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The EU beyond Brexit and COVID-19: The Conference on the Future for Europe and the Outlook for Integration*

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ABSTRACT

The article examines the state of European integration in the aftermath of Brexit and the outburst of the COVID-19 pandemic. The article argues that the European Union (EU) has both faced centripetal and centrifugal pulls since 2020. On the one hand, the article discusses the federalising effects that the economic responses to COVID-19—and notably the launch of Next Generation EU—have had on integration. On the other hand, the article identifies ongoing challenges for the EU, notably resulting from the rule of law crisis. The article argues that these trends result from institutional dynamics at play in the EU, and suggests that further constitutional reforms will be needed to address these. As such, the article concludes by reflecting on the potentials and perils of the Conference on the Future of Europe to relaunch the EU after Brexit and COVID-19.

INTRODUCTION

The withdrawal of the UK from the EU on the basis of the Withdrawal Agreement (WA) in January 2020, and the negotiations on the framework of new EU–UK relations leading towards the conclusion of the Trade and Cooperation Agreement

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(TCA) in December 2020, coincided with one of the most dramatic crises ever experienced by the EU, and indeed the world: the COVID-19 pandemic.¹ The spread of coronavirus constituted a ‘human tragedy of potentially biblical proportion’,² which profoundly tested the resilience of the European integration project. Due to its dramatic death toll and devastating socio-economic consequences, COVID-19 immediately monopolised the attention of decision-makers, forcing member states and EU institutions to devise unprecedented measures to contain the spread of contagions and innovative solutions to rebuild the European economy. At the same time, the pandemic laid bare weaknesses in the EU system of governance, prompting a reflection on steps ahead.

The purpose of this article is to analyse the state of European integration in the aftermath of the withdrawal of the UK from the EU, and in light of developments since the outbreak of the COVID-19 pandemic. The article argues that, despite Brexit, European integration proved to be resilient during the health crisis. Following the UK withdrawal, the EU took unprecedented steps to deal with the pandemic—notably by establishing a massive recovery fund known as Next Generation EU (NGEU),³ designed to allow the European Commission to raise funds on the capital markets by issuing common bonds on behalf of the member states, and to transfer these to EU countries as grants or loans. Nevertheless, in the context of the pandemic the important centripetal pull resulting from the establishment of NGEU was matched by equally powerful centrifugal forces, which either deepened pre-existing divides or exposed new fracture lines between member states—from the state of the rule of law and the functioning of the free-movement Schengen zone to the fight against the health crisis and the vaccine strategy.

Having identified the conflicting integration and disintegration pressures at play in the EU beyond Brexit, the article examines the EU governance mechanisms during the pandemic, and reflects on the constitutional opportunities to reform the EU. As the article highlights, the pandemic revealed a continuing rise in power of the European Council, which has worryingly over-stretched its function well beyond its Treaty remit, taking over legislative and quasi-judicial roles. At the same time, the Commission—while gaining in influence thanks to its agenda-setting proposal to establish NGEU—has committed several strategic blunders in dealing with COVID-19, which have compromised its image of technocratic expertise. In this context, growing calls have been made, particularly by the European Parliament (EP), to open a process of reflection on the future of

¹See also Federico Fabbrini, *Brexit and the future of the European Union* (Oxford, 2020), as well as Federico Fabbrini, ‘Integration: regenerating Europe’s project beyond Covid-19’, in Federico Fabbrini (ed.), *The law & politics of Brexit. Volume III. The Framework of New EU–UK Relations* (Oxford, 2021), 260–78, from which this article draws.

²See former ECB president Mario Draghi, ‘We face a war against coronavirus and must mobilize accordingly’, *Financial Times*, 26 March 2020.

³See European Commission Communication, ‘Europe’s moment: repair and prepare for the next generation’, 27 May 2020, COM(2020) 456 final.

Europe. In fact, in March 2021, the EP, Commission and Council jointly approved a declaration opening the way to the institution of a Conference on the Future of Europe.⁴

As this article underlines, the Conference on the Future of Europe is an important initiative to relaunch the project of European integration—and while the pandemic delayed its start, it actually increased its urgency. According to its instituting document, the Conference should serve as a year-long process to ‘reflect on our Union, the challenges we are facing, and the future we want’ through a series of citizen-focused initiatives at national and European levels.⁵ Nevertheless, the success of the Conference in reforming the EU is anything but assured. Due to disagreement between the institutions, the Conference has a cumbersome management structure, with a joint presidency by the EP, Commission and Council. Moreover, the joint declaration envisages that the Conference’s outcome should be presented in spring 2022 as a report to the three EU institutions, which will then examine how to follow up. As such, while the option of treaty reform is not foreclosed, only the concrete running of the Conference will tell if this is a meaningful exercise. In light of this uncertainty, the article posits that the future of integration remains in the balance, with the EU navigating in uncharted waters beyond Brexit.

The article is structured as follows. The first section examines the resilience of the European integration project during COVID-19, overviewing specifically the recovery plan put together by the EU via NGEU, and explaining that this constitutes a major deepening of Europe’s EMU. The following section looks at the continuing pressures towards disintegration at play in the EU during COVID-19—from the growing attacks on the rule of law in several EU member states to the suspension of Schengen and national divisions in the COVID-19-vaccination strategy—arguing that these are a source of centrifugal pulls in the EU. The article then focuses on the EU institutional balance of powers, considering the evolving roles of the European Council and Commission and showing the ongoing shortcomings of the EU governance system. It takes stock of the new initiative to launch a Conference on the Future of Europe, and reflects on both its potentials to reform the EU and the perils it would face in getting off the ground in the absence of political leadership and legal inventiveness.

INTEGRATION’S RESILIENCE

The outbreak of the COVID-19 pandemic—just days after the UK withdrawal—took the EU, like every other public authority, by surprise, and initially prompted

⁴See *Joint Declaration on the Conference on the Future of Europe*, 10 March 2021, available at: https://www.europarl.europa.eu/sed/doc/news/flash/25243/JOINT%20DECLARATION%20ON%20THE%20CONFERENCE%20ON%20THE%20FUTURE%20OF%20EUROPE_EN.pdf (17 September 2021).

