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Transparency in the Brexit negotiations.

A view from the EU and the UK

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Transparency in the Brexit negotiations. A view from the EU and the UK^{*}

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*Tout le Monde est pour la "transparence"
mais, à être trop populaire, le terme risque de ne plus avoir de signification précise¹*

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1. The EU Position on Transparency in the Brexit Negotiations

The "unprecedented nature" and implications of the United Kingdom's exit from the European Union are requiring an assortment of unparalleled measures. Among others, the approach of the European Union to transparency in the negotiations is particularly interesting. If the EU has gradually embraced transparency in both its internal and external relations, the "maximum level of transparency" promised by the Commission² is being used innovatively by the EU 27 as a tactic in the Brexit negotiations. Indeed, contrary to the premonition of fragmentation raised by the exiting UK, by championing the principle of

^{*} Intervento ricevuto in occasione del convegno organizzato da *federalismi* "Brexit: ad un anno dal referendum, a che punto è la notte?", Roma, 23 giugno 2017. The entire work is the outcome of a joint analysis by both the authors. However, Ms Giorgia Sangiuolo drafted section 1, while Ms Maria Kendrick drafted section 2.

¹ J Söderman, *Le Citoyen, L'administration et le Droit Communautaire*, Rapport général pour le Congrès 1998 de la fide Stockholm, Sweden, 3-6 June 1998, at < http://edz.bib.uni-mannheim.de/daten/edz-b/omb/07/fide_franz.pdf>

² The European Commission's approach to transparency in the Article 50 negotiations with the United Kingdom, at <https://ec.europa.eu/commission/brexit-negotiations/european-commissions-approach-transparency-article-50-negotiations-united-kingdom_en>

transparency, the Union aims to gain the broadest possible support among the remaining Member States and stakeholders, uniting the remaining block under the flag of a Europe of shared values.

The EU approach to openness in the Brexit negotiations is entrenched in a number of promulgations, including the following. Transparency constitutes a “Core Principle” of the negotiations according to the European Council’s guidelines adopted in April 2017.³ The implementing Commission’s policy on Article 50 negotiations justifies the approach of a “maximum level of transparency” as a response to the unprecedented situation of Brexit. Furthermore, the ToR adopted by both EU and UK negotiators on 19 June 2017,⁴ which provide for the structure, dates, and priorities of the negotiations, include an entire section on transparency. Paragraphs 11 to 14 of the ToR specifically state that “*the default position for both parties is transparency*”, provided that each of them remains free to handle negotiating documents and relevant information “*in accordance with their respective legislation*”.⁵

If the emphasis on transparency is evident in the EU narrative around Brexit, how such a regime will be implemented in practice, however, is still not entirely clear. To date, the EU has published a number of negotiating documents, including agendas for negotiating rounds, EU position papers, non-papers, EU text proposals, and regularly updated factsheets. The EU also publicised the composition of its negotiating team⁶ and the negotiating mandate, promising further public statements after each round of negotiations. Special attention is also given to the identification of lobbyists. The policy of the Commission is that organisations or self-employed individuals requiring meetings with the Chief-Negotiator, Mr Barnier, must be registered in the ‘Transparency Register’.⁷ This approach is in line with the Commission’s decision on the publication of information on meetings between Directors-General and organisations or self-employed individuals⁸.

What is becoming apparent from the negotiations to date, is that, as will be seen in more detail below, the concept of “maximum level of transparency” promised by the Commission should not, and rightly so, be misunderstood as entailing unfettered openness.

³ Guidelines following the United Kingdom’s notification under article 50 TEU at <http://www.consilium.europa.eu/en/press/press-releases/2017/04/29-euco-brexit-guidelines/>

⁴ Terms of Reference for the Article 50 TEU negotiations at <https://ec.europa.eu/commission/sites/beta-political/files/eu-uk-art-50-terms-reference_agreed_amends_en.pdf>

⁵ Ibid

⁶ Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU (TF50) at <<https://ec.europa.eu/info/sites/info/files/organisation-chart-tf50.pdf>>

⁷ Stakeholder outreach concerning Article 50 negotiations with the United Kingdom, at <https://ec.europa.eu/info/news/stakeholder-outreach-concerning-article-50-negotiations-united-kingdom-2017-mar-13_en>

⁸ Commission Decision of 25 November 2014 on the publication of information on meetings held between Directors-General of the Commission and organisations or self-employed individuals, OJ L 343/19

1.1. The EU's constitutional structure.

The enhanced demand for transparency is an international trend with a horizontal dimension. During the last 30 years, transparency has been a key element in the reform of regulatory governance around the World.⁹ The legal reasons underlying this global trend have been briefly analysed elsewhere and can be linked to a number of changes in the traditional paradigms of international law¹⁰.

The European Union is an early and striking example of the rising importance of the concept of transparency. As the EU is based on a dual structure of legitimacy, comprising European citizens, and the peoples of the European Union as represented by their respective Member States' constitutions, transparency is increasingly recognized as a crucial tool to gain legitimacy in decision making.¹¹ This is achieved by ensuring that citizens' rights are protected, promoting accountability, and by providing opportunity for participation,¹² thereby improving the Union's democratic credentials. Today, transparency is a principle entrenched in the constitutional charter of the Union. Therefore, the general rule at European level is for greater openness¹³ to ensure that European action is guided by a constructive dialogue with, and subject to the control of, its citizens.

