etc). In this sense the input legitimacy of the European Union could be strengthened if the participation of civil society groups is known to citizens and if citizens perceive this input to be legitimate. But there are problems here too since the democratic nature of many NGO's is increasingly questioned. At the same time at the specific EU level it seems that it is not uncommon  the Commission for example to effectively fund NGO's that they then consult prior to policy-making, so the autonomy of such organisations may be called into question. There is clearly therefore no simple or direct relation between participation and input legitimacy as such.

4.2 Second Myth: A reinforced culture of consultation and dialogue increases the output legitimacy of the EU

This myth has a lot of similarities with the previous myth but it is important to underline the difference between the two myths. The first myth says something about legitimacy: the input legitimacy is supposed to increase when citizens – or members of civil society organizations – are being consulted since this could strengthen social trust in structures for policymaking. The second myth says something about output legitimacy. When citizens perceive the EU to be efficient and effective its output legitimacy is strengthened. The idea behind this myth is that the effectiveness and efficiency of the EU could be enhanced through consultation and dialogue in policymaking (see figure 2). It is worth noting that neither the European Commission nor other institutions of the EU explain what they mean by the concept of effective and efficient policy. They assume a relationship between consultation and effective policy, but they don't explain why this should be the case.

Figure 2: The Second Myth



According to Wallace and Young (1997: 30-31) policymaking is too important to make without involving people other than officials. A government, which is not attempting to receive, process and act on as much information as possible must be seen as a poor one. In a complex and increasingly scientific world, governments must be seen to be taking in more

advice and attempting to make their decisions on the basis of the information received (Peters and Barker, 1993: 2). Political arguments are increasingly based on the criteria of knowledge: the best decision is the one determined by the persuasive force of the valid scientific argument (Fischer, 1990: 111).

When citizens are being consulted, the policymakers receive information about the different interests and wishes of those citizens that live in the EU and will be affected by the policy measure(s) in question. When they take into account these interests and wishes, it could increase the chances that this policy will not fail in its objectives or to be implemented in practice (Pressman and Wildavsky, 1984) and therefore the thinking is that more consultation in advance increases the effectiveness in practice. For the effectiveness of the policymaking process, transparency and a civil dialogue are thus important (Deckmyn, 2002: 109). This civil dialogue should have two aims: to ensure that the views and grassroots experience of the voluntary sector can be systematically taken into account by policymakers at European levels so that policies can be tailored more to real needs, and to disseminate information from the European level down to the local level, so that citizens are aware of developments, can feel part of the construction of Europe and can see the relevance of it to their own situation (Deckmyn, 2002: 109).

There is also an indirect relation between this myth and the first one. As we have indicated, the first myth stresses that, when the different institutions of the European Union consult citizens and other stakeholders in the first stage of policy making, there is a greater chance that the policy-outcome as well as the whole process is seen as legitimate and because of that, people will accept it easier. This increases the efficiency and effectiveness because we cannot speak about an efficient process when citizens and stakeholders reject the outcome of the process or the whole process itself because this could lead to a delay of the process. It follows that acceptance leads to more efficiency (Wallace and Young, 1997: 61). The literature about lobbying in Brussels speaks about the relation between the participation of lobby groups in all stages of policymaking and effectiveness (acceptance of the policy outcomes) and it is conceivable that this is also the case with citizens and other stakeholders (Bignami, 1999: 11; Kok et al., 2004: 33). Such increased effectiveness and efficiency would then be acknowledged by citizens, thereby strengthening the output legitimacy of the EU.

As it happens the Commission has for some time now developed various general and specific (legal) obligations to consult widely before proposing legislation and, wherever appropriate, publish consultation documents (for example in the protocol on the application of the principles of subsidiarity and proportionality and also in the context of the social dialogue). Consultation helps reconcile the views and concerns of different actors throughout the policy-cycle (i.e. in policy-shaping, implementation and evaluation), thereby obtaining wide support and social acceptance for decisions. Consultation is therefore seen as an important means to improve effectiveness and efficiency of the Commission's activities (Working Group 2A, 2001: 7). Indeed consultation is seen as the Commission's "day-to-day business". Specific consultation forums (advisory committees and expert groups) have mushroomed and only very recently has the Commission made available on line information on the exact numbers and composition of all such groups.

