

EDITORIAL COMMENT

The EU-27 Quest for Unity

Without doubt, the biggest challenge the European Union faces today is maintaining its unity as the UK secedes and the world goes through new paradigm shifts, technological, climatic, demographic, migratory and geopolitical.

Dominance of the “West” in terms of organizing the principles of government and international relations is over. Nothing is irreversible, nothing is self-evident, and the values on which the EU is based (Art. 2 TEU) are far from self-executing – as recent problems in Poland and Hungary illustrate.

The EU is currently in distress. There are doubts about whether it can prosper again, and even about its survival. However, we can find examples in history of other unions in distress. In order to understand our predicament better it is worth looking at some aspects of these unions’ own quests for “unity”. This reveals, among other things, that the need for executive effectiveness and legitimacy, as well as symbolism, is of all times; the debate triggered by the recently adopted Commission White Paper on the future of the EU,¹ and the Rome Declaration² should address this issue sooner or later. If not, the EU’s sustainability in the long run may well be in jeopardy and the Union could fall further apart.

The Dutch Republic

In the late 16th century, the Dutch tried to wrest control from the oppressive Spanish regime. Religion may have been the vehicle of the Dutch revolution, but the deeper springs of action also had to do with the heavy taxes exacted from the Dutch for waging wars against the protestant Germans, its main trading partners. This spurred the Union of Utrecht of the Seven Northern

1. Commission, “White paper on the Future of Europe: Reflections and Scenarios for the EU27 by 2025”, available at <ec.europa.eu/commission/white-paper-future-europe_en>. For an analysis, see further below.

2. Declaration of the leaders of 27 Member States and of the European Council, the European Parliament and the European Commission <www.consilium.europa.eu/en/press/press-releases/2017/03/25-rome-declaration/>.

Provinces of the Netherlands in 1579, followed by the Act of Abjuration,³ which was one of the sources of inspiration for the US declaration of independence. The Act of Abjuration stated a new bold concept: the Dutch wished to be loyal subjects of the Spanish King, but if a sovereign forsakes one, there is a divine right to resist him and even secede. Sounds familiar?

Of course, this union of seven provinces did not come about easily. It involved a great deal of cajoling and some bullying. The questions this burgeoning union dealt with included the relationship between the bigger and smaller provinces, national taxation, and a standing army. Emer de Vattel,⁴ who wrote the seminal and influential *The Law of Nations* in 1758, described the Dutch republic in these terms:

“... several sovereign and independent states may unite themselves together by a perpetual confederacy, without ceasing to be, each individually, a perfect state. They will together constitute a federal republic: their joint deliberations will not impair the sovereignty of each member, though they may, in certain respects, put some restraint on the exercise of it, in virtue of voluntary engagements. A person does not cease to be free and independent, when he is obliged to fulfil engagements which he has voluntarily contracted. Such were formerly the cities of Greece; such are at present the Seven United Provinces of the Netherlands, and such the members of the Helvetic body.”

It took another 67 years before the Treaty of Münster ended the war between the Dutch Republic and the Kingdom of Spain. But even then, this union was harassed from all sides, also in the 17th century during its Golden Age; that was the main reason why it was reduced to a relative non-entity in the 18th century. The Dutch example was beginning to lose its lustre, especially for those in America who wanted a strong federation. Alexander Hamilton and his allies deemed the political order of the Seven Provinces no longer adequate. Hamilton warned against collective indecisiveness of all those loose provincial powers

At the turn of the 18th century, the Netherlands underwent a short patriotic revolution, a French King, and then French annexation. The leaders of the Congress of Vienna in 1815 eventually reconstructed the Netherlands as a unitary Kingdom serving especially as a geopolitical buffer and as a guarantee that no one nation could use the harbour of Antwerp to launch an invasion on either side of the Channel. In sum: war, water and trade kept the Dutch together. And the myth of the rebellion and their valiant “Father of our

3. *Plakkaat van Verlatinghe*.

4. Emer de Vattel, *The Law of Nations*, (1758) (Liberty fund, 2008), p. 84.

Fatherland” William of Orange offered the political glue to keep this country together. The organizing unit was thus legitimate and effective for its purposes in the eyes of the Dutch ruling classes at the time.