However, as will be explained in more detail below, EU law recognizes that different factual situations and competing interests may require a different level of transparency. Therefore, the transparency regime at the EU level foresees a number of exceptions¹⁴ to the default position of openness, although subject to a strict proportionality test in relation to the aims sought.¹⁵

1.2. Legal basis.

Transparency was not originally entrenched as an EU obligation in the founding Treaties. Its first appearance dates back to the 1960s, in the field of competition policy.¹⁶ As often happens at EU level,

⁹ SE Dudleya, K Wegrich, The role of transparency in regulatory governance: comparing US and EU regulatory systems [2016] Journal of Risk Research, 19(9)

¹⁰ G Sangiuolo, Transparency in the EU FTAs: Do you really want to know? Blogpost published on the website of the Law Societies, Joint Brussels office, August 2017 at <https://www.lawscot.org.uk/media/1177804/jul-aug-2017.pdf>

¹¹ See *Turco* case-law “a lack of information and debate ... is capable of giving rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole”. Joined Cases C-39/05 P and C-52/05 *Sweden and Turco v Council* [2008] ECR I-4723, paragraph 59

¹² Decision of the European Ombudsman in his inquiry into complaint 2393/2011/RA against the European Parliament

¹³ T-301/10 in *t Veld v Commission* [2013] ECLI:EU:T:2013:135

¹⁴ Art. 4, Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents 31 May 2001 OJ L 145/44

¹⁵ Case C-353/99 P *Council v Houtala* [2001] ECR I-9565, paragraph 28

¹⁶ For an overview of the development of the principle of transparency, see P Settembri, Let he who's without sin cast the first stone [2005] Journal of Common Market Studies 43(3)

the concept was further developed by the case-law of the ECJ.¹⁷ Eventually, declaration No 17 attached to the Final Act of the Treaty of Maastricht recommended steps to improve public access to information in order to accomplish transparency in decision-making processes. The professed aims of the declaration were to enhance both the democratic nature of the institutions and public confidence in the administration.¹⁸ Since the ratification of the Amsterdam Treaty and the entry into force of Article 255 of the Treaty Establishing the European Community (TEC), transparency has been entrenched in the constitutional charter of the European Union, becoming a core principle of EU law.

Article 1(2) of the Treaty on European Union (TEU) makes openness one of the defining characteristics of the EU, opening a “*new stage in the process of creating an ever closer union among the peoples of Europe*”, in which decisions are taken as openly as possible and as closely as possible to the citizen.¹⁹ Indeed, transparency ensures a more effective governance system which is also more accountable to its citizens, facilitating their participation in public activities by ensuring they have access to information and the means to take part in the process of governance²⁰. More specifically, the right of access to documents in the TFEU is placed amongst the Treaty provisions having general application (Article 15(3)) as a principle of good governance, and it is regarded as a fundamental right, guaranteed under Article 42 of the EU Charter on Fundamental Rights (CFREU).

Openness is also instrumental in achieving the EU’s constitutional aims²¹ of ensuring the accountability of decision makers, supporting legal certainty, and strengthening the rule of law²² and the general principle of equality.²³ Furthermore, transparency is also instrumental in ensuring respect for fundamental rights, as laid down in Article 6 of the EU Treaty and in the CFREU. These are not exclusively democratic rights, such as the right to good administration²⁴, but also include a vast array of other rights. For instance,

¹⁷ Ibid

¹⁸ Treaty of Maastricht on European Union, https://europa.eu/european-union/sites/europaeu/files/docs/body/treaty_on_european_union_en.pdf

¹⁹ Article 1(2) TEU

²⁰ Decision of the European Ombudsman in his inquiry into complaint 2393/2011/RA against the European Parliament. See also art. 2, 10 and 11 TEU and joined Cases C-39/05 P and C-52/05, P *Sweden and Turco v Council* [2008] ECR I-4723, para 4. According to the Court of Justice, [t]he possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights”

²¹ A Buijze, The Six Faces of Transparency [2013] Utrecht Law Review 9(3)

²² Art. 2 TEU

²³ A. Prat, “The More Closely we are Watched, the Better we Behave?”, in C Hood, D Heald (eds.), *Transparency: the Key to Better Government?* (Oxford University Press, 2006)

²⁴ Art. 41 CFREU

openness is a key element to ensuring the effective exercise of the right of defence²⁵ or environmental protection²⁶.

Transparency also contributes to fulfilling the aims of the internal market²⁷. Decision making processes which are less likely to be influenced by special interests supports open competition, trade and investment²⁸.

1.3. Transparency in the External Relations of the EU and its limits in Relation to the Brexit Negotiations.

The EU adopted an approach to openness, which is similar to the “maximum level of transparency” embraced in the Brexit talks, during its negotiations with the US on the Trans-Atlantic Trade and Investment Partnership (TTIP).²⁹

Originally, the principle of transparency was developed and implemented internally within the EU, the main piece of legislation being the Transparency regulation,³⁰ which creates a baseline of rights of access to the documents of the Institutions.³¹ However, the Lisbon Treaty constitutes a stepping stone for its application in the external economic relations of the Union, by subordinating the Common Commercial Policy to the broader objectives of EU external action. This was achieved through Articles 207(1) TFEU and 21 TEU, which provide that the Union’s action on the international scene shall be shaped around its constitutional principles – including democracy, the rule of law and good governance, for which transparency is instrumental - and that the Union should actively engage international actors to export such principles abroad.

The changes in the normative framework of the EU are reflected in a number of novelties in EU economic external relations, both at a substantive and at a procedural level.³² At a substantive level, the introduction of the practice of public consultation in the context of EU Free Trade Agreements (FTAs)

²⁵ Art 47 CFREU

²⁶ Art. 37 CFREU. On the relevance of transparency for environmental protection, see Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, of February 14, 2003, OJ L 041

²⁷ Art. 2 TEU

²⁸ OECD, Better Regulation in Europe Better Regulation in Europe: Luxembourg 2010 (OECD Publishing, 2010)

²⁹ http://ec.europa.eu/trade/policy/in-focus/ttip/index_en.htm

³⁰ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents 31 May 2001 OJ L 145/44

³¹ Ibid, art. 2(4)

³² ML Marceddu, “Transparency in the EU FTAs. Do you really want to know? A dialogue on transparency”, conference held by the King’s College Centre of European Law on July 14, 2017, see conference report at <<http://www.lawttip.eu/news-and-events/the-eu-ftas-do-you-really-want-to-know-a-dialogue-on-transparency/>>

constitutes a commendable effort to include civil society's inputs at the early stages of negotiations. At a procedural level, the enhanced degree of transparency in the dispute resolution mechanisms often included in these FTAs, is a particularly important tool to ensure public control over the existence and outcome of litigation arising from the FTAs.

However, transparency in EU external relations can be particularly tricky. In the context of the “new generation” of comprehensive EU FTAs, transparency remains a crucial tool to reconcile the requirements of free trade with requests for guarding non-trade concerns related to public health, labour and environmental issues or intellectual property rights, in accordance with the constitutional principle of sustainable development³³. International negotiations, however, are, by definition, an exercise in diplomacy and compromise. They require an atmosphere of mutual trust, which naturally calls for some secrecy and minimal public or parliamentary scrutiny to maximise the chances of operational success.