⁵Joint Declaration, 1.

uncoordinated national responses.⁶ Nevertheless, the pandemic ultimately became a powerful driver of European integration, particularly on fiscal and economic matters. As I have detailed elsewhere,⁷ starting in March 2020, the Commission, the European Central Bank (ECB) and the Eurogroup deployed in sequence a plurality of measures—from the suspension of the Stability and Growth Pact (SGP)⁸ to the establishment of a new pandemic emergency purchase programme, which at capacity reached an envelope of €1,850bn;⁹ from the creation of a dedicated pandemic support credit line within the European Stability Mechanism¹⁰ to the set-up of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) worth €100bn¹¹—that significantly increased the ability of the EU and its member states to respond to the economic costs of COVID-19. However, the game-changer in the EU responses to the pandemic stemmed from NGEU.

Building on prior proposals by Spain,¹² the EP¹³ and France and Germany jointly,¹⁴ in May 2020 the Commission presented an ambitious proposal for an EU recovery plan, in order to repair the economic damage of the health crisis and to prepare the EU for the next generation. The Commission proposal envisaged a major increase of EU resources, revamping the size of the next multiannual financial framework (MFF) 2021–2027¹⁵ and creating a new €750bn recovery fund, NGEU, connected to the MFF and specifically designed to support member states and businesses affected by COVID-19.¹⁶ In particular, the Commission proposed that NGEU would provide resources, to be disbursed two-thirds as grants and one-third as loans, to support the regeneration of the EU economy along the Commission's priorities of a green deal, digitalisation and social inclusion. Moreover, in a major break with the past, the Commission proposed that NGEU would be funded by the issuance of new EU debt on the financial markets (rather than states' transfers), to be repaid after 2028 and

⁶See also European Parliament resolution of 17 April 2020 on EU coordinated action to combat the COVID-19 pandemic and its consequences, P9 TA(2020)0054.

⁷Federico Fabbrini, *Europe's EMU beyond Covid-19*, report commissioned by the Department of Finance of Ireland for the Presidency of the Eurogroup, 2021.

⁸Council of the EU statement, 23 March 2020 (agreeing with the assessment of the Commission that the conditions to suspend the SPG were fulfilled).

⁹Decision (EU) 2020/440 of the European Central Bank of 24 March 2020 on a temporary pandemic emergency purchase programme (ECB/2020/17), *Official Journal (OJ)* 2020 L 91/1, as amended.

¹⁰Council of the EU, *Report on the comprehensive economic policy responses to the Covid-19 pandemic*, 9 April 2020.

¹¹Council Regulation (EU) 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak, *OJ* 2020 L 159/1.

¹²*Spain's Non-paper on a European recovery strategy*, 19 April 2020.

¹³European Parliament resolution of 15 May 2020 on the new multiannual financial framework, own resources and the recovery plan, P9 TA(2020)0124.

¹⁴French–German initiative for a European recovery from the coronavirus crisis, 18 May 2020.

¹⁵European Commission Communication, 'The EU budget powering the recovery plan for Europe', 27 May 2020, COM(2020) 442 final.

¹⁶European Commission Communication (n 3).

before 2058 through an increase of the headroom in the own-resource ceilings,¹⁷ and prospectively the introduction of new EU taxes.

The Commission's proposal represented a transformative initiative that, by endowing the EU with new fiscal powers, significantly strengthened the federalising process.¹⁸ As such, NGEU was met with initial resistance.¹⁹ Yet in July 2020 the European Council managed to find a deal on the EU recovery plan, and relatedly on the next MFF.²⁰ To muster the necessary unanimity, the Commission proposal for NGEU was amended, reducing the overall size of grants from €500bn to €390bn and increasing the loans component from €250bn to €360bn.²¹ Moreover, at the request of Northern member states, the European Council agreed to cap the size of the next MFF²² and maintain their rebates;²³ to obtain the crucial support of Central and Eastern member states, it watered down the obligation to respect the rule of law as a condition to receive EU funding.²⁴ At the same time, the European Council left the governance of NGEU somewhat unsettled—entrusting the management to the Commission, but subject to control of the Economic and Financial Committee, and with an exceptional back-up role for itself.²⁵ Nevertheless, the European Council fully empowered the Commission to issue common debt on the financial markets,²⁶ and endorsed a roadmap for the introduction of new EU taxes to cover the costs of NGEU.²⁷

Moreover, in subsequent negotiations between the EP and the Council designed to turn NGEU into EU legislation—the EU Recovery Instrument (EURI)²⁸ and the EU Recovery and Resilience Facility (RRF)²⁹—the EP managed to secure a slight increase in the MFF,³⁰ as well as to strengthen the rule of law conditionality applicable to the disbursement of EU funds, under both the MFF and the NGEU.³¹ This raised a veto threat by Hungary and Poland, which staunchly opposed the efforts by the EU institutions to increase oversight on the

¹⁷Commission amended proposal for a Council Decision on the system of own resources of the European Union, 28 May 2020, COM(2020) 445 final.

¹⁸See further Federico Fabbrini, 'The legal architecture of the economic responses to Covid-19', *Journal of Common Market Studies* 59 (2021).

¹⁹See 'Disintegration's pressures' below.

²⁰European Council Conclusions, 17–21 July 2020, EUCO 10/20.

²¹European Council Conclusions, 17–21 July 2020, para. A6.

²²European Council Conclusions, 17–21 July 2020, para. A23.

²³European Council Conclusions, 17–21 July 2020, para. A30.

²⁴European Council Conclusions, 17–21 July 2020, para. A24.

²⁵European Council Conclusions, 17–21 July 2020, para. A19.

²⁶European Council Conclusions, 17–21 July 2020, para. A3.

²⁷European Council Conclusions, 17–21 July 2020, para. 145.