The American Republic

Samuel P. Huntington describes how the American Revolution was a conservative revolution and a one-off in history: “an English medieval system frozen in time”.⁵ The British, waging war in India, needed more funds and increased taxation in the American colonies. Initially, the early Americans, like the Dutch earlier under Spanish rule, were proud of being subjects of the colonial power. Eventually, however, they resented the increasingly oppressive rule of Britain while they had no real representation in Parliament. Taxation and trade led to the independence movement. Thus, the declaration of independence drawn up by Thomas Jefferson brought forth the same themes as the Seven United Provinces almost two centuries earlier: forsaken by the crown they felt loyal to, they went on alone.

It is interesting that the American secession from Britain was an organized secession, as the colonies had written state constitutions and had experience with self-governance. The founders didn’t only want to leave Britain; they wanted to set up a new constitutional republic on a scale unprecedented in history. Compare this to Brexit, where the sole goal is to leave the EU, but without a clear plan of what the future will look like; that all remains to be defined.

To be sure, the future of the American Union was far from certain. The founding fathers did not see eye to eye on what the revolution had actually meant exactly. Alexander Hamilton wanted an energetic national government, with direct taxation, a treasury, a bank, a national coin, a national army to secure the Republic. Jefferson abhorred this view of the US and feared it would lead to European monarchism. He wanted a weak national government, giving the separate states as much power as possible. For him and his followers, 1800 ended the revolution as he entered the White House.⁶

5. S.P. Huntington, *Political Order in Changing Societies* (1968, Yale University Press).

6. See on this paradox Armin Cuyvers, “The EU as a Confederal Union of Sovereign Member Peoples: exploring the potential of American (con)federalism and popular sovereignty for a constitutional theory of the EU”, Doctoral Thesis, Leiden University, 2013 Meijers Reeks; MI-227, p. 228: “Many drafters and supporters of the new constitution were openly opposed to the ‘radical’ democracy of the revolution. ... the shift towards direct democracy had cost most of them their political power. But also conflicted with their deeper beliefs on social justice and the proper organization of a polity”.

In hindsight, history seems so logical; but it could have turned out quite differently. Only in 1865 was the American republic put on a more secure footing for its future. The myths of the flag, the declaration of independence, the constitution, Abraham Lincoln's Gettysburg address: these all hold a nation together. The United States of America (singular, not plural anymore) is legitimate in the eyes of the Americans.

The European Union

Europe's history is a tale of resisting any hegemony on the continent: from Rome, millennia ago, Habsburg Spain in 1648, Napoleonic France in 1815, to Nazi Germany in 1945. After World War II the Europeans did something special – albeit spurred on by Washington – they created their a “hegemony” of their “own”, a Union to which they could belong. This started out with only six founding members in the West, but decade by decade the new community grew into a European Union, encompassing most European States on the continent from North to South, and West to East.

The 60th anniversary of the Treaty of Rome has just been celebrated. The remark of President Tusk says it best: “the real two-speed Europe, was Europe during the Cold War”. The EU's achievements are formidable.

But the world is changing. Generations who remember oppression and war are dying out. Globalization is toppling the traditional way of life, and social media and interconnection of people and things put globalization on steroids. It would be a mistake to blame the EU for all of this. The EU is a good anvil to hammer on, but there are deeper changes that affect our open societies, including the even more complicated and no less frightening phenomenon of “disconnected” (or “alternative”) facts. As a result, there are rumblings of resistance against the “establishment”, from people who are uncertain of what the future may bring and afraid to lose all they have. Harvard Research⁷ suggests that increasingly young generations are open to more authoritarian government, as our politicians, judges, scientists, journalists, institutions and all kinds of experts are rightly or wrongly accused of trying to save themselves rather than better the lot of the victims of globalization. In other words, the legitimacy of our current system of government is being challenged.

