

Possible Avenues for Further Political Integration in Europe

A Political Compact for a More
Democratic and Effective Union?



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Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCO Committee, analyses possible avenues for further political integration in the EU after Brexit. The study maps the multiple crises that the EU has weathered in the past decade and explains how these crises, including the recent Covid-19 pandemic, reveal several substantive and institutional weaknesses in the current EU system of governance. The study considers the potentials of the nascent Conference on the Future of Europe to renew the EU and examines the obstacles and opportunities for EU treaty reforms, considering the option of **channelling the Conference's outcome into a new Political Compact**, subject to new, less-than-unanimous ratification rules.

This document was requested by the European Parliament's Committee on Citizens' Rights and Constitutional Affairs.

AUTHORS

Federico FABBRINI, Full Professor of EU Law at Dublin City University and Founding Director of the DCU Brexit Institute.*

ADMINISTRATOR RESPONSIBLE

Eeva PAVY

EDITORIAL ASSISTANT

Fabienne VAN DER ELST

LINGUISTIC VERSIONS

Original: EN

ABOUT THE EDITOR

Policy departments provide in-house and external expertise to support EP committees and other parliamentary bodies in shaping legislation and exercising democratic scrutiny over EU internal policies.

To contact the Policy Department or to subscribe for updates, please write to:

Policy Department for Citizens' Rights and Constitutional Affairs

European Parliament

B-1047 Brussels

Email: poldep-citizens@europarl.europa.eu

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LIST OF ABBREVIATIONS

AFCO	Committee on Constitutional Affairs
ECAS	European Common Asylum System
ECB	European Central Bank
ECJ	European Court of Justice
ECON	Committee on Economic and Monetary Affairs
ECSC	European Coal and Steel Community
EDIS	European Deposit Insurance Scheme
EEC	European Economic Community
EIB	European Investment Bank
EMU	Economic and Monetary Union
EP	European Parliament
ESM	European Stability Mechanism
EU	European Union
Euratom	European Atomic Energy Community
GDP	Gross Domestic Product
IGC	Intergovernmental Conference
MFF	Multi-annual Financial Framework
SGP	Stability and Growth Pack
SME	Small and Medium Enterprises
SRF	Single Resolution Fund
SRM	Single Resolution Mechanism
SSM	Single Supervisory Mechanism

SURE	EU instrument for temporary support to mitigate unemployment risks in an emergency
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
US	United States of America
VAT	Value-added tax

EXECUTIVE SUMMARY

This study commissioned by the AFCO Committee analyses potential avenues for further political integration in the European Union (EU) after Brexit – the withdrawal of the United Kingdom from the EU, which became a reality on 31 January 2020 – discussing obstacles and opportunities for reform in a Union of now 27 Member States.

The study takes off from an analysis of a plurality of old crises that the EU has weathered during the last decade – including the euro-crisis, the migration crisis and the rule of law crisis – and examines also new crises faced by the EU, including the tense debate on enlargement and the new multi-annual financial framework.

The study maintains that this stream of crises – which culminated in the recent, devastating Covid-19 pandemic, with its immediate health cost and its subsequent socio-economic implications – have patently exposed the institutional and substantive shortcomings of the current EU system of governance, urgently increasing the need to reform the EU.

In particular, the study emphasizes how inter-governmental modes of decision-making nowadays dominate the EU governance system, but underlines how institutions such as the European Council and the Eurogroup have struggled to take decisions in a timely, effective and democratic way – as proven by the difficulty to solve ongoing crises for good.

Moreover, the study stresses how the EU system of governance also lacks powers to act in areas such as health, or enforcement powers to make sure that Member States abide by the common rules – and is also not endowed with real own resources to support its spending programs without having to rely on financial transfers from the Member States.

At the same time, the study emphasises how a pervasive idea among EU analysts and policy-makers is that the EU can continue to muddle-through – but warns against any such form of complacency, showing that the ability of the EU to deliver is increasingly limited to a few policy areas, and that the status quo is decreasingly sustainable.

From this point of view, the study welcomes the initiative to establish a Conference on the Future of Europe, designed to renew the EU and relaunch integration. This plan, which is now endorsed by all EU Institutions, should serve as a way to tackle the shortcomings of the EU system of governance and make the Union more effective and democratic.

As the study points out, the Conference on the Future of Europe has the potential to be a transformative process – along the lines of illustrious precedents such as the Conference of Messina and the European Convention, which in the 1950s and early 2000s opened a pathway to break deadlock and move integration forward.

Nevertheless, the study underlines that if the Conference on the Future of Europe wants to be ambitious it must address the issue of treaty reform. The study analyses the regulation of treaty amendment in the EU and underlines the multiple obstacles that exist on this path – notably as a consequence of the requirement of unanimous approval of EU treaty changes.

As a result, the study explores alternative options, considering the increasing practice by the Member States to conclude inter-se international agreements outside the EU legal order in the context of the euro-crisis, with the adoption of the Fiscal Compact, the Treaty on the European Stability Mechanism and the intergovernmental agreement on the Single Resolution Fund.

In particular, the study emphasises how Member States have introduced in these separate Treaties new rules on their entry into force that do away with the unanimity requirement. These rules deprived states of a veto power on the approval of the treaty among the other ratifying states, and therefore changed the incentives towards ratification.

Building on these important precedents, therefore, the study suggests that policy-makers involved in the Conference on the Future of Europe should consider channelling the outcome of their work into a new international treaty – a Political Compact – which is subject to less-than-unanimous entry-into-force rules; and discusses the consequences of this option.

As the study posits, as an open, transparent and participatory process where the European Parliament would have a leading role, the Conference on the Future could authoritatively result in the drafting of a new Political Compact allowing the EU to move forward beyond the obstacles embedded in the EU treaty revision procedure.

Ultimately, the study argues that there can be no complacency, and that the EU must be reformed to be made more effective and democratic – a fact vividly exposed by Covid-19. While raising new questions, therefore, a Political Compact may represent a preferable alternative to paralysis, and thus a suitable avenue for further political integration in the EU.

1. INTRODUCTION

The purpose of this study is to discuss further avenues for integration in a European Union (EU) of 27 Member States. Since the 1st of February 2020, the EU has shrunk in size, due to the withdrawal of the United Kingdom (UK).¹ The unprecedented event in the history of European integration of a Member State leaving the EU,² rather than joining it, prompted a series of institutional and political reflections on how to relaunch the European project³ – beyond the need to address the immediate institutional consequences of Brexit.⁴ In particular, French President Emmanuel Macron unveiled in a number of speeches an ambitious plan for a sovereign, united and democratic Europe⁵ – and ahead of the European Parliament elections in 2019, he proposed in an open letter, addressed to all European citizens and written in all the official languages of the EU, to promptly set up a Conference on Europe **as a way to renew the EU and to “propose all the changes our political project needs.”**⁶

As this study argues, the EU governance system currently suffers from a number of severe shortcomings, which have been vividly exposed during the last decade. Despite a certain complacency in several quarters, these deficiencies compel EU reforms. In fact, while the EU Member States successfully managed the Brexit negotiations maintaining their unity vis-à-vis the UK,⁷ multiple crises have profoundly challenged the unity of the EU, and revealed the inadequacy of the current EU power-structure and competence arrangements.⁸ Besides Brexit, the EU has weathered the euro-crisis, the migration crisis and the rule of law crisis. Moreover, after Brexit, the EU has continued to face novel crises, in the forms of disagreements on enlargement, on the new EU multi-annual budget, and most recently on how to face the Covid-19 pandemic – a dramatic health emergency with a huge toll for human life and the fabric of society. Both these old and the new crises have been magnified by the institutional and substantive weaknesses of the current EU constitutional architecture, proving the **urgent need to increasing the EU's ability to act in an effective and legitimate way.**

From this point of view, therefore, this study welcomes the recent plan, now endorsed by all EU Institutions, to establish a Conference on the Future of Europe as a new model to reform the EU. This initiative – which evokes two illustrious precedents: namely the Conference of Messina and the Convention on the Future of Europe – has the potential to be a transformative moment for the EU. In fact, while Covid-19 has delayed the launch of the Conference, it has also made it timelier than ever. As the Committee on Constitutional Affairs (AFCO) of the European Parliament stated, the Conference can **be an innovative “process that will lead to proposals for concrete institutional and constitutional reforms to render the European Union stronger, more democratic, more efficient, more transparent,**

¹ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ 2020 L 29/07.

² See further Federico Fabbrini (ed), *The Law & Politics of Brexit. Volume 2: The Withdrawal Agreement* (OUP 2020).

³ European Commission White Paper on “The Future of Europe”, 1 March 2017.

⁴ See Federico Fabbrini, “The Institutional Consequences of a ‘Hard Brexit’”, Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, May 2018.

⁵ French President Emmanuel Macron, speech at Université La Sorbonne, 26 September 2017; and speech at the award of the Prix Charlemagne, Aachen, 11 May 2018.

⁶ French President Emmanuel Macron, *Lettre Pour Une Renaissance Européenne*, 4 March 2019.

⁷ See European Council Conclusions, EUCO XT 20015/18, 25 November 2018, §3 (thanking “Michel Barnier for his tireless efforts as the Union's chief negotiator and for maintaining the unity among EU27 Member States throughout the [Brexit] negotiations”).

⁸ See Carlos Closa, “Looking Ahead: Pathways of Future Constitutional Evolution of the EU”, Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, November 2014.

with a greater capacity to act and to serve the general interest.”⁹ In addition, Covid-19 has revealed in an unequivocal way the need to overhaul the EU as to make it more effective and legitimate.

Nevertheless, as this study maintains, if the Conference on the Future of Europe wants to succeed in its ambitious objective to reform the EU, it must reckon with the obstacles to treaty change. In fact, the EU treaty amendment rule – by conditioning changes to the EU Treaties on the approval by all the Member States meeting in an intergovernmental conference (IGC) and unanimous ratification at the national level – represents a formidable obstacle to reforming the EU. However, as this study points out, in recent years, EU Member States have increasingly resorted to inter-se international agreements concluded outside the EU legal order – which have done away with the unanimity requirement. Drawing on this experience, therefore, this study suggests that policy-makers involved in the Conference on the Future of Europe should consider drafting a new treaty – a Political Compact – and submit it to a new ratification rule, which replaces the unanimity requirement with a super-majority vote.

In sum, this study posits that the Conference on the Future of Europe can be a new and needed initiative to reform the EU institutions and powers, to address important shortcomings in the EU governance system, and to chart a path towards further European integration after Brexit, and Covid-19. However, a necessary pre-condition for the success of the Conference is to boldly address the problem of treaty change in the EU. Because the treaty amendment procedure poses significant obstacles to success, the Conference could take inspiration from the increasing practice of concluding agreements outside the EU legal order, and channel the outcome of its work into a new Political Compact treaty, whose entry into force would be subject to less-than-unanimous ratification rules. While clearly this option would raise novel and difficult questions for the EU institutions and Member States, it may represent a preferable alternative to paralysis, and thus a suitable avenue to further integration in the EU.

The study is structured as follows: Part 2 overviews a series of old but long-lasting crises faced by the EU, namely the euro-crisis, the migration crisis and the rule of law crisis. Part 3 examines instead a series of new crises faced by the EU, notably the Covid-19 pandemic. Part 4 explains that both the old and the new crises have exposed structural shortcomings in the EU system of governance – including inadequate institutions and insufficient powers – which should remove any complacency on the weak state of the union. Therefore, part 5 argues that the EU urgently needs reforms and welcomes the Conference on the Future of Europe as an out-of-the-box initiative to renew the EU along the lines of several illustrious precedents. Part 6 finally highlights the obstacles and opportunities to reform the EU, explaining the difficulties inherent in the process of treaty amendment but also the recent practice of striking international agreements outside the EU legal order. In conclusion, the study suggests that the Conference on the Future of Europe should consider producing a Political Compact whose entry into force is subject to less-than-unanimous ratification rules, and discusses what could be the consequence of this option for further political integration in the EU.

⁹ European Parliament Committee on Constitutional Affairs, Opinion of 10 December 2019 on the Conference on the Future of Europe, para. G, available at https://www.europarl.europa.eu/cmsdata/194307/Adopted%20opinion%20CoFoE_10122019-original.pdf

2. OLD CRISES

During the last decade, the EU had been weathering a number of crises – in particular the euro-crisis, the migration crisis and the rule of law crisis. While the EU and its Member States have taken action to address these crises, the underlying issues have never been fully solved, leaving a lasting legacy of intra-EU tensions that continue today.

2.1. Euro-Crisis

The euro-crisis represented a major stress test for Europe's Economic and Monetary Union (EMU) – with protracted economic and political consequences. The EU and its Member States responded to the Eurozone financial instability of 2009–2012 by introducing a battery of legal and institutional reforms:¹⁰ strengthening the fiscal rules of the Stability and Growth Pact (SGP), establishing new mechanisms to support states facing financial difficulties, and centralizing bank supervision and resolution. Moreover, the European Central Bank (ECB) took decisive steps to save the Eurozone.¹¹ However, the measures adopted to respond to the euro-crisis left a trail of divergence in the macro-economic performances of the Member States, with low growth and high unemployment in some countries: a fact visible in Greece, where the end of the third bailout program in 2018 was accompanied by commitments to **maintain “a primary surplus of 2.2% of GDP on average in the period from 2023 to 2060”**¹² – a target most observers regarded as impossible to meet.¹³ Moreover, the management of the euro-crisis fuelled nationalist movements in a number of Member States, which openly started calling for leaving the Eurozone: a fact visible in Italy, following the 2018 parliamentary elections.¹⁴

At the same time, the euro-crisis tainted inter-state relations, complicating efforts to deepen EMU. In fact, despite a series of high-level reports from the EU Institutions and their leaders calling for completing EMU,¹⁵ the EU27 have been unable to overcome national divisions to this end. In particular, while Southern states – Italy, France, Spain, Portugal, Greece, Malta and Cyprus: caucusing together as the Med7 – vocally pushed for the establishment of a central fiscal capacity with stabilization function, as well for a European deposit insurance scheme (EDIS),¹⁶ Northern states – assembled at the behest of the Netherlands in a new Hanseatic League – resisted any step towards more burden-sharing, calling rather for greater ESM surveillance of national budgets.¹⁷ And while France managed to convince on

¹⁰ See further Federico Fabbrini, *Economic Governance in Europe* (OUP 2016).

¹¹ See ECB President Mario Draghi, speech at the Global Investment Conference, London, 26 July 2012 (stating that the ECB will “do whatever it takes to save the euro”).

¹² Eurogroup statement on Greece, 22 June 2018.

¹³ See Jeromin Zettelmeyer et al., “How to Solve the Greek Debt Problem” Peterson Institute for International Economics Policy Brief 10/2018.

¹⁴ See Roberto D’Alimonte, “How the Populists Won in Italy” (2019) 30 *Journal of Democracy* 114.

¹⁵ See Four Presidents, Final Report “Towards a Genuine EMU”, 5 December 2012; Five Presidents Report “Completing Europe’s EMU”, 22 June 2015; and European Commission reflection paper on “The Deepening of Economic and Monetary Union”, 31 May 2017.

¹⁶ See Declaration of the summit of the Southern European Union countries, Madrid, 10 April 2017.

