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It is Time for the Euro Area to Develop Further Closer Cooperation Among its Members

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IT IS TIME FOR THE EURO AREA TO DEVELOP FURTHER CLOSER COOPERATION AMONG ITS MEMBERS

By Jean-Claude Piris*

Abstract

The aim is to examine what could be done to face the EU serious crisis –euro crisis, distrust of citizens, inadequacy of decision-making with 27 heterogeneous Member States, dysfunctional institutions.

The option to continue on the current path does not look promising, and a substantial revision of the Treaties is politically excluded.

Therefore, a two-speed EU should be considered, with an "avant-garde" of States, probably based on the euro area:

- In a softer version, using possibilities offered by the Treaties,
- In a bolder one, with an additional treaty to be ratified by these States, offering a better framework to act together, while fully respecting their EU obligations.

* This paper was written during the academic year 2010-2011, while the author was a Senior Emile Noël Fellow at the Jean Monnet Center and a Straus Institute Fellow, in New York University, for which he is grateful to Professor Weiler. The author was the Legal Counsel of the European Council and of the European Union's Council, Director-General of the Legal Service of the Council, for more than 20 years, until November 2010. In January 2012, Cambridge University Press will publish his book based on this work, which title will be: "The Future of Europe: Towards a Two Speed EU?"

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INTRODUCTION

The European Union (EU) is currently facing three huge challenges, which are making the present period the most serious crisis the EU has ever known.

First of all, there is an immediate and urgent problem, which already affects its stability, and might even affect its survival if not solved rapidly: the acute crisis of the euro area. The imbalances of the EU's economic and monetary union (EMU), as it is conceived in the EU Treaties, are serious. They cannot be corrected, as long as Member States having the euro as their currency remain the masters of their budgetary and economic policies, as they are allowed to by the Treaties.

Secondly, this crisis is happening at a time when the trust and enthusiasm of the European public opinion for the EU is diminishing. This trust shall hardly be regained with an EU program which, based on the need to solve the euro area crisis, could be characterized as exclusively aiming at providing a reduction in social welfare, an increase in budgetary savings and a stricter economic discipline. This will not only risk diminishing the trust of the populations for the EU but, moreover, open the way to populism, as elections in a number of EU countries are already showing. Therefore, one should think about a wider and more ambitious program, appropriate to give hope for the future.

Thirdly, it is by no means obvious that the institutions of the EU, which are not working well, would be able to deliver such a program with their present decision making system. As a result of its dysfunctionality, the EU does not deliver enough internally and has become less relevant in the external world. This is all the more so, since the EU now has 27 Member States with different levels of economic development and extremely different needs. Yet, its current decision making system is largely based on the system of *"one-decision-fits-all"*, inherited from the time when the aim was to establish a uniform common market among the Six rather homogeneous founding Countries.

A priori, the three fundamental challenges mentioned above could legally be solved by substantively amending the EU Treaties, but this is politically opposed by many (if not all) Member States. What if this leads to stagnation and a growing irrelevance of the

EU? Would developing closer cooperation among a group of Member States based on the composition of the euro area help to open up another way forward?

The purpose of this Paper is to examine, in particular from a legal point of view, the possibility for such a group to act temporarily in closer cooperation in order to be able to progress, without changing the EU Treaties. These States would develop common policies and actions before the other Member States, thus playing the role of an "avant-garde". The others would join them when willing and able. The aim of the process would be to improve the working of the entire EU.

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CHAPTER 1: ASSESSMENT OF THE PRESENT SITUATION OF THE EUROPEAN UNION

A. The Political Institutions suffer from deficiencies which hamper the functioning of the EU

I. The difficulty to take decisions in the Council

As to the decision making in the Council, it is true that, actually, contrary to what most people think, common agreement of the Member States, or unanimity in the Council, are required for many of important decisions to be taken, as shown by the list below.[1] However, this list looks difficult to further be reduced, because these provisions, after the successive enlargements of the scope of QMV in the Single European Act and in the Maastricht, Amsterdam, Nice and Lisbon Treaties, are very sensitive for most Member States.