Populism, nationalism, extremism are substituting feelings for facts. It was a “trust me” society, we try to answer the new problems with a “show me” mentality, but the truth is that we are turning into an “enchant me” society. As Karl Popper showed in *The Open Society and its Enemies*, institutions are a

7. See Foa and Mounk “The Danger of deconsolidation: The democratic disconnect”, (2016) *The Journal of Democracy*, 5–17.

safety valve for open societies.⁸ Break those, and it is might rather than right that governs. These institutions can only work and survive if they are legitimate – which is not the same as saying: as long as they deliver. In the EU context, moreover, we see that political leaders and institutions are becoming less and less legitimate in the eyes of more and more citizens. It seems as though these people feel they are not recognized, not heard. Their response can range from indifference or frustration to rage. It doesn't matter how well the democratic build-up of the EU is explained.

Admittedly, the solution to a real or perceived democratic deficit cannot just lie in giving more strength to the European Parliament or to national parliaments, important though that is, as that relates to increasing *legitimacy of control*. Attention should also be given to increasing *legitimacy of action*. How do we better legitimize the EU's executive power, in particular how can we better enable the European Council and the Commission to do what they must do effectively but also more legitimately in political terms and not just in legal terms. The European Council, though formed by democratically elected Heads of State or Government, comes together as a collection of separately elected leaders, not as an institution that is elected as such. Too often these leaders conveniently hide behind the broad back of what is often perceived as the unelected, faceless and technocratic Commission, and then decide as to whether to endorse or not its initiatives. That results in the ambiguous situation where they take the most fundamental political decisions, for which they will be held responsible nationally, basking in the glory if they are successful, but shifting responsibility to the "unelected" Commission whenever the decision – necessary as it may be – receives a more frosty reception nationally. This is particularly felt in such sensitive areas as migration control and security. Thus "Europe" always fails, and thus "Europe" can ultimately falter.

Member States have given the Commission – as an honest broker, or because the Member states don't trust each other, or simply because it makes sense to have a central point – more and more tasks that are more and more intrusive. In a way, they touch the "sinews of the State". To the extent the Commission is slowly evolving, at least in some respects, into a *de facto* government, its democratic mandate hasn't grown with it. The concept of the *Spitzenkandidat* was an attempt to address this issue but the fact remains that the winner wasn't on any popular ballot. As already indicated, simply strengthening the role of the European Parliament or the national parliaments – essential as that may be for other reasons – will not redress this problem either. A further, but so far fruitless, attempt to address the issue was made by the German Minister of Finance in June 2016 when he stated publicly that the Commission should no longer combine its role as guardian of the EU treaties

8. See Popper, *The Open Society and Its Enemies*, Vol. 1 (Routledge, 1945), p. 115.

– including competition and internal market rules – with its increasingly political role as a “nascent” EU government.⁹

For some time Mair¹⁰ and others have pointed to an additional problem stemming from the fact that at EU level there is no government-opposition *nexus*. They fear that failure to allow for opposition *within* the EU *polity*, i.e. classic opposition directed at the *policies* of the government, is leading to the mobilization of an opposition of principle *against* the *polity* itself, i.e. to anti-European opposition and Euroscepticism. As well as being a decision-making mechanism, democracy allows us to stage and manage social and political conflicts, even use them as a source of freedom. Too many people, at least in the UK and France, seem to think that the EU is immovably wedded to a particular set of political choices, rather than that these are (or could be) choices made by a specific configuration of national politicians and open to debate and change.¹¹ For Van Middelaar¹² a *dissensus*, expressed by such vocal national leaders as e.g. Prime Ministers Orban and Tsipras, can therefore give the EU a dynamism that its current politics of events really demands. But all of this presupposes, in his view, an essential prerequisite: the conviction that what unites us as Europeans is stronger than what divides us. To which one should add that part of that prerequisite should include, as was the case in the other unions, a common understanding of and respect for the values on which the European Union is based.

We need to think hard about the EU’s democratic foundations, because no matter what policies it devises, and how well they are executed, the legitimacy of the EU and of its institutions is being increasingly questioned.¹³ Addressing this issue adequately will, however, most probably require Treaty changes

9. This view seemed, however, less inspired by constitutional considerations than by his irritation about the lenient way he felt the Commission had been checking how the Greek Government implemented the reforms it had committed to as a *quid pro quo* for ESM loans. Moreover, the German Finance Minister failed to explain why the EU agencies, to which he wanted the current supervisory powers of the Commission in relation to competition and the internal market to be transferred, would be more independent and less political than the Commission. See “Schäuble will EU Kommission entmachten”, *Frankfurter Allgemeine Zeitung*, 29 July 2015.