¹⁷ Shared views from the Finance Minister of Denmark, Estonia, Finland, Ireland, Latvia, Lithuania, the Netherlands and Sweden, 6 March 2018.

paper Germany to support a Eurozone budget,¹⁸ this was stalled in the Euro Summit.¹⁹ In the end, after much debate, the Eurogroup in an inclusive format (also open to non-Eurozone Member States) reached in June 2019 a minimalist consensus on a package deal of reforms, which included an enhancement of the ESM and the creation of a budgetary instrument for competitiveness and convergence, but not stabilisation;²⁰ plus it made no progress on the EDIS²¹ – highlighting how the ideological divide between risk-reduction vs. risk-sharing remains a stumbling block towards completing EMU.

2.2. Migration Crisis

The management of migration has also remained a continuing cause of contention among the EU27, putting under severe strain the functioning of both the Schengen free-movement zone and the European Common Asylum System (ECAS).²² The EU27 divided heavily at the peak of the migration crisis in the summer of 2015 on how to deal with the sudden arrival of four million people fleeing war and poverty. Responding to this emergency situation, the Council of the EU in September 2015 adopted by majority a temporary relocation mechanism to the benefit of Greece and Italy which foresaw the relocation of 160,000 asylum seekers to the other EU Member States pro-quota.²³ However, although this number was ludicrously small, Poland, Hungary, Slovakia and the Czech Republic – a group known as the Visegrad 4 – vehemently opposed this course of action. Hungary and Slovakia challenged the Council decision in the European Court of Justice (ECJ). And although the ECJ in September 2017 confirmed its full legality,²⁴ Hungary, Poland and the Czech Republic bluntly refused to comply with it. As a result, even though the ECJ later confirmed that refusal to participate in the relocation mechanism was a breach of EU law,²⁵ no concrete support was offered by the Eastern Member States to the worse-hit coastline EU countries.²⁶

In fact, the question of how to deal with the ongoing arrival of asylum seekers to the border-line EU Member States has continued to divide the EU27. While the EU attempted to outsource to third countries (with dubious human rights records) the task of controlling the EU's external borders,²⁷ it failed to make any progress on overhauling the ECAS – with the European Commission's proposals to

¹⁸ See Franco-German Proposal on the architecture of a Eurozone Budget within the Framework of the European Union, 16 November 2018.

¹⁹ See Euro Summit statement, 14 December 2018, PRESS 790/18.

²⁰ Council of the EU, Term sheet on the Budgetary Instrument for Convergence and Competitiveness, 14 June 2019.

²¹ See also European Commission Communication "Deepening Europe's Economic and Monetary Union: Taking stock four years after the Five Presidents' Report", 12 June 2019, COM(2019) 279 final, 10 (stating that "regrettably, the impasse that characterized the past several years has persisted and no tangible progress has been made" on EDIS).

²² See generally Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (OUP 2015).

²³ See Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, OJ [2015] L239/146 and Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece OJ [2015] L248/80.

²⁴ See Case C-643/15 and C-647/15 *Slovakia & Hungary v. Council of the EU*, ECLI:EU:C:2017:631.

²⁵ See Joined Cases C-715/17, C-718/17 and C-719/17, *Commission v. Poland, Hungary & the Czech Republic*, ECLI:EU:C:2020:257.

²⁶ See European Commission, Thirteen report on relocation and resettlement, 13 June 2017, COM(2017) 330 final (describing the implementation of the relocation scheme as utterly "insufficient").

²⁷ See EU-Turkey statement, 18 March 2016, Press release 144/16.

introduce a permanent mechanism of relocation going nowhere.²⁸ As a result, France launched a coalition of the willing to break the deadlock at EU level, convening 13 EU Member States to set up a solidarity-based system to manage the disembarkation and relocation of asylum seekers on a voluntary basis.²⁹ However, the legacy of the crisis combined with the inequities of the system fuelled across Europe xenophobic political movements which called in the North for the suspension of Schengen,³⁰ and in the South for the outright pushback of migrants.³¹ Moreover, the ideological cleavage in dealing with the migration soured East-West relations in the EU, and the way in which Hungary treats migrants was recently found to be a breach of EU human rights law.³²

2.3. Rule of Law Crisis

An ever more dramatic crisis the EU has faced is the rule of law crisis. Although Article 2 of the Treaty on European Union (TEU) proclaims that the EU “is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights”, since the early 2010s, a number of Member States have experienced legal and political developments that have openly challenged basic constitutional principles such as the independence of the judiciary, separation of powers, and the fairness of the electoral process.³³ This backsliding is particularly acute among those states who had joined the EU in the 2004/2007 enlargements, and is part of a broader right-wing, populist political trend at play in former Communist countries – including also in Eastern Germany. Threats to the rule of law constitute a major danger for the EU.³⁴ Yet Hungarian Prime Minister Viktor Orbán proudly defended this path, explicitly arguing that his country was intent on establishing an authoritarian democracy.³⁵ The Hungarian example has increasingly served as a template for other new EU Member States, notably Poland and Romania, but rule of law issues have emerged also in Slovakia and Malta.³⁶

Although arguably with excessive delay, the EU Institutions have started to take action against this phenomenon. In particular, in preparation for the next multi-annual financial framework (MFF), the Commission proposed to introduce a mechanism to freeze structural funds for EU Member States which failed to respect the rule of law.³⁷ In addition, in December 2017, the Commission activated the

²⁸ See European Commission communication, “A European Agenda on Migration”, 13 May 2015, COM(2015) 240 final.

²⁹ French Government, Réunion informelle sur les migrations en Méditerranée : Conclusions de la Présidence, 22 July 2019.

³⁰ See European Commission communication, “Preserving and strengthening Schengen”, 27 September 2017, COM(2017) 570 final.

³¹ See also Council of Europe Commissioner for Human Rights Dunja Mijatović, Letter to European Commissioners Margaritis Schinas and Ylva Johansson, 9 March 2020 (emphasizing that the EU should respect the prohibition of non-refoulement).

³² See Joined Cases C-924/19 PPU and C-925/19 PPU *FMS and Others*, ECLI:EU:C:2020:367

³³ See Laurent Pech and Kim Lane Scheppele, “Illiberalism Within: Rule of Law Backsliding in the EU” (2017) 19 *Cambridge Yearbook of European Legal Studies* 3.

³⁴ See European Commission Communication “A New EU Framework to Strengthen the Rule of Law”, 11 March 2014, COM(2014)158 final.

³⁵ Hungarian Prime Minister Viktor Orbán, speech at the XXV. Bálványos Free Summer University and Youth Camp, 26 July 2014 (stating that “the new state that we are building is an illiberal state, a non-liberal state”).

³⁶ See European Parliament resolution of 28 March 2019 on the situation of the rule of law and the fight against corruption in the EU, specifically in Malta and Slovakia, (2018/2965(RSP)), P8_TA(2019)0328, available at: [http://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/definitif/2019/03-28/0328/P8_TA\(2019\)0328_EN.pdf](http://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/definitif/2019/03-28/0328/P8_TA(2019)0328_EN.pdf).

³⁷ European Commission proposal for a regulation of the European Parliament and the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, 2 May 2018, COM(2018) 324 final.

Article 7 TEU procedure against Poland, calling on the Council to determine that the country faced a clear risk of a serious breach of the rule of law.³⁸ And in September 2018, Parliament approved a resolution to initiate the same process against Hungary.³⁹ Nevertheless, despite support from several states,⁴⁰ limited progress has been made by the Council in deciding whether corrective action against Hungary and Poland was necessary. In fact, in the first semester of 2019, when the Presidency of the Council was held by Romania – a Member State which had been strongly criticised by Parliament for its rule of law record and limited efforts to fight corruption⁴¹ – the discussion of the Article 7 TEU procedure against Poland and Hungary was even removed from the agenda of the General Affairs Council meeting.⁴²

In this context, a major role has been taken by the ECJ. Ruling in preliminary reference proceedings, the ECJ held that rule of law backsliding – if this resulted in the reduction of the due process rights of a convicted person, to be assessed on a case by case basis – could justify a court decision not to execute a European Arrest Warrant from Ireland toward Poland.⁴³ And ruling in infringement proceedings brought by the Commission, the ECJ stopped Poland from giving effect to a highly controversial law which altered the composition of the state Supreme Court in breach of EU principles on the independence and impartiality of the judiciary,⁴⁴ and also struck down Polish legislation instituting disciplinary proceedings against judges.⁴⁵ Moreover, the ECJ also invalidated Hungarian laws infringing the independence of the academia and the freedom of non-governmental organizations.⁴⁶ Yet, while the ECJ has so far managed to command respect, its ability to halt the erosion of the rule of law based system at the national level is likely to face challenges in the medium term, given the absence of EU coercive power,⁴⁷ and the unwillingness by the other EU Member States to mobilize against threats to the rule of law in forms analogous to what was done at the time of the Haider affair in 2000.⁴⁸

³⁸ European Commission reasoned proposal in accordance with Article 7(1) Treaty on European Union for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, 20 December 2017, COM(2017) 835 final.

³⁹ European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, (2017/2131(INL)), P8_TA(2018)0340, Available at: [http://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/definitif/2018/09-12/0340/P8_TA\(2018\)0340_EN.pdf](http://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/definitif/2018/09-12/0340/P8_TA(2018)0340_EN.pdf).

⁴⁰ See French Assemblée Nationale, resolution relative au respect de l'état de droit au sein de l'Union européenne, 27 November 2018, n° 194; Benelux Prime Ministers' Summit Joint Declaration, Luxembourg, 2 April 2019.

⁴¹ European Parliament resolution of 13 November 2018 on the rule of law in Romania, (2018/2844(RSP)), P8_TA(2018)0446. Available at: [http://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/definitif/2018/11-13/0446/P8_TA\(2018\)0446_EN.pdf](http://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/definitif/2018/11-13/0446/P8_TA(2018)0446_EN.pdf).

⁴² See General Affairs Council, Outcome of meeting, 8 January 2019, Doc 5039/19. See also European Parliament resolution of 16 January 2020 on ongoing hearings under Article 7(1) TEU regarding Poland and Hungary, (2020/2513(RSP)), P9_TA(2020)0014. Available at: [http://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/definitif/2020/01-16/0014/P9_TA\(2020\)0014_EN.pdf](http://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/definitif/2020/01-16/0014/P9_TA(2020)0014_EN.pdf).

⁴³ See Case C-216/18 PPU, LM, ECLI:EU:C:2018:586.

⁴⁴ See Case C-619/18 R, *Commission v. Poland*, Order of the Vice-President of the Court, 19 October 2018, ECLI:EU:C:2018:910; and Judgment of the Court, 24 June 2019, ECLI:EU:C:2019:531.

⁴⁵ See Case C-791/19 R, *Commission v. Poland*, Order of the Court, 8 April 2020.

⁴⁶ See Case C-66/18 *Commission v. Hungary*.

⁴⁷ See Andras Jakab and Dimity Kochenov (eds.), *The Enforcement of EU Law and Values* (OUP 2017).

⁴⁸ Wojciech Sadurski, "Adding Bite to Bark: The Story of Article 7, E.U. Enlargement, and Jörg Haider" (2010) 16 *Columbia Journal of European Law* 385.

In fact, the rule of law and democratic backsliding seems to be worsening, rather than receding, across many new EU Member States.

3. NEW CRISES

In the last few months, following Brexit, the EU has been facing a new wave of crises. Some of these are directly connected to Brexit – such as the tense debate on the new EU budget, which was precipitated by the funding gap left by the UK departure – while others were fully exogenous – such as the Covid-19 pandemic. However, all these new crises profoundly challenged the EU.

3.1. Enlargement

A first taste of the continuing tensions among the EU Member States post-Brexit emerged prominently in October 2019: at the same European Council meeting which approved the Withdrawal Agreement re-negotiated between the Commission and the UK Government,⁴⁹ the EU split on the controversial issue of enlargement.⁵⁰ In particular, a major row erupted among Member States on whether to authorise accession talks with Albania and North Macedonia. While during the 2014–2019 Commission term, then President Jean-Claude Juncker had clarified that no new member state would join the EU under his watch,⁵¹ the accession process had been subsequently relaunched – particularly in the context of the Prespa Agreement of 12 June 2018. This treaty, concluded between Greece and the then Former Yugoslav Republic of Macedonia solved a 30-year-old dispute on the name of North Macedonia – and the prospect of accession to the EU (and NATO) had been put forward as an incentive to conclude the deal.

However, the EU27 divided heavily on the course to take, with especially France – with the backing of Denmark and the Netherlands – objecting to any bureaucratic automaticity in the accession process, and calling for greater political steering on decisions about enlargement.⁵² In the absence of the necessary unanimity within the European Council, the issue was referred back to the Commission, which on 5 February 2020 put forward a new methodology for accession negotiations:⁵³ this confirmed a credible EU perspective for the Western Balkans, but also subjected the enlargement talks to further conditionality, with negotiations on the fundamentals, including the rule of law, to be opened first and closed last, and with the possibility to or suspend *tout court* the accession talks.⁵⁴ On this basis, in March 2020, the Council of the EU gave its green light to the start of the enlargement, stabilization and association process with North Macedonia and, with greater caveats, Albania.⁵⁵ However, it remains to be seen if how far this will proceed,⁵⁶ as also evident from the fact that the Zagreb Declaration

⁴⁹ European Council Conclusions, EUCO XT 20018/19, 17 October 2019.

⁵⁰ European Council Conclusions, EUCO 23/19, 18 October 2019, §5.

⁵¹ European Commission President-elect Jean-Claude Juncker, “A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change. Political Guidelines for the Next European Commission”, 15 July 2014, 12.

⁵² See French non-paper, “Reforming the European Union Accession Process”, November 2019.

⁵³ European Commission Communication “Enhancing the Accession Process – A Credible EU Perspective for the Western Balkans”, 5 February 2020, COM(2020)57 final.

⁵⁴ Ibid 2-3.

⁵⁵ Council of the EU, Doc. 7002/20, 25 March 2020.

⁵⁶ See Andi Mustafaj, “Plaidoyer pour une vraie réforme du processus d’élargissement de l’Union européenne”, Fondation Robert Schuman, April 2020.

concluded by the leaders of the EU Member States and the Western Balkan countries on 6 May 2020 does not mention the word “enlargement”.⁵⁷

3.2. Multi-annual financial framework

After Brexit, the EU Member States also experienced another tense confrontation in the context of the negotiations on the EU budget – the MFF. Admittedly, clashes among Member States have always characterised EU budget negotiations – mostly because, despite the letter and the spirit of the EU Treaties, this is mainly funded by state transfers, with the consequence that Member States aggressively measure the difference between what they pay into, and what they get out of, the EU budget.⁵⁸ However, it was easy to anticipate that talks on the MFF 2021–2027 would be particularly challenging, because of Brexit.⁵⁹ Given that the UK, despite its rebate, represented the fourth largest net contributor to the EU budget, the funding gap left by its withdrawal from the EU was inevitably going to pose a stark choice – either an increase of payment from the net contributors or a decrease of revenues for the net beneficiaries.⁶⁰ In preparation for the new MFF 2021–2027, on 2 May 2018, the Commission put forward a draft proposal which foresaw a budget worth 1,11 % of EU GDP – with a slight decrease compared to the prior MFF and a significant re-allocation of resources towards new policy priorities.⁶¹

However, while the real negotiations on the budget only started after the EP elections of May 2019,⁶² the Council of the EU failed to make any progress on the MFF negotiations during the Finnish and Croatian presidencies – due to the intractable divisions among Member States. In particular, a group of self-proclaimed themselves “frugal”⁶³ northern Member States – Austria, the Netherlands, Denmark and Sweden – staunchly called for further budget cuts with a smaller envelop for the traditional EU policies, while an alliance of 16 Eastern and Southern Member States caucusing as the friends of cohesion⁶⁴ – including the Visegrad and Baltic countries, Bulgaria, Romania, Croatia, Slovenia, Greece, Italy, Malta and Portugal – insisted for maintaining proper funding for agriculture and cohesion. As a result, a special European Council meeting convened on 21 February 2020 ended in a fiasco.⁶⁵ Exactly three weeks after the UK had left the EU, therefore, the same dynamics of selfishness that had characterised the budget negotiations during the years of UK membership in the EU remained vividly

⁵⁷ See Zagreb Declaration, 6 May 2020.

