

# Brexit and the Future of Europe: Opportunities for Constitutional Reforms?

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## **Abstract**

The paper considers how Brexit affects the EU treaties, and argues that withdrawal of the UK compels the EU institutions and the remaining member states to engage in constitutional change at EU level. As it points out, once the UK leaves the EU, several provisions of the EU treaties and a number of quasi-constitutional EU norms – including the European Council decision on the composition of the EP, and the rules on the financing of the EU – will need to be amended to adapt the EU to the reality of a Union at 27. The revision of these legal norms, however, may open a window of opportunity to discuss more far-reaching changes to the EU constitutional system. During the euro-crisis, and in the context of the celebrations for the 60<sup>th</sup> anniversary of the Rome Treaties, a number of roadmaps have been presented at the highest level by EU institutions and several national governments to reform the EU and fix its structural problems. Since these reform proposals mostly concern the functioning of the EU institutions and the financing of the EMU – precisely the two areas where legal changes will be needed after Brexit – this may create the space for a grand-bargain. Clearly, the track-record of treaty reforms in the EU is mixed, and the paper underlines the many legal and political obstacles toward a new constitutional settlement in Europe. Nevertheless, it suggests that the current constitutional status quo is not Pareto optimal, and that the growing calls for a multi-speed Europe signal a credible alternative: after Brexit, integration by a sub-group of states remains a distinctive possibility in case the efforts to reform the EU constitutional system were to falter due to idiosyncratic national reasons. Hence, the paper concludes that while Brexit offers a chance to reform the EU at 27, Europe’s future may lay in a federal union on a smaller scale.

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## 1. Introduction

The decision by the United Kingdom (UK) to leave the European Union (EU) represents a profound shock for the project of European integration. Since its creation with the Treaty of Paris of 1951 and the Treaties of Rome in 1957, the EU has been inspired by the idea that member states committed to a process of “ever closer Union.”<sup>1</sup> Historical developments seemed to vindicate that view: in 60 years, EU membership had widened from 6 to 28 member states, and EU competences have deepened, increasingly absorbing hallmarks of state sovereignty. The EU gradually tied member states and their citizens closer together and succeeded in transforming a continent of warring states into a *Rechtsgemeinschaft*. Scholars conceptualized this state of affairs by describing the EU as a project of integration through law.<sup>2</sup> And although integration has over-time increasingly accommodated differentiation among member states, the idea that all countries of the EU proceeded in the same direction has remained a defining assumption in the EU. Brexit shattered all that: the UK departure from the EU revealed the deep flaws that cut through the EU constitutional fabric, and challenged consolidated understandings on the *finalité* of the European project.

Nevertheless, the decision by the UK to leave the EU may also represent a timely window of opportunity for the EU to seriously re-think its foundations. Even the most ardent pro-Europeans would not deny that today, the state of the EU is not strong. During the last decade, the EU has been bumping from a crisis to the next – at the very risk of its own survival. While since 2009 the euro-crisis has challenged the stability of Europe’s Economic & Monetary Union (EMU), the migration-crisis beginning in 2015 has put under pressure the Schengen internal border-free zone. And additional challenges, from internal security to external defense, trade and the changing transatlantic relations have put under pressure the EU on other fronts too. These challenges have dramatically exposed the limits of the current EU constitutional set-up. In fact, in recent years top policy-makers at national and EU level have increasingly called for reforming the EU powers and institutional architecture, with the aim of strengthening the Union and relaunching the integration project. By catalyzing the centrifugal dynamics at play in the EU, Brexit represents a dramatic wake-up call, but simultaneously a welcome chance to restructure the EU legal and institutional foundations.

The core argument of this chapter is that the decision of the UK to withdraw from the EU increases the urge – and at the same time creates the possibility – to structurally improve the constitutional architecture of the EU. Brexit, in fact, compels the EU and its (remaining) member states to engage in some significant legal and institutional reforms in order to adapt the EU constitutional framework to the new normal of a Union at 27. As this chapter shows, after the UK

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<sup>1</sup> Preamble, TEU.

<sup>2</sup> See Mauro Cappelletti et al (eds), *Integration Through Law*. Volume 1 (De Gruyter 1986).

leaves the EU – by default in March 2019, two years after the notification of Article 50 TEU – the remaining member states will need to amend several provisions of the EU treaties. Moreover, the EU institutions and its member states will need to pass other key legal acts – such as a new decision concerning the allocation of the seats for the European Parliament (EP), and new rules on the funding of the EU – which have essentially a constitutional status, and in fact require unanimity in the Council, EP consent, and ratification by the member states according to their respective constitutional requirements. In other words, Brexit will call for significant constitutional reforms in the EU – whether the member states and the EU institutions like it or not.

The EU institutions and member states could limit constitutional engineering to addressing the issues caused by Brexit. However, the chapter suggests that the reforms compelled by the UK withdrawal offer a window of opportunity that should be seized to fix several other problems of the current EU constitutional order, and to rethink the powers and institutional architecture of the EU for the future. There is no lack of proposals on how this should be done. During the euro-crisis, several high-level blueprints have outlined a roadmap to enhance the EU and democratize EMU: among others, in December 2012 the President of the European Council, in cooperation with the Presidents of the European Commission, Eurogroup and European Central Bank (ECB), produced a report toward a deeper and more genuine EMU;<sup>3</sup> and in June 2015, the President of the European Commission, in coordination with the Presidents of the European Council, Eurogroup, ECB and also EP published a report to complete Europe’s EMU.<sup>4</sup> Moreover, in the context of the celebrations for the 60<sup>th</sup> anniversary of the Treaties of Rome and the activation by the UK of Article 50 TEU, a whitepaper by the Commission,<sup>5</sup> several resolutions of the EP,<sup>6</sup> and a solemn declaration by the 27 heads of state and governments and leaders of the European Council, European Commission, and EP have re-started the debate on the future of the EU, proposing alternative scenarios.<sup>7</sup>

The chapter examines these reform projects, and considers how they may become part of a grand bargain among EU member states and institutions, as they inevitably engage in reform after Brexit. While the chapter acknowledges that changing the treaties opens a Pandora’s box, it claims that this step is necessary to improve the EU effectiveness and legitimacy. At the same time, while the chapter emphasizes some well-known difficulties that treaty reform would meet in the EU – due to either legal obstacles or political opposition in several member states – it seeks optimistically to contextualize them. On the one hand, it claims that the current EU constitutional set-up is a one size

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<sup>3</sup> President of the European Council, final report “Towards a Genuine EMU”, 5 December 2012.

<sup>4</sup> President of the European Commission, report “Completing Europe’s EMU”, 22 June 2015.

<sup>5</sup> See European Commission, whitepaper “The Future of Europe”, 1 March 2017.

<sup>6</sup> See e.g. European Parliament resolution of 28 June 2016 on the decision to leave the EU resulting from the UK referendum, P8\_TA(2016)0294, para. 10.

<sup>7</sup> Rome Declaration of the leaders of 27 Member States and of the European Council, the European Parliament and the European Commission, 25 March 2017.

fits none, with no member state satisfied with the status quo: this situation opens the door for attempts to reform the EU constitutional settlement in a Pareto-optimal way. On the other, it suggests that the recent high-level talk in favor of multi-speed integration may work as a disciplinary factor, pushing recalcitrant member states to go along plans of constitutional revision: because no state wants to be left behind when a core group vanguards forward, the likelihood that change will occur if a majority of countries so desires increases. With that said, the chapter concludes noting that multi-speed integration remains a distinctive possibility in case the efforts to reform the EU constitutional system after Brexit were to falter due to idiosyncratic national reasons.

