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Theory and reality of public access to the EU information

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I. Theory: Legalisation for transparency and the right of access until the new Constitution

1. Before the constitutional process

1. It is not possible to detail here the known process of legal recognition of transparency and right of access, from the Declaration attached to the Treaty of Maastricht of 1992 until the new constitution. At present, basically article 255 ECT and Regulation (EC) No 1049/2001 of May 30, 2001 govern public access to Council and Commission documents of the European Parliament. Apart from some specific points, the global balance of these rules is positive¹.

¹ Thus consider it MAES, Marc, “The ‘New’ Regulation on Access to Documents”, in DECKMYN, Veerle (ed.), *Increasing Transparency in the European Union?*, European Institute of Public Administration, Maastricht, Netherlands, 2002, pp. 199-208 and PEERS, Steve, “The New Regulation on Access to Documents: A Critical Analysis”, *Handbook on European Law* and in *Queen’s Papers on Europeanisation* No 6/2002, available in <http://netec.mcc.ac.uk/WoPEc/data/Papers/erpqueensp0022.html>. Recently, also, DE LEEUW, Magdalena E. “The regulation on public access to European Parliament, Council and Commission documents in the European Union: are citizens better off”, in *European Law Review*, vol. 28, n. 4, July 2003, pp. 324-348. In Spanish, my monographic research *Teoría y realidad de la transparencia pública en la Unión Europea*, to be published in 2005.

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2. From the point of view of the subjects, the important, progressive role of jurisprudence² can not be forgotten (Court of Justice³ and, mainly, the Court Of First Instance⁴), and nor should the intense, progressive influence of the European Ombudsman⁵.

3. Likewise, mention must be made of the horizontal extension of public access that is now enshrined in the Constitution. Also, the vertical enlargement of public access to traditionally opaque committees, groups, and committology. Furthermore, there has been significant progress in jurisprudence and the establishment of norms⁶.

4. Finally, regarding transparency, mention should be made of the publicity surrounding the meetings of Council in its legislative activity, it was formalised by means of Regulation of Council after the Council of Seville of 2002⁷.

2. Transparency and public access in the constituent process

1. In December 2000 the "right of access to documents" was recognized in Article 40 of the Charter⁸. This article has suffered modifications in its latest integration in the second part of the EU Constitution: Extension to all the institutions, bodies, offices and agencies of the EU (from the project of July 2003) and access to documents "whatever their medium" (by ICG), as in Regulation 2001 on public access. Finally, the right has been recognized in Article II-102:

"Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium."

2. After the inclusion of this right in the Nice Bill Of Rights, it must be remembered that the Council of Laeken in 2001 ordered the Convention, precisely, to achieve a "more democratic, more transparent, and more efficient EU". The

² On jurisprudence, PEERS, Steve, "From Maastricht to Laeken: The Political Agenda of Openness and Transparency in the European Union", in DECKMYN, Veerle (ed.), *Increasing Transparency in the European Union?*, cit. pp. 7-32 and, in this same one NAÔME, Caroline, "The Case-Law of the Court of Justice and of the Court of First Instance of the European Communities on Transparency: From Carvel to Hautala II (1995-2001)", pp. 147-198.

³ 5 sentences, the last I know, Mattila case, January 22nd, 2004.

⁴ In its 19 sentences. It could be refer the sentence of the First instance, october the 16th, 2003, with references to the Regulation of 2001, but not directly.

⁵ HARDEN, Ian, "The European Ombudsman's Efforts to Increase Openness in the Union", en DECKMYN, Veerle (ed.), *Increasing Transparency in the European Union?*, cit., pp. 123-146.

⁶ The Decision the 1999/468, of June 28, 1999 substituted former Decision 87/373 EEC, of July 13, 1987. In the same way, the First Instance Court case Rothmans International BV v. Commission, of July 19, 1999, T-188/97.

⁷ Regulation by EU Council, approved by Decision of Council of August 22, 2002, 2002/682/EC, Euroatom. Its article 8 is about "open deliberations of Council to the public and public debates", as well as the article 9 on "Publicity of the votes, explanations of vote and proceedings".

⁸ It has special interest the Parliament website on this article http://www.europarl.eu.int/comparl/libe/elsj/charter/art42/default_en.htm (2003).

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White Book of Governance in Europe (in 2001) said its "ethos" was in transparency.