²⁸European Commission proposal for a Council Regulation establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 pandemic, 28 May 2020, COM(2020) 441 final.

²⁹European Commission proposal for a Regulation of the European Parliament and the Council establishing a Recovery and Resilience Facility, 28 May 2020, COM(2020) 408 final.

³⁰Council of the EU, press release, 'Next MFF and recovery package: Council presidency reaches political agreement with European Parliament', 10 November 2020, Press 763/20.

³¹Council of the EU, press release, 'Budget conditionality: Council presidency and Parliament's negotiator reach provisional agreement', 5 November 2020, Press 750/20.

use of EU funding in rule-of-law-backsliding member states.³² Nevertheless, ultimately in December 2020 the European Council managed to overcome the Polish and Hungarian veto,³³ opening the door to the approval of the consequential legislation—including the new EU Own Resources Decision (ORD),³⁴ the MFF 2021–2027,³⁵ the rule of law regulation,³⁶ the EURI³⁷ and, subsequently, the RRF.³⁸

Therefore, since early 2021—and specifically since the end of May 2021, following the approval by all national parliaments of the ORD, pursuant to Article 311(3) Treaty on the Functioning of the European Union³⁹—the EU has been endowed with a powerful recovery fund, supporting member states to rebuild their economies and social structures ravaged by the COVID-19 pandemic. Admittedly, NGEU is formally designed as a one-off initiative, with a precise lifespan, and its success will ultimately depend on national implementation.⁴⁰ Yet, by empowering the Commission to issue common debt and transfer resources collected on the capital markets to the member states, NGEU constitutes a paradigm change in the functioning of the EU generally, and EMU specifically: with NGEU, in fact, the EU is now endowed with a fiscal capacity that matches the EU monetary powers, rendering the EU fiscal union analogous to other federal arrangements worldwide. As such, in the aftermath of the UK withdrawal from the EU, the EU27 ultimately made a major leap forward in integration. In fact, according to some, NGEU was a dividend of Brexit for the EU, as the UK withdrawal removed a veto player that would most certainly have opposed such a dramatic transfer of spending and taxing power from the national to the supranational level.⁴¹ Be that as it may, the EU responses to COVID-19 proved the resilience of the European integration project.

³²See below, ‘Disintegration’s pressures’.

³³European Council Conclusions, 10–11 December 2020, EUCO 22/20.

³⁴Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom, *OJ* 2020 L 424/1.

³⁵Council Regulation (EU, Euratom) 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027, *OJ* 2020 L 433 I/11.

³⁶Regulation (EU, Euratom) 2020/2092 of the European Parliament and the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, *OJ* 2020 L 433 I/1.

³⁷Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, *OJ* 2020 L 433 I/23.

³⁸Regulation (EU) 2021/241 of the European Parliament and the Council of 12 February 2021 establishing the Recovery and Resilience Facility, *OJ* 2021 L 57/17.

³⁹See also Alessandro D’Alfonso, ‘National Ratifications of the Own Resources Decision’, European Parliament Research Service, June 2021.

⁴⁰Federico Fubini, “‘If it works, Next Generation EU will change the face of the Union’: an interview with European Commissioner for the Economy Paolo Gentiloni”, in Simone Disegni (ed.), *Europe at a crossroads after the shock* (Milan, 2020), 25 (stating that if NGEU is successfully implemented it could become a permanent rather than a temporary feature of the EU).

⁴¹‘The EU’s recovery fund is a benefit of Brexit’, *The Economist*, 30 May 2020.

DISINTEGRATION'S PRESSURES

Despite the significant advancement in the European integration project connected to the centripetal effects of NGEU, in the context of the COVID-19 pandemic the EU also experienced important centrifugal pressures. These dynamics emerged in a variety of policy domains—from respect of the rule of law to the functioning of the Schengen zone. Moreover, they both deepened problems that predated the pandemic and created new problems, for example in the field of health management, notably as a result of the initial slow roll-out of anti-COVID-19 vaccines. In fact, developments in the member states and the EU in the aftermath of the UK withdrawal and the outbreak of COVID-19 exposed ongoing cleavages among member states, and growing difficulties in dealing with them given the limitations of intergovernmental coordination. As such, the achievements in EU integration in the field of EMU should not obfuscate other pressing challenges for the EU.

First, the approval of NGEU was itself anything but a straightforward process. As mentioned, the Commission's recovery plan was met in spring 2020 with push-backs both by a group of Northern member states—the Netherlands, Austria, Denmark and Sweden—that criticised it for being based on grants rather than loans,⁴² and by the Visegrad countries—Poland, Hungary, Czechia and Slovakia—which criticised it for not being generous enough towards lower income member states.⁴³ Moreover, although the European Council approved NGEU in summer 2020, the recovery plan was hijacked in autumn 2020 by Hungary and Poland, which jointly vetoed the MFF, ORD and NGEU as a way to block the entry into force of the EU regulation protecting the financial interests of the EU against breaches of the rule of law.⁴⁴ In the end, in December 2020 the European Council convinced Poland and Hungary to withdraw their veto⁴⁵—but through an interpretative declaration of the regulation on the rule of law conditionality, which raised serious legal issues of its own,⁴⁶ and confirmed the existence of a rule of law crisis in the EU. Finally, the entry into force of NGEU was on hold for almost month in April 2021, when Germany's Constitutional Court temporarily suspended national ratification of the ORD, until it rejected in preliminary terms the constitutional challenge raised against NGEU by anti-EU applicants.⁴⁷

⁴²Austria, Denmark, the Netherlands, Sweden, *Non-paper EU support for efficient and sustainable Covid-19 recovery*, 20 May 2020.

⁴³Government of the Czech Republic, 'V4 common lines regarding the Multiannual Financial Framework/Next Generation EU', press release, 11 June 2020.

⁴⁴Joint Declaration of the Prime Minister of Poland and the Prime Minister of Hungary, 26 November 2020.