The importance of preserving some secrecy in the external relations is recognized in Article 4(1)(a) of the Transparency Regulation, which sets an absolute exception³⁴ to the transparency regime laid down in the regulation with regards to *inter alia* international relations. The rationale behind the exception results from the political importance of the negotiations. To use the words of the Court of Justice of the EU (CJEU), the legitimate interest in not revealing strategic elements of the negotiations protected by the Transparency Regulation calls for the exercise of particular care³⁵. Care which translates into a broad margin of appreciation being granted to the executive, in determining whether the disclosure of documents relating to the fields covered by those exceptions could undermine the public interest.³⁶

Therefore, if it is indeed the political sensitivity of the negotiations that determines the breadth of the margin of discretion in disclosing documents, then, arguably, the unprecedented case of Brexit would grant the Institutions an even larger margin and room for manoeuvre. The UK's divorce from the EU is likely to impact massively on a number of highly sensitive interests, such as free movement of people, which requires at least some space for discussion shielded from the public scrutiny. On closer inspection of a number of EU documents, this appears to be the Union's position. The ToR³⁷ exclude public participation in the actual negotiations between the EU and the UK, by providing that each round should be conducted solely by public officials. Furthermore, the ToR provide the EU and the UK with the

³³ Art. 11 TEU

³⁴ Decision of the European Ombudsman in his inquiry into complaint 2393/2011/RA against the European Parliament, 22 July 2017

³⁵ Case T-529/09, *t Veld v Council* [2012] ECR, paragraph 88

³⁶ Eg. C-266/05 P *Sison v Council* [2007] ECR I-1233, paragraphs 34 to 36, and T-362/08 *IFAW Internationaler Tierschutz-Fonds gGmbH v Commission* [2011] ECR II-00011, paragraph 104

³⁷ Terms of Reference for the Article 50 TEU negotiations at <https://ec.europa.eu/commission/sites/beta-political/files/eu-uk-art-50-terms-reference_agreed_amends_en.pdf>

power to apply restrictions on the distribution of their documents, and a duty to consult the other party prior to disclosure. More generally, the Commission's policy identifies two outer limits to the application of transparency, in the interests of the preservation of the integrity of the negotiations,³⁸ and in the limitations under EU law, including the exceptions to transparency provided for by Article 4(1)(a) of the Transparency Regulation.³⁹

Therefore, the commendable effort of the EU to ensure a "maximum level of transparency" in the negotiations cannot, and rightly so, create an expectation of unfettered openness on the EU side. Contrarily, it correctly preserves a minor, yet fundamental, space for discretion in order to ensure that the negotiations achieve the best possible overall outcome for the EU 27.

2. The UK position on transparency in the Brexit negotiations.

The initial response of the UK Government to expectations as to its approach to the Brexit negotiations has been epitomised by the Prime Minister's refusal to give a 'running commentary'⁴⁰ on the negotiations. The justification for this was cited as protecting the UK Government's hand, in order to allow it to take a considered approach. It was stressed that for the right deal to be struck with the EU, the Government needed to be able to keep as many options as possible available to it, and therefore keep them private, and not be forced to reveal its negotiating position prematurely for risk of prejudicing negotiations.⁴¹

While this stance was maintained for a short time, once the EU decided that it was to adopt an approach of providing a "maximum level of transparency", this became difficult to justify. When the EU commenced its programme of publications including, as listed above, position papers, the approach of the UK Government, when compared to the EU, began to be questioned. As will be discussed in more detail below, once one party to a negotiation starts to release position papers consequences then occur for the remaining party. The Government's approach to transparency began to be questioned on two significant bases. The first is the logic of its argument that to avoid publication and announcements as to its negotiating position will somehow keep the negotiations private, despite the fact that the EU is publicising so much. This does not seem to be the logical outcome of this proposition because those who wish to obtain information on the negotiations can just get it from the EU anyway. The second is

³⁸ https://ec.europa.eu/commission/brexit-negotiations/european-commissions-approach-transparency-article-50-negotiations-united-kingdom_en

³⁹ The European Commission's approach to transparency in the Article 50 negotiations with the United Kingdom, at https://ec.europa.eu/commission/brexit-negotiations/european-commissions-approach-transparency-article-50-negotiations-united-kingdom_en

⁴⁰ <https://www.theguardian.com/politics/video/2016/sep/07/theresa-may-not-provide-running-commentary-on-brexit-negotiations-video>

⁴¹ Prime Minister's Questions Hansard 7 September 2016 volume 614.

its preparedness; it was assumed that the UK Government was not publicising its stance in the Brexit negotiations and its plan for a withdrawal agreement and post-Brexit settlement because it was in fact void of any such ideas. In short, it was suggested that the UK Government did not want to publish its plan for the Brexit negotiations, because it didn't have one.⁴²

It was the latter argument that prompted the Government to attempt to dispel and quash such criticism. It has now started to follow the EU's example, and in compliance with the ToR, it has begun to publish. It has, amongst other things, set up its own website,⁴³ published position papers,⁴⁴ made speeches and announcements,⁴⁵ issued statements,⁴⁶ released the biographies of some of the civil servants in the UK negotiating team,⁴⁷ and also published a 'Future Partnership Paper' in relation to the customs union.⁴⁸ This has now spawned what we term the 'battle of the papers' during which both the EU, and now the UK, are publishing a significant amount of position papers and details of their negotiating stances in an attempt to demonstrate the strength of their negotiating hand. Transparency is being used in this battle as a weapon, or tactic, in the Brexit negotiations.

The implied outcome of the 'battle of the papers' is that the side that publishes first, and publishes the most, is somehow better prepared. The corollary to this argument is that the negotiating side that is better prepared has the greater chance of securing a successful, and therefore favourable, outcome.

However, as will be elucidated further below, there can be drawbacks to using transparency as a tactic in this manner. It can produce an atmosphere in which quantity becomes preferable to quality. Consequently, if neither side are progressing the negotiations through their publications because getting in first becomes more important than the furtherance of the discussions, it makes transparency seem like a futile exercise.