For many years whether a consultation procedure was carried out in a meaningful manner or not was almost entirely dependent on the capacity of individual Commission departments. It has only been in recent years that the Commission has attempted to reflect and make operational the guarantees needed for a stable framework in this respect. Policy developme



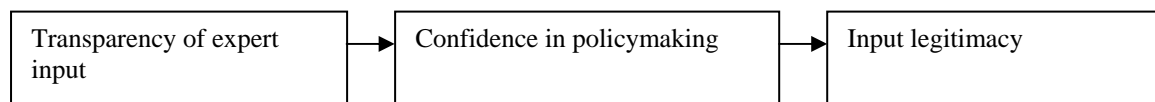
related to consultation processes has ideally built upon the experience from the social dialogue and has aimed to create synergies between the European social dialogue and wider civil society consultation mechanisms. The idea is that a more coherent and transparent approach applied by the Commission would encourage the other European institutions to review their own practices relating to consultation processes (Working Group 2A, 2001: 16, 20).

The consultation of citizens and interest groups does, however, not always have positive consequences for the efficiency of the process. When the different institutions of the European Union have to consult as many citizens as possible and when they are obliged to give all citizens the possibility to participate in the process, this can lead to enormous delays in the process of decision-taking (Mazey and Richardson, 1993: 34). It is also possible that different interest groups and citizens make use of different styles of participation and lobbying and it costs a lot of time and money for the institutions of the European Union to work with all these different styles (Wallace and Young, 1997: 51). According to Stone, efficient organizations are ones that get things done with a minimum of waste, duplication and expenditure of resources (Stone, 1988: 61). For politicians or policymakers it is efficient to consult only experts and use their knowledge to make policy. It is quite inefficient to let citizens and interest groups participate in the policymaking process because it takes a lot of time to realize this. Too much emphasis on participation can thus lead to sub optimal and inefficient decisions instead of improved performance. When citizens perceive the EU, as they often seem to, as an inefficient policymaker the result of increased opportunities for participation may result in a decline of output legitimacy.

4.3 Third Myth: Transparency of expert input in policymaking leads to more input legitimacy

Very often the corollary of arguing that citizen participation is inefficient, costly and too time-consuming is to argue that it only makes sense to include *experts* in the policy-making process. The third myth stresses the importance of making the input of experts transparent to the general public. We pay specific attention to this form of transparency since European policymaking has a strong input from different kinds of experts; the EU is sometimes called an ‘expertocracy’. The assumption is often made that increasing the transparency of expert input will enhance public trust in policymaking. When citizens know *which experts* are consulted and *how* these consultations are used in policymaking processes, the assumption is that their confidence in policymaking will be strengthened. One could argue that, therefore, input legitimacy will be enhanced since citizens have a better chance to scrutinize policymaking and this will enhance their social acceptance of policymaking structures.

Figure 3: The Third Myth



The influence of experts in policy-making has increased during the twentieth century in Europe as well as in the United States. The knowledge of experts is quite generally considered indispensable for policymakers (Fischer, 1990: 153). Also in the European Union policymaking process, experts play an increasingly significant role (European Commission, 2001: 19). The primary function of experts is to give advice upon difficult political issues. It is characteristic of the contemporary democratic state to want to be seen to be receiving as much advice as possible. In a complex and increasingly scientific world, governments must

be seen to be taking in more advice and attempting to make their decisions on the basis of the information received (Peters and Barker, 1993: 1-2, 41). According to Fischer (1990: 111) political arguments are increasingly based on the criteria of knowledge: the best decision is the one determined by the persuasive force of the valid scientific argument. Taking and even requesting advice helps democratic governments to legitimate their decisions (Peters and Barker, 1993: 2, 51).