⁴⁵See above, 'Integration's resilience'.

⁴⁶See below, 'Institutional developments'.

⁴⁷See 2 BvR 547/21, order of 26 March 2021 and 2 BvR 547/21, order of 15 April 2021.

Second, the pandemic led to a worsening of the rule of law crisis—a cancerous process at play for over a decade in the EU.⁴⁸ On the one hand, the emergency measures deployed by national authorities to tackle the pandemic served as a cover for the introduction of further illiberal measures,⁴⁹ for example in Hungary, where COVID-19-related legislation allowed the government to rule indefinitely by decree.⁵⁰ On the other hand, rule of law backsliding through action imperiling the independence of the judiciary and the protection of human rights continued unabated during COVID-19,⁵¹ for example in Poland, where, among others, abortion rights were de facto banned.⁵² In this context, the European Court of Justice (ECJ) delivered in the past year a stream of high-level rulings that sought to halt the rule of law backsliding in Hungary and Poland.⁵³ Nevertheless, these judicial developments were not matched with equal resolve by the intergovernmental institutions, which failed to follow up on the Article 7 TEU procedure⁵⁴ and rather watered down the rule of law conditionality regulation.⁵⁵ Yet respect for the rule of law is increasingly becoming an unbridgeable cleavage, which may tear the EU apart—as confirmed also in early 2021 by the decision by the largest EP political group, the European People's Party, to force out Fidesz, the party of Hungarian Prime Minister Viktor Orban.⁵⁶

Third, the pandemic increasingly threatened another of the milestone achievements of European integration, namely the Schengen free-movement zone. The existence of an area without internal frontiers in which EU citizens could freely circulate had already been dramatically called into question at the

⁴⁸See *inter alia* Bojan Bugarcic, 'Central Europe's descent into autocracy: a constitutional analysis of authoritarian populism', *International Journal of Constitutional Law* 17 (2019), 597–616; Renata Uitz, 'The perils of defending rule of law through dialogue', *European Constitutional Law Review* 15 (2019), 1–16.

⁴⁹See also European Parliament resolution of 13 November 2020 on the impact of COVID-19 measures on democracy, the rule of law and fundamental rights, P9_TA(2020)0307.

⁵⁰Act XII of 30 March 2020 on protecting against coronavirus (Hu.). Subsequently, on 16 June 2020, the Hungarian parliament voted unanimously to suspend the state of emergency. However, it also passed a new law, which entered into force on the following day, on temporary sanitary measures that carried over many of the provisions of the old law. Act LVIII of 17 June 2020 on transitional provisions of the termination of state of danger and on epidemic preparation (Hu.).

⁵¹See also European Commission Communication, '2020 Rule of Law Report', 30 September 2020, COM(2020) 580 final.

⁵²See also European Parliament resolution of 26 November 2020 on the de facto ban of the right to abortion in Poland, P9_TA(2020)0336.

⁵³See *inter alia* Case C-78/18, *Commission v. Hungary* (declaring in breach of EU law a Hungarian law restricting the financing of civil society by persons established outside of Hungary); Case C-66/18, *Commission v. Hungary* (declaring in breach of EU law a Hungarian law restricting the freedom of foreign academic establishments to operate in Hungary); Case C-824/18 *A.B. and others* (declaring in breach of EU law a Polish law that had the effect of removing judicial review of the decisions by the National Council of the Judiciary on the appointment of judges to the Supreme Court).

⁵⁴See also European Parliament resolution of 17 September 2020 on the proposal 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, P9_TA(2020)0225.

⁵⁵See below, 'Institutional developments'.

⁵⁶Jean-Baptiste Chastand and Jean-Pierre Strobant, 'En rompant avec le groupe du Parti populaire européen, Viktor Orban met fin à vingt ans d'une relation tumultueuse', *Le Monde*, 4 March 2021.

height of the migration crisis in 2015, when many member states suddenly reintroduced border controls to stem the wave of refugees seeking to enter the EU from the Balkan and the Mediterranean routes.⁵⁷ In fact, in a poisonous marriage with the rule of law crisis, a number of member states had embraced inhuman tactics to curb migration—later declared illegal by both the ECJ and the European Court of Human Rights.⁵⁸ This had prompted the Commission to advance proposals to strengthen Schengen.⁵⁹ But with the explosion of the pandemic, and the fear of the spreading of contagions and virus variants, EU member states once again rushed to unilaterally impose border controls⁶⁰—often also hampering the free movement of goods, in blatant disregard of EU internal market rules.⁶¹ Despite calls from the Commission for a coordinated approach,⁶² therefore, the pandemic raised pressing questions on the resilience and sustainability of a crucial piece, and highly visible manifestation, of the project of European integration.

Finally, the pandemic also placed a wedge between EU member states in the roll-out of anti-COVID-19 vaccines. In the absence of EU competences in the field of health policy, and following an initial go-it-alone by the larger member states,⁶³ the EU decided in summer 2020 to coordinate the purchase of vaccines by tasking the Commission to negotiate advanced purchase agreements with multinational pharmaceutical companies on behalf of all states.⁶⁴ However, coordination problems and costs concerns led the Commission to be slower than other governmental authorities in procuring contracts: as a result, shortages of vaccine supplies emerged in spring 2021, and the EU was initially slower in its efforts to secure the vaccination of large swathes of the population. In fairness, the process accelerated in summer 2021, and later that year the EU surpassed

⁵⁷European Commission Communication, 'Back to Schengen—a roadmap', 4 March 2016, COM(2016) 120 final.

⁵⁸Joined Cases C-924/19 PPU and C-925 PPU, *FMS and others* (holding that the detention of migrants in the Röszke transit zone at the border with Serbia amounted to an illegal deprivation of liberty in breach of EU law) and ECtHR, *R.R. v Hungary*, App. No. 36037/17, judgment of 2 March 2021 (holding that Hungary's treatment of migrants in the Röszke transit zone at the border with Serbia constituted a violation of the prohibition of inhumane or degrading treatment, a breach of the right to liberty and security and an infringement on the right to speedy judicial review); Case C-808/18, *Commission v. Hungary* (declaring in breach of EU law a substantial part of Hungarian legislation on asylum procedure).