2.1. The UK's constitutional structure.

The UK Government has altered its approach to transparency with regard to the Brexit negotiations, as explained in the last section. As to what information the UK Government chooses to publish, and when

⁴² On which see <https://www.theguardian.com/politics/2017/jan/05/theresa-may-plans-major-speech-defuse-brexit-criticism>

⁴³ <https://www.gov.uk/government/collections/article-50-and-negotiations-with-the-eu>

⁴⁴ Including on subjects such as the Ireland and Northern Irish border, privileges and immunities and the position of EU citizens in the UK and UK citizens in the EU.

⁴⁵ Texts of these items can be found at <https://www.gov.uk/government/collections/article-50-and-negotiations-with-the-eu>

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/637748/Future_customs_arrangements_-_a_future_partnership_paper.pdf

it specifically chooses to publish it, however, can be explained as a product of the operation of the UK's constitutional structure.

The UK's constitution has famously been described as uncodified, which means that, in contrast to the EU, there is no overarching document similar to the Treaty from which a constitutional obligation to be open and transparent can be derived. The UK constitution functions in a flexible manner with the actions of politicians, Departments of State, and their Ministers, being guided by, amongst other things, constitutional conventions.⁴⁹ The convention of collective ministerial responsibility, which is pertinent in this context, essentially requires that the Cabinet present a united front. Disagreements are to be voiced inside confidential meetings of the Cabinet but public statements are to express the collective stance adopted in Cabinet meetings with Government policy publicly defended regardless of any thoughts to the contrary held privately by the Minister.

The operation of this convention was suspended in the run up to the referendum on 23 June 2016 because it was well known that members of the Cabinet held wildly differing views on Brexit. Now the referendum has resulted in a majority, albeit a slim majority, vote in favour of leaving the EU and it is the Government's policy that Brexit is to be achieved, Ministers need to act in accordance with the convention.

However, what was apparent in the referendum campaign, and from the recent general election, is that there are differing views still within Cabinet.⁵⁰ The operation of the convention and certainly the corollary, which is essentially the stability of the Government and its ability to command the confidence of the House of Commons, depends not on transparency but on privacy. In short, keeping control of the dissemination of information, especially as it relates to disagreements between Cabinet Ministers as to what form Brexit should take and how long it should take, is of paramount importance for the continuation of the current Government. The UK Government has therefore chosen to publish in accordance with the items on which it can obtain agreement, or at least a semblance of agreement.

The UK constitutional structure also influences transparency in the Brexit negotiations through the role of Parliament. It has been said that legitimacy for the UK Government's actions with regards to Brexit stems from the referendum result.⁵¹ The referendum question, however, was silent as to what form Brexit

⁴⁹ Much has been written on the definition and operation of conventions in the UK constitution but the still considered authority is G. Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford University Press, 1987).

⁵⁰ This has been reported significantly in the press, on example of which is at <https://www.ft.com/content/5404c058-5bf4-11e7-b553-e2df1b0c3220>

⁵¹ This has been suggested by V. Bogdanor in (2016) *Brexit, the Constitution and the Alternatives* King's Law Journal, 27:3, 314-322 and also at <https://www.theguardian.com/commentisfree/2017/aug/03/second-brexit-referendum-case-getting-stronger-political-deadlock-life-raft>

should take, how long it should take, and what should be the impact, if any, on the devolved powers of the nations that comprise the United Kingdom. The Government, and consequently the governing Conservative party, also needs to maintain the confidence of the House of Commons specifically, and Parliament generally. Concerns about limiting the impact that the opposition parties can have on shaping Brexit in a manner not endorsed by the Conservative party is also a concern which filters into issues of transparency. The desire to control the debate in the UK is a strong one which, as the recent general election result has shown, can pay dividends. Consequently, information as to what the UK Government, as opposed to individual Ministers, is seeking from the Brexit negotiations has been disseminated in a piecemeal and controlled manner, including through the modest detail given in the Prime Minister's letter to Donald Tusk⁵² triggering Article 50 TEU, and the Government White Paper.⁵³ Parliamentary involvement in terms of legislation has so far been kept to a surprising minimum, with the European Union Referendum Act 2015 and the European Union (Notification of Withdrawal) Act 2017 being the precious few examples, and even then, precipitated by litigation.⁵⁴ The motivation behind keeping information disclosure to a minimum domestically is the maintenance of a strong and able Government. Furthermore, the ToR are brief and sufficiently opaque that they provide little impetus to the UK to alter its view on transparency with regard to the content of disclosure. Rather, it is apparent from the increase in the number of papers it is now willing to disclose in response to the EU's openness objective, that negotiating strength is the driving force.

2.2. Does the EU approach to transparency also influence the UK?

The EU's obligation of transparency has a broader impact, also binding Member States via the principle of sincere cooperation⁵⁵. The question then arises as to whether, and to what extent, the UK should be bound to cooperate with the EU to ensure the "maximum level of transparency" promised by the Institutions. Arguably, for the time being the UK still is a Member of the EU, subject to all rights and obligations set out under EU law, including the principle of sincere cooperation. However, as illustrated

⁵² Prime Minister's letter to Donald Tusk, President of the European Council, 29 March 2017, at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604079/Prime_Ministers_letter_to_European_Council_President_Donald_Tusk.pdf

⁵³ White Paper, *The United Kingdom's exit from and new partnership with the European Union* February 2017, Cm 9417

⁵⁴ This is as a result of the case of *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin) and [2017] UKSC 5 on which see the following blog posts: in relation to the High Court judgment <http://patentblog.kluweriplaw.com/2016/11/14/brexit-judgment-r-miller-v-secretary-of-state-for-exiting-the-european-union-2016-ewhc-2768-admin/> and the Supreme Court judgment: <http://copyrightblog.kluweriplaw.com/2017/02/01/uk-brexit-decision-r-miller-v-secretary-of-state-for-exiting-the-european-union-2017-uksc-5/>

⁵⁵ Art. 4(3) TEU

above, the UK's motivations do not focus heavily on the EU principle of sincere cooperation. In fact, although the ToR set an obligation to cooperate to ensure the implementation of the “default position of transparency”, they also provide that both Parties will handle negotiating documents in accordance with their respective legislation. In so doing, the ToR actually disentangle the UK from the consequences of the legal obligations of transparency deriving from EU law.