The chapter is structured as follows. Section 2 analyzes the constitutional *changes* necessary after the UK abandons the EU, and underlines that the EU institutions and member states will need to amend at the minimum several provisions of the EU treaties, the European Council decision establishing the composition of the EP and the rules on the financing of the EU: as I explain, given the nature of these changes, major inter-state and inter-institutional bargaining and negotiations are to be expected. Section 3 summarizes the leading constitutional *proposals* for reform in the EU articulated during the euro-crisis, and more recently in the context of the celebrations for the 60<sup>th</sup> anniversary of the Treaties of Rome: here I emphasize how these blueprints could be implemented as part of a grand bargain. Section 4 finally, considers the constitutional *challenges* that still pave the way toward treaty reforms, identifying legal and political obstacles in some member states: as I suggest, however, the prospect of constitutional revisions at 27 is shaped by the ever more realistic alternative that a core group of member states may decide to opt for a multi-speed solution, preceding in integration on its own, outside the EU legal order. Section 5 briefly concludes.

## 2. Constitutional change

The departure of the UK compels the EU institutions and the remaining member states to change a number of key EU law measures.<sup>8</sup> Several provisions of the treaties require amendment. Moreover, revisions are necessary to the European Council decision on the allocation of seats in the EP, as well as the rules on the financing of the EU. These legal acts are formally not treaty amendments, since there is no need to use the procedure of Article 48 TEU to change them. And yet, they have a quasi-constitutional status: substantially, because they deal with crucial aspect of the (institutional and financial) functioning of the EU; and procedurally, because their approval is subject to special legislative procedures which are akin for all practical purposes to a treaty revision. Modifying the decision on the EP composition and the rules on the own resources of the EU requires member

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<sup>8</sup> See Federico Fabbrini, “How Brexit Opens a Window of Opportunity for Treaty Reform in the EU”, Bertelsmann Stiftung paper, September 2016.

states unanimity, EP involvement, as well as ratification by each member state according to its respective constitutional requirements. The necessity to re-adopt these crucial EU legal acts to adapt the EU to the departure of the UK will thus compel the member state to engage in the broad and complex bargaining, proper of major constitutional reforms.

## 2.1. EU Treaties

The most glaring treaty change which will have to be made as a result of Brexit regards Article 52 TEU. This provision – which is then further specified by Article 355 TFEU – lists the member states of the EU, including the UK. Article 52 TEU has been updated over time to account for EU enlargement. The last amendment occurred in 2013, when Croatia joined the EU. On that occasion, Article 13 of the Act concerning the conditions of accession of the Republic of Croatia – annexed to the Treaty between the 27 EU member states and Croatia – modified Article 52 TEU to include Croatia among the list of EU countries.<sup>9</sup> After the UK withdraws from the EU, Article 52 TEU will have to be modified. However, an important point must be underlined. Article 49 TEU (which regulates enlargement) explicitly authorizes “adjustments to the Treaties on which the Union is founded” to be made in the accession agreement between the member states and the applicant state. Hence, formal modifications of the EU treaties which result from the accession of a new member state can be dealt with in the accession treaty and accompanying documents – without the need for a revision of the EU treaties according to the rules of Article 48 TEU.

On the contrary, Article 50 TEU (which regulates withdrawal) does not mention an equal rule, and only states that the EU shall “conclude an agreement with [the withdrawing] State, setting out the arrangement for its withdrawal, taking into account of the framework for its future relationship with the Union”. Since the agreement with the withdrawing state is negotiated by the EU as any normal international pact pursuant to Article 218(3) TFEU – and is thus a legal act hierarchically inferior to the EU treaties<sup>10</sup> – this implies that in order to modify Article 52 TEU and remove the name of the UK from the list of EU member states, resort should be made to normal amendment procedure of Article 48 TEU. An international agreement concluded by the EU, in fact, cannot modify EU primary law.<sup>11</sup> In other words, while in the case of enlargement the accession agreement suffices to introduce formal amendments to the EU treaties (such as a change to Article

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<sup>9</sup> See Art 13 Act concerning the conditions of accession of the Republic of Croatia and the adjustments to the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ 2012 L 112/25.

<sup>10</sup> See Art 218(11) TFEU.

<sup>11</sup> See Paul Craig, *The Treaty of Lisbon: Law, Politics and Treaty Reform* (OUP 2010) 401.

52 TEU), in the case of withdrawal the secession agreement cannot do: even a banal and formal adjustment to the EU treaties such as the one under discussion here needs to be undertaken through the revision procedure disciplined in Article 48 TEU.

As is well known, Article 48 TEU outlines two revision procedures to amend the EU treaties: a simplified, and an ordinary one. However, according to Article 48(6) TEU the simplified revision procedure can only be used to “revise all or part of the provisions of Part Three of the TFEU” and at the condition that the amendment “shall not increase the competences conferred on the Union in the Treaties.” In order to modify Article 52 TEU, therefore, resort has to be made to the ordinary revision procedure. This procedure requires the European Council to “convene a Convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the [EP] and of the Commission” and charged to “adopt by consensus a recommendation [to amend the treaties] to a conference of representatives of the governments of the Member States.” 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 EP consent to do so: hence the EP can insist on calling a Convention to examine proposals for revisions to the EU treaties.<sup>12</sup> Finally, amendments to the treaties have to be agreed by common accord by a conference of representatives of the member states and “shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.”

In sum, when the UK will withdraw from the EU, the other member states will need to amend the EU treaties, at the minimum to modify Article 52 TEU (and, relatedly, Article 355 TFEU). As explained, the withdrawal agreement cannot introduce a modification to Article 52 TEU, since an international treaty concluded by the EU under Article 218 TFEU cannot modify EU primary law. Moreover, a simplified treaty amendment procedure cannot be used to change Article 52 TEU: an ordinary treaty amendment procedure is required in this context. It is quite possible that the remaining 27 member states in the European Council will quickly settle to modify Article 52 TEU and decide that a Convention is not worth for such a formal amendment. However, Article 48 TEU gives to the EP a right to insist on convening a Convention. Considering that the EP has on multiple occasions called for setting up a new Convention,<sup>13</sup> it cannot be excluded that the EP will exploit the opportunity created by Brexit to force the European Council to eventually set in motion a broader project of revisions and updates of the EU treaties.

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<sup>12</sup> See Jean-Claude Piris, *The Lisbon Treaty: A Legal and Political Analysis* (CUP 2010) 104.

<sup>13</sup> See *infra* Section 3.

## 2.2. Composition of the European Parliament

Besides the treaty amendment discussed above, when the UK withdraws from the EU, the composition of the EP will have to be modified to account for the secession of one of its (most populous) member states. Whereas the EU treaties provisions dealing with the European Council, the Council, the European Commission and the European Court of Justice (ECJ) can be applied without much ado to a Union at 27, institutional engineering is needed to adapt the EP to the new reality. According to Article 14(2) TEU, in fact, the EP shall be composed by maximum 750 members, plus the President – hence, for a total of 751 MEPs, to be elected in the various member states according to the principle of degressive proportionality “with a minimum threshold of six members per Member State. No Member State shall be allocated more than ninety-six seats.” As Article 14(2) TEU clarifies the specific allocation of EP seats in the various member states is determined in a European Council decision, “adopted by unanimity, on the initiative of the [EP] and with its consent.”