⁵⁹European Commission Communication, 'Preserving and strengthening Schengen', 27 September 2017, COM(2017) 570 final.

⁶⁰European Parliament resolution of 24 November 2020 on the Schengen system and the measures taken during the COVID-19 crisis, P9_TA(2020)0315.

⁶¹Alessio Ribaud, 'Brennero, l'Austria impone tamponi anti Covid ai camionisti: 40 chilometri di coda', *Corriere della Sera*, 15 February 2021 (reporting closure by Austria of the Brenner pass border, with requirement to show COVID-19 tests for transporting goods).

⁶²European Commission Proposal for a Council Recommendation on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic, 4 September 2020, COM(2020) 499 final.

⁶³Government of the Netherlands, press release, 'France, Germany, Italy and The Netherlands working together to find a vaccine for countries in Europe and beyond', 3 June 2020 (discussing 'Inclusive Vaccine Alliance').

⁶⁴European Commission decision of 18 June 2020 approving the agreement with member states on procuring COVID-19 vaccines on behalf of the member states and related procedures, 18 June 2020, C(2020) 4192 final.

other advanced economies in the vaccination campaign. Nevertheless, in this context, member states quickly broke ranks—with some negotiating bilateral deals with pharmaceutical companies, others striking partnership with third countries to develop vaccines, and still others even purchasing drugs produced, for example in China and Russia, which had not been approved by the European Medical Agency.⁶⁵ The EU vaccine fiasco contrasted starkly with the fast and successful roll-out of jabs in the UK and the USA, reflecting ‘fundamental flaws in [EU] institutions and attitudes’ and revealing the troublesome state of the European project.⁶⁶

INSTITUTIONAL DEVELOPMENTS

The challenges that the EU has faced since the beginning of the pandemic, which have fuelled a number of centrifugal forces, are the consequences of the shortcomings of the EU system of governance.⁶⁷ During the past decade, the EU system of governance experienced conflicting institutional trends.⁶⁸ On the one hand, the European Council had increasingly acquired the role of the EU powerhouse, de facto taking control of the EU policy agenda.⁶⁹ On the other hand, the European Commission also endeavoured to strengthen its standing, notably through the *Spitzenkandidaten* system, which, by tying the selection of the Commission President to the outcome of the EP elections, sought to push the EU towards parliamentarisation.⁷⁰ Nevertheless, despite some debates in academia, widespread consensus exists on the rise of intergovernmentalism in the EU, particularly in the framework of crisis management. Developments since the explosion of the COVID-19 pandemic have largely confirmed this institutional dynamic, with the European Council playing a key function in driving EU responses to the health crisis forward, even though the Commission acquired key roles with NGEU. In fact, since the outbreak of the pandemic the European Council met at least on a monthly basis via video-conference to take stock of the COVID-19 situation and coordinate health responses.⁷¹

⁶⁵Jillian Deutsch and Sarah Wheaton, ‘How Europe fell behind on vaccines’, *Politico*, 27 January 2021.

⁶⁶Paul Krugman, ‘Vaccines: a very European disaster’, *New York Times*, 18 March 2021.

⁶⁷See further Federico Fabbrini, ‘The institutional origins of Europe’s constitutional crises’, in Tom Ginsburg, Mark D. Rosen and Georg Vanberg (eds), *Constitutions in times of financial crisis* (Cambridge, 2019). See also Vivien Schmidt, *Europe’s crisis of legitimacy* (Oxford, 2020).

⁶⁸See further Federico Fabbrini et al. (eds), *What form of government for the EU and the Eurozone?* (Oxford, 2015).

⁶⁹See also Uwe Puetter, *The European Council and the Council: new intergovernmentalism and institutional change* (Oxford, 2014).

⁷⁰See further Hussein Kassim et al., *The European Commission of the 21st century* (Oxford, 2013).

⁷¹A novel practice emerging during the pandemic because of the remote meeting of the European Council is the adoption of statements by the EU member states or oral conclusions of the President of the European Council in lieu of European Council conclusions. See e.g. Joint Statement of the Members of the European Council, 26 March 2020; Oral conclusions drawn by President Charles Michel following the video-conference of the members of the European Council, 21 January 2021.

The influence of the European Council in EU decision-making, however, has not been unproblematic—as seen in the divisions emerging in this intergovernmental body, and the delays in its actions. Moreover, whereas Article 15 TEU vests the European Council exclusively with executive powers, this body has increasingly started acting like a European quasi-monarch, disregarding any constitutional boundary:⁷² if its tendency to take up legislative powers had been already noted, during COVID-19 the European Council also, ominously, assumed for itself judicial roles. In its December 2020 conclusions⁷³—which solved the Polish and Hungarian vetoes against the MFF and opened the way towards the entry into force of NGEU—the European Council adopted a political declaration on the rule of law conditionality regulation which dictated action for all the other EU institutions. In particular, to soothe Hungary and Poland, the European Council determined that the regulation ought to be interpreted in such a way that ‘the mere finding that a breach of the rule of law has taken place does not suffice to trigger the mechanism’.⁷⁴ Moreover, the European Council mandated the Commission to adopt guidelines on the application of the regulation.⁷⁵ At the same time, it ruled that these were to be finalised only after a forthcoming action of annulment to be brought by Hungary and Poland against the regulation.⁷⁶

As the EP immediately pointed out in a highly critical resolution,⁷⁷ the European Council had clearly overstepped its powers, and ‘the content of [its] conclusions on the Regulation on a general regime of conditionality for the protection of the Union budget [were] superfluous’.⁷⁸ First, they did not change the text of the regulation, which had already been approved by the EP and Council. Second, ‘any political declaration of the European Council cannot be deemed to represent an interpretation of legislation as interpretation is vested within the [ECJ]’.⁷⁹ Third, ‘the conclusions of the European Council cannot be made binding on the Commission in applying legal acts’.⁸⁰ Be that as it may, the Commission acquiesced to the European Council’s diktats—to the point that the EP

⁷²Charles Howard McIlwain, *Constitutionalism: ancient and modern* (Ithaca, NY, 1940) (characterising the emergence of constitutionalism in the separation between *gubernaculum*, the function of governing, and *jurisdictio*, the function of judging).