10. See e.g. Mair, *Government and Opposition* (Blackwell Publishing, 2007), pp. 5–6 and 15–17.

11. Arguably, the attempts made to entrench some choices into hard-to-change treaties (e.g. the Fiscal Compact), although understandable in the crisis context, exacerbate this tendency.

12. Van Middelaar, “L’Europe doit amorcer une triple conversion”, *Le Monde*, 20 March 2017; id. “The EU must protect, improvise and tolerate opposition”, *The Guardian*, 25 March 2017.

13. See on the trend: Eurobarometer of November 2016, available at <ec.europa.eu/commfrontoffice/publicopinion/index.cfm/General/index>; see also the more recent survey of YouGov, available at: <yougov.uk/news/2016/11/28/five-findings-yougovs-european-mega-survey>.

and therefore could take many years. So it is not surprising that current efforts are aimed in the first place at trying to achieve a minimum of consensus about what the 27 EU Member States should do jointly. The Commission's White Paper on the future of the Union launches the debate about that question, without ruling out the need for Treaty changes.

The Commission's White Paper on the future of the Union

The White Paper was presented by President Juncker to the European Parliament on 1 March 2017. It is intended to mark the beginning of a process for the EU27 to decide on the future of their Union. A series of "Future of Europe Dialogues" will be held across Europe's cities and regions. As part of the White Paper process, the Commission will also present a series of five Reflection Papers on what it considers key themes for Europe's future. They will deal with EU finances, the social dimension of the EU, EU defence, harnessing globalization, and the deepening of the EMU. President Juncker's State of the Union speech in September 2017 will take these ideas forward, so the first conclusions can be drawn at the December 2017 European Council. This should help to decide on a course of action to be rolled out in time for the European Parliament elections in June 2019. The White Paper looks at how Europe will change in the next decade, from the impact of new technologies on society and jobs, to pros and cons about globalization, security concerns and the rise of populism. It spells out the choice we face: being swept along by those trends, or embracing them and seizing the new opportunities they bring. Europe's population and economic weight is falling as other parts of the world grow. By 2060, none of our Member States will account for even one percent of the world's population – a compelling reason for sticking together to achieve more. Unsurprisingly therefore, the Commission's mantra is that as a positive global force, Europe's prosperity will continue to depend on its openness and strong links to its partners.¹⁴

The White Paper sets out five scenarios, each offering a glimpse into the potential state of the Union by 2025 depending on the choices the EU makes. The scenarios cover a range of possibilities and are illustrative in nature. They are neither mutually exclusive, nor exhaustive.

- **Scenario 1: "Carrying On"** – The EU 27 focuses on delivering its reform agenda in the spirit of the June 2014 Strategic Guidelines of the European Council, the October 2014 Ten Priorities of the Juncker

14. See the European Commission press release of 1 March 2017: "Commission presents White Paper on the future of Europe: Avenues for unity for the EU at 27".

Commission, and the September 2016 Bratislava Declaration of 27 Member States.

- **Scenario 2: “Nothing but the Single Market”** – The EU27 is gradually re-centred on the internal market as the 27 Member States are not able to find common ground on an increasing number of policy areas.
- **Scenario 3: “Those Who Want More Do More”** – The EU27 proceeds as today but allows willing Member States to do more together in specific areas such as defence, internal security or social matters. One or several “coalitions of the willing” emerge.
- **Scenario 4: “Doing Less More Efficiently”** – The EU27 focuses on delivering more and faster in selected policy areas, while doing less where it is perceived not to have an added value. Attention and limited resources are focused on selected policy areas.
- **Scenario 5: “Doing Much More Together”** – Member States decide to share more power, resources and decision-making across the board. Decisions are agreed faster at EU level and rapidly enforced.