Currently, the EP composition is set in a European Council decision adopted in June 2013.<sup>14</sup> This decision – the first passed since the entry into force of the Lisbon Treaty – determined the apportionment of seats in the 8<sup>th</sup> EP elections in June 2014 and was the result of a long wrangling among the member states.<sup>15</sup> In fact, concerns about the allocation of EP seats among the states played out in the negotiations leading to the Lisbon Treaty and are reflected in the fact that Declarations No. 4 and No. 5, annexed to the EU treaties, address specifically this issue. Declaration No. 4, in particular, indicates that “the additional seats in the [EP]” (i.e. the 751<sup>st</sup> seat) will be attributed to Italy, and Declaration No. 5 states that the European Council “will give its political agreement on the revised draft Decision on the composition of the [EP] for the legislative period 2009-2014, based on the proposal from the [EP].” These declarations – which technically are not binding, and do not have the same legal values as the EU treaties – testify however to the difficulties of finding an acceptable inter-state and inter-institutional compromise, on an issue which is regarded by national governments as a proxy for the status of their country.

Following the departure of the UK, the European Council and the EP will have to agree on a new decision on the allocation of EP seats. In fact, the June 2013 European Council decisions already anticipated that a new formula for the allocation of seats had to be agreed upon in view of the 9<sup>th</sup> EP elections in 2019,<sup>16</sup> and the EP is expected to come up with a proposal shortly. Yet, it is

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<sup>14</sup> European Council Decision of 28 June 2013 establishing the composition of the European Parliament, 2013/312/EU, OJ 2013 L 181/57.

<sup>15</sup> See further Federico Fabbrini, “Representation in the European Parliament: of False Problems and Real Challenges” (2015) 75 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 823.

<sup>16</sup> See Art 5, European Council Decision 2013/312/EU.

clear that the withdrawal of the UK creates space for major new demands by several member states, and potentially for a heavy reshuffling of seats. In fact, the current European Council decision assigns to the UK 73 seats in the EP – the third largest delegation (after Germany and France, and on a par with Italy).<sup>17</sup> Considering that the new decision will have to be proposed by the EP, approved unanimously by the European Council, sanctioned by the EP – and then de facto ratified domestically by all member states, since national legislation will have to be put in place to regulate the specific modalities for electing the number of MEPs assigned to each member state by the EU decision – it is clear that much will be at stake during the negotiations. After all, comparative studies reveal that choices on the allocation of seats in federal systems are often taken within the framework of broader constitutional bargains, when units which may be losing out in terms of corporate representation can be compensated with other payoffs.<sup>18</sup>

In sum, the need to adopt a new decision on the composition of the EP after Brexit seems to create another window of opportunity for significant updates and revisions to the EU institutional set-up. As amending this European Council decision is – in terms of complexity – almost tantamount to a treaty revision, it cannot be excluded that the opportunity will be exploited to call for a more fully-fledged change to the EU institutional architecture, or at least to some other specific amendments to EU primary law, which may be part of a package-deal on how to assign seats among the various member states within the EP.

### 2.3. Financial provisions

In addition to the new rules on the allocation of EP seats, another legal area where major reforms will be necessitated in the EU by Brexit concerns the rules on the financing of the EU. The EU treaties provisions regulating the financing of the EU set up a highly technical and complex system, which can be summarized as follows. First, under Article 312 TFEU, the Council, acting unanimously and with the consent of the EP shall adopt a regulation laying down the multiannual financial framework (MFF) of the EU: this regulation, usually adopted for a 7-year time-span, “shall ensure that Union expenditure develops in an orderly manner.” Second, under Article 311 TFEU, the Council, acting unanimously and after consulting the EP shall adopt a decision laying down the system of own resources of the Union: this decision – which “shall not enter into force until it is approved by the Member States in accordance with their respective constitutional

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<sup>17</sup> See Art 3, European Council Decision 2013/312/EU.

<sup>18</sup> See Jonathan Rodden, “Strengths in Number? Representation and Redistribution in the European Union” (2002) *European Union Politics* 151.



requirements” – defines the *revenues*-side of the EU financing, and thus complements the MFF regulation which instead sets the *expenditures*. Third, based on the funding prospect set in the own resources decision and in light of the expenditure plan sketched in the MFF regulation, the EP and the Council adopt every year the annual budget of the EU according to Article 314 TFEU.

The current rules on the financing of the EU were set in a package of legal measures adopted after the entry into force of the Lisbon Treaty. In particular, on the revenue-side, the own resources of the EU are set in a Council decision adopted in May 2014.<sup>19</sup> On the expenditure side, instead, rules are condensed in a Council regulation adopted in December 2013, which sets the MFF for 2014-2020.<sup>20</sup> Both these legal measures were the result of highly complex political negotiations. A proposal for a new own resources decision was tabled by the Commission in 2011,<sup>21</sup> and it took 3 years to approve it in the Council: in fact, the own resources decision is still subject to parliamentary ratification in several member states (but will apply retroactively as from 1<sup>st</sup> January 2014, when national ratification will be completed).<sup>22</sup> At the same time, negotiations for the MFF 2014-2020 broke down on several occasions, and the intervention of the European Council (in place of the Council) was necessary in order to find a compromise among the member states.<sup>23</sup>

As is well-known, the difficulties in negotiating the own resources decision and the MFF regulation are a result of the way in which the EU is currently funded.<sup>24</sup> Since, despite the letter and the spirit of the EU treaties, today resources are mostly transferred to the EU from member states’ coffers, EU countries consider the contributions they make to the EU budget as *their* money, and aggressively measure the difference between their contributions to, and their receipts from, the EU budget. As a result of this state of affairs, the decision-making process about the EU budget has been captured by endless negotiations among the member states about the precise costs and benefits that each member states would incur. Because no member state is willing to transfer *its* money to the EU budget for the benefit of *other* member states, the discussion about the EU funding have become increasingly costly and decreasingly effective – every member state having a veto power on how much resources the EU should raise and how it should spend.

Given this situation, it is to be expected that after Brexit the negotiations of the new EU financial framework will be highly contentious. Although the UK enjoys a famous rebate (obtained in 1984, and preserved ever since) which allows it to pay less than it should, it still remains one of

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<sup>19</sup> Council Decision of 26 May 2014 on the system of own resources of the European Union, 2014/335/EU, Euratom, OJ 2014 L 168/105.

<sup>20</sup> Council Regulation (EU, Euratom) No 1311/2013 of 2 December 2013 laying down the multiannual financial framework for the years 2014-2020, OJ 2013 L 347/884.

<sup>21</sup> See Commission proposal for a Council Decision on the system of own resources of the European Union, 29 June 2011, COM(2011)510 final.

<sup>22</sup> See Art 11 Council Decision 2014/335/EU, Euratom.

<sup>23</sup> See European Council meeting, 22-23 November 2012.