⁵⁸ See Luca Zamparini & Ubaldo Villani-Lubelli (eds), *Features and Challenges of the EU Budget* (Elgar 2019).

⁵⁹ See Federico Fabbrini, “Brexit and Treaty Reform”, in Federico Fabbrini (ed), *The Law & Politics of Brexit* (OUP 2017) 276.

⁶⁰ See also Michele Chang, “The Financial Settlement” in Federico Fabbrini (ed), *The Law & Politics of Brexit. Volume 2: The Withdrawal Agreement* (OUP 2020).

⁶¹ See European Commission Communication “A Modern Budget for a Union that Protects, Empowers and Defends: The Multiannual Financial Framework for 2021–2027”, 2 May 2018, COM(2018)321 final.

⁶² European Parliament resolution of 14 March 2018 on the next MFF: Preparing the Parliament’s position on the MFF post-2020, (2017/2052(INI)), P8_TA(2018)0075, available at: [http://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/definitif/2018/03-14/0075/P8_TA\(2018\)0075_EN.pdf](http://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/definitif/2018/03-14/0075/P8_TA(2018)0075_EN.pdf).

⁶³ See Austrian Chancellor Sebastian Kurz, “The ‘Frugal Four’ Advocate a Responsible EU Budget”, Op-Ed, *Financial Times*, 16 February 2020.

⁶⁴ Mateusz Morawiecki, “Polish PM: EU budget is about more than arithmetic”, Op-Ed, *Financial Times*, 19 February 2020

⁶⁵ See European Council President Charles Michel, remarks, 21 February 2020.

at play – with the EU Member States unable to **compromise on the new MFF, as a result of its members' focus on the *juste retour***.⁶⁶

3.3. Covid-19

The EU was just adjusting to the UK withdrawal, when “a human tragedy of potentially biblical proportions”⁶⁷ fell upon it: the Covid-19 pandemic. As the virus started spreading rapidly across Europe, and indeed the world, EU Member States’ **governments rushed in February and March 2020 to take unprecedented public policy measures**. In particular with death tolls spiking to shocking numbers, notably in Italy, Spain and France, authorities imposed war-like lock-downs, closing schools, factories, and public facilities, banning the movement of persons, prohibiting public gatherings and requisitioning properties essential to address the health crisis. The immediate action by the EU Member States revealed a remarkable lack of coordination, with some countries unilaterally suspending the intra-EU export of medical devices, or introducing intra-EU border checks, also on goods – in blatant disregard of EU law. In fact, Hungary even abused Covid-19 to adopt emergency legislation which allowed the government to rule indefinitely by decree – effectively codifying authoritarian governance into law.⁶⁸

Eventually, a more European response to Covid-19 started to take place – especially in tackling the socio-economic consequences of the pandemic. In particular, after some hesitation, the EU supranational institutions mobilised to support Member States worst hit by the health crisis. The European Investment Bank (EIB) developed a special Covid-19 investment scheme to support small and medium size enterprises (SMEs).⁶⁹ The ECB launched a new pandemic emergency purchase program, committing to buy public bonds and commercial paper in the financial markets.⁷⁰ And the Commission suspended the application of state aid rules;⁷¹ called on the Council to trigger the SGP general escape clause putting fiscal rules on temporary hold;⁷² activated the EU Solidarity Fund;⁷³ put forward a coronavirus response **investment initiative to mobilize €37bn of available cash reserves in the EU Structural and Investment Funds**;⁷⁴ and also proposed the establishment of a European instrument for

⁶⁶ See also Peter Becker, “A New Budget for the EU: Negotiations on the Multiannual Financial Framework 2021-2027”, Stiftung Wissenschaft und Politik research paper 11, August 2019.

⁶⁷ See former ECB President Mario Draghi, “We Face a War Against Coronavirus and Must Mobilize Accordingly”, Op-Ed, *Financial Times*, 26 March 2020.

⁶⁸ See Act XII of 30 March 2020 on protecting against coronavirus (Hu.).

⁶⁹ See EIB Press Release, “EIB Group Will Rapidly Mobilize up to €40 billion to Fight Crisis Caused by Covid-19”, 16 March 2020.

⁷⁰ See ECB Press Release, “ECB Announces €750 billion Pandemic Emergency Purchase Programme”, 18 March 2020.

⁷¹ See European Commission Communication “Temporary Framework for State aid measures to support the economy in the current Covid-19 outbreak”, 20 March 2020, 2020/C 91 I/01.

⁷² See Council of the EU, statement, 23 March 2020 (agreeing with the assessment of the Commission that the conditions to suspend the SPG were fulfilled).

⁷³ See Regulation (EU) 2020/461 of the European Parliament and of the Council of 30 March 2020 amending Council Regulation (EC) No 1012/2002 in order to provide financial assistance to Member States and to countries negotiating their accession to the Union that are seriously affected by a major public health emergency, OJ 2020 L 99/9.

⁷⁴ See Regulation (EU) 2020/460 of the European Parliament and of the Council of 30 March 2020 amending Regulations (EU) No 1301/2013, (EU) No 1303/2013 and (EU) No 508/2014 as regards specific measures to mobilise investments in the healthcare systems of Member States and in other sectors of their economies in response to the COVID-19 outbreak (Coronavirus Response Investment Initiative), OJ 2020 L 99/5.

temporary support to mitigate unemployment risks in an emergency (SURE) – a re-insurance system designed to support the heavily pressured national unemployment insurance regimes through loans backed-up by Member States' **guarantees**.⁷⁵

However, joint action by the EU intergovernmental institutions was much less forthcoming.⁷⁶ In fact, the EU Member States split heavily on what new measures to put in place to sustain the economy during the pandemic and relaunch it afterwards. In particular, on 25 March 2020 a group of nine Eurozone states – France, Italy, Spain, Portugal, Greece, Slovenia, Belgium, Luxembourg and Ireland – **requested in a letter to the European Council President that the EU start “working on a common debt instrument issued by a European institution to raise funds on the market on the same basis and to the benefit of all Member States.”**⁷⁷ Yet, this proposal was fiercely rejected as an unacceptable effort of debt mutualisation by the Netherlands and Germany – which called instead for the use of the ESM as a crisis response tool.⁷⁸ In this context, the European Council, meeting by video-conference for the third time in two weeks, failed to reach a deal⁷⁹ – and hence kicked the can to the Eurogroup. But the Eurogroup, meeting in an inclusive format (open to non-Eurozone states), did not have an easier time either: after three days of negotiation, on 9 April 2020, it came up with a half-baked compromise, which envisioned tackling Covid-19 with both the ESM and a new Recovery Fund.⁸⁰ However, details on the latter were scant at best, suggesting that tough talks lie ahead if the EU is to find a consensual way out of the Covid-19 crisis.⁸¹

⁷⁵ See European Commission Proposal for a Council Regulation on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the Covid-19 outbreak, 2 April 2020, COM(2020)139 final.

⁷⁶ See also Italian President Sergio Mattarella, statement, 27 March 2020.

⁷⁷ See Joint letter by Belgium, France, Greece, Ireland, Italy, Luxembourg, Portugal, Slovenia and Spain to European Council President Charles Michel, 25 March 2020.

⁷⁸ See Dutch Finance Minister Wopke Hoekstra, statement at the Tweede Kamer, 7 April 2020, available at: <https://debatgemist.tweedekamer.nl/debatten/eurogroep>.

⁷⁹ See Joint statement of the Members of the European Council, 26 March 2020.

⁸⁰ See Council of the EU, Report on the comprehensive economic policy responses to the Covid-19 pandemic, 9 April 2020.

⁸¹ See also Sebastian Grund et al, “Sharing the Fiscal Burden of the Crisis”, Hertie School Jacques Delors Centre Policy Paper, 7 April 2020.

4. THE SHORTCOMINGS OF THE CURRENT EU GOVERNANCE SYSTEM

The old and new crises that the EU experienced have all exposed the shortcomings of the current EU system of governance. In fact, the difficulties of the EU in solving once and for all any of the pending crises are a consequence of the institutional and substantive weaknesses of the current EU constitutional architecture. Addressing these issues is thus essential to enable the EU to act in an effective and legitimate way in crisis-management and beyond.

4.1. Institutional issues

Recent crises have unearthed and accelerated a major shift in the form of governance of the EU: the rise of intergovernmentalism.⁸² Institutions such as the European Council – which groups heads of state and government of the EU Member States together with the Commission President, under the leadership of a semi-permanent European Council President⁸³ – and the Eurogroup – which brings together the Ministers of Finance of the Member States⁸⁴ – have come to acquire a leading function in EU decision-making. According to Uwe Puetter, the centrality of the European Council in EU governance is not a haphazard development.⁸⁵ Rather, it is the result of a deliberate institutional choice made at the time of the Maastricht Treaty of 1992. When Member States decided to transfer a number of new competences in areas of high politics to the EU, they resisted delegating powers to the Commission and other supranational bodies, and rather created an intergovernmental framework in which they could remain in control of decision-making.⁸⁶ Even though with the Maastricht Treaty “policy interdependencies have grown, member state governments have resisted the further transfer of formal competences to the EU level and did not follow the model of the Community method.”⁸⁷

Be that as it may, in the last decade the European Council has become “ever mightier.”⁸⁸ In fact, the European Council today meets much more frequently than what is foreseen in the Treaties,⁸⁹ and is regularly involved in deciding the agenda of the EU and its Member States across the board.⁹⁰ The European Council – as well as the Euro Summit, which is de facto a sub-composition of the European Council including only the heads of state and government of Eurozone countries – played a dominant

⁸² See Sergio Fabbrini, *Which European Union?* (CUP 2015).

⁸³ Art 15 TEU.

⁸⁴ Protocol 14.

⁸⁵ Uwe Puetter, *The European Council and the Council: New Intergovernmentalism and Institutional Change* (OUP 2014) 68.

⁸⁶ *Id.* at 17.

⁸⁷ Uwe Puetter, “Europe’s Deliberative Intergovernmentalism: The Role of the Council and the European Council in EU Economic Governance” (2012) 19 *Journal of European Public Policy* 161.

⁸⁸ Editorial, “An Ever Mighty European Council – Some Recent Institutional Developments” (2009) 46 *Common Market Law Review* 1383.

⁸⁹ See Art 15 TEU.

⁹⁰ See Frederic Eggermont, *The Changing Role of the European Council in the Institutional Framework of the European Union* (Bruylant 2012).

role in EMU,⁹¹ but has also emerged as crucial in other areas of policy-making – from migration⁹² to enlargement,⁹³ to MFF negotiations,⁹⁴ and now of course health and the responses to the Covid-19 pandemic.⁹⁵ In fact, the European Council has increasingly side-lined other EU institutions, including the Commission and the Council. Hence, while the EU Treaties formally grant to the Commission the right of legislative initiative,⁹⁶ the Commission today mostly acts at the behest of the European Council, after obtaining its political endorsement. And while the EU Treaties grant legislative power to the Council⁹⁷ (as opposed to the European Council, which should instead exercise executive powers⁹⁸), it has come to be the rule for the Council to shift high-level legislative files to the European Council for consideration and negotiation.⁹⁹ Moreover, also Parliament has been remarkably marginalised in this intergovernmental institutional configuration: hence, for instance the Parliament has mostly been left out of decision-making in EMU, as well as on the economic responses to Covid-19.¹⁰⁰

The rise of the European Council as the power-house of the EU institutional structure has created however important problems.¹⁰¹ First, the European Council has deepened the pre-existing cleavages between Member States, fuelling the resurgence of a clash between conflicting national interests. In fact this was, and is, an inevitable consequence of the structural composition of the European Council and the electoral incentives underpinning it. Although a number of scholars had sought to mythologise the European Council as a bucolic institution in which Member States can reconcile their interests and find consensus through deliberation,¹⁰² the reality is that the European Council is made up of national leaders – whose job is to represent and promote the national interest.¹⁰³ But because EU Member States often have conflicting national interests – from economic policy to migration, from enlargement to the MFF – it is not surprising that disagreement has emerged in the functioning of the European Council. With heads of state and governments going to the European Council with the aim to win the best deal for their home country, clashes between national leaders representing conflicting national interests have become a regular feature of the European Council life, with a negative feedback in the European public debate.¹⁰⁴

Second, in an institution which structurally favours the clash between conflicting national interests, it has become inevitable for the leaders representing the larger and more powerful Member States to gain the upper hand. Although formally speaking all heads of state and government sitting at the European Council table are equal, in reality state power matters – and some Member States are more

⁹¹ See Euro Summit statement, 14 December 2018, PRESS 790/18.

⁹² See European Commission communication, "A European Agenda on Migration", 13 May 2015, COM(2015) 240 final.

⁹³ See European Council Conclusions, EUCO 23/19, 18 October 2019, §5..

⁹⁴ See European Council President Charles Michel, remarks, 21 February 2020..

⁹⁵ See Joint statement of the Members of the European Council, 26 March 2020.

⁹⁶ Article 17 TEU.

⁹⁷ Article 16 TEU.

⁹⁸ Article 15 TEU.

⁹⁹ See Federico Fabbrini, "The Relation between the European Council and the Council" (2016) 22 *European Public Law* 489.

¹⁰⁰ See Cristina Fasone, "European Economic Governance and Parliamentary Representation: What Role for the European Parliament?" (2013) 20 *European Law Journal* 164.

¹⁰¹ See further Federico Fabbrini, "The Institutional Origins of Europe's Constitutional Crises, in Tom Ginsburg et al (eds.), *Constitutions in Times of Financial Crises* (CUP 2019), 204.

¹⁰² See Luuk van Middelaar, *The Passage to Europe: How a Continent Became a Union* (Yale University Press 2013).

¹⁰³ See Petya Alexandrova & Arco Timmermans, "National Interest Versus the Common Good: The Presidency in European Council Agenda Setting" (2012) 52 *European Journal of Political Research* 316.

¹⁰⁴ See Ingolf Pernice et al., *A Democratic Solution to the Crisis: Reform Steps towards a Democratically Based Economic and Financial Constitution for Europe* (Nomos 2012), 83.

powerful than others.¹⁰⁵ As Jonas Tallberg has explained, bargaining within intergovernmental institutions is the result of several sources of power and “differences between large and small Member States” shape inter-state relations within the European Council.¹⁰⁶ Aggregate states’ sources of power play the most fundamental role in explaining negotiation in the European Council, with the result that larger Member States can dominate the decision-making process. In this context, it is not surprising that Germany has emerged as the dominant player in defining the EU agenda.¹⁰⁷ Yet, this has raised a major challenge to the anti-hegemonic nature of the EU project.¹⁰⁸ It is evident that a system of governance that structurally disfavors the interests of smaller/weaker members *vis-à-vis* larger/mightier ones deeply undermines the fabric of the EU and its promise of continental pacification.¹⁰⁹

In conclusion, the increase of intergovernmentalism as the leading mode of EU governance has decreased the effectiveness and legitimacy of the EU, as proven by the systematic difficulties of the EU to tackle, once and for all, the crises of the last decade. The structural incentive for each member of the European Council is to focus on the interests of the state where he/she is elected – not the interest of the EU as a whole. Due to its composition, the European Council has fuelled interstate conflicts, rather than taming them. And while conflict is part of politics,¹¹⁰ domination by larger/mightier states has become the formula to solve interstate disagreement. Yet this institutional state of affairs has undermined the legitimacy of the measures decided by the European Council. In the end, as Sergio Fabbrini has underlined, decision-making within the European Council has always delivered too little, too late, since heads of state and government have faced challenges in reaching agreement on the measures to be taken, and then met selective non-compliance by some Member States in the implementation of the agreed measures.¹¹¹

4.2. Substantive issues

Besides the abovementioned institutional shortcomings, the current EU constitutional arrangement also suffers from several substantive problems. To begin with, the competences of the EU are limited.¹¹² The Lisbon Treaty has re-affirmed the principle of conferral by stating in Article 5(2) TEU that “the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties.” Moreover, the Lisbon Treaty introduced a distinction between types of EU competences in

¹⁰⁵ See Mark Dawson & Floris de Witte, “Constitutional Balance in the EU after the Euro-Crisis” (2013) 76 *Modern Law Review* 817.