On institutional matters:

- Accession of a new Member State (Art. 49 TEU),
- Determining the seats (Art. 341 TFEU) and the rules governing the languages (Art. 342 TFEU) of the EU institutions,
- Composition of the European Parliament (Art.14(2), 2nd subparagraph TEU),
- Conferral of jurisdiction on the Court of Justice in disputes relating to the application of EU acts creating European intellectual property rights (Art. 262 TFEU),
- System of own resources (Art. 311, 3rd subparagraph TFEU) and adoption of the multiannual financial framework (Art. 312(2) TFEU),
- Flexibility clause (Article 352 TFEU, formerly 308 TEC),[2]
- Association of the overseas countries and territories with the EU (Art. 203 TFEU),
- Accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Art. 6(2) TEU and 218 (8, 2nd subparagraph) TFEU).

[1] See my book on the Lisbon Treaty, Cambridge University Press, June 2010, 450 pages, Appendix 8 (pp. 386-397).

[2] The use of Article 352 will also need the adoption of a law in Germany, as had been requested by the German Constitutional Court in its judgment on the Lisbon Treaty of June 2009.

Out of all these matters, it deserves to be noted that, on the adoption of the multiannual budget, Article 312(2), 2nd subparagraph, allows the European Council, acting unanimously, to authorize the Council to decide by QMV.

On substantive matters:

- Determination of the existence of a serious and persistent breach by a Member State of the EU's values (Art. 7 TEU),
- Any decision in the field of foreign policy and defence (Art. 31 and 42(2) TEU), including to proceed with enhanced cooperation (Art. 329(2), 2nd subparagraph TFEU) ,
- Conclusion of some international agreements (Art. 218(8), 2nd subparagraph TFEU), and of any international agreements containing some elements belonging to the Member States' competences, even if most commitments to be taken in the international agreement belong to the competences of the EU ("mixed agreements").
- Some matters concerning commercial policy (Art. 207(4), 2nd subparagraph TFEU),
- Any decision concerning direct or indirect taxes (Art. 113, 192(2)(a), 194(3) TFEU),
- Measures concerning social security, with a few exceptions (Art. 153(2), 3rd subparagraph and 21(3) TFEU). In any case, provisions adopted in that domain "shall not affect the right of Member States to define the fundamental principles of their social security system and must not significantly affect the financial equilibrium thereof",
- Addition of new rights for EU citizens (Art. 25 TFEU),
- Actions to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation (Art. 19(1) TFEU),
- Most delicate measures in the field of protection of the environment (in particular measures "affecting" town and country planning, quantitative management of water resources or "affecting, directly or indirectly", the availability of those resources, land use, with the exception of waste management, as well as measures "significantly affecting" a Member State's choice between different energy sources and the general structure of its energy supply: see Art. 192(2)(b) TFEU),
- Most important measures in the field of energy (measures "significantly affecting" a Member State's choice between different energy sources and the general structure of

its energy supply, or measures primarily of a fiscal nature: see Art. 192(2)(c) and Art. 194 (2) TFEU),

- Acts concerning family law(Art. 81(3)TFEU),
- Acts concerning some aspects of cooperation in criminal law and criminal procedure (Art. 82(2 and 3), 83(3), 86 TFEU),
- Provisions concerning passports, identity cards, residence permits or any other such document (Art. 77(3) TFEU),
- Establishment of a European Public Prosecutor (Art. 86 TFEU),
- Operational police cooperation (Art. 87 (3), 1st subparagraph TFEU),
- Measures setting out the conditions and limitations under which the competent judicial and police authorities of a Member State may operate in the territory of another Member State in liaison and in agreement with that Member State (Art. 89 TFEU).

Some of the issues on this list would deserve discussion, for example the provision on tax matters which has a very large scope, but others have the potential to raise sensitive problems for a number of Member States.