<sup>24</sup> See Federico Fabbrini, “Taxing and Spending in the Eurozone” (2014) 39 European Law Review 155.

the major contributors to the EU budget – the 4<sup>th</sup> total net payer into the EU coffers (after Germany, France and Italy).<sup>25</sup> Hence, when the UK will pull out of the EU the question will arise of how to handle the loss of UK contributions to the EU budget. In principle, the EU could reduce expenditures in proportion to the UK quota – but it seems unlikely that states which are net beneficiaries of EU spending would endorse such an outcome. Alternatively, the states which are net contributors to the EU budget could increase their contributions to wind-up the shortfall – but again it seems unlikely that countries which are already paying into the EU budget more than what they get in return would endorse this option. In this context, therefore, Brexit may create a window of opportunity for a more significant constitutional rethinking of the EU financing system.<sup>26</sup>

In sum, the need to adopt new legal rules for EU revenues and expenditures for the post-2020 financial framework attains a new meaning as a consequence of the UK departure from the EU. Given the complexities already characterizing the negotiations of the EU financing system, it is to be expected that the withdrawal of one of the (richest) member states will heat up further the tone of the future negotiations, between member states, and among EU institutions. Since the adoption of the MFF regulation, and even more so of the own resources decision, are practically tantamount to a treaty revision – as reflected in the need of state ratifications according to national constitutional requirements – major challenges are to be expected. Brexit changes the stakes in the negotiations, tipping the balance in favor of some kind of reform. Although until now member state governments have been lukewarm at initiatives to endow the EU with adequate taxing and spending powers – independent from member states’ financial transfers – in the aftermath of Brexit these ideas may acquire a new attractiveness as a way to provide adequate funding to the EU.

### 3. Constitutional proposals

As the previous section has shown, Brexit opens windows of opportunity for wider constitutional changes in the EU. Resort to Article 48 TEU could be exploited by the EP to push further other revisions to EU primary law. Moreover, since the UK is one of the most populous and richest member states of the EU, its withdrawal from the EU will significantly change the stakes of the renegotiation of the decision on the composition of the EP and the financing of the EU: while these acts were already scheduled to be renewed before 2019 (for the new EP elections) and 2020 (for the

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<sup>25</sup> See European Commission, “EU Expenditure and Revenue 2014-2020”, interactive chart available at [http://ec.europa.eu/budget/figures/interactive/index\\_en.cfm](http://ec.europa.eu/budget/figures/interactive/index_en.cfm)

<sup>26</sup> See Edoardo Traversa and Alexander Maitrot de la Motte, “Le fédéralisme économique et la fiscalité dans l’Union européenne”, in Stéphane De la Rosa et al (eds), *L’Union européenne et le fédéralisme économique* (Bruylant 2015) 343.

new MFF), it seems clear that without the UK the other member states and the EU institutions will need to engage in a much more significant grand bargain, both to re-apportion seats and to re-think the revenues and expenditures of the EU for a post-Brexit era. In this context, several of the proposals for constitutional reforms that had been brought forward by the EU institutions and member states' government may acquire a new relevance. In fact, in the midst of the euro-crisis and then at the occasion of the celebrations for the 60<sup>th</sup> anniversary of the Treaties of Rome, multiple blueprints have been outlined to re-launch the European integration project: and these may become part of a package-deal of constitutional reforms post-Brexit.

### 3.1. The euro-crisis and EMU

The euro-crisis, which challenged the functioning of EMU since 2009, prompted a wide set of legal and institutional reforms.<sup>27</sup> Nevertheless, additional proposals have been articulated over-time at the highest EU institutional level to improve further the effectiveness and the legitimacy of EMU. Following an explicit mandate of the European Council, the President of the European Council, jointly with the Presidents of the European Commission, the Eurogroup and the ECB, delivered in December 2012 a report "Towards a Genuine EMU,"<sup>28</sup> which outlined a road-map of EMU reforms, including deeper economic, banking and fiscal union coupled with a new framework of democratic legitimacy and accountability. And following the EP election in May 2014, and the appointment of a new European Commission in October 2014, the heads of state and government of the Eurozone entrusted the President of the European Commission, in close cooperation with the Presidents of the European Council, the Eurogroup, and the ECB, with the task to bring forward the work on the future of EMU<sup>29</sup> – an effort which resulted in the publication in June 2015 of a report, signed also by the President of the EP, on "Completing Europe's EMU."<sup>30</sup>

The European Commission, the ECB, and the EP have then also been individually active to push for further changes in the functioning of EMU. In November 2012 the European Commission unveiled a blueprint for a deep and genuine EMU, opening a debate on future reforms,<sup>31</sup> and in October 2015 it charted its proposed steps to complete EMU.<sup>32</sup> The ECB President has on multiple

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<sup>27</sup> See Federico Fabbrini, *Economic Governance in Europe* (OUP 2016).

<sup>28</sup> President of the European Council, final report (n 3).

<sup>29</sup> Euro Summit Statement, 24 October 2014, para 2.

<sup>30</sup> President of the European Commission, report (n 4).

<sup>31</sup> European Commission Communication, "A Blueprint for a Deep and Genuine EMU. Launching a European Debate", 28 November 2012, COM (2012) 777 final.

<sup>32</sup> See European Commission Communication, "On Steps Toward Completing Economic and Monetary Union", 21 October 2015, COM(2015)600 final.

occasions underlined the importance of overcoming the asymmetry of EMU, by complementing monetary policy with a real supranational economic policy.<sup>33</sup> And the EP has repeatedly expressed its desire that constitutional changes be brought back on the agenda of the EU institutions, including by reviving the Convention method to re-discuss the architecture of EMU.<sup>34</sup> In particular, the EP has made the case in favor of endowing the Eurozone with a fiscal capacity – that is, a counter-cyclical stabilization mechanism that can be used to ensure the proper functioning of EMU – and has called for greater parliamentary scrutiny in the framework of EU economic governance.<sup>35</sup> At the same time, the EP has stated that action should be taken to re-incorporate within EU law the EMU-related intergovernmental treaties concluded outside the EU legal order, using that opportunity for a broader overhaul of the EMU constitutional system.<sup>36</sup>

Moreover, several national governments have made the case for further legal and institutional reforms in EMU aimed at enhancing the Eurozone effectiveness and legitimacy. Among others, the French President brought forward the idea to create a Eurozone presidency and endorsed the call for an EMU fiscal capacity.<sup>37</sup> The Italian Minister of Finance proposed the creation of a European unemployment insurance scheme.<sup>38</sup> And the then French and German Ministers of the Economy argued that the EU needs institutional changes to handle its democratic deficit.<sup>39</sup> In fact, although the European Council as a whole has so far shied clear of endorsing any major blueprint for constitutional change in the EU, such as the creation of a Eurozone treasury, proposals for legal and institutional reforms have been supported by countries as diverse as Spain,<sup>40</sup> Slovakia,<sup>41</sup> and Belgium.<sup>42</sup> And the German government too – despite the comfortable dominant

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<sup>33</sup> See ECB President, Mario Draghi, Introductory statement in front of the EP, 15 June 2015 (expressing its support for “a quantum leap towards a stronger, more efficient institutional architecture” for EMU).

<sup>34</sup> See European Parliament Resolution of 20 November 2012 towards a Genuine EMU, P7\_TA(2012)0430 para. 6; and European Parliament Resolution of 12 December 2013 on the constitutional problems of multi-tier governance in the European Union, P7\_TA(2013)0598 para.s 67-69.

<sup>35</sup> See European Parliament Resolution of 23 May 2013 on future legislative proposals for EMU, P7\_TA(2013)0222; and European Parliament Resolution of 24 June 2015 on the review of economic governance framework: stock-tacking and challenges, P8\_TA(2015)0238.

<sup>36</sup> See European Parliament Resolution of 2 February 2012 on the European Council meeting of 30 January 2012, P7\_TA(2012)0023, para. 7.

<sup>37</sup> See French President François Hollande, “Intervention liminaire de lors de la conférence de presse”, Paris, 16 May 2013, 6 (speaking of “un gouvernement économique qui se réunirait, tous les mois, autour d’un véritable Président.”).