It must be admitted that the Commission’s choice to opt for various scenarios instead of a single blueprint reflects a realistic assessment of its role in the EU. “I am not a dictator”, President Juncker is reported to have replied to those Members of the European Parliament who reproached him for lack of leadership.¹⁵ In saying this he made it clear that the Commission, as indicated earlier, is certainly part of the EU’s executive but it is not its government in the classic sense of the word, and that especially at this critical point in time when it appears to be so difficult to build a consensus on the way forward, it should limit itself to stimulating the debate about the EU’s future and put the responsibility where it ultimately belongs: the EU Member States and its citizens. Indeed, addressing now fundamental issues of a constitutional nature would probably deepen rather than help bridging current divisions between the 27 Member States.

The White Paper and the law: will form follow function?

For any critical reader of the White Paper, it will immediately be clear that it is a political document, not a legal analysis. In fact, the paper is brutally direct on the role that law played in the design of the different scenarios:

“The five scenarios are illustrative in nature to provoke thinking. They are not detailed blueprints or policy prescriptions. Likewise, they deliberately

15. See Van Middelaar, “Welke Premier sturen we erop uit”, *NRC Handelsblad*, 3 March 2017.

make no mention of legal or institutional processes – the form will follow the function.”

Nevertheless, or precisely for this reason, a legal analysis of the different scenarios remains interesting. To begin with, EU law, as it stands today, may impose certain limits to the developments envisioned in some scenarios. In addition, EU law may not be able to deliver the legal instruments and flexibility that a reading of some scenarios implicitly seems to presume. Since even the flexibility of EU law has limits, form cannot endlessly follow function.

Moreover, a legal analysis is even useful to assess the *political* viability of the different scenarios. For example, some scenarios may require Treaty change, reducing their political chances of survival, given, as indicated above, the time needed to agree and ratify Treaty amendments, but also the risk that negotiations may unravel a careful balance struck in 2009. Some other elements may only be possible by going outside the framework of EU law proper, whilst nevertheless building on and interfering with its *acquis* and selectively using its institutions. Such elements, therefore, contain an implicit but consequential choice between the Community method and the increasingly popular Union method, used in connection with e.g. the banking and sovereign debt crisis, unified patent protection and more recently Brexit and the EU-Ukraine association agreement.¹⁶

Despite its political nature, therefore, the elaboration of the five scenarios in the White Paper cannot escape legal scrutiny. Indeed, whatever political choice will be made with regard to the different scenarios, or a combination of them, it must rest on a solid legal basis, and a solid understanding of their legal and constitutional consequences. An attempt is therefore made here to identify

16. See Chancellor Merkel’s speech at the opening ceremony of the 61st academic year of the College of Europe in Bruges on 2 Nov. 2010, pp. 7–8, claiming that the choice is not between the community method and the intergovernmental method, but between a coordinated European position and nothing at all. In other words, a coordinated European position can be arrived at not just by applying the community method; sometimes a coordinated European position can be achieved through the intergovernmental method. The crucial thing is that we have common positions on important issues. In her view, if all the major stakeholders – the Union institutions, the Member States and their parliaments – complement each other by acting in a coordinated manner in the areas for which the EU and Member States are competent, the immense challenges facing Europe can be tackled successfully. “Coordinated action in a spirit of solidarity – each of us in the area for which we are responsible, but all working towards the same goal”, that is for her the Union method. The problem with this Union method is, however, that it sometimes leads to the adoption of “hybrid” rules, i.e. EU rules and rules agreed on a purely intergovernmental basis co-exist, whilst neither of these two sets of rules can be applied autonomously but are fully interdependent, thus affecting the supremacy and autonomy of the EU legal order, as illustrated by the application of the Union method in relation to patent law, or financial services in the context of sovereign debt crisis.

a number of overarching legal issues affecting the elaboration and implementation of all the scenarios and the relation between them.

The first issue to be aware of is that the assumption cannot be that EU law is endlessly flexible, equally allowing repatriation of competences, doing much more with existing competences, such as completely taking over national borders, or creating a multi-speed Europe. Yet, unlike other future-oriented papers, such as the Five President Report on the future of the EMU¹⁷ or the Commission's Blueprint,¹⁸ the White Paper doesn't distinguish between options that would require Treaty change and those that do not. *A fortiori*, it doesn't distinguish between minor Treaty changes and fundamental changes that would for instance alter the institutional balance, institutional structure or fundamental values and objectives of the EU. Such fundamental changes would *de facto* trigger a debate on the very nature of the EU. As necessary as such debate may be in order to ensure the EU's sustainability in the long run, this may not be the most ideal moment to have it.