⁷³European Council Conclusions (n 33).

⁷⁴European Council Conclusions (n 33), para. 2.e.

⁷⁵European Council Conclusions (n 33), para. 2.c.

⁷⁶European Council Conclusions (n 33). See now also Case C-156/21 *Hungary v. European Parliament and Council*, pending and Case C-157/21 *Poland v. European Parliament and Council*, pending.

⁷⁷European Parliament resolution of 17 December 2020 on the Multiannual Financial Framework 2021–2027, the Inter-Institutional Agreement, the EU Recovery Instrument and the Rule of Law Regulation, P9_TA(2020)0360.

⁷⁸European Parliament resolution of 17 December 2020 on the Multiannual Financial Framework 2021–2027, P9_TA(2020)0360, para. 4.

⁷⁹European Parliament resolution of 17 December 2020 on the Multiannual Financial Framework 2021–2027, P9_TA(2020)0360, para. 5.

⁸⁰European Parliament resolution of 17 December 2020 on the Multiannual Financial Framework 2021–2027, P9_TA(2020)0360, para. 8.

threatened to sue it before the ECJ for failure to act.⁸¹ In fact, the Commission has in general become increasingly reliant on the European Council's input for its action.⁸² Often this is blamed on political leadership or the lack thereof.⁸³ Nevertheless, this is much more the result of institutional developments. Indeed, with the ditching of the *Spitzenkandidaten* process after the 2019 EP elections, and the decision by the European Council to nominate as Commission president Ursula von der Leyen—who was serving as Defence Minister in the German government and had never been considered for the job beforehand—the political legitimacy of the Commission suffered.⁸⁴

At the same time, the Commission has evolved in ways that hardly resemble what the institution was during the mythical times of President Jacques Delors. On the one hand, the Commission is increasingly revealing intergovernmental traits: this is an inevitable consequence of the 'Irish compromise',⁸⁵ maintaining one commissioner per member state, which has been reinforced by the tendency of EU countries to nominate as Commissioners top national politicians, who in turn surround themselves predominantly with compatriots. On the other hand, the Commission is decreasingly characterised by its unparalleled expertise—traditionally a source of output legitimacy that compensated for the lack of input legitimacy.⁸⁶ This is most visible in the much discussed blunder the Commission made in January 2021 in its effort to force pharmaceutical companies to abide by their contractual commitments on the delivery of anti-COVID-19 vaccines:⁸⁷ less than a month after the entry into force of the Protocol on Ireland/Northern Ireland attached to the WA, the Commission triggered Article 16 thereof, the so-called safeguard clause, to impose customs process on goods crossing the border between Ireland and Northern Ireland and prevent the export of vaccines to the UK.⁸⁸ The measure prompted an outcry, and was immediately retracted with apologies,⁸⁹ but it painted the Commission as a villain—leaving a stain on its reputation.

⁸¹European Parliament resolution of 25 March 2021 on the application of Regulation (EU, Euratom) 2020/2092, the rule-of-law conditionality mechanism, P9_TA(2021)0103.

⁸²A novel practice that emerged in the pandemic is the adoption of joint documents by the Presidents of the European Commission and European Council. See e.g. Joint European Roadmap towards lifting COVID-19 containment measures, 15 April 2020.

⁸³See also Nereo Penalver Garcia and Julian Priestly, *The making of a European president* (London, 2015).

⁸⁴Jan-Herman Reestman and Leonard Besselink, 'Editorial: *Spitzenkandidaten* and the European Union's system of government', *European Constitutional Law Review* 15 (4) (2019), 609–18.

⁸⁵Gráinne de Búrca, 'If at first you don't succeed: vote, vote again: analyzing the second referendum phenomenon in EU treaty change', *Fordham International Law Journal* 33 (2011), 1472 (discussing the decision to maintain the principle of one Commissioner per member state after the first Irish 'no' vote against the Lisbon Treaty, to pave the way for a successful second vote).

⁸⁶Fritz Scharpf, 'Legitimacy in the multilevel European polity', *European Political Science Review* 1 (2) (2009), 173–204.

⁸⁷See further Dagmar Shiek, 'The implementation of the Withdrawal Agreement', in Federico Fabbrini (ed.), *The law & politics of Brexit. Volume III. The framework of new EU–UK relations* (Oxford, 2021).

⁸⁸European Commission Implementing Regulation (EU) 2021/111 of 29 January 2021, repealed.

⁸⁹European Commission President Ursula von der Leyen, statement in response to questions put by the *Irish Times*, 2 February 2021.

Admittedly, the Commission has gained more powers as a result of NGEU. Indeed, it championed this initiative to respond to the pandemic; and, because NGEU follows the *methode communautaire*,⁹⁰ it has acquired important new tasks, not only in issuing debt on behalf of the EU27 but also in managing the RRF in partnership with the member states. Nevertheless, as the difficulty in securing an effective roll-out of vaccinations demonstrates, there are limits to the Commission's ability to act as the engine of integration if it has to coordinate member states' action in areas where the treaties do not envision clear-cut supranational competences. In conclusion, beyond the pandemic, the EU still lacks a centralised executive authority with both the powers and the legitimacy to act with vigour in the name of the whole EU. In fact, if in the Brexit withdrawal process the 27 EU member states acted in a remarkably united fashion, delegating to the Commission all negotiations with the UK, the TCA ended that resolve, since the governance of the new EU–UK relations will see the Commission work with all the member states at its side in the Partnership Council and subordinate committees.⁹¹ Hence, the EU governance system continues to be dominated by intergovernmental traits, which are at odds with the need for effective and democratic decision-making.