The legal explanation and justification for this apparent contradiction is straight-forward. If it is true, on the one hand, that until its actual exit from the Union the UK is still a full member of the EU, it is also true, on the other hand, that the aim of the negotiations is to prepare for the UK's exit. In such preparations the EU and the UK have opposing and hardly reconcilable interests, which they are both seeking to protect. In short, in circumstances strictly limited to the Brexit negotiations, the EU and the UK are counterparts and the principle of sincere cooperation cannot be expected to apply.

3. Pros & Cons of Openness in the Brexit Negotiations.

The default position of transparency agreed in the ToR is being tactically implemented by the two negotiating parties in two very different ways. In contrast to the “maximum transparency” approach, the UK Government has adopted an alternative strategy befitting of its own constitutional requirements and its own domestic agenda. It has repeatedly affirmed that it is in the public interest for it to choose what information to share with the general public, and indeed the UK Parliament, on a case by case, or need to know, basis.

The rationale behind these two positions lies in the constitutional structures and differing aims and priorities of the two parties to the negotiations. As previously mentioned, transparency is not intrinsically valuable, in the sense that one does not adopt an approach of transparency for transparency's sake. Rather, transparency embodies a number of advantages and pitfalls, and its concrete implementation requires a careful balancing, by each negotiating party, of the interests underlying the conduct of negotiations.

The following analysis aims to compare and contrast the application of the pros & cons of adopting a transparent approach, demonstrated through the respective positions of the two negotiating parties as to their choices on the implementation of transparency.

a. Considerations in Favour of Transparency.

Unity and Strength.

The first argument in favour of openness for the EU lies in the necessity for the 27 remaining Member States to show unity and strength by raising awareness and making a link to both civil society⁵⁶ and national institutions. With regard to the fragmenting forces that led to the exit of the UK, the EU is now declaredly seeking to achieve the maximum consensus and participation from civil society in the negotiating process through consultations and by stimulating the largest possible debate on the talks. Additionally, transparency strengthens the link between the EU and the national institutions. As the EU Chief Negotiator pointed out at the 57th COSAC (Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union), transparency allows national parliaments to have informed discussions, reply to citizens' questions, and engage in public debate, acting as trustees of the Union at the local level.⁵⁷

In contrast, for the UK, the maintenance of unity and strength has militated against adopting a transparent approach. It has been well documented that there have been divisions and disagreements in the Cabinet over the direction of the Brexit negotiations.⁵⁸ The referendum question⁵⁹ offered a binary choice which did not prescribe a description as to the meaning of Brexit. It has therefore fallen, within the UK's constitutional arrangements, to the UK Government, and specifically the Cabinet, to design the outcome the UK desires to achieve from the Brexit negotiations. As this is a matter of domestic political compromise, conducted under the auspices of the convention of collective ministerial responsibility, which requires unified public engagement by Ministers with disagreements kept confidential, it has been constitutionally expedient to keep dissent behind closed doors.

Legitimacy and constitutional structure.

From Van Gend en Loos onwards, the constitutional structure and legitimacy of the European Union has been increasingly found in two main constituencies: Member States and non-State entities. Specifically

⁵⁶ Speech by M Barnier at the European Economic and Social Committee of July 6, 2017, at <http://europa.eu/rapid/press-release_SPEECH-17-1922_en.htm>

⁵⁷ Discours par Michel Barnier à la 57ème COSAC (Conférence des Organes Parlementaires Spécialisés dans les Affaires de l'Union des Parlements de l'Union Européenne), Malte, at <http://europa.eu/rapid/press-release_SPEECH-17-1469_en.htm>

⁵⁸ There have been multifarious newspaper reports, including: The Guardian, *Tensions Flare in Cabinet Over Post-Brexit Free Movement* 30 July 2017 at https://www.theguardian.com/politics/2017/jul/30/tensions-flare-in-cabinet-over-post-brexit-free-movement?utm_source=esp&utm_medium=Email&utm_campaign=Brexit+briefing+2016&utm_term=237450&subid=19634169&CMP=ema-3239

⁵⁹ Section 1(4) European Union Referendum Act 2015.

by means of the creation of institutional tools (direct and indirect effect, supremacy of EU law and doctrine of state liability for failure to implement EU law⁶⁰) and substantive rights (doctrine of fundamental rights and citizenship⁶¹) the European system has “constitutionalized” individuals as the “new” subject of EU law, both as carriers of rights and duties and as legitimacy providers, by means of their participation in the law-making process⁶². The default position of openness in the negotiations can therefore be regarded as, although not absolute, a constitutional principle of EU law. Thus, through openness, the EU reinforces its democratic legitimacy to conduct the negotiations in the name of the peoples of Europe. Furthermore, the EU is also offering non-State entities the possibility to participate in the Brexit talks through both input, via consultations and stimulating public debate from the publication of documents, and through output, by allowing the civil society to control their development in real time.

The legitimating factor behind the UK’s approach to the negotiations, is the referendum held on 23 June 2016. Because the referendum yielded no definite blueprint for Brexit, despite discussions in the UK as to what was and was not said in press interviews by both sides of the campaign in the run-up to the vote, in order to decide the outcome of the Brexit negotiations and the manner in which they are to be conducted, the UK’s flexible uncoded constitution comes into operation. Although not prescriptive, because, as stated above, the Brexit situation is as unprecedented in the UK as it is in the EU, there are some constitutional conventions and practices which operate in the UK Constitution to encourage transparency. One of the most important, in addition to the convention of collective ministerial responsibility, is what Walter Bagehot attributed to the House of Commons,⁶³ which can now be attributed to both Houses of Parliament and its select committees⁶⁴ is an informing function. However, the extent to which this will be truly effective in producing open engagement with the public towards something akin to the EU’s “maximum transparency” approach, is wholly dependent on the ability and motivation of the UK Parliament, with its MP, Peer and Committee systems, to demand information and quality debate on the approach of the UK Government to the negotiations.