<sup>38</sup> See Italian Minister of Finance Pier-Carlo Padoan, “European Unemployment Insurance Scheme”, October 2015.

<sup>39</sup> See French Minister of the Economy Emmanuel Macron and German Minister of the Economy Sigmar Gabriel, Op-Ed, “Europe Cannot Wait Any Longer”, *The Guardian*, 3 June 2015 (stating that “to make its institutions work [...] Europe will need to address its democratic deficit as well as its executive one.”).

<sup>40</sup> See Government of Spain, “Better Economic Governance in the Euro area: Spanish Contribution”, May 2015, 7.

<sup>41</sup> See Government of Slovakia, “Contribution on Preparing for Next Steps in Better Economic Governance in the Euroarea”, May 2015, 3.

<sup>42</sup> See Government of Belgium, “Report on Preparing for Next Steps in Better Economic Governance in the Euroarea”, 27 April 2015, 3.

position it has come to play in EMU governance during the euro-crisis<sup>43</sup> – has emphasized the need to change the treaties, to either reform the institutions,<sup>44</sup> or improve the rules.<sup>45</sup>

### 3.2. The 60<sup>th</sup> Anniversary of the Rome Treaties and the EU

The debate on EU constitutional reform has then received a further boost on the occasion of the celebrations of the 60<sup>th</sup> anniversary of the Treaties of Rome in March 2017. As this historic moment arrived exactly at the time when the UK triggered Article 50 TEU, the EU institutions and the member states sought to reflect on how to absorb the loss of the UK while charting a new way forward. The results of these reflections go beyond the EMU-focused debate that took place during the euro-crisis, but the blueprints produced on the road to Rome reflect variable levels of ambition. The European Commission published in March 2017 a whitepaper aimed at opening a debate on the future of the EU at 27.<sup>46</sup> The whitepaper, which will be integrated in 2017 by several sector-specific contributions,<sup>47</sup> outlines five alternative scenarios: 1) carrying on; 2) nothing but the single market; 3) those who want more do more; 4) doing less more efficiently; and 5) doing much more together. These scenarios are presented by the Commission to the member states for considerations, but the Commission has not itself outlined its preferences for the way forward.

While the initiative of the Commission lacked a clear vision, the EP has been more consistent in advancing proposals for constitutional reforms in the EU after Brexit. The EP has recently approved a set of resolutions which combine calls for a greater exploitation of the legal and institutional mechanisms currently available under the Treaty of Lisbon, while outlining a roadmap for treaty reforms in the mid-term. On the one hand, the EP has claimed that the action should be taken *à traité constant*, with further integration in the area of economic governance, social policy, and defense.<sup>48</sup> Moreover, the EP has reaffirmed its intention to set up a fiscal capacity for the EU, based on real EU taxes,<sup>49</sup> as recently indicated also in the final report of the High Level Group on Own Resources chaired by former Italian Prime Minister and European Commissioner Mario

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<sup>43</sup> 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 3.

<sup>44</sup> See Berlin Group, Final Report of the Future of Europe Group of the Foreign Ministers of Austria, Belgium, Denmark, France, Italy, Germany, Luxembourg, the Netherlands, Poland, Portugal and Spain, 17 September 2012.

<sup>45</sup> See German Finance Minister Wolfgang Schäuble, “Strategy for a European Recovery”, Keynote speech at the 5<sup>th</sup> Bruges European Business Conference, 27 March 2014 (speaking in favor of a “European budget commissioner, who would be able to reject national budgets if they don’t correspond to the rules we have jointly agreed.”).

<sup>46</sup> European Commission whitepaper (n 5).

<sup>47</sup> See e.g. European Commission reflection paper on “The Social Dimension of Europe”, 26 April 2017 and European Commission reflection paper on “The Deepening of Economic and Monetary Union”, 31 May 2017.

<sup>48</sup> See European Parliament resolution of 16 February 2017 on improving the functioning of the European Union building on the potential of the Lisbon Treaty, P8\_TA(2017)0049.

<sup>49</sup> See European Parliament resolution of 16 February 2017 on budgetary capacity for the Eurozone, P8\_TA(2017)0050.

Monti.<sup>50</sup> On the other hand, however, the EP has also unveiled its plans for constitutional changes beyond the Treaty of Lisbon, aimed at overhauling more fundamentally the EU institutional architecture,<sup>51</sup> and it has emphasized how Brexit should be used to this end.<sup>52</sup>

Heads of state and government, finally, have also debated the future of the EU, first in a declaration signed in Bratislava in September 2016,<sup>53</sup> and then in a declaration signed in Rome – together with the Presidents of the European Council, European Commission and EP – in March 2017.<sup>54</sup> While this declaration is mostly focused on celebrating the achievements of 60 years of European unity, it indicates space for future interstate cooperation in the field of internal security, economic growth, social protection as well as foreign policy and defense – an area where rapid changes have occurred since the election of the new US administration.<sup>55</sup> The declaration avoids any discussion on the legal and institutional mechanisms to achieve these objectives, and contents itself with proclaiming that the EU member states and institutions will “promote a democratic, effective and transparent decision-making process and better delivery.” Nevertheless, the minimalist compromise reached in the Rome has not obfuscated the calls – notably by the Italian President,<sup>56</sup> and the speakers of parliaments of 14 EU member states<sup>57</sup> – for immediate treaty changes to establish a federal union endowed with adequate powers and democratic legitimacy.

### 3.3. Grand bargain?

In the context of the euro-crisis and the celebrations of the 60<sup>th</sup> anniversary of the Rome Treaties many proposals for reform have been advanced. While several of the blueprints openly speak about treaty amendments and the revision of other EU basic acts, other are instead more modest and rather seek to bring about change within the framework of the current treaties. Nevertheless, all proposals

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<sup>50</sup> See Mario Monti, High Level Group on Own Resources, final report and recommendations, “Future Financing of the EU”, December 2016.

<sup>51</sup> See European Parliament resolution of 16 February 2017 on possible evolutions of and adjustments to the current institutional set-up of the European Union, P8\_TA(2017)0048.

<sup>52</sup> See European Parliament resolution of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union, P8\_TA(2017)0102.

<sup>53</sup> See Bratislava Declaration, 16 September 2016.

<sup>54</sup> See Rome Declaration (n 6).

<sup>55</sup> See High Representative of the EU for Foreign Affairs and Security Policy, A Global Strategy for the EU Foreign & Security Policy, June 2016; European Parliament resolution of 22 November 2016 on the European Defense Union, P8\_TA(2016)0435; and Foreign Affairs Council Conclusions, 6 March 2017, Annex – Concept Note: Operational Planning and Conduct Capabilities for CSDP Missions and Operations.

<sup>56</sup> See Italian President Sergio Mattarella, “I valori dell’Europa”, intervento in occasione della seduta congiunta delle Camere per il 60° anniversario dei Trattati di Roma, Rome, 22 March 2017 (speaking of the need to relaunch “la riforma dei Trattati”).

<sup>57</sup> See President of the French Assemblée Nationale Claude Bertolone, President of the Italian Camera dei Deputati Laura Boldrini, President of the German Bundestag Norbert Lammert et al, “Un patto per l’Unione federale”, *La Stampa*, 26 February 2012.

reveal unease for the way how the EU currently functions and thus call for reforms of the system, by tackling several legal or institutional problems in the EU, and EMU specifically. In particular, all the reform projects by the EU institutions as well as by the member states identify two main areas for action. First, calls are being recurrently made for changes to the EU *institutional* architecture – e.g. to enhance the legitimacy of decision-making, or to improve the effectiveness of executive action, if it may be through the creation of new institutions. Secondly, reform proposals persistently focus on *substantive* issues, and notably on the problems of EMU stability, fiscal capacity and EU own resources to finance the growing set of policies that the EU should carry out.