¹⁰⁶ Jonas Tallberg, “Bargaining Power in the European Council” (2008) 46 *Journal of Common Market Studies* 685.

¹⁰⁷ See William Paterson, “The Reluctant Hegemon? Germany Moves Center Stage in the European Union”, (2011) 49 *Journal of Common Market Studies* 57.

¹⁰⁸ See Federico Fabbrini, “States’ Equality v States’ Power: The Euro-crisis, Inter-state Relations and the Paradox of Domination” (2015) 17 *Cambridge Yearbook of European Legal Studies* 1.

¹⁰⁹ See Simone Bunse & Kalypso Nicolaidis, “Large Versus Small States: Anti-Hegemony and the Politics of Shared Leadership”, in Erik Jones et al. (eds.), *The Oxford Handbook of the European Union* (OUP 2012), 249, 251.

¹¹⁰ See Damian Chalmers, “The European Redistributive State and a European Law of Struggle” (2012) 18 *European Law Journal* 667, 686.

¹¹¹ See Sergio Fabbrini, “Intergovernmentalism and Its Limits” (2013) 46 *Comparative Political Studies* 1003, 1022.

¹¹² See Michael Dougan, “The Competences of the Union”, in Robert Schütze and Takis Tridimas (eds), *Oxford Principles of European Union Law* (OUP 2016).

Articles 2 to 6 of the Treaty on the Functioning of the European Union (TFEU).¹¹³ In particular, besides distinguishing competences which are exclusive to the EU and competences which are shared between the EU and the Member States, Article 2(5) TFEU also created a blurred class of coordinating, **supporting and supplementing competences by stating that “in certain areas and under certain conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States without thereby superseding their competence in these areas.”** However, an example of a policy area where the EU has only supporting competence is health,¹¹⁴ the relevance of which has been dramatically exposed by the Covid-19 pandemic.¹¹⁵ In this terrain, the powers of the EU are marginal, and thus insufficient to deal effectively with a crisis.

Moreover, even when the EU has formally conferred competences to intervene in a given sector, the instruments that are made available under the Treaties to act are often inadequate for the challenges at stake. In fact, the recent crises discussed above have highlighted a serious enforcement problem for EU law – with increasing incidence of Member States’ **non-compliance** with fully valid EU norms.¹¹⁶ This is particularly the case in the context of migration,¹¹⁷ as well as the rule of law:¹¹⁸ neither infringement proceedings nor the threat of Article 7 TEU procedure have done much to redress the cavalier attitude of Visegrad states *vis-à-vis* Council decisions on the relocation of migrants, or ECJ rulings enjoining the implementation of domestic laws which imperilled the independence of the judiciary. Yet cases of outright defiance of EU law, often under colour of national constitutional identity claims,¹¹⁹ have multiplied themselves in recent years,¹²⁰ showing that the EU Institutions have very little ability to compel obedience of EU law in recalcitrant Member States.¹²¹ Yet, it has become evident that the **absence of substantive enforcement tools to make sure that “the law is observed”**¹²² uniformly and consistently across the EU poses a major threat to the project of European integration as a *Rechtsgemeinschaft*.¹²³

Last but not least, besides competences and enforcement powers, the EU as it stands also lacks critical resources to fulfil its mission. This is the well-known problem of taxing and spending in the EU,¹²⁴ which

¹¹³ See Takis Tridimas, “Competence after Lisbon: The Elusive Search for Bright Lines” in Diamond Ashiagbor et al (eds), *The European Union after the Treaty of Lisbon* (CUP 2012), 47.

¹¹⁴ Article 168 TFEU.

¹¹⁵ See former ECB President Mario Draghi, “We Face a War Against Coronavirus and Must Mobilize Accordingly”, Op-Ed, Financial Times, 26 March 2020..

¹¹⁶ See Carlos Closa & Dimitry Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2018).

¹¹⁷ See European Commission, Thirteenth report on relocation and resettlement, 13 June 2017, COM(2017) 330 final (describing the implementation of the relocation scheme as utterly “insufficient”).

¹¹⁸ See General Affairs Council, Outcome of meeting, 8 January 2019, Doc 5039/19. See also European Parliament resolution of 16 January 2020 on ongoing hearings under Article 7(1) TEU regarding Poland and Hungary, (2020/2513(RSP)), P9_TA(2020)0014. Available at: [http://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/definitif/2020/01-16/0014/P9_TA\(2020\)0014_EN.pdf](http://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/definitif/2020/01-16/0014/P9_TA(2020)0014_EN.pdf).

¹¹⁹ Federico Fabbrini & Andras Sajó, “The Dangers of Constitutional Identity” (2019) 25 *European Law Journal* 457.

¹²⁰ See also recently the ruling of the German Constitutional Court which, in breach of the principle of the supremacy of EU law, declared invalid an ECB measure duly upheld by the ECJ. See BVerfG, 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15, judgment of 5 May 2020.

¹²¹ See Mark Dawson, “Coping with Exit, Evasion, and Subversion in EU Law” (2020) 21 *German Law Journal* 51.

¹²² Article 19 TEU.

¹²³ See Julio Baquero Cruz, *What’s Left of the Law of Integration?* (OUP 2018).

¹²⁴ Federico Fabbrini, “Taxing and Spending in the Eurozone” (2014) 39 *European Law Review* 155.

prominently emerged in the context of the EMU,¹²⁵ MFF,¹²⁶ and Covid-19 crises.¹²⁷ Even though the spirit and the letter of the EU Treaties require the EU budget to be funded by own resources, it is well known that the EU budget is for the most part today financed by contributions from the Member States.¹²⁸ Contrary to the High Authority of the European Carbon and Steel Community (ECSC), which was empowered to collect levies from private companies and borrow on the markets to finance itself,¹²⁹ the contemporary EU is funded by budgetary transfers from the Member States, based on their GDP, or the income derived by a harmonised value-added tax (VAT).¹³⁰ In fact, because Article 310(1) TFEU requires that “[t]he revenue and expenditure shown in the [EU] budget shall be in balance,” the EU is prevented from issuing bonds in the financial markets, which is accounted as debt – except for the amount resulting from the difference (the so-called margin) between the payment ceiling and the actual payments appropriations.

While nothing in the EU Treaties stops the Member States from raising the EU’s own resources ceilings, Article 312 TFEU requires the decision laying down the provisions relating to the system of own resources of the EU to be adopted by Council, acting unanimously and after consulting Parliament – with the proviso that: **“That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements.”** Hence, the procedure to endow the EU with the resources necessary to function is subject to the veto of each state.¹³¹ Unanimity also characterises EU legislation to harmonise tax policy: pursuant to Article 113 TFEU, the Council can, acting unanimously and after consulting Parliament, **“adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition.”** In any case, the EU does not currently have the power of direct taxation, with the consequences that at best it can only set a harmonised tax, which states could then collect and use as part of their contributions to the MFF. This state of affairs severely reduces the effectiveness of the EU – not to mention the issues of legitimacy it raises for Parliament, which is cut off from the whole picture.¹³²

¹²⁵ See Council of the EU, Term sheet on the Budgetary Instrument for Convergence and Competitiveness, 14 June 2019.

¹²⁶ See Luca Zamparini & Ubaldo Villani-Lubelli (eds), *Features and Challenges of the EU Budget* (Elgar 2019).

¹²⁷ See Council of the EU, Report on the comprehensive economic policy responses to the Covid-19 pandemic, 9 April 2020.

¹²⁸ See supra n. 125.

¹²⁹ Art 49 ECSC Treaty.

¹³⁰ See also Alessandro D’Alfonso, “How the EU Budget is Financed. The ‘Own Resources’ System and the Debate on its Reform”, European Parliament Research Service in-depth analysis, 2 June 2014, 140805REV1.

¹³¹ See Sylvain Plasschaert, “Towards an Own Resource for the European Union? Why? How? And When?” [2004] *European Taxation* 470.

¹³² See Giacinto Della Cananea, ‘No Representation without Taxation: the European Union’, in Lina Papadopoulou et al (eds), *Legitimacy Issues of the European Union in the Face of the Crisis* (Nomos, 2017), 95.

4.3. Complacency issues

In addition to the abovementioned institutional and substantive problems, the EU also suffers from a complacency problem. Even though the case for reforming the EU's constitutional architecture is strong, an equally powerful complacency is nonetheless present in several EU policy-making circles. Indeed, it is often argued that path-dependency is a defining feature of the EU.¹³³ As a consequence, leading voices in politics as well as in academia have discarded as idealistic the scenario of grand reform for the EU, rather arguing that the EU ultimately always manages to carry on from one crisis to the next – and that muddling through, right or wrong, is the natural way to do business.¹³⁴ In fact, it is sometimes heard that if the EU ain't totally broken, why fix it? Admittedly, there are policy areas where the EU is delivering successful policy outcomes with its current governance system – which could be a powerful case against reform. Nevertheless, these areas are limited, and are themselves subject to the developments occurring in the overall EU regime. Moreover, the functioning of the EU – and its ability to carry on – is increasingly being tested to the extreme, which challenges the sustainability of the status quo.¹³⁵

For example, it has been noticed how in the field of international trade the EU has been able to achieve its objectives successfully. In the last few years, the EU has initiated a major free trade agreement with Japan¹³⁶ and started negotiations for new economic partnerships with, among others, Australia.¹³⁷ Moreover, despite a challenge by the Belgian region of Wallonia,¹³⁸ the EU Council signed a comprehensive economic trade agreement with Canada¹³⁹ and the Commission received a mandate to start new trade negotiations with the United States (US),¹⁴⁰ averting (so far) the threats of a tariff war with the Trump administration.¹⁴¹ Nevertheless, the ability of the EU to work in an area such as international trade, conceals the fact that this is a special domain where the institutional structures of the EU actually support effective governance. In fact, the EU Treaties make the common commercial policy an exclusive competence of the EU,¹⁴² vesting the power to handle international negotiations in the Commission, subject to the mandate of the Council, which operates under qualified majority voting, and the oversight of Parliament.¹⁴³ Moreover, it is noteworthy how intergovernmentalism has slowly but steadily seeped also into the area of international trade. In fact, while the EU Treaties grant to the Commission exclusive authority to conduct the EU commercial policy,¹⁴⁴ the European Council has acquired a crucial role in endorsing, and shaping EU trade agreements¹⁴⁵ – suggesting that even

¹³³ See Paul Pierson, "The Path to European Integration: A Historical Institutional Analysis" (1996) 29 *Comparative Political Studies* 123.

¹³⁴ See Andy Moravcsik, "Europe's Ugly Future: Muddling Through Austerity" (2016) 95 *Foreign Affairs* 139.

¹³⁵ See Ronan McCrea, "Forward or Back: The Future of European Integration and the Impossibility of the Status Quo" (2017) 23 *European Law Journal* 66.

¹³⁶ See EU-Japan Economic Partnership Agreement.

¹³⁷ See European Commission press release, "EU and Australia launch talks for a broad trade agreement", 18 June 2018, IP/18/4164.

¹³⁸ Opinion 1/17 on CETA, Judgment of 30 April 2019, ECLI:EU:C:2019:341.

¹³⁹ See EU-Canada Comprehensive Economic Trade Agreement OJ [2017] L11/23.

¹⁴⁰ See Council decision of 15 April 2019 authorizing the opening of negotiations with the United States of America for an agreement on the elimination of tariffs for industrial goods, Doc 6052/19.

¹⁴¹ Joint EU-US Statement, 25 July 2018, STATEMENT/18/4687.

¹⁴² Article 3 TFEU.

¹⁴³ Article 207 TFEU.

¹⁴⁴ See Article 207 TFEU.

¹⁴⁵ See Charles de Marcilly, « La politique commerciale de l'UE au risque des défis internes », Fondation Robert Schuman Policy Paper, 17 October 2016.

areas traditionally governed under the Community method are not immune from the spill over of the intergovernmental dynamics that have become dominant elsewhere.

Similarly, it has been noticed how one of the most remarkable aspects of Brexit has been the degree to which the EU and its remaining Member States have been united in their dealings with the UK. Contrary to the expectations of some, the EU27 have never divided during the Brexit negotiations. With the **marginal exception of Italy's legal challenge against the Council decision to relocate the European Medical Agency from London to Amsterdam, rather than Milan,**¹⁴⁶ the EU Member States have remained consistently united, delegating all Brexit talks to the *ad hoc* European Commission Article 50 Task Force, and backing the work of the Chief Negotiator Michel Barnier.¹⁴⁷ Nevertheless, Brexit was in many ways an exceptional process, and facing a state intent on leaving the EU, all other members felt compelled to group together, including to protect the interest of its weaker parties.¹⁴⁸ The performance of the EU during the Brexit process cannot therefore be taken as a benchmark in other policies. In fact, if Brexit shows anything, it is precisely that the ability of the EU to muddle through has limits. Even **discounting for the UK's idiosyncratic approach to European integration,**¹⁴⁹ there is no doubt that its withdrawal from the EU sounds an alarm bell.¹⁵⁰ After all, exit becomes an option when voice is limited.¹⁵¹ In other words, reforming the EU system of governance is a necessity to reduce centrifugal pulls, and to secure the long term survival of the EU itself.

¹⁴⁶ See Regulation (EU) 2018/1718 of the European Parliament and of the Council of 14 November 2018 amending Regulation (EC) No 726/2004 as regards the location of the seat of the European Medicines, OJ [2018] L291/3.

¹⁴⁷ See Emily Jones, "The Negotiations", in Federico Fabbrini (ed), *The Law & Politics of Brexit. Volume 2: The Withdrawal Agreement* (OUP 2020).

¹⁴⁸ Irish Taoiseach Leo Varadkar, "Thank you to the People of Europe", Op-Ed, *Irish Times*, 31 January 2020.

¹⁴⁹ See Marlene Wind, "Brexit and Euroskepticism: Will 'Leaving Europe' be Emulated Elsewhere?" in Federico Fabbrini (ed), *The Law & Politics of Brexit* (OUP 2017).

¹⁵⁰ See Hannes Hoffmeier (ed), *The End of the Ever Closer Union?* (Nomos 2018).

¹⁵¹ See Albert O. Hirschman, *Exit, Voice, Loyalty: Responses to Decline in Firms, Organizations and States* (Harvard University Press 1970).

5. THE CONFERENCE ON THE FUTURE OF EUROPE

Given the shortcomings in the EU system of governance, the initiative to establish a Conference on the **Future of Europe designed to rethink in depth the EU's governance system is more needed than ever**. In fact, the Conference on the Future of Europe could follow the footsteps of two illustrious precedents and potentially serve as the launching pad to renew the European integration project.