⁶⁰ MP Maduro, *We the Court - The European Court of Justice and the European Economic Constitution* (Hart Publishing, 1998)

⁶¹ Additional to the national ones but bearing with it a ‘multiplying effect’ on the rights of the EU citizens in the fields of competence of the Union

⁶² S Bardutzky, E Fahey, *The subjects and objects of EU Law: Exploring a research platform* (Edward Elgar Publishing, 2016)

⁶³ W. Bagehot, *The English Constitution* (Oxford University Press, re-print 2001), p101.

⁶⁴ Such as the House of Commons Exiting the European Union Select Committee.

Control of the public narrative around Brexit.

The international trend towards openness⁶⁵ was determined by a number of factors. One of these factors is the modification to the role of non-State entities in international law, which has dictated a recent shift towards a new global system of governance,⁶⁶ in which non-State entities, individuals and States work together. As is well represented in the 2017 Edelman Trust Barometer-Global Results⁶⁷, in this new system of governance, the media play a crucial role in transmitting and conveying information between institutions and non-State entities, influencing how they are received by both parties.

How information is transmitted by institutions to the media consequently shapes the way civil society and, more generally, non-State entities, understand the position of the negotiating parties and the development of the talks. Therefore, becoming the main source of information for the media on the development of the negotiations is a powerful tool by which the EU can control the public narrative around Brexit. For instance, the initial reluctance of the UK Government to publish position papers in a manner similar to that of the EU, was received with an element of hostility by the media, thereby putting the EU in a more favourable position with regard to shaping public opinion.

The relative importance of transparency as a tool to control the public narrative around Brexit is again highly influenced by the constitutional structure of the UK and the EU. With regard to the latter, as suggested above, the EU has grasped the nettle, strongly influenced by the constitutional obligations already elucidated in this article. Indeed, the position of non-State entities is naturally a greater consideration in the EU, where they are both carriers of rights and duties and legitimacy providers. With regard to the former, the UK constitution puts the control of information in relation to the Brexit negotiations in the hands of the Government. The extent to which the Government will be successful in controlling this information, however, depends on the size of its majority in the House of Commons. After the general election held on 8 June 2017, the Prime Minister and governing Conservative party no longer enjoys a majority in the House of Commons. A spirit of compromise with the other political parties is now the order of the day. This has precipitated a need to be cooperative with opposition parties who espouse differing views as to the meaning of Brexit and the shape any Brexit settlement should take. As a consequence, there is a demand that more information needs to be shared, and therefore publicised, rather than being kept confidentially in Whitehall.

⁶⁵ SE Dudleya, K Wegrich, The role of transparency in regulatory governance: comparing US and EU regulatory systems [2016] *Journal of Risk Research*, 19(9)

⁶⁶ 2017 Edelman Trust Barometer-Global Results, slide 50, at <<http://www.edelman.com/global-results/>>

⁶⁷ Ibid

Finally, there is also a major difference with regards to the message that the EU and the UK intend to send to the media. Indeed, it has been important for the UK Government to demonstrate that it is competent, not only with regard to handling the negotiations, but also in relation to the UK's future international relations. It has therefore focused on controlling the narrative and photo opportunities in relation to its likely future trade negotiations with third countries. It is safe to say that the priority of the EU, which is to ensure the portrayal of a united front on the part of the EU 27, differs considerably from that of the UK, which wishes to appear to be looking away from the EU to its future relations with third countries.

Much of the negotiating material is bound to leak.

The experience of the TTIP has showed that the unauthorised disclosure of EU classified information is a recurring issue, which bears some serious consequences in terms of the credibility of the whole system⁶⁸. Leaked information undermines the authority of decision makers, creating mistrust within the general public, by challenging the authority of ruling administrations by highlighting real or alleged contradictions between its public and private behavior⁶⁹. For this reason, after the unauthorised publication of TTIP documents by Greenpeace⁷⁰, the Council issued a working paper containing an Anti-Leak strategy⁷¹.

The issue of unauthorised disclosure of classified information is particularly relevant in a legal system, such as that of the EU, which, as previously mentioned, greatly bases its legitimacy on the support of non-State entities. Consequently, a loss of trust and credibility within the general public has a direct and immediate impact on the legitimacy of the Union vis-à-vis one of its constituents.

Against this background, the “maximum level of transparency” approach of the Commission is very understandable. Thus, the *ex-ante* publication of most of the negotiating material and outcomes constitutes an effective way to reduce the possible harm caused by their unauthorised disclosure.

The EU is not the only party to the Brexit negotiations to have a problem with suppressing the unauthorised dissemination of information. With regard to the negotiations themselves, especially the UK's opening negotiating position, there have been many occasions of alleged ‘leaks’ to the press from

⁶⁸ A Alemanno, What the TTIP Leaks Mean for the On-going Negotiations and Future Agreement? Time to Overcome TTIP's many Informational Asymmetries [2016] European Journal of Risk Regulation 7(2)

⁶⁹ A Bail, The Public Life of Secrets: Deception, Disclosure, and Discursive Framing in the Policy Process [2015] Sociological Theory 33(2)

⁷⁰ Eg. www.ttipp-leaks.org

⁷¹ Council of the European Union, Working Paper, Limite, 27 May 2016 WK 439/2016 INIT, at <<http://polscieu.ideasoneurope.eu/files/2016/09/May2016-Council-Anti-Leak-Strategy.pdf>>

several Cabinet Ministers⁷² which have been linked to the issue of the incumbent Prime Minister's authority to negotiate Brexit, her possible successor, and general disagreements within the Conservative Party as to the direction that Brexit should take.

It is probably safe to say that these unauthorised disclosures of information are politically motivated, as they relate more to the political positioning of those within the Cabinet with regard to the Conservative leadership succession, rather than to the detailed substance of the position papers which have been published by the Department for Exiting the European Union. This has the consequence of undermining the UK's position in the Brexit negotiations through suggestions that the UK Government is divided and does not know what it wants to achieve from the Brexit negotiations. This has led to the perception that the UK Government may not have sufficient constitutional authority to agree the terms of the UK's withdrawal from the EU. Concerns have therefore been raised about the need for further parliamentary approval of any withdrawal settlement which may be agreed with the EU and even a second referendum. Rather than seek to dispel such rumours solely through the publication of position papers, although the UK Government has increased this considerably of late, joint statements have been made by Senior Cabinet Ministers in an attempt to present a united front on the UK Government's approach to Brexit.⁷³ Although the UK and the EU are approaching the implementation of transparency from very different starting positions, strength and assurance of negotiating hand is certainly one factor which is a consistent motivation for both parties.