The paradox is that expertise is a resource that is increasingly sought for policymaking and for social choice, but at the same time one that is also increasingly contested (Working Group 1B: 4) In general, the lack of transparency in the way expertise is selected, used and diffused by governments is considered by many to undermine the legitimacy of the policy process. Efforts to restore the credibility of expertise, and trust in it, have been part of the Commissions thinking on the reform of EU governance and its White Paper in particular. The trend is to open up the 'technocratic' process, formerly regarded as being driven by expert elite, to increasing transparency and broader participation in decision making. Making expertise more accessible is considered important by the Commission and progress has been made, but as it itself has pointed out, this "has to go hand-in-hand with other more fundamental changes. Among these, more accountability and procedures to provide a 'trace' of sources and uses of expertise; procedures to acknowledge minority views; involvement of 'stakeholders' at early stage; and better management of uncertainty" (Working Group 1B, 2001: 14).

Why is it important for citizens to see which experts participate in policymaking and how they influence the process? First of all, it is important for citizens to check the independence of experts. According to Peters and Barker (1993: 189) it is essential that experts are independent of the governmental process. An ideal situation is when the experts are independent and their advice is entirely based on their expert knowledge and not on their personal interests. Advice, which is within decision-making, can be given only by bodies with established competence and who are independent when forming their opinion (Joerges and Vos, 1999: 333). It is interesting that experts often present themselves as independent (Fischer, 1990: 160). Through transparency it is possible for citizens to check the backgrounds, opinions, interests and way of working of experts and when they do this, they can conclude for themselves if an expert is independent or not. When people think that an expert is independent, the legitimacy of their work increases and that's why it is important for them to act as independent persons. It should thus be possible for citizens to control the work of policymakers and the way they make use of expertise. To control this, citizens are dependent on the public nature of the information in question. Unfortunately, a lot of public organizations don't like to provide information about the way they function (Welch and Wong, 2001: 509-538).

Fischer (1990: 358) concludes that although there is room for discretion on both sides of the relationship, citizens have little control over experts' behaviour. This is partly as a result of a lack of information (Fischer, 1990: 358). Smith (1991: 138). Transparency is thus needed to control the behaviour of experts. Access to expertise can be seen as an important 'ingredient' and complement of freedom of information provisions. Such access can take two main forms: open meetings of Committees where expert advice is elaborated and publication of expert advice, and more broadly, of any evidence used for policy formulation, evaluation, etc" (Working Group 1B, 2001: 15-19). The Commission itself considers that it should be open in seeking and acting on advice from experts. Transparency is required, particularly in relation to the way issues are framed, experts are selected, and results handled. The Commission

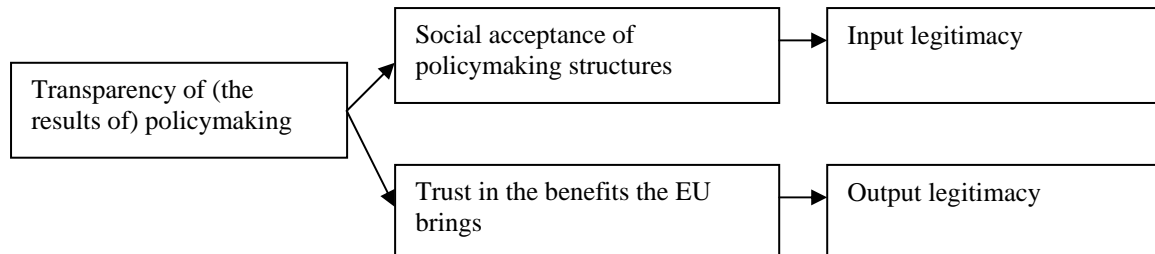
should also ensure that its methods for collecting and using expert advice are effective. (European Commission, 2002b: 7-10).

Traditionally experts are responsible for the facts and citizens for the values. However, more and more facts and values are interconnected and it is impossible to separate them. There is a trend for policymakers and politicians to maintain that citizens are involved in policymaking because some experts or interest groups participate in these processes. It can indeed be queried whether this can be equated with legitimacy for citizens. It is moreover not so sure that there is a positive relation between transparency and legitimacy. Because of the transparency, every citizen has the possibility to see how decisions are being made and how experts intervene in the whole process. It is not always nice to see this and it could lead to negative views of the government, experts and the policymaking process (Bovens, 2003: 128-129).