5.1. Plans for the Conference

While the debate on the future of Europe is now several years in the making,¹⁵² the proposal in favour of a Conference on the future of Europe is relatively recent: as mentioned in the Introduction, the idea was first floated by French President Emmanuel Macron in March 2019. Before the European elections – at a moment of profound restructuring of the party system, with a strong polarisation between pro- and anti-European political forces – President Macron proposed to renew the EU by putting front and centre the issue of constitutional reforms as a way to unite, strengthen and democratize the EU and make it a sovereign power in an ever more uncertain world.¹⁵³ In particular, drawing from the French **experience of citizens' conventions**,¹⁵⁴ **President Macron recommended the convening “with the representatives of the European institutions and the Member States, a Conference for Europe in order to propose all the changes our political project needs, with an open mind, even to amending the treaties.”**¹⁵⁵ After the European elections – in light of the positive result of pro-European forces in the pan-European electoral process, and a rising enthusiasm for participating in EU affairs – France detailed its plan for a Conference on the Future of Europe and, building on the special relationship with Germany,¹⁵⁶ took the lead in outlining a common roadmap forward.

Specifically, France and Germany put forward in November 2019 a joint non-paper on the Conference on the future of Europe, outlining key guidelines for the project.¹⁵⁷ In this document, France and **Germany indicated their belief that “a Conference on the Future of Europe is prompt and necessary”**¹⁵⁸ **and clarified that it “should address all issues at stake to guide the future of Europe with a view to make the EU more united and sovereign.”**¹⁵⁹ In terms of scope, the Franco-German proposal clarified that **“the Conference should focus on policies and identify [...] the main reforms to implement as a matter of priority, setting out the types of changes to be made (legal – incl. possible treaty change [...]).”**¹⁶⁰ Moreover, the Franco-German proposal indicated that **“[i]nstitutional issues could also be tackled as a cross-cutting issue, to promote democracy and European values and to ensure a more efficient functioning of the Union and its Institutions.”**¹⁶¹ In terms of structure, the Franco-German proposal

¹⁵² Whitepaper (n 3).

¹⁵³ Macron Speech Sorbonne (n 5).

¹⁵⁴ See also French Assemblée Nationale, Commission des Affaires Européennes, *Rapport d'information sur les conventions démocratiques de refondation de l'Europe*, N° 482, 7 December 2017.

¹⁵⁵ Macron Letter (n 6).

¹⁵⁶ See Treaty of Aachen.

¹⁵⁷ See Franco-German non-paper on key questions and guidelines: Conference on the Future of Europe, 25 November 2019.

¹⁵⁸ Ibid, 1.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

indicated that the **“Conference needs to involve all three EU institutions”** on the basis of an inter-institutional mandate to be agreed in early 2020.¹⁶² Moreover, the Franco-German proposal suggested that the **“Conference could be chaired by a senior European personality”, to be advised by “a small Steering Group, consisting of representatives of the EU institutions, Member States, experts/ civil society.”**¹⁶³ Finally, in terms of scenarios, the Franco-German proposal stated that the Conference should work in phases – tackling institutional issues first, and conclude during the French Presidency of the Council in spring 2022 with final **“recommendations [to] be presented to the [European Council] for debate and implementation.”**¹⁶⁴

The proposal in favor of a Conference on the Future of Europe was fully taken on board by the new Commission President Ursula von der Leyen.¹⁶⁵ As she pointed out when explaining her political guidelines for the 2019–2024 term before Parliament on 16 July 2019, the Conference on the Future of Europe would represent **“a new push for European democracy.”**¹⁶⁶ In particular, President Von der Leyen stated that the **“Conference should bring together citizens, [...], civil society and European institutions as equal partners [...and] should be well prepared with a clear scope and clear objectives, agreed between the Parliament, the Council and the Commission.”**¹⁶⁷ Moreover, she indicated her **readiness to follow up on what is agreed, including via “Treaty change.”**¹⁶⁸ Subsequently, in her mission letter to the Commission Vice-President-designate for Democracy and Demography Dubravka Šuica, President Von der Leyen emphasised the importance of agreeing **“on the concept, structure, timing and scope of the Conference”** and ensuring **“the follow-up on what is agreed.”**¹⁶⁹ In fact, when speaking again in front of Parliament on 27 November 2019, when the whole new Commission was subject to a consent vote,¹⁷⁰ President Von der Leyen mentioned once more her ambition to **“mobilise Europe’s best energies from all parts of our Union, from all institutions, from all walks of life, to engage in the Conference on the future of Europe.”**¹⁷¹ These views were subsequently outlined in a position paper of the Commission on the Conference on the Future of Europe, released on 22 January 2020.¹⁷²

Moreover, the proposal for a Conference on the Future of Europe was also strongly backed by Parliament, which quickly started preparing its position on the matter.¹⁷³ To this end, Parliament set up an *ad hoc* working group (WG), representing all political parties, which in December 2019 presented to the Parliament’s Conference of Presidents a detailed document outlining its views on the initiative.¹⁷⁴

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ Ibid, 2.

¹⁶⁵ European Council Conclusions, 2 July 2019, EUCO 18/19, para. 3.

¹⁶⁶ European Commission President candidate Ursula von der Leyen, “A Union that strives for more: My Agenda for Europe. Political Guidelines for the Next European Commission 2019-2024”, 16 July 2019, 19.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

¹⁶⁹ European Commission President Ursula von der Leyen, Mission Letter to Dubravka Šuica, 10 September 2019, 5.

¹⁷⁰ See European Parliament Decision of 27 November 2019 electing the Commission, (2019/2109(INS)), P9_TA(2019)0067, available at: https://www.europarl.europa.eu/doceo/document/TA-9-2019-0067_EN.pdf.

¹⁷¹ European Commission President Ursula von der Leyen, Speech at the European Parliament, 27 November 2019, 14.

¹⁷² European Commission Communication “Shaping the Conference on the Future of Europe”, 22 January 2020, COM(2020)27 final.

¹⁷³ See also Chair of the European Parliament Committee on Constitutional Affairs Antonio Tajani, Letter to the European Parliament President David Sassoli, 15 October 2019 (indicating consensus that the EP should play a leading role in the Conference and reporting that AFCO as the competent committee of the EP stands ready to start working immediately to prepare the EP position on the matter).

¹⁷⁴ European Parliament Conference on the Future of Europe, Main Outcome of the Working Group, 19 December 2019.

This document was subsequently embraced by Parliament's full chamber in a resolution adopted on 15 January 2020.¹⁷⁵ Here, Parliament underlined how **"the number of significant crises that the Union has undergone demonstrates that reform processes are needed in multiple governance areas"**¹⁷⁶ and **therefore welcomed the Conference as an opportunity "to increase [the EU's] capacity to act and make it more democratic."**¹⁷⁷ In terms of structure, Parliament proposed that the Conference should be based on a range of bodies, including a Conference Plenary, involving also representatives of national parliaments,¹⁷⁸ and a Steering Committee, consisting of representatives of Parliament, the Council and the Commission.¹⁷⁹ Moreover, Parliament also called for the establishment of an **"Executive Coordination Board [to] be composed of the three main EU institutions under Parliament's leadership"**¹⁸⁰ with responsibilities on the daily management of the Conference. In terms of scope, then, Parliament stated that the Conference should address a **"pre-defined but non-exhaustive" list of issues**, including European values, democratic and institutional aspects of the EU and some crucial policy areas.¹⁸¹ Nevertheless, Parliament clarified that **the Conference should "produce concrete recommendations that will need to be addressed by the institutions,"**¹⁸² and called for **"a general commitment from all participants in the Conference to ensure a proper follow-up of its outcomes,"**¹⁸³ including **"initiating treaty change."**¹⁸⁴

The proposal in favour of a Conference on the Future of Europe was also endorsed by the European Council, which on 12 December 2019 **"considered the idea of a Conference on the Future of Europe starting in 2020 and ending in 2022"**¹⁸⁵ and asked the incoming Croatian Presidency of the Council **"to work towards defining a Council position on the content, scope, composition and functioning of such conference and to engage, on this basis, with Parliament and the Commission."**¹⁸⁶ The European Council also underlined that the need for the Conference to respect the inter-institutional balance, and **to be "an inclusive process, with all member states involved equally."**¹⁸⁷ Moreover, while the European Council stated that **"priority should be given to implementing the Strategic Agenda"**¹⁸⁸ and that the Conference should therefore **"contribute to the developments of our policies,"**¹⁸⁹ the new European Council President Charles Michel mentioned that the Conference should also serve as a way to change the EU by reforming it where needed.¹⁹⁰ On 3 February 2020, on the basis of the mandate of the European Council, the Council of the EU also agreed on a common position in favour of the Conference

¹⁷⁵ European Parliament resolution of 15 January 2020 on the European Parliament's position on the Conference on the Future of Europe, (2019/2990(RSP)), P9_TA(2020)0010, available at: [http://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/definitif/2020/01-15/0010/P9_TA\(2020\)0010_EN.pdf](http://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/definitif/2020/01-15/0010/P9_TA(2020)0010_EN.pdf)

¹⁷⁶ Ibid. para. B.

¹⁷⁷ Ibid. para. 2.

¹⁷⁸ Ibid. para. 14.

¹⁷⁹ Ibid. para. 22.

¹⁸⁰ Ibid. para. 24.

¹⁸¹ Ibid. para. 7.

¹⁸² Ibid. para. 29.

¹⁸³ Ibid. para. 30.

¹⁸⁴ Ibid. para. 31.

¹⁸⁵ European Council Conclusions, 12 December 2019, EUCO 28/19, para. 14.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid. para. 16.

¹⁸⁸ Ibid. para. 15.

¹⁸⁹ Ibid.

¹⁹⁰ See European Parliament press release, "Ten Years of the Lisbon Treaty and the Charter of Fundamental Rights", 18 December 2019.

of the Future of Europe.¹⁹¹ Here the Council recognised **the need to engage “in a wide reflection and debate on the challenges Europe is facing and on its long-term future”**¹⁹² and proposed the creation of a light institutional structure, focusing on policy priorities with a mandate to report to the European Council by 2022.

In sum, all the EU Institutions have progressively embraced the plan to establish a Conference on the Future of Europe. In fact, following the Franco-German non-paper, several other Member States have also thrown their support behind this initiative, seeing it as the way to let the EU leap forward a decade after the adoption of the Lisbon Treaty.¹⁹³ Admittedly, many issues concerning the institutional organisation and the constitutional mandate of the Conference still have to be worked out. In fact, while Parliament and several Member States individually or jointly have pushed for the Conference to have an ambitious remit, with a clear role to revise the EU Treaties, the Council and other Member States **are more prudent and would rather want the process to serve as a redo of the citizens’ dialogue** the EU organized in 2017–2019.¹⁹⁴ For this reason, a joint resolution of the three main EU Institutions is awaited to sort out these issues. Yet the very idea of establishing a Conference on the Future of Europe confirms the ambition to start a self-reflection process, which could tackle the EU weaknesses and relaunch European integration, along the model of two important precedents.

5.2. Precedents for the Conference

The Conference on the Future of Europe – already from its name – evokes two illustrious precedents: the Conference of Messina, on the one hand; and the Convention on the Future of Europe, on the other. **Both initiatives were taken at critical time in the EU’s history. Both were out of the box initiatives. And both proved valuable to relaunch the project of European integration – although they formally had different fates.**

The Conference of Messina, which took place in the Sicilian city from 1 to 3 June 1955, is broadly regarded as a turning point in the project of European integration. The 1951 Treaty of Paris establishing the ECSC had been a success. However, the failure of the European Defense Community – and connected to that of the European Political Community – due to a negative vote in the French Assemblée Nationale on 30 August 1954 had paralysed the European project.¹⁹⁵ Yet, at the initiative of Italy, the Ministers of Foreign Affairs of the six founding Member States congressing in Messina were able to find a way to move forward in the construction of Europe.¹⁹⁶ In particular, as explained in a conclusive Conference resolution,¹⁹⁷ **the Governments agreed on the substantive objectives of “the**

¹⁹¹ See Council of the EU, 3 February 2020, Doc. 5675.

¹⁹² Ibid. para. 1.

¹⁹³ See e.g. Italian non-paper for the Conference on the Future of Europe, 14 February 2020.

¹⁹⁴ European Commission, “Citizens’ Dialogues and Citizens’ Consultations: Key Conclusions”, 30 April 2019.

¹⁹⁵ See also Richard T. Griffith, *Europe’s First Constitution. The European Political Community, 1952-1954* (The Federal Trust 2000).

¹⁹⁶ See Enrico Serra, “L’Italia e la Conferenza di Messina”, in Enrico Serra (ed.), *Il rilancio dell’Europa e i trattati di Roma* (Giuffrè 1989).

¹⁹⁷ Resolution adopted by the Ministers of Foreign Affairs of the Member States of the ECSC at their meeting at Messina, 3 June 1955, available at: https://www.cvce.eu/obj/resolution_adopted_by_the_foreign_ministers_of_the_ecsc_member_states_messina_1_to_3_june_1955-en-d1086bae-0c13-4a00-8608-73c75ce54fad.html

expansion of trade and the movement of persons,"¹⁹⁸ "more and cheaper energy,"¹⁹⁹ and "the setting up of a common European market."²⁰⁰ Moreover, from a procedural point of view, they decided that "a conference or conferences will be convened for the purpose of drafting the relevant treaties or arrangements"²⁰¹ and that "these conferences will be prepared by a Committee of government delegates assisted by experts under the chairmanship of a leading political figure whose task it will be to co-ordinate the work to be undertaken"²⁰² and to draft a report to be submitted to the foreign ministers by October 1955.²⁰³

The intergovernmental Committee established by the Conference of Messina – which came to be known as the Spaak Committee, from the name of the Belgian Minister of Foreign Affairs chairing it – worked out in meetings held in Brussels in the summer 1955 the details of a plan to set up a common market and an atomic energy community, which were presented in a report on 21 April 1956.²⁰⁴ The Ministers of Foreign Affairs of the ECSC member states meeting in a Conference in Venice in May 1956 embraced the Spaak Report and mandated an IGC, again placed under Paul-Henri Spaak's leadership, to draft a treaty.²⁰⁵ Notwithstanding the futile efforts to derail the initiative staged by the UK²⁰⁶ – which had been associated to the Messina process, but had refused to fully engage in it – the diplomatic talks rapidly progressed toward the drafting of two new international agreements: the Treaties establishing the European Economic Community (EEC) and the European Atomic Energy Community (Euratom), both signed in Rome on 25 March 1957. The EEC and the Euratom were instituted as separate organisations from the ECSC, but shared with the latter two institutions – namely the ECJ and the Common Assembly (the forerunner of Parliament).²⁰⁷ As such, the Conference of Messina was able to initiate a process which – through an innovative institutional set-up, centered on a committee of experts acting under ministerial mandate – was able to expand the purview of the ECSC and relaunch the project of European integration through new international treaties, but functionally and institutionally connected to the Treaty of Paris.

The Convention on the Future of Europe (or European Convention), instead, took place much more recently – but also at a very critical time in the process of European integration, given the coming EU enlargement, and the hostile geo-political environment. Established by the European Council meeting in Laeken, Belgium, on 14–15 December 2001,²⁰⁸ **the European Convention was tasked to "resolve three basic challenges: how to bring citizens, and primarily the young, closer to the European design and the European institutions, how to organise politics and the European political area in an enlarged Union and how to develop the Union into a stabilising factor and a model in the new, multipolar world."**²⁰⁹ Given the difficulties in reforming the EU experienced earlier in 2001 in the IGC concluded with the

¹⁹⁸ Ibid. I.A.1.