CONSTITUTIONAL PROSPECTS

If the COVID-19 pandemic has exposed ongoing shortcomings in the EU institutional framework, it has also revamped prospects of EU constitutional reforms. In fact, on 10 March 2021, the Presidents of the EP, European Commission and Council of the EU jointly signed a declaration on the Conference on the Future of Europe, launching a new process to reflect on the future of Europe.⁹² The initiative to establish a Conference on the Future of Europe was a long time coming.⁹³ Originally proposed by French president Emmanuel Macron in spring 2019,⁹⁴ ahead of the EP elections and the then expected UK withdrawal from the EU, the plan for the Conference was embraced by Commission president Von der Leyen in her political guidelines presented to the EP in summer 2019.⁹⁵ Subsequently, a number of EU member states (notably France and Germany

⁹⁰See also European Commissioner for Economic Affairs Paolo Gentiloni, Speech at the Conference 'Progettiamo il Rilancio', 13 June 2020.

⁹¹See further Nicolas Levrat, 'Governance: managing bilateral relations', in Fabbrini (ed.), *Law & politics of Brexit. Volume III*.

⁹²Joint Declaration (n 4).

⁹³For prior analyses of ongoing efforts to reform the EU since Brexit see Federico Fabbrini, 'Brexit and EU treaty reform', in Fabbrini (ed.), *Law and politics of Brexit, Volume III*, 267 and Federico Fabbrini 'The future of the EU after Brexit and COVID-19', in Federico Fabbrini (ed.), *Law & politics of Brexit. Volume II. The Withdrawal Agreement* (Oxford, 2020), 274.

⁹⁴French President Emmanuel Macron, Lettre pour une Renaissance Européenne, 4 March 2019.

⁹⁵European 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.

jointly,⁹⁶ and Italy⁹⁷) as well as all EU institutions (the European Council,⁹⁸ the EP,⁹⁹ the Commission¹⁰⁰ and the Council¹⁰¹) endorsed the idea of the Conference in winter 2019–2020, albeit with varying degrees of enthusiasm. However, the outbreak of the COVID-19 pandemic in spring 2019 delayed the process, which was initially scheduled to start on 9 May 2020.

Yet the COVID-19 pandemic—and the unprecedented responses that the EU developed to address its devastating socio-economic consequences, notably through NGEU¹⁰²—reignited calls in favour of the Conference on the Future of Europe by the EP,¹⁰³ France and Germany,¹⁰⁴ and the Commission.¹⁰⁵ Therefore, thanks particularly to the push of the EP,¹⁰⁶ in the summer of 2020 the EU institutions reached an understanding on the conference's plan.¹⁰⁷ After a further delay due to inter-institutional arm-wrestling on the eminent person(s) who would lead the conference, on 10 March 2021 EP president David Sassoli, Commission president Von der Leyen, and—with Portugal holding the six-month presidency of the Council—Portuguese prime minister Antonio Costa representing the Council signed a joint declaration on the Conference on the Future of Europe, formally titled 'Engaging with Citizens for Democracy—Building a More Resilient Europe'. The conference eventually kicked off on 9 May 2021 with the task 'to reach conclusions by Spring 2022 so as to provide guidance on the future of Europe'.¹⁰⁸

The Conference on the Future of Europe is a process with both potential and perils.¹⁰⁹ The joint declaration launching this new venture is a compromise text, with a number of ambiguities but also an open-ended nature. In particular, building on experiments of participatory democracy at the state level,¹¹⁰ the declaration envisions the Conference as a 'citizens-focused, bottom-up exercise'.¹¹¹ At the same time, the declaration states that the Conference shall 'result in

⁹⁶Franco-German *Non-paper on key questions and guidelines: Conference on the Future of Europe*, 25 November 2019.

⁹⁷Italy *Non-paper for the Conference on the Future of Europe*, 14 February 2020.

⁹⁸European Council Conclusions, 12 December 2019, EUCO 28/19, para. 14.

⁹⁹European Parliament resolution of 15 January 2020 on the European Parliament's position on the Conference on the Future of Europe, P9_TA(2020)0010.

¹⁰⁰European Commission Communication, 'Shaping the Conference on the Future of Europe', 22 January 2020, COM(2020) 27 final.

¹⁰¹Council of the EU, 3 February 2020, Doc. 5675.

¹⁰²See above, 'Integration's resilience'.

¹⁰³European Parliament resolution (n 6), para. 69.

¹⁰⁴French–German Initiative (n 14).

¹⁰⁵European Commission Communication (n 3).

¹⁰⁶European Parliament resolution of 18 June 2020 on the European Parliament's position on the Conference on the Future of Europe, P9_TA(2020)0153.

¹⁰⁷Council of the EU, 24 June 2020, Doc. 9102/20, para. 2.

¹⁰⁸Joint Declaration (n 4), p. 2.

¹⁰⁹Federico Fabbrini, 'The Conference on the Future of Europe: process and prospects', *European Law Journal* 21 (2021).

¹¹⁰See further Daniel Farrell and Jane Suiter, *Reimagining democracy: lessons in deliberative democracy from the Irish front line* (Ithaca, NY, 2019).