A year later⁹, in the First Draft of The Constitutional Treaty, of 28 October 2002¹⁰, a Title VI was included, "On the democratic life of the EU". It contained five articles, limited only to naming the themes. An article on "Transparency of the Legislative Debates of the EU" was labelled Article 36. After this first draft, the article on transparency took shape from Article 87 of the studies ordered by Prodi, in December 2002¹¹.

3. After the work of the Convention¹², reflected in the Project of July 2003, versions of the text of the IGC (November 2003), and finally the IGC agreement of 18 June, 2004 should be mentioned. The changes made regarding transparency and the right of access throughout these stages are basically semantic and formal, without altering the substantial content contained in the Project of June 2003. It could be said that in the constituent process it was intended to guarantee with greater legal precision not only the right of access but also in the autonomous principle of transparency (whichever includes the right), while at the same time extending it horizontally (As seen in Art. III. 399).

3. The final presence of transparency and public access in the European Constitution

1. The constitutional Preamble affirms "Believing that a reunited Europe intends to ... deepen the democratic and transparent nature of its public life". A symbolic value is expressed with - beyond the merely legal - that is granted to transparency and, as a consequence, to the right of access.

2. In the First Part, Title VI is on "The democratic life of the EU"¹³ with the final Article I-50 under the title "Transparency of the proceedings of Union Institutions, bodies, offices and agencies"¹⁴. This article declares:

⁹ PEERS, Steve, "From Maastricht to Laeken: The Political Agenda of Openness and Transparency in the European Union", in DECKMYN, Veerle (ed.), *Increasing Transparency in the European Union?*, cit. pp. 7-32, p. 30.

¹⁰ Preliminary draft project of Constitutional Treaty, Secretary of the European Convention, Brussels, October 28, 2002, (OR fr), CONV 369/02, by the Presidium, to be presented in the full session of October 28, 2002. The same was an articulate skeleton but not completed.

¹¹ The article 87 of this study (draft with articles) dedicated to the transparency consisted in:
 - broad reception of the right of access (paragraph 1st, 3rd at the end).
 - the remission to European law for principles and limits (paragraph 1st, definitively separated 4th).
 - the consecration of Parliament's and Council's publicity in their legislative activity (paragraph 2nd, also at the end).

See, Feasibility Study Contribution To A Preliminary Draft Constitution Of The European Union Working Document, at the request of President PRODI by François LAMOUREUX and others (04/12/2002).

¹² The text of all the thirty six amendments presented to article I-49 (former 36 in the first draft project and, at the end, art. I-50) in the process of Convention, can be followed in <http://convention.eu.int/Docs/Treaty/pdf/36/global36.pdf> can ensue in <http://european> (21/8/2003).

¹³ Now it occupies articles 45-52: Democratic equality (art. 45); Representative democracy (art. 46), participative democracy (art. 47); Social interlocutors and social autonomous dialogue (art. 48); European ombudsman (art. 49), as well as data protection (art. 51) and Rules of the churches and non confessional organizations (art. 52).

¹⁴ In the project, only the "Institutions".

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"1. 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.¹⁵

2. The European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act.¹⁶

3. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State shall have, under the conditions laid down in Part III, a right of access to documents of the Union institutions, bodies, offices and agencies, whatever their medium."¹⁷

European laws shall lay down the general principles and limits which, on grounds of public or private interest, govern the right of access to such documents.¹⁸

4. Each Institution, body, office or agency referred to in paragraph 3 shall determine in its own rules of procedure specific provisions regarding access to its documents, in accordance with the European laws referred to in paragraph 3."

Likewise, in this title various references to transparency and openness are reiterated as in Article 46 (openness principle) and in particular in Article 47 (transparent dialogue).

3. Finally, III Article 399 (Project, III-305, about common rules of management of EU institutions, organs and agencies and offices):

"1. The institutions, bodies, offices and agencies of the Union shall ensure¹⁹ transparency in their work and shall, pursuant to Article I-50, lay down in their rules of procedure the provisions for public access to documents. The Court of Justice of the European Union, the European Central Bank and the European Investment Bank²⁰ shall be subject to the provisions of Article I-50(3) and to this Article only when exercising their administrative tasks.²¹

¹⁵ Adding "offices" to agencies introduced by IGC of November 2003.

¹⁶ Modification introduced by IGC of November 2003, in the project it was talked about "Council Of Ministers". Also, in the IGC the open meetings were changed from the time when Council "examine or adopt a legislative proposition" (Project) to when Council "deliberate and vote". Besides, the final text includes "project of legislative act" and not the former "legislative proposition".