¹⁹⁹ Ibid. I.A.2.

²⁰⁰ Ibid. I.B.

²⁰¹ Ibid. II.1.

²⁰² Ibid. II.2.

²⁰³ Ibid. II.4.

²⁰⁴ See Raymond Bertrand, "The European Common Market Proposal" (1956) 10 *International Organizations* 559.

²⁰⁵ See Anne Boerger-De Smedt, "Negotiating the Foundations of European Law, 1950-1957: The Legal History of the Treaties of Paris and Rome" (2012) 21 *Contemporary European History* 339, 348.

²⁰⁶ See Martin Schaad, "Plan G – A 'Counterblast'? British Policy Towards the Messina Countries, 1956" (1998) 7 *Contemporary European History* 39.

²⁰⁷ See Jean-Marie Palayret, "Les décideurs français et allemands face aux questions institutionnelles dans la négociation des traités de Rome 1955-1957" in Marie-Thérèse Bitsch (ed.), *Le couple France-Allemagne et les institutions européennes* (Bruylant 2001), 105.

²⁰⁸ European Council Presidency Conclusions, Laeken, 14-15 December 2001, Annex I: Laeken Declaration.

²⁰⁹ Ibid., II.

Treaty of Nice,²¹⁰ however, the European Council “decided to convene a Convention composed of the main parties involved in the debate on the future of the Union.”²¹¹ Moreover, it **tasked it “to consider the key issues arising for the Union’s future development and try to identify the various possible responses.”**²¹² To this end, the European Council established an original body: the Convention – modelled on the successful experiment of the Convention that had been set-up two years previously to draft a Charter of Fundamental Rights for the EU, proclaimed on 7 December 2000²¹³ – composed of delegates of heads of state and government together with representatives of national parliaments, the EP and the Commission.²¹⁴ Moreover, it mandated this body to prepare a final document with **recommendations that would provide a starting point for discussion in the IGC, “which will take ultimate decisions.”**²¹⁵

As is well known, though – under the leadership of its Chairman: Valéry Giscard d’Estaing, a former French President; and its Vice-Chairmen: Giuliano Amato, a former Italian Prime Minister, and Jean-Luc Dehaene, a former Belgian Prime Minister – the Convention quickly re-interpreted its mandate, and wearing the clothes of a constitution-making body engaged in a full-blown process of re-thinking the institutional organisation and policy competences of the EU.²¹⁶ Following an extensive process of deliberation – which ran in Brussels for 18 months starting in March 2002, through plenary meetings and thematic working groups, steered by a praesidium – the Convention drafted a new Treaty establishing a European Constitution, replacing the previous EU Treaties and codifying EU primary law into a single text with an explicit constitutional character.²¹⁷ This draft treaty, agreed by consensus, was presented to the European Council on 18 July 2003 and served as the basis for the subsequent IGC. Despite a number of adaptations required by several Member States during the intergovernmental negotiations, the draft treaty prepared by the Convention was mostly embraced *pari passu* by the IGC. The then 25 EU Member States thus signed the Treaty establishing a Constitution for Europe in Rome on 29 October 2004.²¹⁸ Alas, this treaty encountered a ratification crisis, leading ultimately to the abandonment of the constitutional language.²¹⁹ Yet, its substance was eventually preserved via the Treaty of Lisbon.²²⁰ As such the European Convention – through an innovative institutional set-up, with a mixed composition and a transparent deliberative process – was able to come up with a grand plan of EU reforms, which in the end allowed the process of European integration to move forward on a stronger basis for another decade.

In sum, the Conference of Messina and the Convention on the Future of Europe represented historical turning points in the process of European integration – which serve as important precedents for the Conference on the Future of Europe. Indeed, both were out-of-the-box initiatives able to change the

²¹⁰ See also Declaration No. 23 on the future of the Union annexed to the Treaty of Nice (calling “for a deeper and wider debate about the future of the European Union”) OJ C 80, 10.3.2001, p. 85.

²¹¹ Laeken Declaration (n 207), III.

²¹² Ibid.

²¹³ See Grainne de Búrca, “The Drafting of the European Union Charter of Fundamental Rights” (2015) 40 *European Law Review* 799.

²¹⁴ Laeken Declaration (n 207), III.

²¹⁵ Ibid.

²¹⁶ See Peter Norman, *The Accidental Constitution* (Eurocomment 2005).

²¹⁷ See Jean-Claude Piris, *The Constitution for Europe. A Legal Analysis* (CUP 2010).

²¹⁸ See Paul Craig, “Constitutional Process and Reform in the EU: Nice, Laeken, the Convention and the IGC” (2004) 10 *European Public Law* 653.

²¹⁹ See European Council Presidency Conclusions 21-22 June 2007, Annex I, para. 1.

²²⁰ See Paul Craig, *The Lisbon Treaty: Law, Politics and Treaty Reform* (OUP 2010).

political dynamics of interstate bargaining through new institutional methods.²²¹ And both resulted in documents, which profoundly influenced the developments of integration, albeit differently.

5.3. Potentials of the Conference

The Conference on the Future of Europe represents potentially a major initiative to relaunch the project of European integration and reform the EU. To achieve its ambitious objectives, however, the Conference must be directed also towards treaty change as this is the main way to address the **shortcomings that have emerged in the context of Europe's multiple crises, culminating with Covid-19**. In fact, Covid-19 has had an impact on the Conference itself, because the explosion of a global pandemic delayed the adoption of a joint resolution by the three main EU institutions aimed at **outlining the Conference's mission. As a result, the originally envisioned schedule to launch the Conference on the Future of Europe on Europe Day, 9 May 2020 (the 70th anniversary of the Schuman Declaration), in Dubrovnik, Croatia was derailed, with the new time-frame for the initiative still unknown.**

Nevertheless, Covid-19 has actually made the need for the Conference on the Future of Europe more pressing than ever. As Parliament underlined on 17 April 2020 in a broad resolution outlining its position on the action needed at EU level to combat Covid-19 and its consequences, **"the pandemic has shown the limits of the Union's capacity to act decisively and exposed the lack of the Commission's executive and budgetary powers."**²²² As a result, Parliament suggested **"proposing greater powers for the Union to act in the case of cross-border health threats,"**²²³ it called for completing EMU, and for activating **"the general *passerelle* clause to ease decision-making process in all matters which could help to cope with the challenges of the current health crisis."**²²⁴ More crucially, however, Parliament stressed that **"the Union must be prepared to start an in-depth reflection on how to become more effective and democratic and that the current crisis only heightens the urgency thereof; believes that the planned Conference on the Future of Europe is the appropriate forum to do this; is therefore of the opinion that the Conference needs to be convened as soon as possible and that it has to come forward with clear proposals, including by engaging directly with citizens, to bring about a profound reform of the Union, making it more effective, united, democratic, sovereign and resilient."**²²⁵

Parliament's call for a prompt installation of the Conference on the Future of Europe as part of the institutional responses to Covid-19 found echoes in recent statements by other leading policy makers. For example, French President Emmanuel Macron once again threw his weight behind constitutional reforms in the EU, underlying how the pandemic should break any hesitation towards an in-depth rethinking of the EU.²²⁶ At the same time, speaking in the Bundestag ahead of a crucial European Council meeting, German Chancellor Angela Merkel emphasized the need to be open towards the

²²¹ See Koen Lenaert & M Desomer, "New Models of Constitution-Making in Europe: The Quest for Legitimacy?" (2002) 39 *Common Market Law Review* 1217.

²²² European Parliament resolution of 17 April 2020 on EU coordinated action to combat the Covid-19 pandemic and its consequences, (2020/2616(RSP)), P9_TA(2020)0054. Available at: [http://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/definitif/2020/04-17/0054/P9_TA\(2020\)0054_EN.pdf](http://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/definitif/2020/04-17/0054/P9_TA(2020)0054_EN.pdf), para. 69.

²²³ Ibid. para. 67

²²⁴ Ibid. para. 69

²²⁵ Ibid. para. 72

²²⁶ See French President Emmanuel Macron interview "We Need to Invent Something New", *The Financial Times*, 17 April 2020.

option of EU treaty change.²²⁷ And France and Germany jointly re-called the opportunity offered by the Conference “to open a large democratic debate on the European project [and] its reforms” in their proposal for a European Recovery from the Covid-19 crisis.²²⁸ Moreover, EU leaders celebrated Europe’s Day on 9 May 2020 reaffirming their conviction that the Conference on the Future of Europe, which “was only delayed due to the pandemic, will be essential in developing” ideas to make the EU more transparent and more democratic.²²⁹ From this point of view, therefore, the Conference on the Future of Europe represents potentially a ground-breaking initiative to start a constitutional reform process in the EU – along the models of the Conference of Messina and the Convention on the Future of Europe.

In fact, as mentioned above, both the Conference of Messina and the Convention on the Future of Europe were game changers, setting a new path to advance the project of integration. The former established an *ad hoc* intergovernmental committee charged to prepare a “general report”²³⁰ to be presented to an IGC for the purpose of drafting a new treaty.²³¹ Similarly, the Laeken Declaration set up a new body – the Convention: mixing states’ representatives with delegates of the EU institutions and national parliaments – tasked to deliberate on the reforms needed to renew the EU and prepare a “final document,”²³² which would be later considered by the IGC.²³³ Moreover, both in conceiving the Conference of Messina and the Convention on the Future of Europe, EU Member States moved beyond the strictures of the treaties – since the Conference was an initiative outside the ECSC and the Convention model was not (yet) foreseen in the TEU.

Nevertheless, the two initiatives had different fates. The Conference of Messina resulted in the drafting of two new Treaties – albeit on the basis of a traditional IGC process – which successfully entered into force. On the contrary, the European Convention presented a draft text which, after renegotiation by the IGC, was subjected to a ratification process in accordance with the TEU rules – but the requirement of unanimous ratification doomed the Treaty establishing a European Constitution.²³⁴ The precedents of the Conference of Messina and the European Convention offer therefore some useful lessons for the architects of the Conference on the Future of Europe. In fact, if the Conference on the Future of Europe aspires to achieve a relevant reform of the EU, it must deal with the challenge of treaty change in the EU. This requires analysing the legal rules and political options for treaty reform in the EU, with the aim to offer guideposts that policy-makers should consider in defining the shape and scope of the Conference.

²²⁷ See German Chancellor Angela Merkel, speech Bundestag, 23 April 2020.

²²⁸ See French-German Initiative for the European Recovery from the Coronavirus Crisis, 18 May 2020.

²²⁹ See European Parliament President David Sassoli, European Council President Charles Michel and European Commission President Ursula von der Leyen, Joint Op-ed, 9 May 2020.

²³⁰ Messina Resolution (n 196) II.4.

²³¹ See Pierre-Henri Laurent, “Paul-Henri Spaak and the Diplomatic Origins of the Common Market, 1955-1956” (1970) 85 *Political Science Quarterly* 373.

²³² Laeken Declaration (n 207) III.

²³³ See Diana Panke, “More Arguing than Bargaining? The Institutional Designs of the European Convention and Intergovernmental Conferences Compared” (2006) 28 *European Integration* 357.

²³⁴ But see Bruno de Witte, “Saving the Constitution? The Escape Routes and their Legal Feasibility” in Giuliano Amato et al (eds), *Genesis and Destiny of the European Constitution* (Bruylant 2007).

6. REFORMING THE EUROPEAN UNION

If the objectives of the Conference on the Future of Europe are to be ambitious they require treaty change. Yet, this procedure is rife with difficulties, which is why Member States have increasingly resorted in recent years to separate treaties adopted outside the EU legal order. This potentially serves as a model for the Conference to be followed – via a Political Compact.

6.1. The treaty amendment procedure

The rules on EU treaty reform are currently enshrined in Article 48 TEU, as last modified by the Treaty of Lisbon. This provision presents a number of innovative features.²³⁵ Yet, the fundamentals of the treaty revision procedure in EU law have remained unchanged since the early stages of the process of integration: treaty changes must be approved unanimously by the Member States formally congressing as an IGC, and in order to enter into force they should be ratified by all of them in accordance with their domestic constitutional requirements.²³⁶ As stated in Article 48(4) TEU, “[a] conference of representatives of the governments of the Member States shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to the Treaties. The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.”

Formally, Article 48 TEU currently foresees two mechanisms to amend the EU Treaties: an ordinary revision procedure, and a simplified one. In both cases, pursuant to Article 48(2) TEU “the Government of any Member State, the European Parliament or the Commission may submit proposals for the amendment of the Treaties to the Council,” which shall forward these to the European Council. In some cases, however, a less burdensome, simplified procedure can be used. In particular, pursuant to Article 48(6) TEU, a simplified revision procedure can be resorted to “for revising all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union” relating to the internal policies and action of the EU. In this case, the European Council – acting by unanimity after consulting Parliament and the Commission – may adopt a decision amending all or part of the provisions of Part Three of the TFEU, which “shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements.” However, because Article 48(6) TEU explicitly affirms that the simplified revision procedure “shall not increase the competences conferred on the Union in the Treaties”, effectively this mechanism can only be used only in limited cases.²³⁷

As a result, the main mechanism to reform the EU Treaties is the ordinary revision procedure, which has codified in EU primary law the so-called convention method, originally experimented – as explained before – in the process that led to the Treaty establishing a European Constitution.²³⁸ According to Article 48(3) TEU, “if the European Council, after consulting the European Parliament and the

²³⁵ See Steve Peers, “The Future of EU Treaty Amendments” (2012) 31 *Yearbook of European Law* 17.

²³⁶ See already Article 96 Treaty Establishing the European Coal and Steel Community (ECS).

²³⁷ But see European Council Decision No. 2011/199/EU of 25 March 2011, amending Article 136 TFEU with regard to a stability mechanism for Member States whose currency is the euro OJ 2011 L 91/1 (using the simplified revision procedure to amend Article 136 TFEU by adding a paragraph that recognizes “the Member States whose currency is the euro may establish a stability mechanism [...]”).

²³⁸ See Jean-Claude Piris, *The Lisbon Treaty: A Legal and Political Analysis* (CUP 2010) 104.

Commission, adopts by a simple majority a decision in favour of examining the proposed amendments, the President of the European Council shall convene a Convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission.” The Convention shall examine the proposals for amendments and shall adopt by consensus a recommendation which is then submitted for ultimate consideration to, and approval, by the IGC of Member States’ governments. Pursuant to Article 48(3) TEU the European Council may decide by a simple majority “not to convene a Convention should this not be justified by the extent of the proposed amendments” – but it must obtain Parliament’s consent to do so: hence Parliament can insist on calling a Convention to examine proposals for revisions to the EU Treaties.²³⁹

Article 48 TEU therefore puts in place a highly regulated process for amending the EU Treaties. Admittedly, other provisions permit tailored changes to EU primary law through special procedures.²⁴⁰ Yet, Article 48 TEU is indeed the main route through which the EU Treaties can be modified. And while the Lisbon Treaty has created a simplified revision procedure – which gives the European Council a direct treaty-making role – it is the ordinary revision procedure which overall remains paramount. At the same time, while the Lisbon Treaty has now constitutionalised the convention method – which entrusts the preparation of treaty reforms to a mixed body where representatives of national parliaments and EU Institutions sit alongside representatives of national governments – ultimately Article 48 TEU has re-affirmed the original arrangement. Like in the early days of European integration it is the EU Member States’ governments, meeting in the IGC, that have the power to adopt changes to the Treaties by common accord – and these amendments enter into force when they are ratified by *all* Member States in accordance with their domestic constitutional requirements.