¹¹¹Joint Declaration (n 4), p. 2.

concrete recommendations for EU actions'¹¹² and that its scope 'should reflect the areas where the European Union has the competence to act or where European Union action would have been to the benefits of European citizens'.¹¹³ As a result, the initiative potentially opens a window of opportunity for a welcome effort of reforming the EU's substantive powers and institutional structures, and tackling the shortcomings that have been dramatically exposed in the past decade of crises.¹¹⁴ From this point of view, therefore, the Conference on the Future of Europe can be regarded as an out-of-the-box initiative reminiscent of illustrious precedents, such as the 1955 Conference of Messina and the 2001–2 Convention on the Future of Europe, which played a key role in prior moments of the EU's history in relaunching the project of European integration at difficult times.¹¹⁵

Nevertheless, given its unclear constitutional mandate and unsettled institutional organisation, the Conference's prospects remain highly uncertain, and only time will tell if this initiative can turn into a new constitutional moment for the EU.¹¹⁶ In particular, if the successes and failures of prior initiatives to reform the EU provide any lesson, two conditions appear necessary—albeit perhaps insufficient—for the Conference's success: political leadership and legal inventiveness. With regard to the former, however, the joint declaration contains some clouds. Given the institutions' inability to agree on the name of a single eminent person presiding over the endeavour, the declaration placed the Conference 'under the authority of the three institutions, represented by the President of the [EP], the President of the Council and the President of the European Commission, acting as its Joint Presidency'.¹¹⁷ Moreover, the declaration established an executive board—comprising three voting representatives each from the EP, Council and Commission—that 'will be responsible for taking decisions by consensus, regarding the works of the Conference, its processes and events, overseeing the Conference as it progresses'.¹¹⁸ This solution does not seem conducive to the exercise of political leadership, and it remains to be seen how the dynamics within the Conference executive board will play out, and whether one figure will be able to emerge as an agenda-setter shaping the process.

Moreover, if the Conference on the Future of Europe is to be more than a redo of the citizens' dialogues on the future of Europe run by the Commission between 2017 and 2019,¹¹⁹ it must undertake institutional reforms. However,

¹¹²Joint Declaration (n 4), p. 2.

¹¹³Joint Declaration (n 4), p. 4.

¹¹⁴See above, 'Disintegration's pressures'.

¹¹⁵See also Simone Disegni, 'A conversation with Italy's former prime minister Giuliano Amato on the late Valéry Giscard d'Estaing', in Simone Disegni (ed.), *Europe at a crossroads after the shock* (Milan, 2020), 90.

¹¹⁶Matej Avbelj, 'Revitalization of EU constitutionalism', *European Law Review* 46 (2021), 3–19.

¹¹⁷Joint Declaration (n 4), p. 3.

¹¹⁸Joint Declaration (n 4), p. 3.

¹¹⁹European Commission, 'Citizens' dialogues and citizens' consultations: key conclusions', 30 April 2019.

given the profound differences in the vision of Europe among member states, it is not unlikely that the outcome of the Conference will face opposition from specific member states' governments. From this point of view, it would be important for the institutional players involved in the Conference to anticipate and overcome national idiosyncrasies so as to avoid the fate of the European Constitution, which ultimately failed.¹²⁰ This is why I have suggested elsewhere¹²¹ that the Conference could resolve to produce a new international treaty—the Political Compact. Moreover, drawing from the example of the intergovernmental treaties concluded by subgroups of EU member states in the aftermath of the euro crisis, the Conference could decide that the Political Compact does not require unanimous approval and ratification by the member states to enter into force, but only a super-majority vote. On the one hand, this solution would remove from any member state the power to prevent the others from moving forward with the process of European integration.¹²² On the other hand, the change in the ratification game would also create a powerful incentive for hold-outs to actually join the treaty, if the majority of EU countries do so.¹²³ Nevertheless, it remains to be seen whether the players of the Conference will follow an innovative legal solution or remain paralysed by the quest for consensus.¹²⁴

CONCLUSION

The COVID-19 pandemic that exploded right after the UK withdrawal from the EU proved to be a watershed for European integration. Speaking in front of the Italian senate before he received a vote of confidence to serve as Italy's new prime minister, Mario Draghi emphatically stated that 'there is no sovereignty in solitude'.¹²⁵ In fact, in cobbling together with NGEU an unprecedented response to the devastating socio-economic consequences of this health crisis, the EU took a major federalising step, proving the resilience of integration. Nevertheless, NGEU requires reform to back up the transfer of fiscal power to the EU with adequate institutional adjustments. Moreover, the pandemic also deepened pre-existing crises—such as the rule of law crisis and the malfunctioning of the Schengen zone—and created new fracture lines within the EU, for instance in the initially slow roll-out of vaccines, which revealed ongoing centrifugal pulls.

¹²⁰See also Nick Barber, Maria Cahill and Richard Ekins (eds), *The rise and fall of the European Constitution* (Oxford, 2019).

¹²¹Federico Fabbrini, 'Possible avenues towards further integration in Europe: a political compact for a more effective and democratic Union', study commissioned by the European Parliament Constitutional Affairs Committee, June 2020; and Federico Fabbrini 'Reforming the EU outside the EU? The Conference on the Future of Europe and its Options' *European Papers* 5 (2020), 963–82.

¹²²See also Sergio Fabbrini, *Europe's future: decoupling and reforming* (Cambridge, 2019).

¹²³Carlos Closa, *The politics of ratification of EU treaties* (Abingdon, 2013).

¹²⁴Dermot Hodson and Imelda Maher, *The transformation of EU treaty making* (Cambridge, 2018).

¹²⁵Italian prime minister Mario Draghi, speech at the Italian Senate, 17 February 2021 (stating that '*non c'è sovranità nella solitudine*'—my translation).

As this article has suggested, the tensions at play in the European project are connected to the shortcomings of the EU system of governance. From this point of view, the EU needs constitutional reforms to enhance its effectiveness and legitimacy after Brexit—and the nascent Conference on the Future of Europe has opened a prospect in that direction. Yet the joint declaration signed on 10 March 2021 by the presidents of the EP, Commission and Council is a compromise text, with multiple ambiguities; hence, the process of the Conference on the Future of Europe faces pitfalls. Ultimately, if the Conference is to be more than a talking shop, it will require political leadership, and if it is to achieve meaningful results, it will need legal inventiveness. As Brexit proves, integration may not move in only one direction. Therefore, if the European project is to be regenerated beyond the COVID-19 pandemic, the EU needs not just a recovery fund but also a reformed institutional architecture.¹²⁶

¹²⁶See further Federico Fabbrini, *Next Generation EU* (Bologna, 2022).