¹⁷ There is a little change on the omission of reference to "the Constitution" (in the part III), as well as the term offices added to "agencies". Likewise, as in the art. II-102 the access is to documents "whatever their medium".

¹⁸ There are a variation of style in relation to the project of Convention and the IGC, but without the least material alteration. The variation is the change of the paragraph in the to the law, now in the 3 (before was the 4). There is a mistake in the article III-399 caused by it. Also, can be mentioned that now it is said "european laws", before "a european law". The regulation, for that, could be disseminated, not necessarily would be in a law on public access.

¹⁹ It is pertinent to indicate that July 2003 project said "recognise the importance", it was reformed by IGC of November 2003.

²⁰ This Bank is included only into the last version of the approved text.

²¹ The reference to the management functions is added by the IGC of November 2003. In like manner, in the final version is stressed that they are "only" subduced to the article I-50.

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2. The European Parliament and the Council shall ensure publication of the documents relating to the legislative procedures under the terms laid down by the European law referred to in Article I-50(4).²²."

6. In conclusion on the constitutional text, the following should be emphasized:

- Transparency is legally consolidated as an autonomous principle, from which derives, as the essential nucleus, the right of access (Art. III-399 clearly) and public meetings of Parliament and Council (in its legislative activity). The rule of openness and publicity is also essential to this principle.

- The presence of transparency and access is transverse in all the Constitution, it is not present only at its functional Part IV.

- There is an excessive amount of repetition about the recognition of transparency and access. Right of access is recognized on three different occasions, sometimes with internal and reciprocal remissions (Arts. I-50 and II-102 reiterate right; Arts. I-50 and III-399 had crossbred remit and even with mistakes²³). Legally, these repetitions do not seem to make any particular sense.

- The importance of transparency and access goes beyond the purely legal aspect, with the importance that is implied by repetition and the guarantee, its transverse presence, and its proclamation in the Preamble,

- The regulation on access to the different institutions, organs, agencies, and offices will not be regulated by a single European law, but by each separate laws.

- Finally, The nature of the right of access as a fundamental right will be unquestionable when the Constitution become effective, not before.

The practice of institutions, organs, agencies, and offices, the resolutions of the Courts will have confirm if legally and politically we are facing something so fundamental. Nevertheless, the effective exercise of this right of access and transparency in Europe will be what reveals if they really are decisive and fundamental for the democratic development of the EU, such as has been hoped over the past years.

On this point, the rest of the present study attempts to show, very briefly, what the reality of the right of access and transparency is after ten years' experience in the Council and the European Commission.

II. Formal and real access to information in the EU

1. Reality of the exercise of the right of access: From scepticism to hope

1. Examining the data available from the Commission and the Council, a new analysis can be made on the exercise of the right to access from 1984 to the end of 2003²⁴. We should note the following:

²² The reference to the paragraph 4 of the article I 50 was included by IGC of November 2003.

²³ The article 399 makes a reference to the European law cited by paragraph 4, article I-50. However, this remission had to be to the paragraph 3.

²⁴ Council and Commission annual reports since 1994 are studied. Usually, they are not specially easy to find and to work. Some of data with it is exposed do not incorporate the last reports of 2003 (published on April and May 2004).

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- Until 2002 (before it was possible to access the Registry on Internet) six out of every ten requests were addressed to the Council (6,742 59%) and four to the Commission (4,713 41%). In addition, almost nine out of ten documents requested were from the Council (87.25 %), and only one in ten from the Commission (13.75 %).

- There is a clearly sustained growth in the exercise of the right of access. In the last years, this growth was geometric (from 431 documents requested in both 1994-1995, to 11,467 in 2002). Nevertheless, this progression stabilized in 2003, probably due to the introduction of online access to the Registry which did indeed increase²⁵.

- With the implementation of the online access to Registry documents²⁶, the number of accesses to the Council's documents multiplied forty times (not 40%) in 2002²⁷. These numbers increased by 25% in 2003 with 467,532 online accesses to the Council's Registry, 37 times greater than the number of documents accessed not on line.

- Moreover, if the estimate is made of users and the number of screens accessed, then online accesses are 400 times those with non-virtual accesses. In 2002, 900,000 people accessed the Council Registry Internet site and consulted 4,600,000 screens²⁸. In 2003 181,317 different users paid 768,725 visits - 800 per day – and accessed 5,928,096 screens²⁹.