As is well known, though, the unanimity requirement for treaty change has become a major constraint in reforming the EU. If the need to obtain unanimous consent from all EU Member States as a condition to change the EU Treaties could have been understandable in a union of six members, the requirement is nowadays a powerful challenge for a union of 27 (after Brexit). In fact, while arguably during the last 28 years, the EU Treaties **have been subject to a “semi-permanent treaty revision process”**²⁴¹ – with four major overhauls occurring in short sequence: the Treaty of Maastricht of 1992, the Treaty of Amsterdam of 1996, the Treaty of Nice of 2001, and the Treaty of Lisbon of 2007 – ratification crises dogged the process. Voters in France and the Netherlands sank the Treaty establishing the European Constitution in 2005,²⁴² and in Ireland they voted down the Treaty of Nice in 2001, and the Treaty of Lisbon in 2007 – requiring the European Council to scramble to find a solution, with additional reassurances added to the treaties that allowed in both cases a second, successful vote.²⁴³ As Dermot Hodson and Imelda Maher have explained, national parliaments, courts and the people through referenda have become ever more important actors in the process of national ratification of EU Treaties, hence increasing the

²³⁹ But see European Parliament resolution of 6 May 2010 on the draft protocol amending Protocol No 36 on transitional provisions concerning the composition of the European Parliament for the rest of the 2009-2014 parliamentary term, (2009/0813(NLE)), P7_TA(2010)0148 (giving its consent under Article 48(3) TEU to proceed with an IGC without a convention), available at:

[http://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/definitif/2010/05-06/0148/P7_TA\(2010\)0148_EN.pdf](http://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/definitif/2010/05-06/0148/P7_TA(2010)0148_EN.pdf)

²⁴⁰ See e.g. Art 49 TEU.

²⁴¹ Bruno De Witte, “The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process”, in Neil Walker et al (eds), *Convergence and Divergence in European Public Law* (Hart 2002), 39.

²⁴² See Nick Barber et al (eds), *The Rise and Fall of the European Constitution* (Hart 2019).

²⁴³ See Grainne de Búrca, “If at First you Don’t Succeed: Vote, Vote Again: Analyzing the ‘Second Referendum’ Phenomenon in EU Treaty Change” (2010) 33 *Fordham International Law Journal* 1472.

veto points against EU reforms.²⁴⁴ In particular, a quantitative analysis shows that EU Member States' **"constitutional rules and norms underpinning the negotiation and consent stages [of EU treaty amendments] have shifted to provide a more prominent role to parliaments, the people and the courts."**²⁴⁵

For this reason, a number of proposals have been put forward to amend Article 48 TEU. After all, the requirement to obtain unanimous approval by all Member States to reform a treaty is actually exceptional from a comparative viewpoint. Indeed, international organisations which are much less integrated than the EU allow their constituting treaties to be changed with a super-majority vote: for example, the United Nations allows its Charter to be amended by a vote of two-thirds of the members of the General Assembly provided changes are ratified in accordance with their constitutional requirements by two-thirds of its members, including all the five permanent members of the Security Council.²⁴⁶ In the run-up to the Treaty establishing a European Constitution it was thus suggested to replace unanimity with a super-majority vote of five sixths of Member States as the rule for the entry into force of the reform treaty.²⁴⁷ While the Convention did not itself consider this option,²⁴⁸ the Commission, in a preliminary draft Constitution of the European Union promoted by then President Romano Prodi – and known as the Penelope project – embraced it.²⁴⁹ In particular, anticipating the problems that the unanimity rule would produce in the ratification process, the Commission proposed **that the treaty establishing the European Constitution should ultimately enter into force if "by a given date, five sixths of the Member States have ratified this agreement"**²⁵⁰ **and that the "Member States which have not ratified are deemed to have decided to leave the Union."**²⁵¹ The Commission **acknowledged that this represented "a break with Article 48 TEU,"**²⁵² the then applicable rule on EU treaty change – **but, it stated that this was "consistent with international law"**²⁵³ because sufficient guarantees applied to the hold-outs.

Yet, the Commission's plan was criticised at the time from a strict legal point of view²⁵⁴ – and it ultimately never made it into the final draft. Rather – precisely in light of the failure of the Treaty establishing a European Constitution – **Article 48(5) TEU now foresees that "[i]f, two years after the signature of a treaty amending the Treaties, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council": but this effectively leaves the resolution of a future ratification crisis to the good will of the heads of state and government in the European Council.**

²⁴⁴ Dermot Hodson and Imelda Maher, *The Transformation of EU Treaty Making: The Rise of Parliaments, Referendums and Courts since 1950* (CUP 2018).

²⁴⁵ Ibid, 16.

²⁴⁶ Article 108 UN Charter.

²⁴⁷ See European University Institute Robert Schumann Centre for European Studies, "Reforming the Treaties' Amendment Procedures", report submitted to the European Commission, 31 July 2000.

²⁴⁸ **But see Valéry Giscard d'Estaing, Interview, *Financial Times*, 11 November 2002, 4** (suggesting need to have the new treaty enter into force even without the consent of all the (then) 25 member states).

²⁴⁹ See European Commission, Feasibility Study: Contribution to a Preliminary Draft Constitution of the European Union, 4 December 2002, available at: https://www.europarl.europa.eu/meetdocs/committees/afco/20021217/const051202_en.pdf

²⁵⁰ Ibid., XII.

²⁵¹ Ibid.

²⁵² Ibid.

²⁵³ Ibid.

²⁵⁴ See Bruno De Witte, "Entry into Force and Ratification", in Bruno De Witte (ed.), *Ten Reflections on the Constitutional Treaty for Europe* (European University Institute Robert Schuman Centre for Advanced Studies 2003), 203, 212.

6.2. The conclusion of agreements outside the EU legal order

As a consequence of the difficulties of changing the EU Treaties, Member States have in recent years explored with ever greater frequency other options to reform the EU. In particular – to overcome the disagreement characterising an ever more heterogeneous EU, and to avoid the deadlock resulting from the unanimity rule – coalitions of Member States have increasingly concluded inter-se agreements outside the EU legal order, but closely connected to the functioning of the EU. Indeed, as Bruno de Witte pointed out, EU Member States remain subjects of international law and as such they are free to conclude international agreement between themselves – either all of them or just a group thereof.²⁵⁵ This freedom is subject to several constraints. To begin with, inter-se agreements concluded between the Member States may not contain norms conflicting with EU law proper and cannot derogate from either primary or secondary law.²⁵⁶ In fact, the ECJ has not hesitated to strike down bilateral agreements concluded between Member States as inconsistent with EU law.²⁵⁷ Moreover, there are limits to how Member States can enlist the work of the EU Institutions in agreements concluded outside the EU legal order.²⁵⁸ In particular, as the ECJ ruled in *Pringle*, states are entitled, in areas which do not fall under the EU exclusive competence, to entrust tasks to the EU Institutions, outside the framework of the EU, only provided that those tasks do not alter the essential character of the powers conferred on those Institutions by the EU Treaties.²⁵⁹

Yet, apart from these limitations, EU Member States have leeway to resort to international agreements concluded outside the EU legal order; and in concluding such agreements they can craft new rules governing ratification and entry into force – overcoming the unanimity requirement set in Article 48 TEU. This is precisely what has happened in the context of the responses to the euro-crisis, with the adoption of the Fiscal Compact, the Treaty establishing the European Stability Mechanism (ESM) as well as the Inter-governmental Agreement on the Transfer and Mutualisation of Contributions to the Single Resolution Fund (SRF Agreement).²⁶⁰ In 2012, 25 out of then 27 EU Member States signed up to the Fiscal Compact, which strengthened the rules of the EU Economic and Monetary Union (EMU), notably by requiring contracting parties to constitutionalise a balanced budget requirement.²⁶¹ In 2012, the then 17 Eurozone member states also concluded the ESM, which endowed the EMU with a stabilisation fund to support states facing fiscal crises.²⁶² And in 2014, 26 Member States also concluded an intergovernmental agreement which – in the framework of the nascent Banking Union, with its Single Supervisory Mechanism (SSM) and Single Resolution Mechanism (SRM) – established a SRF to support

²⁵⁵ Bruno De Witte, “The European Union as an International Legal Experiment”, in Grainne de Búrca and Joseph H.H. Weiler (eds), *The Words of European Constitutionalism* (CUP 2011).

²⁵⁶ See Bruno De Witte, “The Law as Tool and Constraint of Differentiated Integration”, EUI RSCAS Working Paper 47/2019, 11.

²⁵⁷ See e.g. Case C-284/16, *Slowakische Republik v Achmea*, ECLI:EU:C:2018:158 (striking down a bilateral investment treaty between the Netherlands and Slovakia as incompatible with EU law).

²⁵⁸ See Steve Peers, “Towards a New Form of EU Law? The Use of EU Institutions Outside the EU Legal Framework” (2013) 9 *European Constitutional Law Review* 37.

²⁵⁹ See Case C-370/12, *Pringle*, ECLI:EU:C:2012:756, para. 158.

²⁶⁰ See Federico Fabbrini & Marco Ventoruzzo (eds), *Research Handbook on EU Economic Law* (Elgar 2019).

²⁶¹ Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, 2 March 2012, available at: http://www.eurozone.europa.eu/media/304649/st00tscg26_en12.pdf.

²⁶² Treaty Establishing the European Stability Mechanism, 2 February 2012, available at: http://www.european-council.europa.eu/media/582311/05_tesm2_en12.pdf.

credit institutions facing a banking crisis and set rules on the transfer and mutualisation of the national contributions to the SRF.²⁶³

The Fiscal Compact, the ESM Treaty and the SRF Agreement had special rules on their entry into force. In particular, Article 14(2) of the Fiscal Compact fore**saw that** “[t]his Treaty shall enter into force on 1 January 2013, provided that twelve Contracting Parties whose currency is the euro have deposited their **instrument of ratification**”. **Article 48 of the ESM Treaty provided that:** “[t]his Treaty shall enter into force on the date when instruments of ratification, approval or acceptance have been deposited by **signatories whose initial subscriptions represent no less than 90% of the total subscriptions**.” And Article 11(2) of the SRF Agreement stated that: “[t]his Agreement shall enter into force [...] when instruments of ratification, approval or acceptance have been deposited by signatories participating in the [SSM] and in the [SRM] that represent no less than 90% of the aggregate of the weighted votes of **all Member States participating in the [SSM] and in the [SRM]**” as **determined according to Article 3 of Protocol No. 36 on transitional provisions attached to the TEU**, which assigned (until 2014) to each member state a number of weighted votes proportional to population for calculating majorities in the Council.

For the first time in the history of the EU, therefore, the Fiscal Compact, the ESM Treaty and the SRF Agreement bypassed the unanimity requirement for treaty change. In fact – while Article 14(3) of the Fiscal Compact clearly indicated that the Treaty shall apply as from the date of its entry into force only **to those states “which have ratified it”** – by requiring ratification by just 12 Eurozone countries, it set approval by a *minority* of EU Member States as a condition for its entry into force. Moreover, the overcoming of the unanimity requirement was even more striking in the case of the ESM: because Eurozone Member States contribute to the paid-in capital stock of the ESM pro quota – with each contracting party contributing on the basis of a proportional capital key distribution set in Annex II of the ESM Treaty – by subjecting entry into force of the Treaty to the ratification, approval or acceptance of states representing 90% of the ESM capital, Article 48 of the ESM Treaty essentially conditioned the operation of the ESM to the positive vote of just the largest Eurozone countries. Similarly, the SRF Agreement – while clarifying in Article 12 that the Agreement **shall apply only “amongst the Contracting Parties that have deposited their instruments of ratification, approval or acceptance”** – set a **super-majority requirement for approval, connecting the importance of each member state’s ratification to its weighted vote in the Council**.

The new ratification rules introduced in the Fiscal Compact, the ESM Treaty and the SRF agreement were all designed to prevent a hold-out member state from blocking a treaty from applying among the others. In fact, the explicit opposition by the UK to treaty change was the main reason why EU Member States decided to conclude the Fiscal Compact outside the EU legal order²⁶⁴ – while admittedly reasons of German domestic politics played a larger role in pushing states to using an intergovernmental agreement, rather than an act of secondary EU law, for the SRF.²⁶⁵ Be that as it may, the new rules on the entry into force of these EMU-related treaties profoundly changed the ratification game, because they shifted the costs of non-ratification to the hold-outs Member States. In fact, the process of ratification of the Fiscal Compact in Ireland – the only Member State where a referendum was required

²⁶³ Agreement on the transfer and mutualisation of contributions to the Single Resolution Fund, 21 May 2014 available at: <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%208457%202014%20INIT>.

²⁶⁴ See Michael Gordon, “The United Kingdom and the Fiscal Compact” (2014) 10 *European Constitutional Law Review* 28

²⁶⁵ See Federico Fabbrini, “On Banks, Courts and International Law. The Intergovernmental Agreement on the Single Resolution Fund in Context” (2014) 21 *Maastricht Journal of European & Comparative Law* 444.

– proved as much, as voters endorsed the Treaty, simply not to be left out from this initiative.²⁶⁶ As a result, none of these EMU-related international Treaties faced issues in the national ratification procedures and they all entered into force as scheduled with all the Member States which had signed the treaties, including the reluctant ones, ultimately ratifying them.

In sum, by going outside the legal order of the EU – provided they did not do anything in breach of EU law proper – Member States have been able to reform the EU, and specifically EMU. In fact, by resorting to inter-se agreements Member States have overcome the strictures of Article 48 TEU, finding a solution to EU reform which is more consonant to a union with more than two dozen members. In particular, by introducing ad hoc rules on the entry into force of the Fiscal Compact, the ESM Treaty and the SRF Agreement, Member States have overcome the veto that inheres to the EU treaty amendment rule, and thus ultimately guaranteed the speedy entry into force of these new inter-se agreements. Needless to say, the specific ratification rules set by these treaties are questionable. In particular, the veto power given only to the largest and wealthiest Member States in the ESM Treaty has raised eyebrows.²⁶⁷ Moreover, it was a matter of concern that recital 5 in the Preamble of the ESM Treaty conditioned the granting of financial assistance by the ESM to the ratification of the Fiscal Compact – effectively putting countries in financial difficulties under duress to sign up to the Fiscal Compact as a *quid pro quo* to get ESM support. However, there is no doubt that the overcoming of the unanimity rule of ratification in these agreements is an important precedent, which opens new options also for the Conference on the Future of Europe.

6.3. Towards a “Political Compact”?

As explained in Parts 2 and 3, the EU has faced a plurality of crises which, as pointed out in Part 4, are all connected to shortcomings of the current EU governance system. As emphasised in Part 5, the ambition of the Conference on the Future of Europe is to renew the EU at a critical time in its history, and this should include treaty reforms. However, as underlined in this Part, if the Conference were to propose a change to the Treaties it would run into the obstacles of Article 48 TEU – which is a formidable obstacle to success given the unanimity requirement embedded in it. This is why EU Member States have increasingly resorted to inter-se agreements outside the EU legal order, particularly in the field of EMU, where they have codified special rules on approval and entry into force of these new treaties overcoming the unanimity rule. The analysis of the legal rules and political options for treaty reform in the EU, however, provides an important lesson that should be taken into account by policy-makers engaged in the nascent Conference on the Future of Europe.²⁶⁸

First among these is the awareness that the rules on the entry into force of any reform treaty resulting from the Conference on the Future of Europe will have a major impact on the success of the initiative. Because of the veto-points embedded in Article 48 TEU, any major reform plan that may emerge from the Conference on the Future of Europe risks foundering on the rocks of the unanimity requirement.