4.4 Fourth Myth: Transparency of (the results of) European policymaking strengthens input and output legitimacy

The first two myths focus on the relation between interactivity and input and output legitimacy of the European Union. This fourth myth concerns the relationship between transparency and legitimacy. What happens when information about European policymaking is made available to the general public? What happens when the results of European policies are widely published? The presumption in this myth is that both the input legitimacy – the social acceptance of policymaking – and output legitimacy – trust in the benefits the EU brings – are strengthened by transparency (see figure 4).

Figure 4: The Fourth Myth



The most important consequence of a transparent policymaking process is probably that citizens have the possibility to control this process. According to Frissen (1996: 54) transparency and control are connected with each other. To control the different steps in the policy making process and the way different actors act, transparency is a necessary condition. This is also the reason why there is a lack of transparency in a lot of policymaking processes. A lack of transparency is often attributable to a government's attempt to escape public scrutiny of its behaviour, especially in the run-up to elections, to avoid or postpone possible adverse reaction from the electorate and from financial markets, on which it depends for the political support and deficit financing, respectively. Therefore, it is possible that policymakers and politicians avoid risks because they know that all citizens and other (groups) of people control them (Kopits and Craig, 1998: 1).

Ideally, political oversight and accountability should involve citizens sharing the responsibility for the decisions taken by policymakers and politicians (Van Houtven, 2002: 69). When people have the possibility to read as much information as possible about the policy, politicians are supposed to account for the (policy) process as well as for the outputs

and the outcomes of this policy. Information and communication technology increases the possibilities to control policymaking. According to Kopits and Craig (1998: 5, 15) freedom-of-information legislation helps ensure government transparency and accountability by giving citizens access to public documents and assigning to government the burden of justifying nondisclosure. According to Cotino (2004: 12) the proclamation of transparency and public access has been interpreted as an attempt to legitimise the EU.

Accountability is one of the principles of good governance which the Commission formulated in its White Paper on Governance (European Commission, 2001: 8, 10). The Commission takes the view that more information and openness are important for the accountability for all citizens and stakeholders that are involved in policymaking. When referring to accountability in this context the Commission is referring to the fact that citizens (and their representatives) have the possibility to control the work of the Commission in particular by means of information made pro-actively available by the institutions. The institutions deliver this information through the Internet or through other channels. When people have this information, they are in theory able to control the policymaking process (who are being consulted in the process, what kind of information did the institutions use when they made policy, how much time did it cost to make policy, etcetera). Citizens have however only the possibility of controlling the work of the European institutions when they have the information that is necessary to exercise that control. Transparency is thus important and in particular the availability of information.

In addition the Commission perceives that consultation processes run by the Commission in order to enhance its accountability must themselves be transparent: “It must be clear what issues are being developed, what mechanisms are being used to consult, who is being consulted and why and what has influenced decisions in the formulation of policy. Openness and accountability are important principles for the conduct of organisations when they are seeking to contribute to EU policy development. It must be apparent which interests they represent and how inclusive that representation is. The Commission encourages interest groups to establish their own mechanisms for monitoring the process, so that they can see what they can learn from it and check that they are making an effective contribution to a transparent, open and accountable system” (European Commission, 2002a: 3,17-18).

Coherent and transparent consultation processes contribute to greater accountability in the sense not of political or administrative accountability but rather of a new type of accountability that has emerged in recent years. This is accountability towards citizens or society as a whole and it provides the rationale for a new approach towards relationships between public administration and citizens. In the words of the Commission itself: “This new form for direct accountability of public administration can never be aimed at replacing or sidelining the concept of political accountability. In fact, transparent and coherent consultation processes run by the Commission constitute a win-win option in this respect: they not only increase the acceptability of Commission proposals as far as the general public is concerned, they also enhance the possibility of scrutiny of the Commission’s activities by the legislator. In other words, more transparent consultation processes will foster the Commission’s political accountability rather than diluting it” (Working Group 2A, 2001: 3-8).