- University researchers are the most frequent visitors (27.5%), followed by lawyers (16.5%), and industrial sectors (1%), which mostly visit the Commission (16.6% as against 7.1% for the Council). Industry is closely followed by pressure groups (9.9 %). Journalists take a surprisingly modest place as visitors just 6.6%, more to the Council than to the Commission. Members of Parliament and their collaborators represent a mere 2.5 % of the visitors.

- In terms of countries, Belgium is the country which exercised its right the most, just under one in three requests are from there (27.2 %). With the only exception of the Netherlands, where the access exceeds its correlative population, the rest of the member countries are more or less on a par.

- There is a high proportion of concession to requested access. Approximately, eight out of ten are conceded (80.9 % Council, 81.8 % Commission). The evolution in the Council is noticeable, from 58% access (94-95) to 87% in 2003. Nevertheless, the Commission has gone from 92% of earlier year to 70% in 2002 and 2003 (due mainly to accesses requested by lawyers for questions on competence). There are two reason for rejecting by both institutions:

²⁵ According to the data of 2003 (of April 2004) growth has stabilized: from 11,467 documents in 2002 to 14,118 requested documents (1,523 Commission 12,595 Council).

²⁶ From 2001 access to the Registry online was made possible to the Commission and, more, to the Council. In December 2002, less of the half of the documents of Council were directly accessible online (44.95 %) and only they were a 0,07 % classified. In 2003 the 53 % of the Council documents were accessible online (349,935 of 467,532).

²⁷ In 2002 9,349 documents were accessed not online, they were 375,155 documents acceded online(40,12 times more).

²⁸ It is assert in the First Annual report of Council of 2002 on the application of Regulations.⁹ 1049/2001, cit., without more precision.

²⁹ It is referred in the Second annual report of Council of 2003 (May 2004).

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The secret of deliberations (43.4%) and for reasons of public interest (30.6%), in particular, the investigations and procedures of infraction. The latter reason has been used increasingly in recent years by the Commission.

2. Thus, in spite of non-stop growth - almost geometric – in the exercise of this right, until online access was available, absolute numbers were proving that the exercise of formal access was practically anecdotal. If the accession request numbers are put in relation to the population of EU, then one in thirty-three thousand citizens have exercised that right to date³⁰. Without wishing to be demagogic, obviously if only one in a hundred vote in elections, it would be invalid to argue that the rest have had the opportunity to do so. This very reduced use of the exercise of the right of access contrasts with the high legitimizing expectations that public access and transparency represented.

Thus, we wonder *if so much baggage was needed for this trip*, with such great normative and institutional effort to constitutionalize and fundamentalize this right. Likewise, we should consider the profile of the people who exert this right (university researchers, libraries, students, lawyers, and industrials). They are people doubtfully linked to the participation to conform the general interest.