Transparency safeguards the global economy from major disruptions caused by Brexit and protects the UK from foreign investors' claims.

The way the Brexit negotiations are handled is bound to have deep repercussions on the global economy. As noted by Japan in its message to the UK and the EU, uncertainty is a major concern for any economy⁷⁴. Therefore, the first request directed by Japan to both negotiating parties was to be as transparent as possible in the negotiations, because openness is the key to stimulate stakeholders' confidence in the legal environment, making regulations more secure and accessible.

⁷² One such example of this is the series of leaks over the authority of the Prime Minister, Theresa May, to oversee the Brexit negotiations after losing the Conservative party's majority in the House of Commons in the general election held on 8 June: at <http://www.bbc.co.uk/news/uk-politics-40547731>

⁷³ See for example the Chancellor of the Exchequer and the secretary of State for International Trade writing in The Telegraph at <http://www.telegraph.co.uk/news/2017/08/12/britain-will-not-stay-eu-back-door-philip-hammond-liam-fox-declare/>

⁷⁴ Japan's Message to the United Kingdom and the European Union, at <<http://www.mofa.go.jp/files/000185466.pdf>>

This consideration plays a role, although not a crucial role, for both the EU and the UK, in the safeguarding of the stability of the global economy and their own international relations.

b. Considerations against transparency.

Transparency is not an aim in itself. A number of empirical assessments have found that transparency's effects are often limited and differ according to a number of factors such as the area of government, policy domain, and citizen characteristics⁷⁵. According to some of these studies, openness may, in some cases, even cause more harm than good, fuelling "*polarization, indecision, and, ultimately, dysfunction in government*".⁷⁶ With regards to the Brexit negotiations, the following caveats on the approach to complete transparency apply.

Transparency inhibits the development of free and effective discussions in the context of the negotiations.

The primary consideration behind maintaining a certain amount of secrecy in international relations resides in the need to leave Governments with some room for manoeuvre in diplomatic and political negotiations. As the CJEU noted in relation to the exception under Article 4(1)(a) of the Transparency Regulation⁷⁷ in the context of international negotiations, negotiating positions are, by definition, subject to change, depending on the course of negotiations and on concessions and compromises made in that context by the various stakeholders. It is possible that public disclosure of negotiating positions, or of sensitive information, even if the negotiating position of the other party remains secret, could have a negative effect on that parties' negotiating strength.⁷⁸ Indeed, the relevance of public opinion to the modern system of governance reduces the ability to compromise. Negotiators would be bound to maintain their publicised positions, that may have actually been merely provisional.

With particular reference to the 'battle of the papers' above, this predicament is true of both the EU and the UK. Now that both sides to the Brexit negotiations have, and are continuing, to publish position papers, which may well be starting positions in terms of the negotiations, we are already witnessing comments in the press that movements away from these positions are being perceived as signs of weakness. Described in terms of 'wins' or 'losses', concessions to achieve a compromise may be seen as

⁷⁵ For a review on the literature on the issue see, M Cucinello and others, 25 Years of Transparency Research: Evidence and Future Directions [2017] Public Administration Review 77(1)

⁷⁶ Ibid

⁷⁷ T-301/10, *t Veld v Commission* [2013] ECLI:EU:T:2013:135

⁷⁸ Ibid

‘caving in’.⁷⁹ Ultimately, negotiators could be prevented from achieving the best overall outcome in terms of the public interest, in an attempt to avoid such criticism.

Transparency damages mutual trust between the negotiators.

The CJEU has also noted, in relation to the exception under Article 4(1)(a) of the Transparency Regulation, that secrecy is key in international relations in order to safeguard the relationship between the negotiating parties.⁸⁰ It is possible that the disclosure of one party’s negotiating position could, indirectly, reveal that of other parties to the negotiations. In fact, unilateral disclosure by one negotiating party, of the negotiating position(s) of one or more of the other parties to the negotiation, may seriously undermine the mutual trust essential to the effectiveness of those negotiations and, more generally, the credibility of the disclosing party on the international plane⁸¹.

This consideration is particularly important to both the EU and the UK, given their common interest in achieving and maintaining close cooperation post-Brexit. Consequently, paragraph 14 of the ToR states clearly that the disclosure of any information, or documents regarding the position of the other negotiating party, shall be subject to the prior consultation with the other party⁸².

More transparency does not necessarily lead to a more informed debate.

As the TTIP negotiations show, the narrative created by stakeholders around negotiating documents often “*does not survive basic fact-checking*”⁸³. The importance of information and the media in shaping global governance brings with it the risk of a number of abuses, such as its use for purely personal and political agendas rather than pedagogical aims. Furthermore, a number of empirical studies on the relationship between transparency and trust in government, or transparency and accountability, differ.⁸⁴

This reasoning applies to both the EU and the UK. Information which particularly requires technical competences, are likely to be, at best, ignored by the general public, causing more harm than good to the negotiations.

⁷⁹ See, as a case in point, The Independent 19 June 2017 *Brexit talks: UK caves in to EU’s demand that divorce terms are established before future trade deals*, David Davis told the ‘weakness of your negotiating position’ has been exposed – within hours of the talks opening at <http://www.independent.co.uk/news/uk/politics/brexit-talks-negotiations-latest-uk-eu-divorce-deal-government-agrees-caves-in-before-trade-deal-a7798076.html>

⁸⁰ T-301/10, *t Veld v Commission* [2013] ECLI:EU:T:2013:135

⁸¹ Ibid

⁸² Terms of Reference for the Article 50 TEU negotiations at <https://ec.europa.eu/commission/sites/beta-political/files/eu-uk-art-50-terms-reference_agreed_amends_en.pdf>

⁸³ A Alemanno, What the TTIP Leaks Mean for the On-going Negotiations and Future Agreement? Time to Overcome TTIP’s many Informational Asymmetries [2016] European Journal of Risk Regulation 7(2)

⁸⁴ M Cucinello and others, 25 Years of Transparency Research: Evidence and Future Directions [2017] Public Administration Review 77(1)

Transparency and legal certainty as a safeguard against legal actions from foreign businesses under investment agreements.