As Section 2 has pointed out, Brexit will compel the EU institutions and the 27 member states to engage in constitutional reforms *precisely* in the areas of the institutions and the finances of the EU. Because the EU institutions and the member states need to reconsider core EU constitutional norms, Brexit opens a window of opportunity for implementing a number of constitutional proposals which had been discussed at the highest level for several years – but so far never put into practice. Constitutional change is a serious business and member states and EU institutions understandably engage reluctantly with it. But since after Brexit the EU treaties and other quasi-constitutional acts will have to be changed anyway, entrepreneurial EU institutions and member states now have greater margin of maneuver to push for further constitutional change. In this context, therefore, the reform proposals debated during the last decade may be taken seriously as part of a grand constitutional bargain between EU institutions and member states.

As scholars of constitution-making have emphasized,<sup>58</sup> changes to the legal foundations of a political regime hardly ever occur in good times: rather, they tend to occur in moments of crisis, when there is a window of opportunity to exploit. Moreover, constitutions are never ideal documents: rather, they are the result of compromise between competing interests. In order to succeed processes of constitution-making must ensure that each player around the negotiating table obtains some net gain from the end result. Given the far-reaching adaptations to the EU legal order that the EU institutions and the member states will need to make as a result of Brexit, however, the need for a grand bargain significantly increases, and proposals which have been thus far only discussed in the abstract may become real. In fact, more far-reaching institutional and substantive changes to the EU regime could become indispensable for reaching the inter-state and inter-institutional compromises necessary to adapt the EU to the reality of a Union at 27. By compelling treaty reforms, therefore Brexit offers an opportunity which can – and in my view should – be seized to strike a new grand bargain to improve the EU constitutional architecture.

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<sup>58</sup> See Tom Ginsburg et al., “Does the Process of Constitution-Making Matter?” (2009) 5 Annual Review of Law and Social Science 1.

#### 4. Constitutional challenges

The previous section summarized the multiple proposals recently advanced for constitutional reform in the EU; and discussed how these could be part of a grand bargain after Brexit. However, it is clear that any major initiative to reform the EU – even one exploiting the window of opportunity created by the need to adapt the EU to the new reality at 27 – would meet important challenges. There are in fact legal constraints and political obstacles in a number of member states that complicate any major project of constitutional revision. Yet, while not being unaware of these difficulties, I want to submit that there are relevant incentives that still push in the direction of a constitutional change. On the one hand, although the member states bear collective responsibility for the existing EU architecture, the EU seems to have increasingly become one size fits none, which may spur efforts to change the status quo. On the other, the growing calls in favor of a multi-speed Europe may pressure recalcitrant states to go along, as a least-worst alternative to a scenario where a core group of member states decides to move forward outside the EU legal order.

##### 4.1. Obstacles

Needless to say, the key impediment toward a major reform of the EU is the unanimity requirement: as pointed out in Section 2, amendments to the EU treaties and to several other quasi-constitutional acts of the EU require the unanimous consent of the (soon 27) EU member states. In this context, of course, every EU member state wields a veto power on any constitutional change in the EU.<sup>59</sup> Even if unanimous agreement were to be reached among the governments of the member states congressed in an intergovernmental conference (or other intergovernmental settings), moreover, domestic constraints may still limit the states' scope of action. These constraints may be legal or political – depending on the member states' constitutional systems.

In Germany, for example, the Constitutional Court, the *Bundesverfassungsgericht* (BVerfG) has drawn over-time a number of red-lines on possible future steps in European integration: while the BVerfG has never prevented the ratification of an EU treaty so far, its case law has restricted the room of negotiation for the German government on EU affairs.<sup>60</sup> In its *Lissabon Urteil*, the BVerfG has identified a core set of competences which belong to the heart of state sovereignty and which

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<sup>59</sup> See Steve Peers, “The Future of EU Treaty Amendments” (2012) 31 Yearbook of European Law 17.

<sup>60</sup> See Sabino Cassese, “L’Unione europea e il guinzaglio tedesco” [2009] *Giornale di diritto amministrativo* 1003.



cannot be transferred to the EU.<sup>61</sup> In reviewing the German law for the election of the EP, the BVerfG has reaffirmed its view that the EP is not a real parliamentary assembly, as it does not elect a government.<sup>62</sup> And in its judgments related to the legal measures adopted to respond to the euro-crisis, the BVerfG has been adamant in claiming that efforts to stabilize the EMU should not undermine the budgetary sovereignty of the German Parliament, or the right to democracy.<sup>63</sup> In fact, in referring its first preliminary reference to the ECJ in 2014 the BVerfG has affirmed that action by the ECB consisting in the purchase of government bonds would be in breach of Germany's constitutional identity<sup>64</sup> – a view it later retracted.<sup>65</sup>

Although the position of the BVerfG is in many ways exceptional,<sup>66</sup> other national constitutional courts, particularly in Central and Eastern Europe, have taken similar stands. At the same time, while any treaty change would need to pass muster before national courts in some EU member states, other countries are facing different kinds of constitutional constraints on the path toward greater integration. In Ireland, for instance, under the *Crotty* doctrine of the Supreme Court every EU treaty that entails a transfer of power from the national to the European level requires to be approved through a constitutional referendum.<sup>67</sup> As is well known, however, Irish voters rejected the last two EU reform treaties. In 2001, Ireland voted down the Treaty of Nice; and in 2007 the Treaty of Lisbon.<sup>68</sup> On both occasions, the European Council took stock of the decision of the Irish voters and at the request of the Irish government produced official declarations aimed at reassuring Ireland of the fact that, among others, the EU treaties would not undermine the principle of Irish military neutrality.<sup>69</sup> Based on these reassurances, the Nice and Lisbon Treaties were put to a second vote, and eventually approved in 2002 and 2008 respectively.

Even in countries where there is no constitutional requirement for referendum on treaty changes, moreover, political expediency may make such a step inevitable. As the recent examples of Denmark and the Netherland highlight, however, the popular mood may be strongly against any further step in European integration. Hence, in December 2015 the Danish citizens voted against the proposal endorsed by the nation's government to abandon Denmark's opt-out on several measures

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<sup>61</sup> See BVerfG 123, 267 (2009).

<sup>62</sup> See BVerfG 2 BvE 2/13, judgment of 26 February 2014.

<sup>63</sup> See BVerfG 2 BvR 1390/12 et al, judgment (preliminary measures) of 12 September 2012.

<sup>64</sup> See BVerfG 2 BvR 2728/13 et al, order of 7 February 2014 .

<sup>65</sup> See Case C-62/14 *Gauweiler*, ECLI:EU:C:2015:400 and BVerfG 2 BvR 2728/13 et al, judgment of 21 June 2016.

<sup>66</sup> See Monica Claes, "The Validity and Primacy of EU Law and the 'Cooperative Relationship' Between National Constitutional Courts and the CJEU" in Federico Fabbrini (ed), *The European Court of Justice, the European Central Bank and the Supremacy of EU Law*. Special Issue (2016) 23 Maastricht Journal of European & Comparative Law 151.

<sup>67</sup> See *Crotty v An Taoiseach* [1987] IESC 4.

<sup>68</sup> 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.