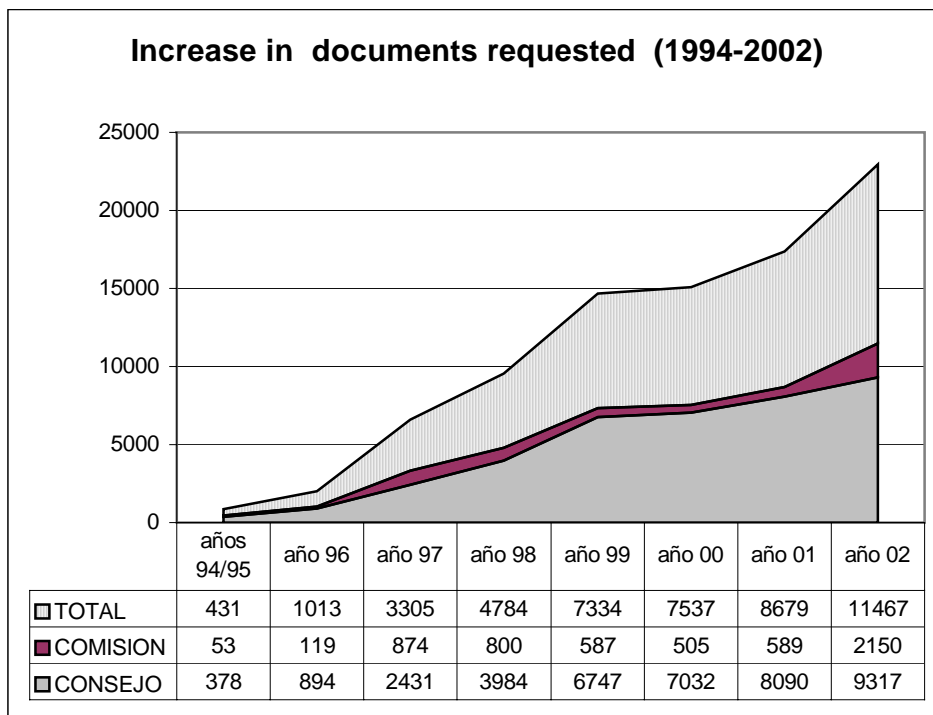


Table. Evolution of the number of requests to Council and Commission

Reques ts	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	Total
Council	71	71	169	282	338	889	1294	1234	2394	2831	9573

³⁰ Thus, for a 378 million habitants of EU (before the enlargement), taking into account a total of 11455 requests of access to Commission and Council. A 0.003 %, 1 every 33 thousand people exercise this fundamental right of access.

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Commis sion	320	320	322	745	676	408	481	450	991	1523	6236
Total	391	391	491	1027	1014	1297	1775	1684	3385	4354	15809

Docum ents request ed	94/9 5	1996	1997	1998	1999	2000	2001	2002	2003	Total
Council	378	894	2431	3984	6747	7032	8090	9317	2936	41809
Commis sion	53	119	874	800	587	505	589	2150	12595	18272
Total	431	1013	3305	4784	7334	7537	8679	11467	15531	60081

Table: Evolution of the number of documents requested from Council and Commission

3. The data on the poor use of the right to access can be interpreted as criticism of the emergence, proclamation, and constitutionizing of transparency as part of a strategy of the rhetorical legitimizing of the EU. I consider this to be an important part of the phenomenon.

However, a more optimistic interpretation is possible if we take into account the most recent electronic accessibility of the Registries by internet, specially in the Council. These Registries allow the direct exercise of the right of access. Thus, with data for the years 2002 and 2003, each year there are 800,000 accesses online to 350-470 thousand documents and 4.5-6 million screens. There are forty times more online accesses than ordinary (non virtual) accesses. There are about 400 times more accesses to electronic documents (screens). These numbers are not to despised.

Perhaps the internet leads to people's concept that the public powers are effectively monitored by the public. Nevertheless the absence of journalists, Members of Parliament, associations, and NGOs, and private individuals as visitors is a detail that does not suggest an interpretation of the political legitimising of the EU system thanks to this right of access and the transparency.

2. Real access to public information through the "Europe" website

1. It has been studied the electronic access to the Registries. Now, it is possible to analyze the access to general information by the website "Europe" (www.europe.eu.int). And the data³¹ confirms the above-mentioned hope for an "electronic transparency" actually exercised by the public.

³¹ The "Europe" server has monthly statistics of accesses to the website, plenty of insufficient because they are automated. See, http://europa.eu.int/survey_es.htm (25/8/2004).

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Data is convincing: in 2003 already two and a half million "documents" (web pages with text) were accessed every day, a billion a year³². Furthermore, these numbers double annually.

Site "Europe"	Million docs/day	Millio n docs/year	Incre ase/ year (%)
1998	0,223	80	--
1999	0,486	177,6	197%
2000	0,869	318,3	178%
2001	1,314	479,4	156%
2002	1,678	612,8	127%
2003	2,322	1000	163%

Although it is comparing pears and apples, (access to documents or access to information on Web pages), if the important thing is to eat fruit, then there is 1 pear to every 60 thousand apples³³.

2. In spite of the inappropriateness of comparing this data, the number of electronic accesses makes us reflect on the institutional efforts accomplished to get legal recognition of the formal right of access, and perhaps the relative ignoring of the real access by internet for the sake of effective transparency in the EU. At this point, as Curtin insists³⁴, the excess of information is as dangerous as the lack of it, it has generated the paradox of disinformation by product saturation. Besides, it is the emitter who selects the information and who makes it more or less accessible in real parameters (difficult to control legally), with all the after-effects that that entails.

Thus, we need to know what kind of information there is and how to find it, especially in the decision making process³⁵ and its preparatory phases³⁶. Due to

³² From the year 1998 to the 2003 around two thousand seven hundred million are the yearly accesses to "documents" (web pages with text). From 1998 to 2003 the level of access has been multiplied 12 times, from 80 million of accesses to 1998 documents, it has arrive to the milliard of 2003. In other words: in 1998 an average of 225 thousand documentary daily accesses was achieved. At the end of 2003 two millions and a half of documentary daily accesses are getting over.