The Commission’s positive view on the relationship between transparency and legitimacy can be questioned. One problem with transparency is the fact that the increasing possibilities for control may lead to the autonomy of policymakers being reduced. Some authors

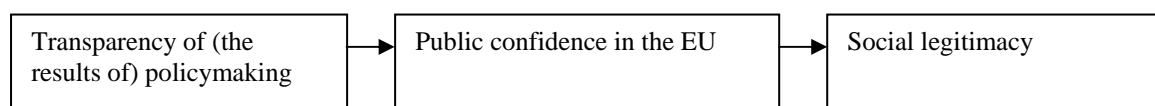
emphasise this tension between transparency and autonomy (Bekkers, 1998: 64, 104). Because information can be equated with power, the increasing importance of transparency (through information and communication technology) leads to shifting powers in policymaking (Caputo, 1988: 113). There are other dysfunctions too (Bovens, 2004: 13). Too rigorous democratic control may squeeze the entrepreneurship out of public managers and may turn agencies into rule-obsessed bureaucracies. Too much emphasis on integrity and corruption control may lead to a proceduralism that seriously hampers the efficiency and effectiveness of public organizations (Anechiarico and Jacobs, 1996). Too much emphasis on accountability and transparency can lead to sub optimal and inefficient decisions instead of improved performance. In other words the dysfunction of democratic control can be considered to be rule-obsession and the dysfunction of integrity to be proceduralism.

Another critical remark concerning the relation between transparency and legitimacy concerns the reality of the information overload (Bekkers, 1993: 139-140). This refers to the fact that it is impossible for a normal citizen to understand all information on policymaking processes both because of the quantity of the information available or received as well as the specific terms and explanations used. On the whole, only citizens with knowledge of the policy subject make use of the possibility to read information about policy, the process and the policy actors. It follows that only those citizens that are aware of the information available and possess knowledge enabling them to handle this information will in fact be able to control the policymakers.

4.5 Fifth Myth: Transparency of (the results of) policymaking strengthens the social legitimacy of the EU

The previous myths focused on input and output legitimacy and the direct link between (the results of) European policymaking and policy results and legitimacy. This fifth myth focuses on more general social legitimacy, the affective loyalty to the EU of European citizens. When citizens know – or can find out – what the EU does, their sense of being a European citizen may be strengthened. As a general effect, transparency of policymaking and the results of policies are supposed to strengthen public confidence in the EU and thus enhance its social legitimacy (see figure 5).

Figure 5: The Fifth Myth



Transparency is often perceived not only as a goal in itself but also as a tool for a more democratic way of working (Deckmyn, 2002: 120). According to the European Commission (1995: 11-14) openness is a means of achieving democracy. Openness will, in this view, put a spot-light on those areas of the European Union’s political life which are deficient in terms of democracy and the stronger the democratic institutions become, the more they will demand, as a prerequisite, more comprehensive openness and transparency. The White Paper on Governance suggests that more transparency will lead to better involvement in the processes of EU policy-making. Thus the Commission also makes the link with increasing the citizen’s sense of belonging in Europe: “Democracy depends on people being able to take part in public debate. To do this, they must have access to reliable information on European issues and be able to scrutinise the policy process in various stages. Providing more information and more effective communication are a pre-condition for generating a sense of belonging to Europe” (European Commission, 2001: 11).

In contemporary debates it is often emphasised how alienated many EU citizens feel from the Union's work. In the Commission's opinion: "Member States do not communicate well about what the Union is doing and what they are doing in the Union. Many people do not know the difference between the Institutions. They do not understand who takes the decisions that affect them and do not feel the Institutions act as an effective channel for their views and concerns" (European Commission, 2001: 7). Opening the doors could eliminate some of the alienation citizen's experience today. Moreover, communication could play a vital part in bringing the Union and its citizen's closer together (European Commission, 1995: 9). Improved access to information is thus seen as a means of bringing the public closer to the EU and as a way of stimulating a more informed and involved debate on EU policy. The Commission indeed seems to assume that if the public has greater access to more relevant and more attractively presented information about the EU and its policies, disaffection, scepticism and hostility will decline (Lodge, 1994: 350, 359).