²⁶⁶ See Roderic O’Gorman, “An Analysis of the Method and Efficacy of Ireland’s Incorporation of the Fiscal Compact” in Federico Fabbrini et al (eds), *The Constitutionalization of European Budgetary Constraints* (Hart 2014), 273.

²⁶⁷ See Carri Ginter and Raul Narits, “The Perspective of a Small Member State to the Democratic Deficiency of the ESM” (2013) 38 *Review of Central & Eastern European Law* 54.

²⁶⁸ See further Federico Fabbrini, “The Conference on the Future of Europe: A New Model to Reform the EU?” Charlemagne Prize Academy paper, December 2019.

After all, this is precisely the reason why EU Member States have opted not to use the standard EU amendment procedure to respond to the euro-crisis – but have rather acted outside the EU legal framework, adopting new intergovernmental treaties which did not require approval by all the Member States to enter into force. The precedents set by the Fiscal Compact, the ESM Treaty and the SRF Agreement, however, offer a roadmap that institutional players in the Conference on the Future of Europe should use. To avoid the fate of the Treaty establishing the European Constitution – which was drafted by consensus in the European Convention, but then abandoned following two negative national referenda – the Conference on the Future of Europe could channel the outcome of its process into a new treaty with new rules on the entry into force of the treaty itself, which do away with the unanimity requirement and thus change the dynamics of the ratification game in the 27 Member States.

Specifically, the Conference on the Future of Europe could propose the drafting of a new treaty – call it Political Compact. This would be an international agreement, functionally and institutionally connected to the EU, just like the EMU-related treaties adopted in the aftermath of the euro-crisis.

From a content point of view, the Political Compact could tackle many of the shortcomings in the EU system of governance identified above.²⁶⁹ It is not the purpose of this study to outline in depth what the content of the Political Compact should be. In fact, it would be precisely the responsibility of the Conference on the Future of Europe to deliberate on these high matters. Nevertheless, in light of the EU institutional and substantive weaknesses this study has exposed, the Political Compact could introduce important reforms. On the one hand, at the institutional level, the Political Compact could strengthen the role of the EU supranational institutions – which have proven to be the only one capable to act effectively in times of crises. Hence – while the role of the ECJ in the Political Compact would necessarily have to be maintained, because of Articles 273 and 344 TFEU, which gives to the ECJ exclusive jurisdiction in settling disputes between Member States on matters related to EU law – the Political Compact could also make other institutional adjustments. For example, in Article 7 of the Fiscal Compact signatory Member States, **“while fully respecting the procedural requirements of the Treaties on which the European Union is founded”, committed “to supporting the proposals or recommendations submitted by the European Commission” in the excessive deficit procedure, unless a reversed qualified majority opposes this.**²⁷⁰ Similarly, in the Political Compact signatory Member States **could commit to supporting a Commission’s reasoned proposal that there is a clear risk of a serious breach of the rule of law unless there is a reversed qualified majority that opposes it.**

On the other hand, at the substantive level, the Political Compact could increase the EU powers and enforcement mechanisms. Member States participating in the Political Compact could transfer to the EU institutions new competences – for instance in the field of migration and external border management, as well as in the field of health policy, for example by giving to common institutions powers to procure medical equipment for the benefit of all parties.²⁷¹ Moreover, the Political Compact could also strengthen supranational enforcement powers, modifying the decision-making process on rule of law matters, as mentioned above, but also imposing harsher financial sanctions for violations of EU norms. Finally, then the Political Compact could re-allocate to the supranational level new resources, including the power to introduce direct taxes, which are crucial for a fiscal capacity.²⁷²

²⁶⁹ See supra n 82.

²⁷⁰ See also Paul Craig, “The Stability, Coordination and Governance Treaty” (2012) 37 European Law Review 231.

²⁷¹ See also “Coronavirus and the Costs of Non-Europe”, European Parliament Research Service, May 2020.

²⁷² See also Federico Fabbrini, “A Fiscal Capacity for the Eurozone”, Policy Department for Citizens’ Rights and Constitutional Affairs, European Parliament, February 2019.

Besides its content, however, the key innovation of the Political Compact would be on the procedural side. Crucially, the Political Compact would spell out new rules on its entry into force, which do away with the unanimity requirement. In particular, the Political Compact could foresee its entry into force when ratified by a super-majority of e.g. 19 states, which corresponds circa to three fourths of the Member States. Just like the Fiscal Compact – and contrary to the ESM Treaty and the SRF Agreement – the ratification of each Member State would count the same, consistent with the principle of the international equality of states. But contrary to the Fiscal Compact, both Eurozone and non-Eurozone Member States would weight towards ratification. Moreover – contrary to prior academic proposals to overcome unanimity in treaty amendments²⁷³ – the Treaty would not apply to the non-ratifying states, guaranteeing them the free choice whether to join or not the Political Compact, with all the consequences that follow.

The proposal put forward here resembles the one advanced at the time of the Convention by the Commission in its Penelope project mentioned above. Nevertheless, it differs from it in one essential way. The Penelope project proposal sought to amend the EU Treaties with a procedure that by its own admission broke the rules of the TEU itself. On the contrary, the proposal advanced here would be consistent with the TEU, as it would not surreptitiously amend Article 48 TEU, but rather set a new ratification rule for a new, inter-se treaty. In fact, by being drafted as a separate interstate agreement – and provided this would not introduce any measure explicitly inconsistent with EU law – the Political Compact could meet the criteria of legality set by the ECJ notably in *Pringle* when reviewing inter-se agreements concluded between groups of Member States.²⁷⁴ Moreover, while the overcoming of the unanimity rule in the ratification process was unheard of, and revolutionary, in 2002, today the practice has now become real, and indeed quite ordinary: the Fiscal Compact, the ESM Treaty and the SRF Agreement represent important precedents to follow.

At the same time, however, the option to conclude a separate Political Compact treaty as the outcome of the Conference would mitigate many of the criticisms that have been raised during the negotiations of the EMU intergovernmental agreements. In fact, the processes of drafting the Fiscal Compact, the ESM Treaty and the SRF Agreement were purely diplomatic and secretive negotiations, which left out Parliament, save for the pro-forma involvement of the Chairman of the Committee on Economic and Monetary Affairs (ECON).²⁷⁵ On the contrary, the Conference on the Future of Europe would be a much more open, transparent and participatory process – and with full input from, and involvement by, Parliament, which in fact would likely play a leading role in the steering of the Conference, and influencing its output. Therefore, one could expect the Conference to steer away from the perils of intergovernmental decision-making, and that its output would rather resemble the features of the Treaty establishing the European Constitution produced by the European Convention.

For these reasons, it seems likely that the Political Compact would withstand any judicial review of its EU legality. Indeed, as mentioned above, the ECJ is competent to review that inter-se agreements concluded outside the Treaties are compatible with EU law.²⁷⁶ Yet, in *Pringle* the ECJ found that the ESM Treaty passed the test, and simultaneously clarified that Member States are free to expand the powers of the EU Institutions as long as this extra grant of authority does not alter their essential functions.

²⁷³ See Hervé Bribosia et al, “Revising European Treaties: A Plea in Favor of Abolishing the Veto”, Notre Europe Policy Paper No 37/2009.

²⁷⁴ See supra n. 258.

²⁷⁵ See Valentin Kreiling, “The Making of a New Treaty: Six Rounds of Political Bargaining”, Notre Europe Policy Brief No 32/2012.

²⁷⁶ See supra n. 256.

Moreover in *Wightman* the ECJ ruled that the aim of the EU Treaties to create "an ever closer union among the peoples of Europe" has legal consequences (in that case, the possibility for a member state to revoke its notification of the intention to withdraw from the EU).²⁷⁷ By these standards it seems that a Political Compact making the EU more effective and democratic would certainly be consistent with the guidelines offered by the ECJ. In fact, if the outcome of the Conference on the Future of Europe were to be subject to ECJ review, it seems plausible to claim that it could be looked at even more approvingly than the ESM treaty, which was the result of a purely intergovernmental process.²⁷⁸ And at the same time, if the Political Compact could represent the way to allow the project of EU integration to move forward, on a more solid basis, between those who want it the initiative would be consistent with the Treaties' aim to create "an ever closer union among the peoples of Europe."

In fact, from a constitutional point of view, there is a major precedent for what is suggested here – namely the adoption of the oldest and most revered basic law in the world: the Constitution of the US. While after the War of Independence in 1781, the 13 North American colonies had come together and established a union under the Articles of Confederation, this first constitution proved unable to serve well the interests of the nascent US.²⁷⁹ As a result, in 1787, a convention of **states' delegates was called** in Philadelphia to propose amendments to the Articles.²⁸⁰ However, this Convention reinterpreted its mandate and drafted a brand new document: the Constitution of the US.²⁸¹ Crucially, though, the framers set into the Constitution itself the rule that ratification by 9 (out of 13) states would suffice for its entry into force.²⁸² As explained by Michael Klarman, this was technically a breach of the Article of Confederation,²⁸³ which required unanimous consent by the 13 states to amend the Articles themselves.²⁸⁴ **However, by replacing the Articles' unanimity requirement with a super-majority one for the entry into force of the Constitution – and by requiring the new Constitution to be approved by special states' ratifying conventions, set-up exclusively for this task – the framers were able to circumvent the opposition of some states, which otherwise would have doomed the whole constitutional endeavour.**²⁸⁵

Needless to say, if the Conference on the Future of Europe were to foresee a new ratification rule for the entry into force of a treaty resulting from its works, this could sanction the path toward a decoupling of the EU.²⁸⁶ Indeed, Member States which did not ratify the Political Compact would be left out from the new architecture of integration. Nevertheless, one should not underestimate the pressuring effect that this would have on states which are *prima facie* reluctant to ratify a treaty – a dynamic which as mentioned was visible e.g. in Ireland where the Fiscal Compact was approved in a referendum in 2012. In fact, as Carlos Closa has explained, the introduction of less-than-unanimous treaty entry-into-force rules, profoundly changes the ratification game and creates strong incentives for the hold-outs to join the treaty once this has reached the necessary number of ratifications to enter

²⁷⁷ See Case C-621/18 *Wightman* ECLI:EU:C:2018:999 (holding that the notification of Article 50 TEU can be revoked as a consequence of the commitment by Member States enshrined in the Treaties to achieve ever closer union).

²⁷⁸ See also Federico Fabbrini, "The Euro-Crisis and the Courts" (2014) 32 *Berkeley Journal of International Law* 64.

²⁷⁹ See Douglas Smith, "An Analysis of Two Federal Structures: the Articles of Confederation and the Constitution" (1997) 34 *San Diego Law Review* 249.

²⁸⁰ See Gordon Wood, *The Creation of the American Republic: 1776-1787* (Norton 1993).

²⁸¹ See Max Farrand, *Records of the Federal Convention*, Volume 1 (Yale University Press 1911).

²⁸² See Article VII, US Constitution.

²⁸³ Michael Klarman, *The Framers' Coup. The Making of the United States Constitution* (OUP 2016).

²⁸⁴ See Art XIII, Articles of Confederation.

²⁸⁵ See also Bruce Ackerman and Neal Katyal, "Our Unconventional Founding" (1995) 62 *University of Chicago Law Review* 475 (explaining that the last state – Rhode Island – only ratified the US Constitution in 1790, two years after it has already entered into force for the other states, and when a new federal government was already in place).

²⁸⁶ See Sergio Fabbrini, *Europe's Future: Decoupling and Reforming* (CUP 2019).

into force.²⁸⁷ Moreover, one must acknowledge that the process of EU differentiation has been going on for a while – particularly in the context of the Eurozone, which has increasingly acquired features of its own.²⁸⁸ And the recent crises that the EU has weathered have further divided, rather than united the EU.²⁸⁹ For this reasons, a Political Compact could be seen as a positive step to relaunch European integration among the Member States that are willing to build a strong and sovereign political union, circumventing the opposition that could come e.g. from countries which are increasingly at odds with the EU founding principles and values.²⁹⁰

²⁸⁷ See also Carlos Closa, *The Politics of Ratification of EU Treaties* (Routledge 2013).

²⁸⁸ See Jean-Claude Piris, *The Future of Europe: Towards a Two Speed EU?* (CUP 2011).

²⁸⁹ See Federico Fabbrini, “The Future of the EU 27” in Federico Fabbrini (ed.), “The Brexit Negotiations and the May Government”: Special Issue (2019) *European Journal of Legal Studies*.

²⁹⁰ See supra n 38-39.

7. CONCLUSION

In the last decade, the EU has faced a plurality of crises which have exposed the shortcomings of the current EU system of governance. These call for urgent and needed reforms to relaunch integration among the 27 EU Member States. In fact, on 31st January 2020, the UK left the EU, in an unprecedented process of withdrawal that should remove any complacency regarding the weak state of the union. It is also in response to these challenges that leading statesman pushed recently for the establishment of a Conference on the Future of Europe designed to renew the EU and restart integration. The explosion of the Covid-19 pandemic has delayed the launch of the Conference. Nevertheless, the difficulties of the EU in responding to a dramatic health crisis, with its unprecedented social, political and economic ramifications, has made the convening of the Conference more necessary than ever to tackle the institutional and substantive weaknesses of the current EU constitutional architecture.

As this study argued, the Conference on the Future of Europe should be welcome as a potentially ground-breaking initiative to achieve a more effective and legitimate EU. Nevertheless, as the study cautioned, policy-makers involved in the Conference should be aware of the challenges of EU reforms. Enhancing EU democracy and capacity to act requires treaty change – but this procedure is rife with difficulties, due to the unanimity requirement embedded in Article 48 TEU. This is why Member States have increasingly resorted as of late to inter-se international agreements concluded outside the EU legal order, where they have set new rules on the entry into force of such agreements. Drawing on these precedents, therefore, this study suggested that political actors involved in the Conference on the Future of Europe should channel the output of their work into a new treaty – a Political Compact – which would be subject to its own ratification rule, dispensing with the requirement of unanimity.

There is no denying that the option to draft a separate treaty as the outcome of the Conference on the Future of Europe would raise novel, and difficult issues – including about its connection to, and interplay with, the existing EU Treaties. Nevertheless, the open and participatory process of the Conference – where Parliament is **involved in the driver's seat** – makes this initiative different from the intergovernmental forums, which drafted the treaties concluded outside the EU legal order during the euro-crisis. As such, the Conference on the Future of Europe could follow in the footsteps of two illustrious precedents – the Conference of Messina and the Convention on the Future of Europe – and serve as an out-of-the-box initiative to relaunch integration and endow supranational authorities with the means to act in a more effective and legitimate way. In the end, therefore, by overcoming the obstacles to treaty reform, a Political Compact for a more democratic and effective EU can represent a preferable alternative to paralysis, and thus constitute for political entrepreneurs a suitable avenue to further integration in the EU.

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This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCD Committee, analyses possible avenues for further political integration in the EU after Brexit. The study maps the multiple crises that the EU has weathered in the past decade and explains how these reveal several substantive and institutional weaknesses in the current EU system of governance. Therefore the study considers the potentials of the nascent Conference on the Future of Europe to renew the EU and examines the obstacles and opportunities for EU treaty reforms, considering the option of channelling the **Conference's outcome into a new Political Compact**, subject to new, less-than-unanimous ratification rules.