Another consideration that may prove to be especially important for the UK, is connected to the link between transparency and legal certainty as a safeguard against legal actions from foreign businesses. Transparency, as a tool to facilitate the predictability of the outcome of the negotiations, may reduce the possibility of success of prospective claims which could be brought by foreign investors against the UK under its numerous bilateral investment treaties and free trade agreements based on their legitimate expectations⁸⁵. Indeed, changes to the regulatory framework of the UK subsequent its exit from the EU seem more likely to pass the test of reasonableness and proportionality carried out by arbitral panels to ascertain their legality vis-à-vis investors' legitimate expectations⁸⁶ if the latter are granted a reasonable timeframe to adapt to the changing circumstances. In light of current political expediencies in the UK, however, this may not incline the UK Government to change its current stance on transparency in the short term but may prove to be a long-term impetus.

4. Conclusion

The “maximum transparency” approach adopted by the Commission, once again, places the EU as a leader on the international scene, setting a golden standard in international relations for the years to come. Such approach is commendable and in line with the Union's constitutional values and most recent practice. Brexit is bound to have a deep impact on both individuals and companies, therefore an enhanced level of transparency is welcome, ensuring democratic participation and uniting the EU 27 under the flag of shared values.

However, the promise of a “maximum level of transparency” does not, and should not, mean complete openness. The negotiating documents show that the fundamental public interest which militates in favour of participation, must be balanced with the need for effectiveness. Indeed, the advantages and the pitfalls of openness call for a balancing exercise between the competing interests to democratic participation and the achievement of the best overall outcome to the negotiations. Balance that necessarily requires

⁸⁵ A Ross, Could Brexit trigger investment claims?, Global Arbitration Review, June 19, 2017, at <<http://globalarbitrationreview.com/article/1143054/could-brexit-trigger-investment-claims>>

⁸⁶ Eg. Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic (ICSID Case No. ARB/14/3), Final Award, December 27, 2016, available <<https://www.italaw.com/sites/default/files/case-documents/italaw8967.pdf>>

affording the Institutions a margin of discretion in regards to the implementation of the principle of transparency.

Much of this can also be said to be true for the UK. With the political, and indeed constitutional, position in the UK following the EU referendum on 23 June 2017 and the general election on 8 June 2017, in flux,⁸⁷ it is stability and, to a certain extent, the presentation of a united front, that motivates the UK Government in relation to the Brexit negotiations. As well as being influenced by the operation of constitutional conventions the UK Government's approach to transparency in the Brexit negotiations is influenced by the management of, and input from, Parliament. Transparency therefore becomes a means to an end, the end being a display of a unified Cabinet and a prepared approach to Brexit. The downside for the UK is that, on the one hand, achieving this may hinder the ability for the UK Government to compromise, and on the other hand, a perception of disunity and unpreparedness can lead to domestic constitutional problems, and possibly calls for a second referendum.

Both sides face an unprecedented challenge in the Brexit negotiations, to conduct a process that will affect the lives of millions of EU and UK citizens. Therefore, in their approach to the negotiations, in general, and in relation to the transparency regime, in particular, both the EU and the UK should remember that, far from a bureaucratic "battle of the papers" the main task of the negotiators will have to be that of reaching the best possible outcome for their citizens.

Abstract: According to the Terms of Reference for the Article 50 TEU negotiations between the United Kingdom and the European Union (ToR)⁸⁸, both the UK and the EU's default approach to the negotiations is one of transparency. However, the two negotiating parties are implementing transparency in very different ways. In stark contrast to the position expounded by the UK Prime Minister, not to provide "a running commentary" on the Brexit negotiations⁸⁹, the EU has promised to adopt a "maximum level of transparency"⁹⁰.

The reason behind this difference in approach stems from the fact that transparency is not intrinsically valuable, in the sense that one does not adopt an approach of transparency for transparency's sake. Rather, it is a concept which is very much interconnected with the evolution of society. Indeed, in functioning democracies, transparency not only means disseminating information, but also appropriately

⁸⁷ On which see the recent publications on the role in the UK constitution of referendums and direct democracy such as, V. Bogdanor in (2016) *Brexit, the Constitution and the Alternatives* King's Law Journal, 27:3, 314-322

⁸⁸ Terms of Reference for the Article 50 TEU negotiations at <https://ec.europa.eu/commission/sites/beta-political/files/eu-uk-art-50-terms-reference_agreed_amends_en.pdf>

⁸⁹ <https://www.theguardian.com/politics/video/2016/sep/07/theresa-may-not-provide-running-commentary-on-brexit-negotiations-video>

⁹⁰ The European Commission's approach to transparency in the Article 50 negotiations with the United Kingdom, at <https://ec.europa.eu/commission/brexit-negotiations/european-commissions-approach-transparency-article-50-negotiations-united-kingdom_en>

withholding information.⁹¹ Consequently, its implementation requires a complex balance of the interests which vary according to the constitutional structure and values operating at the relevant time.

The motivation behind the extent that a transparent approach is adopted is also dictated by the desire for legitimacy. The suggestion of a “democratic deficit” has long been associated with the EU⁹² and therefore it utilises transparency as a legitimating factor. The UK, however, is certainly legitimising its approach to Brexit through reference to the referendum of 23 June 2016.

After offering an overview of the constitutional frameworks of the EU and the UK in relation to the concept of transparency, the following article aims to compare and contrast the main considerations which underlie the very different positions of the two negotiating parties with regard to transparency in the Brexit negotiations.

⁹¹ E O'Reilly, European Ombudsman, Transparency and the Brexit negotiations, Interview of February 2017 at <<http://esharp.eu/conversations/transparency-and-the-brexite-negotiations>>

⁹² The concept of the EU's 'democratic deficit' has been much debated and traversed in academic literature, including in the following: S Garcia (ed), *European Identity and the Search for Legitimacy* (Pinter, 1993); K Neunreither and A Weiner (eds), *European Integration after Amsterdam, Institutional Dynamics and Prospects for Democracy* (Oxford University Press, 2000); and W van Gerven, *The European Union, A Polity of States and Peoples* (Hart, 2005)