It is not unthinkable that increasing openness resulting in more public understanding will over time lead to more confidence of citizens in the organization as a whole. A former member of the European Commission explained in 1995 that transparency leads to the confidence of citizens: "If we want the participation of the citizens, if we want to make Europe the business of every citizen – then we must, on the one hand, seek their involvement, listen to and welcome new ideas and, on the other hand, make our work and visions understood. In brief: transparency and democracy must be practised together" (European Commission, 1995: 8). In a democratic society it is very important for citizens to have access to as much information as possible. Decisions are more likely to be accepted and supported if people can understand the basis on which they are taken (European Commission, 2001: 8). According to Fischer (1990: 31, 172) the policymaking process depends on the input of experts and this input is often very specific and therefore hard to understand for the majority of the public. It is not unthinkable that more openness and more explanation of the expert input leads to more confidence of citizens in the policymaking process. Therefore it should always be possible for citizens to participate in the process and there must always be enough room left for meaningful debate (Fischer, 1990: 15). In a democratic society it is very important for citizens to have access to as much information as possible. Decisions are more likely to be accepted and supported if people can understand the basis on which they are taken (European Commission, 2001: 8).

Yet it can also be argued that this presents an idealistic picture not grounded in the real world reality of transparency aggravating an overall information overload (Bekkers, 1993: 139-140). As a matter of practice only those citizens with (expert) knowledge of the policy subject make use of the possibility to read information about policy, the process and the policy actors (Cotino, 2005). It follows that increasing public access to documents will not automatically lead to a situation in which a majority of citizens feel well informed on European matters. There are several other factors of relevance in this context, namely professional capacities in dealing with the press, quality of the information, readability of documents, hierarchy of information criteria and selection of the news by the media, etcetera (Deckmyn, 2002: 120). The institutions of the European Union subscribe to the objective of a more active policy of making information available but struggle to make it a reality.

According to Lodge (1994: 261) the basic assumption of the European Union could be wrong: filling an alleged information deficit will not necessarily restore confidence among people who mistrust political processes, for whatever reason. As Eurobarometer indicates,

some feel that the information deficit has been ineffectively confronted by information overload. In 1993, a Gallup poll in the United Kingdom found that over 80 percent of respondents had never wanted to seek information about the European Union and therefore it is not true that more openness leads automatically to more confidence of citizens in the Union. If one looks further at the figures on who is seeking access to documents in the EU then it has been calculated that if the access request numbers are used in relation to the population of the EU then one in thirty-three thousand citizens has exercised that right to date, which has led one commentator to describe the exercise of formal access to documents as “practically anecdotal” (Cotino, 2005). Increasing transparency of processes and results is therefore not going to necessarily increase the perception of the social legitimacy of the EU of those who never seek information. On the other hand it can of course be argued that since the Council and the Commission have been obliged to provide a list of all their documents in a Register on the Internet online access is 400 times that of non-virtual access. In 2003, 181,317 different users paid approx. 760,000 visits-some 800 a day- and accessed almost 6 million electronic documents. These figures are certainly more impressive, although they still tell a limited story of participation by the few rather than the many.

At the end of the day it is in any event difficult to show an absolute commensurate relationship between transparency and legitimacy (Bovens, 2004: 14) Transparency does not guarantee a favourable press: each imperfection, each transgression of rules and regulations, however unimportant they may be, each dispute about a decision, can be ruthlessly exposed as a sign of irrationality or deviance. After every affair and fiasco, but even in routine situations, journalists can always find procedures and rules that have not been followed by the book. According to Harlow (2002: 189) transparency has been taken to extreme lengths, and has become a weapon with which media presses incursions into private life, howling for punitive action and seeking exaggerated redress for the simplest of errors.

The conclusion is that transparency may not deliver the expected results and may even have negative effects on social legitimacy. Many citizens show no interest in information on the EU and, therefore, their social legitimacy will not be influenced by increased transparency. Worse, the transparency may be exploited by media and those wishing to damage the reputation of the EU. This may even result in negative effects of transparency on social legitimacy. Citizens may not want to belong to an institution when they hear only about all the mistakes and the affairs that take place in Brussels.