Although the wish to consider political options "outside the legal box" may be welcomed in some regards, this approach has its limits, certainly in the EU context where the law plays a relatively central role in the EU compared to national systems.

A second issue to be avoided when examining the White Paper is the false dichotomy between the internal market and "other" areas of EU action. Scenarios 2 and 4, for example, should not imply that you can focus on the market alone, or on separate other issues whilst hoping to preserve at the same time the integrity of the market. Legally, this is not so simple. The internal market inherently encompasses and touches on other issues that are not directly market related, but that may affect the functioning of the market. The EEA agreement and, particularly, the flanking policies illustrate these interconnections quite well. Indeed, access to healthcare or social benefits, for example, affects the functioning of the market, as do environmental norms, collective labour rights, tax benefits, access to education, measures to protect the national language, mutual recognition of judgments or personal data protection. Similarly, EU citizens who work in other Member States have a general right to be treated equally to national workers based on the Treaties. This is a core tenet of the internal market, but deeply affects national law in fields that, according to a possible interpretation of scenario 2, could be reserved or "given back" to the Member States.

17. The Five Presidents' Report: Completing Europe's Economic and Monetary Union, 22 June 2015, available at <ec.europa.eu/commission/publications/five-presidents-report-completing-europes-economic-and-monetary-union_en>.

18. "A blueprint for a deep and genuine and monetary union", COM(2012)final, 28 Nov. 2012.

Thirdly, and closely related to the problematic market-non-market dichotomy, one should distinguish between the different “channels” through which the EU affects its Member States. The White Paper largely focuses on the competence of the EU to regulate certain areas, and often seems to be concerned with reducing the amount of regulation. Reducing regulation cannot implicitly equate with reducing the impact of EU law and increasing Member State freedom. Adopting regulation, is only one, albeit of course an important, channel through which the EU impacts and restrains Member States. In addition to regulation, the Treaties contain multiple obligations, including negative integration obligations, which bind the Member States where no regulation is adopted. In fact, where regulation is reduced or rescinded, the importance of primary law, and hence the EU Court of Justice, will increase, unless Treaty obligations themselves are removed. This will be particularly true in areas where legislation was inspired by the need to refine or develop the per definition casuistic and often pro-integration case law of the ECJ. Rescinding the posted workers directive, for example, may only strengthen the right of service providers to bring (third country national) staff without respecting national labour standards.¹⁹ Moreover, the Treaties also contain several general principles that the Member States need to respect, including the principle of loyal or sincere cooperation, which obliges Member States not to undermine any EU action, even through actions in areas where the EU has no competence whatsoever. Even where the EU “does less”, therefore, or focuses on the market alone, Member States will still be limited when regulating many sensitive and non-market issues at national level.

Fourthly, and again related, one should not assume that the several freedoms underpinning the internal market can be separated. In fact, reducing certain freedoms would often require Treaty change. Moreover, the trend in the case law of the ECJ, since *Gebhard*,²⁰ has been an increasing convergence of the four freedoms. In addition, the different freedoms also build on several underlying general principles, including equal treatment and non-discrimination. Even if some of the Treaty freedoms were reduced via Treaty change, the general right to equal treatment would still significantly restrain the Member States.

Fifthly, in many scenarios, various claims are made about risks to EU citizenship, be it citizenship rights not being protected, or some categories of EU citizens getting more rights than others. Yet, within the limits set by EU secondary law, EU citizens inherently have a right to equal treatment. It will be

19. See e.g. already Case C-113/89, *Rush Portuguesa v. Office National d'immigration*, EU:C:1990:142.

20. Case C-55/94, *Gebhard v. Consiglio Nazionale dell'Ordini degli Avvocati e Procuratori di Milano*, EU:C:1995:411.

legally impossible, therefore, in the elaboration of any scenario, for a situation to arise where, for example, a German citizen would have more rights in France than a Hungarian citizen. In fact, removing secondary law may only increase the scope of the right to equal treatment, as it is secondary law that restricts this right, such as under Article 24 of Directive 2004/38.²¹