³³ Between 1994 to 2001 (available data) 44,550 documents were requested formally to the Council and to the Commission and about 40,000 documents were effectively acceded.

While, in the same period 94-01 1.055 millions of "documents" were acceded online. In this way, every each document that has been accessed by means of the formal exercise of right of access the documents, 24 thousand documents (23,681) have been accessed by internet. And this number would be very superior with data of 2003, arriving to an average of one formal access to a document in respect of some 60 thousand documents online.

³⁴ CURTIN, Deirdre M. "Citizens' Fundamental Right of Access to EU Information...", cit. p. 40.

³⁵ *Ibidem*, p. 18.

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this policies have been embraced such as *euroactiv*³⁷. In order to make the electronic government become a more transparent government, it is not enough just to make information available, but rather that this information should follow the parameters of "accessibility": recognizability and localizability; availability; manageability; affordability; reliability; clarity, and accessibility to handicapped people³⁸.

3. Given that formal and real access (right of access and access to online information) seems to be an important *lever* for legitimizing the political system of the EU (and one of apparent causes of constituent process), to be coherent the possibility for control that the electronic government of the EU has also implies effective transparency has to be studied. While the attention and constituent efforts are concentrated on the possibility of formal access to a few thousands documents - perhaps the most important ones – it is not supervised in practice the public information that is disseminated by internet. For that reason, some isolated demands by Curtin are of interest, for example, the possibility of enlarging the jurisdiction of the European Ombudsman as an independent guarantee of the access to the public information by the different public powers of the EU.³⁹ Not in vain, since these functions are exercised by the Information Commissioner or Information Tribunal in various countries of the Anglo-Saxon world such as Australia, England, Ireland, Canada, and South Africa⁴⁰. In the EU, the person in charge should create and apply standards of accessibility to information, not only technical standards, but created from the political and democratic point of view, taking into account the importance that transparency seems to have for the EU. The Interinstitutional Group on Information⁴¹ that exists in the EU is not designed to fulfil these needs.

4. The data on the profiles of the users of the "Europe" website is not sufficiently updated. They only indicate that the majority of users are men (as in

³⁶ CURTIN, Deirdre M. y DEKKER, Ige F., "Governance as a Legal Concept within the European Union: Purpose and Principles", in *International Law FORUM du droit international* 4: 134-148, 2002, p. 141.

³⁷ See, BAKER, Willy, "How Information Technology can Further Transparency: Euroactiv.com", in DECKMYN, Veerle (ed.), *Increasing Transparency in the European Union?*, cit. pp. 241-242.

³⁸ About it, follow the principles of "accessibility" fixed into the conclusions of the e-democracy GOL project by G-7. VV. AA, *Online consultation in GOL countries. Initiatives to foster e-democracy*, Government Online International Network project report 6 December 2001. <http://www.governments-online.org/articles/18.shtml> (21/12/2001).

³⁹ CURTIN, Deirdre M. y DEKKER, Ige F., "Governance as a Legal Concept within the European Union: Purpose and Principles", cit. p. 142, , simply she mentions this possibility.

⁴⁰ In general http://www.law.utas.edu.au/foi/bookmarks/FOI_index.html

⁴¹ The Interinstitutional Group on Information is a mixed working group with members from the Parliament and Commission (Council, is not a part for the moment). Its initial mandate was restricted to the PRINCE campaigns. After has been widened to cover all of the activities with information and communication. This group supervises the correct functioning of cooperation among the Institutions, on an annual basis, it evaluate progress and it fix orientations on the general and specific activities of information in what the Parliament and the Commission cooperates. Also, it has responsibility in choosing the priority areas for the activities of information, the general objectives that must be attained and the strategy to follow; as well as the determination of the instruments that must be utilized (PRINCE, another important campaigns, etc.); It has to recommend agreements for the control and the evaluation of impact, too. Communication "A new frame to the cooperation in activities on the information an communication EU policy", by the Commission to the Council, EP,ECS, and RC, Com (2001) 354 final, June 26th.

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general on Internet) also that they are the university students, civil servants, members of public administration, agencies of studies and multinationals, followed by NGOs, lawyers, professors, secondary school students, and small businesses. That is why a considerable of requests are for students studies (23%), although most used by professionals (47%).