5. Conclusions

Where does this deconstruction of myths bring us in the final analysis? It is in any event clear that transparency and openness are not a panacea for the legitimacy problems of the European Union and can only be a starting point in building public understanding, participation and involvement (Deckmyn, 2002: 109). The proclamation of transparency and public access has been interpreted as an attempt to legitimise the European Union which lacks real democratic legitimisation. It is highly doubtful that democratic legitimacy will be significantly increased as a result. Democratic legitimacy is not just about the distribution of political authority. It mirrors public perceptions as to ‘the rightness of authority’. Sceptical publics will not necessarily be any the more confident in and convinced of the rightness of authority once the Commission has implemented transparency as foreseen and implemented. (Lodge, 1994: 365).

Does it follow from this rather pessimistic conclusion that the EU should not continue to strive for more transparency? On the contrary, in spite of all our criticisms and attempts to show the warts of transparency, it remains both conceptually and methodologically pivotal in our further thinking on the evolution of the EU as a political system. We indicated that myths are important for guiding institutions through a process of change and in that respect we should not discard the myths: new rules are needed to guide the behaviour of civil servants and politicians in Brussels and make them realize that transparency is a key element of democratic institutions. To make the myths about transparency and legitimacy more effective we will place them within a larger framework concerning the relationship between the EU and citizens.

What the European Union needs at this stage of its development is arguably a much more sophisticated view of the relationship between transparency and legitimacy. In our critical perspective on the myths, our overall conclusion is that the myths presented a simplification of the relationship between transparency and legitimacy and of the relationship between citizens and the EU. The general assumption seems to be that if citizens know what the EU is doing and if they can give input in policymaking, legitimacy is enhanced. An elaborate framework for understanding the relationship between transparency and legitimacy is lacking.

According to Fischer (1990: 343) the answer to the problem of legitimacy versus participation can be solved by applying a new concept of democracy: democratic elitism or deliberative supra nationalism. Democratic elitism does not mean that citizens should be totally ignored in the policy process. It should always be possible for them to participate in the process and there must always be enough room left for meaningful debate (Fischer, 1990: 15). But when experts are really interested in the problems and wishes of the people, it is possible that they participate on behalf of them. Christian Joerges has in the context of the EU taken this argument quite far, arguing that (expert) committees constitute arenas for deliberative supra-nationalism in the sense that the experts deliberate on behalf of the public (Joerges, 2002).

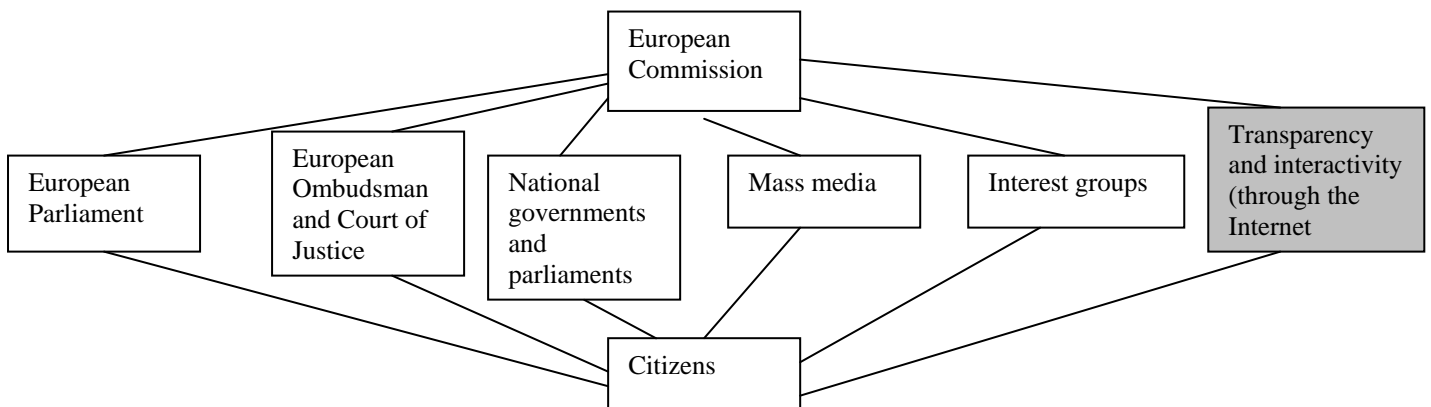
Although there may be something to developing arenas of deliberative supra-nationalism within the context of the EU, it still does not convincingly provide an adequate answer for the overall legitimacy problems. We prefer to understand the relationship between transparency and legitimacy within a different framework than that of deliberative supra nationalism (or democratic elitism), namely the framework of public accountability. This framework enables us to understand that transparency becomes meaningful in a social relationship between actors which discuss (expected) performance and (plan to) evaluate performance according to certain criteria. To control the different steps in the policy making process and the way different actors act, transparency is a necessary condition and a first step. It is but a first step within a much broader architecture of accountability.