<sup>69</sup> See Presidency Conclusions, European Council, 11-12 December 2008, EU Doc. 17271/08.

in the field of criminal justice and police cooperation,<sup>70</sup> limiting the possibility of cooperation between the law enforcement agencies of Denmark and the other EU member states. And in consultative referendum in April 2016 the Dutch citizens voted against the Ukraine Association Agreement,<sup>71</sup> complicating the possibility for the EU to strengthen its economic ties with Ukraine. If one considers also the maverick July 2015 Greek referendum where a majority of voters rejected the terms of the draft third memorandum of understanding between Greece and its EU creditors,<sup>72</sup> a picture of increasing popular wariness against the EU seems to emerge.

#### 4.2. Incentives

All the above notwithstanding, however, the prospect of constitutional change in the EU remains a possible outcome. First, history thus far has shown that national legal obstacles to integration are not ultimately insurmountable. During the last 25 years, the EU treaties have been subject to a “semi-permanent treaty revision process”.<sup>73</sup> Four major overhauls have occurred in short sequence, even excluding the failed attempt to adopt a Treaty Establishing the European Constitution: 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 have all introduced relevant changes to the architecture of the EU – and they were all eventually approved despite the difficulties of national ratifications. Moreover, the ink of the Lisbon Treaty text was barely dried when the EU member states exploited the newly introduced simplified treaty revision procedure of Article 48(6) TEU to rewrite Article 136 TFEU and allow for the establishment of a permanent stability mechanism for the Eurozone:<sup>74</sup> the European Stability Mechanism.<sup>75</sup>

Second, also recent electoral opposition to the EU must be contextualized. To start with, as political scientists have explained through empirical data, popular support in favor of the EU has increased in the aftermath of Brexit, even in traditionally Eurosceptic countries – confirming that

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<sup>70</sup> See Danish Parliament, *Resultat af folkeafstemning: Nej*, available at <http://retsforbehold.eu.dk/da/nyheder/2015/resultat> (last visited 27 April 2017)

<sup>71</sup> See Dutch Election Council, *Uitslag referendum Associatieovereenkomst met Oekraïne*, available at <https://www.kiesraad.nl/actueel/nieuws/2016/04/12/uitslag-referendum-associatieovereenkomst-met-oekraïne> (last visited 27 April 2017)

<sup>72</sup> See Greek Government, *Euroelections*, available at

<sup>73</sup> 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.

<sup>74</sup> 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.

<sup>75</sup> See Treaty Establishing the European Stability Mechanism, 2 February 2012, available at <http://www.european-council.europa.eu/media/582311/05-tesm2.en12.pdf> (last visited 1 June 2014).

membership is regarded by most EU citizen as a valuable asset.<sup>76</sup> Moreover, in my view the dissatisfaction of European citizens toward the EU should not be interpreted as an opposition to European integration as such. Rather, discontent vis-à-vis the EU should be seen as the product of an unsatisfactory functioning of the EU.<sup>77</sup> Electoral disapproval for the EU is largely the result of a system of governance which is unresponsive to citizens' preferences – and when voice is limited, exit becomes an option.<sup>78</sup> Hence, if constitutional reforms in the EU proposed to address more fundamentally the current disconnect between the European citizens and the project of European integration, creating channels of legitimacy from the citizens towards the institutions, they may ultimately revert the tide, and win the support of the people.

In fact, relevant incentives play in favor of an overhaul of the EU constitutional system. On the one hand, the EU appears to be in a state of unstable equilibrium, and the status quo does not seem to be satisfactory for any member state.<sup>79</sup> The euro-crisis has exposed the weaknesses of the EMU, and states, notably in the South (but also in the West), have suffered from a constitutional regime that prioritizes fiscal stability at the price of growth and employment. The migration-crisis, otherwise, has revealed the EU deficiencies in the field of Schengen and immigration, displeasing states particularly in the North, which have had to shoulder a greater burden in the management of asylum claims. At the same time, states in the East have been concerned that the current EU is not able to sufficiently protect them from external military threats, particularly in the face of a resurgent Russia and a US administration which appears less concerned with EU defense. In sum, the current EU set-up is being criticized by states across the EU, albeit for different reasons in different places: in this situation, it is not implausible for push toward Pareto-optimality to succeed.

On the other hand, however, a major pressure toward a new settlement in the EU constitutional architecture may derive from the growing calls for a multi-speed Europe. This occurs when not all member states are willing to move forward in integration, and those who want to do so do it on their own, through forms of special cooperation. In fact, at a time when the EU is facing multiple challenges, the idea voiced by several member states that they may decide to act independently as a sub-group to the side of the EU works as a powerful incentive for outlier states to re-align themselves towards the median view. Despite national differences, no member state of the EU at 27 wishes to be excluded from the project of integration, so even the simple threat of such a scenario materializing operates as a disciplinary factor on recalcitrant members. Considering that

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<sup>76</sup> See Marlene Wind in this book, as well as Isabell Hoffmann, “Brexit has Raised Support for the European Union” EUOpinions, Bertelsmann Stiftung, 21 November 2016

<sup>77</sup> See Joseph H.H. Weiler, “Europa: ‘Nous Coalisons des Etats, Nous N’Unissons pas des Hommes’”, in Marta Cartabia and Andrea Simoncini (eds), *La sostenibilità della democrazia nel XXI secolo* (Il Mulino 2009), 51, 62 (stating that the system of EMU governance contributes to the political and democratic deficit of the EU).

<sup>78</sup> See Albert Hirschman, *Exit, Voice, Loyalty: Responses to Decline in Firms, Organizations and States* (HUP 1970).

<sup>79</sup> See Kalypso Nicolaïdis in this book, as well as Sergio Fabbrini, *Which European Union?* (CUP 2015).

Brexit forces the EU member states and institutions to engage in forms of constitutional change, the desire to remain part of the club may be a powerful incentive even for the lukewarm member states to move along with the majority in updating the EU regime.

### 4.3. Multi-speed Europe?

Yet, the idea of multi-speed Europe does remain on the table in case the efforts to reform the constitutional architecture of the EU after Brexit were to falter for idiosyncratic national reasons. The idea of a multi-speed Europe is nothing new. Legally speaking, it has existed for 25 years. Since the Maastricht Treaty of 1992, EU law has introduced opt-outs, exempting some member states from participating in some EU project. And since the Amsterdam Treaty of 1996, EU law created the enhanced cooperation procedure, allowing those member states that are willing to move forward to do so within the EU legal order. As a result of that, Europe has developed in variable geometry: two countries (the UK and Denmark) have a derogation from adopting the common currency;<sup>80</sup> two countries (the UK and Ireland) have an opt-out from Schengen;<sup>81</sup> and three countries (the UK, Poland, and the Czech Republic) have obtained a protocol that seeks to exempt them from the application of the EU Charter of Fundamental Rights.<sup>82</sup> Moreover, 25 member states have embarked in the process of enhanced cooperation to set up a Unitary Patent court,<sup>83</sup> and 10 Eurozone countries are discussing the introduction of a financial transaction tax.<sup>84</sup>

Nevertheless, since Brexit several national governments have re-invoked the idea of multi-speed integration with a new streak, namely as a way to overcome deadlock in the EU system. In the run-up to the celebrations of the 60<sup>th</sup> anniversary of the Treaties of Rome, the Benelux countries (Belgium, Luxembourg and the Netherlands) indicated in a joint document that “[d]ifferent paths of integration and enhanced cooperation could provide for effective responses to challenges that affect member states in different ways.”<sup>85</sup> The European Commission whitepaper identifies multi-speed integration as the third possible scenario for the future of the EU.<sup>86</sup> And the four largest countries of the Eurozone – Germany, France, Italy and Spain – have expressed their wish “qu’il y ait de nouvelles formes de coopération pour de nouveaux projets – ce que l’on appelle les coopérations différenciées – qui fassent que quelques pays puissent aller plus vite, plus loin dans de domaines

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<sup>80</sup> See Protocol No. 15 and Protocol No. 16.