Issues searched by citizens on Internet are: six out of ten search EU News (61%) and official documents (49%), rules (47 %) and detailed information on policies (46%). A third of the hits are from outside the EU.

III Conclusion

Transparency is postulated for two basic reasons: as much to be able to control the government and the administration as to be able to participate in such a system of governance. Article I-50. 1^o of the Constitution expresses the latter.

The EU has made transparency sacred. We can see in Laeken's declaration that transparency was one of the three reasons for making a Constitution (a more transparent EU) and which can be seen in the Preamble to the Constitution.

However, although constitutionalisation is praiseworthy, transparency has been proclaimed in the EU without its necessary complement: the recognition of concrete rights of participation⁴². As Frost indicates referring to the earlier legislation, it is "a notable absence"⁴³ that the right of access is not accompanied by the right of participation, so that transparency is almost merely symbolic⁴⁴.

It reveals a "reality": "transparency has become the leading candidate to represent the EU's public image"⁴⁵. If in USA transparency "is perceived as just one more of the good government practices, in the EU it is seen as a constitutional pre-requirement of democracy"⁴⁶. One thing is to regard transparency as a principle of good government and the premise for participation in a democracy⁴⁷ and it is another very different thing to consider transparency as *magic ointment*, which *when rubbed into* the EU solves all its evils.

Berdin indicates than the citizen, now without God, without a mother country, without beliefs, without doctrines, in a society without a project, see truth as a "last virtue thus the 'cult of transparency' in the modern society is the last refuge of a democracy that has lost its beliefs and illusions, a democracy that only has the ideal of a world of truth"⁴⁸. Carcassone considers that we have passed from an excess of secrecy to the transparency nebula⁴⁹, and he insists on the common

⁴² Particularly, the North American author, FROST, Amanda, "Restoring Faith in Government: Transparency Reform in the United States and the European Union", in *European Public Law*, vol. 9, Issue 1, 2003, pp. 87-104.

⁴³ *Ibidem*, p. 98.

⁴⁴ *Ibidem*, p. 96.

⁴⁵ *Ibidem*, p. 95.

⁴⁶ *Ibidem*, p. 101.

⁴⁷ For instance, CURTIN, Deirdre M. "Citizens' Fundamental Right of Access to EU Information: An Evolving Digital *Passepartout*?", in *Common Market Law Review* 37, pp. 7-41, 2000, p. 8.

⁴⁸ BERDIN, Jean-Denis, "Secret, transparence et démocratie", in *Pouvoirs*, n. 97, 2001, monograph on transparency and secret, pp. 5-16, p. 11.

⁴⁹ *Ibidem*, p. 18.

"Theory and Reality of Public Access to EU Information" en Deirdre Curtin, Alfred E. Kellermann, Steven Blockmans (eds.) *The EU Constitution : the Best Way forward?*, The Hague: TMC Asser Press, 2005.

confusion of ends and means, transparency is not a goal but merely an instrument for superior purposes that the democratic ideal carries⁵⁰.

Transparency definitely, but always as an instrument, complement and supplement, without distracting the attention and effort from other problems on democratic deficits in EU, as or more important. Transparency definitely, but with its complement of democratic participation clear and legally assured.

Then, here the fundamentalisation and constitucionalisation of transparency and the right of access and their formal institutionalisation have been seen as "theory" but as "reality", the real importance of it with the observation of the exercise of the right of access. Moreover, the proclamation of transparency and public access has been interpreted as an attempt to legitimize the EU which lacks real democratic legitimization.

Regarding the effective exercise of transparency, a first appreciation tends to confirm the idea that the proclamation of transparency conceals an attempt to legitimize a EU which is difficult to legitimize democratically. In this sense, it has been observed that in spite of its and formal appearance, the exercise of the right of access has been insignificant and almost anecdotic in its first ten years of life. it can hardly serve to legitimize the EU.

Nevertheless, on the phenomenon of Internet, the analysis of the data is more hopeful, at least quantitatively. Online access to the Registries as much as the information available at the 'Europe' website suggests that we are facing really transparent public European power. In any case, the study has ended noting that if transparency is so important then it will be necessary to control the institutions that provide the information themselves.

⁵⁰ CARCASSONNE, Guy, "Le trouble de la transparence", in *Pouvoirs*, n. 97, 2001, cit., pp. 17-24, pp. 18 y 19.