Sixthly, all scenarios equally presume that the euro is continued, yet they do not explain how this is possible, especially in the “less EU” scenarios. What is more surprising still is that different conclusions on the euro are somehow drawn in the different scenarios, even though there are no relevant differences for EMU mentioned. In all scenarios but scenario 5, EMU is presumed to develop incrementally. However, in the Five Presidents Report, referred to above, it was still assumed that EMU could only become really stable with far-reaching measures that required Treaty change and political union. Only in scenario 5 is the presumption that the Five Presidents Report will be followed, through a big leap forward, yet when elaborating that scenario it remains to be explained how the necessary political union could be achieved.

Seventhly, in certain scenarios the White Paper appears to imply a higher degree of flexibility within the EU constitutional and institutional system than seems available under the current Treaties. Indeed, as presently regulated, enhanced cooperation may only be used insofar as it does not undermine the internal market or economic, social and territorial cohesion; it may not draw on the EU budget without approval of all Member States; it must respect all general principles of EU law; and before it may be used a serious attempt must be made to legislate with all Member States. A true multispeed Europe may be a desirable political model, but political feasibility aside, it requires fundamental changes to the EU Treaties and the systems and models of decision-making and representation.

Eighthly, and lastly, when elaborating the scenarios attention needs to be paid to the national legal dimension. National constitutional law, in particular, increasingly poses limits to EU integration. These limits become particularly relevant for scenarios 4 and 5, where the EU would do much more, also in very sensitive terrains such as criminal law and taxation. With the German *Bundesverfassungsgericht* in the lead, many national constitutional courts may object, *inter alia* blocking the ratification of Treaty amendments needed in the different scenarios, for example on EU fiscal capacity, mutual recognition of criminal evidence, or completely transferring border controls to the EU.

21. Directive 2004/38/EC of the European Parliament and the Council on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States, O.J. 2004, L 158/77.

Conclusions

On the occasion of the 60th anniversary of the Treaty of Rome, three weeks after the White Paper was adopted, the 27 Member States, the European Council, the European Parliament and the Commission adopted the relatively short and abstract Rome Declaration, whereby they pledged to work towards a “safe”, “secure”, “prosperous”, “sustainable”, “social” and “a stronger Europe on the global scene”. Each of these “objectives” was illustrated by a series of examples, mirroring to some extent the themes to be addressed in the coming months by the Commission reflection papers announced in its White Paper. Like the White Paper, the Declaration starts with an assessment of what has been achieved over the last 60 years:

“We have built a unique Union with common institutions and strong values, a community of peace freedom, democracy, human rights and the rule of law, a major economic power with unparalleled levels of social protection and welfare ...”

and it ends with a commitment to deliver on the agreed objectives and to remain united:

“We as Leaders, working together with the European Council and among our institutions, will ensure that today’s agenda is implemented, so as to become tomorrow’s reality. We have united for the better. Europe is our common future.”

The Declaration generated a substantial amount of political comment and featured prominently in the media of most Member States – much more than the White Paper. Overall the message that came through was that the EU still has a valid purpose and most of the leaders praised the unity that was maintained when they met in Rome and in the Declaration itself. One can reasonably conclude that the White Paper and the Declaration, if not exactly consistent with each other, are complementary in the sense that both documents seek to contribute to the Union’s sometimes tortuous but inevitable quest for unity. The history of other unions suggests that perhaps the EU should not impose too high a norm or threshold of unity: a functioning union does not require perfect unity or agreement. In fact, one of its purposes is to face and overcome the inherently different interests of the parties, as these parties agree that the benefits of their cooperation outweigh the downside of the compromises they will have to make. In order to enable this process to work, however, the EU needs to be based on several solid anchors, as the experience of other unions shows; and the EU seems to be searching for these

anchors now that existing ones do not seem to be as permanent as was presumed for a long time. As indicated earlier, executive effectiveness and its legitimacy as well as symbolism can help to provide such anchors; but there should be no illusion: the EU is still far away from a “We the People” moment, as the US experienced at a crucial point in its constitutional history, and it may well never reach that stage.