<sup>81</sup> See Protocol No. 20.

<sup>82</sup> See Protocol No. 30.

<sup>83</sup> See Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, OJ 2012 L 361/1.

<sup>84</sup> See Economic & Financial Affairs Council Conclusions, 6 December 2016, Doc. 15205/16.

<sup>85</sup> See Benelux Vision on the Future of Europe, 3 February 2017.

<sup>86</sup> See Commission whitepaper (n 5) 20.

comme la défense, mais aussi la zone euro au travers l'approfondissement de l'Union économique et monétaire [...] sans que d'autre ne puissent s'y opposer.”<sup>87</sup>

Needless to say, the idea of a multi-speed Europe is controversial in many EU member states. The government of Croatia has openly spoken against it,<sup>88</sup> and Poland – reflecting a widespread view in Central and Eastern Europe – has vigorously opposed it. In fact, the March 2017 Rome declaration was till the last minute held hostage of the Polish government precisely on this point. While the draft text of the declaration indicated that states would act together whenever possible and at different paces and intensity where necessary,<sup>89</sup> the final text affirms that the member states “will act together, at different paces and intensity where necessary, while moving in the same direction, as we have done in the past, in line with the Treaties and keeping the door open to those who want to join later.” Otherwise, although the President of the European Council has emphasized that the positive side-effect of Brexit has been to draw the 27 remaining member states closer together,<sup>90</sup> there are clear fissures within the Union – and nothing proves this better than the decision by the Polish government to vote (alone) against the re-appointment of Poland's Donald Tusk as President of the European Council for a second mandate in March 2017.<sup>91</sup> In fact, the clear authoritarian drift in countries like Poland and Hungary can only deepen the cleavage within the EU, raising question on the ability of the EU to reform itself at 27.

In this context, the possibility of taking the road of multi-speed integration outside the EU legal order to achieve greater political union remains an option for the states that want to do so. And a recent model exists. The Fiscal Compact, concluded in 2012 by 25 of the then 27 EU member states (all excluding the UK and the Czech Republic), strengthened budgetary constraints outside the EU legal order, while still foreseeing the involvement of the EU institutions in its functioning.<sup>92</sup> Moreover, in order to bypass national vetoes, the Fiscal Compact set the rule that the treaty would enter into force when ratified by only 12 contracting parties whose currency is the euro, although it would obviously apply only to the ratifying states.<sup>93</sup> By effectively requiring that only a minority of EU member states approve the treaty, the Fiscal Compact shifted the cost of non-ratification to the hold-outs: a member state unwilling or unable to ratify the treaty would be simply cut off, without preventing the others from moving forward.<sup>94</sup> Yet, the effect of this ratification rule has been to put

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<sup>87</sup> See Déclaration au Sommet informel Allemagne, Espagne, France, Italie à Versailles, 6 March 2017.

<sup>88</sup> See Croatian Prime Minister Andrej Plenkovic, “We Must Not Fall into the Trap of Multi-Speed Europe”, Speech, Zagreb, 22 March 2017.

<sup>89</sup> Draft Rome Declaration, 12 March 2017.

<sup>90</sup> See President of the European Council, statement, 29 March 2017, Doc. 160/17.

<sup>91</sup> See European Council, press release, 9 March 2017, Doc. 122/17.

<sup>92</sup> See 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](http://www.eurozone.europa.eu/media/304649/st00tscg26_en12.pdf) (last visited 1 June 2014).

<sup>93</sup> See Art 14 Fiscal Compact.

<sup>94</sup> See Carlos Closa, *The Politics of Ratification of EU Treaties* (Routledge 2013).

pressures on all countries to join – a dynamic visible in Ireland where the Fiscal Compact was approved, albeit disgruntledly, in a referendum in 2013.<sup>95</sup>

If post-Brexit constitutional reform were to prove hopeless in the framework of the Union at 27, therefore, the possibility to resort to multi-speed integration along the model of the Fiscal Compact may re-emerge as an option to establish a political union, particularly among the 19 Eurozone countries.<sup>96</sup> Otherwise, the ECJ in *Pringle* has maintained that the member states remain free to use inter-se intergovernmental agreements in cases where the EU treaties do not devolve a specific competence to the EU.<sup>97</sup> And because the creation of a federal-like union would certainly require going beyond the current constitutional set-up of the EU, it seems safe to argue that action by the member states outside the EU legal order would also not unlawfully bypass the EP legislative powers.<sup>98</sup> In sum, while Brexit creates a window of opportunity to reform the EU constitutional architecture for the good of all 27 member states, the possibility of a multi-speed Europe remains available as a back-up: after all, if the American example can teach us anything, it is that at constitutional moment rules of the game can be unexpectedly changed – and that this is often the pre-condition for the success of a new constitutional endeavor.<sup>99</sup>

## 5. Conclusion

Brexit opens a window of opportunity for constitutional change in the EU. As this chapter argued the withdrawal of the UK from the EU compels the remaining member states and the EU institutions to amend the EU treaties as well as several quasi-constitutional EU acts regulating the composition of the EP and the financing of the EU. In this context, wider proposals for constitutional reform could become part of a package deal in which EU institutions and member states reach consensus on how to adapt the EU to the new reality of a Union at 27. During the euro-crisis, and in the run-up to the 60<sup>th</sup> anniversary of the Rome Treaties, EU institutions and national governments have outlined several blueprints to improve the EU's effectiveness and legitimacy.

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<sup>95</sup> 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.

<sup>96</sup> See Christian Calliess, “The Governance Framework of the Eurozone and the Need for a Treaty Reform” in Federico Fabbrini et al (eds), *What Form of Government for the European Union and the Eurozone?* (Hart 2015) 37.

<sup>97</sup> See Case C-370/12 *Pringle v. Ireland*, ECLI:EU:C:2012:756.

<sup>98</sup> See Federico Fabbrini, “A Principle in Need of Renewal? The Euro-Crisis and the Principle of Institutional Balance” (2016) 50 *Cahiers de droit européen* 285.

<sup>99</sup> See Michael Klarman, *The Framers’ Coup. The Making of the United States Constitution* (OUP 2016) (explaining how the US Constitution entered into force because the framers set the rule that ratification by 9 states out of 13 would be sufficient for its validity, notwithstanding the fact that the Articles of Confederation, i.e. the ‘old’ US Constitution, required unanimous consent by the 13 states as a condition to approve amendments to the Articles themselves).

Since Brexit requires action precisely in these areas, entrepreneurial policy actors may now find the space to push change forward. Certainly, as this chapter pointed out, several challenges have to be taken into account: legal obstacles and political opposition at national level constrain the scope for treaty revisions. Nevertheless, no state appears to be fond of the status quo. And the potential for differentiated integration by a core group of member states may also function as an incentive for recalcitrant countries to go along with the prospect of amendments at 27. However, if efforts to reform the constitutional architecture of the EU after Brexit were to falter for idiosyncratic national reasons, innovative ideas should be explored to establish “a more perfect Union”<sup>100</sup> in Europe.

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<sup>100</sup> Preamble, US Const.