In the context of developing the legitimacy of the EU both as a polity and a policy forum, it is important to construct a “public accountability” conceptual framework. The adjective “public” is specifically related to the openness of the policy-making process. The account giving is done in public in the sense that it is open or at least accessible to citizens. Accountability can be defined as a social relationship in which an actor feels an obligation to explain and to justify his or her conduct to some significant other (Day and Klein, 1987: 5; Romzek and Dubnick, 1998: 6; Lerner and Tetlock, 1999: 255; McCandless, 2001: 22; Pollit, 2003: 890). According to our colleague Mark Bovens who has put flesh on the bones of this

conceptual framework, there are five functions of public accountability (see, Bovens, 2004). These include the function of democratic control; of enhancing the integrity of public governance and of improving performance by fostering institutional learning. Together, these three functions provide a fourth function of public accountability which is primordial for our paper, namely to maintain or to enhance the legitimacy of public governance. Public accountability, in the sense of transparency, responsiveness and answerability is meant to assure the public confidence in government and to bridge the gap between citizens and representatives and between governed and government (Aucoin and Heintzman, 2000: 49-52).

A (highly simplified) overview of accountability relations between the European Commission and citizens is presented below (figure 6). This figure highlights that transparency is only one of the many accountability relations between the European Commission and citizens. These relations are generally mediated and the roles of intermediaries are based on conceptions of democracy (Edwards, 2003). Transparency and interactivity (often through the Internet) are distinct from the other relations since these concern non-mediated relations between citizens and European Commission (hence the grey box). The effects of this non-mediated accountability relation, however, can only be understood within the context of the other accountability relations. One cannot expect that increasing transparency will enhance legitimacy when citizens have no confidence in the other (mediated) accountability relations.

Figure 6. Accountability relations between citizens and the European Commission



The relationship between transparency and legitimacy is thus to be understood within the context of the multiple accountabilities of the European Commission and indeed more broadly of the EU as a whole. Legitimacy will be strengthened only when citizens have confidence in the various accountability arrangements of the EU. For those who wish to move once and for all beyond the realm of political rhetoric, the crucial challenge is to construct the guiding principles of a system of public accountability of the various actors at the European level, performing not only legislative tasks, but increasingly significant executive tasks and even what is often these days referred to as “operational” tasks.

A system of multi-level governance calls for its counter-part of multiple-level accountabilities. The system of accountabilities will be multi-layered in the sense that it will include political accountability, legal accountability, financial liability and administrative liability. The crucial point is however that all these various accountabilities will be placed under the conceptual framework of what is deliberately termed “public” accountability. In other words, there must be a relationship between the accountee to an accountability forum

with the possibility of a public reflection and deliberation, and possibly in some instances of a sanction. Transparency thus needs to be accompanied by other fairly rigorous efforts to enhance accountability at the various levels of the European Commission political system and with regard to its various actors. This may well constitute the third and future phase of the evolution of the concept of transparency at the EU level when the citizens and their various representatives move to centre-stage to (help) design and to participate in the architecture of a public accountability system of the European Union and its various actors. We think that legitimacy is strengthened when citizens have confidence in the overall accountability arrangements of the European Union. That architecture will facilitate moving through the Looking Glass in order to assess, scrutinize and sometimes sanction the behaviour of multifarious institutions and actors exercising legislative, executive and what is increasingly misleadingly called “operational” powers on the other side. We prefer to conceive of the citizens as actively engaging (either directly or through representatives of one kind or another) in the EU Looking Glass House in “spaces” of deliberation and dialogue rather than in a paternalistic relationship with “experts” doing that putatively on their behalf.

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