In any case, the major problems in the Council decision making are not due to an excess of unanimity rule, but to other causes:

Firstly, where applicable, qualified majority voting (QMV) requires a high threshold:

- until 31 October 2014 (and probably until 31 March 2017, as foreseen in Article 3(2) of Protocol Nr. 36 on Transitional Provisions), QMV required will remain the same as in the treaties before Lisbon, i.e. essentially based on weighted votes attributed to each Member State, as it has always been the case before; however, since the Treaty of Nice, the majority must also represent at least 62 % of the EU's population;
- after that date, QMV will be based on a "double majority" with two thresholds: 55 % of the Member States and 65 % of the EU's population.

These requirements are very demanding. Moreover, the culture is such that Member States always try to take into account the specific problems caused to one of them by a

given proposal, and often try to avoid to go to a vote and to put some of them in a minority.[3]

Secondly, under the Treaty provisions, the right of veto has two effects: not only does it protect the Member State exercising it from adopting a legislation or a decision which would cause problems for its economy, culture or values but, at the same time, it also forbids other Member States to go ahead, even if that would not harm the interests of the one exercising the veto.

Thirdly, the simple fact that the number of participants is higher makes the decision-making longer, more cumbersome and more difficult. Each Member State's representative tries to modify the legal obligations to be adopted in order to allow his authorities not to change its existing national law, or to revise it as little as possible.

Fourthly, the 27 Member States have extremely different needs. As a consequence, it has become difficult to adopt a decision on any matter, be it economic, social, environmental, judicial cooperation, etc. which would be apt to suit all interests and needs of so many and so different countries. To begin with, the Council, as a legislator, does not receive enough proposals, or in any case substantive enough proposals, from the Commission. This is due to the fact that the Commission itself cannot agree on substantive proposals, at least in some matters, such as the Area of Freedom, Security and Justice, or on tax, social or environmental matters. Then, even if and when the Commission manages to reach a consensus to make a meaningful proposal (see below the difficulty for a Commission composed of one member per Member State to decide through a simple majority vote), the Council has difficulties in reaching the QMV or unanimity necessary to adopt the act proposed, because of the diverging views of its 27 members.

II. <u>The progressive weakening of the Commission</u>:

Most observers would agree that the Commission has gradually become weaker since the 1990's. This is due to a number of factors, among which the major ones are probably

[3] This has been symbolically reflected over the years by different political mechanisms, such as the 1966 so-called "Luxembourg compromise", or the 1994 "Ioannina decision" and the 2009 "Ioannina-bis mechanism" (see my book on the Lisbon Treaty, pages 223-224).

its composition, as well as the pressures from both the EP and from the biggest Member States.

The political decision to go back to the composition of one Commissioner per Member State, if formally adopted and legally put in place as it has been politically promised to Ireland, would reinforce the consequences such a composition has had already. Firstly, such a composition results in a too high number of Commissioners. Therefore, the Commission cannot work efficiently as a "college", as it should do according to the Treaty, but forces its President to take the lead on all major subjects. Secondly, the principle of independence of Commissioners vis-à-vis their country of origin has become theoretical, which has serious consequences for the legitimacy of the decision-making in the Commission.

This is why the most important measure the Lisbon Treaty contains to increase the effectiveness of the Commission is the reduction of the number of Commissioners from one per Member State to two thirds of the number of Member States, with a system of equal rotation. The Treaty provides that this measure should be applied as from 1 November 2014 (Article 17(5) TEU). In the meantime (i.e. until 31 October 2014), Article 17(4) TEU provides that the Commission is composed of one national per Member State. However, after the failure of the first Irish referendum on the ratification of the Lisbon Treaty, in June 2008, the European Council promised in December 2008 to abandon the planned reduction of the number of Commissioners, in order to facilitate the success of the second referendum. The political decision of the European Council will have to be legally implemented through a "decision ..., in accordance with the necessary legal procedures".[4]

[4] See Presidency Conclusions, European Council of 11-12 December 2008 (para. 2, doc. 17271/1/08 REV 1) and Presidency Conclusions, European Council of 18-19 June 2009 (para. 2, doc. 11225/1/09 REV 1). Some argue that a decision of the European Council would be sufficient, because of the phrase at the end of Art. 17(5), 1st subpara., TEU reads: "the Commission shall consist of a number of members ... corresponding to two thirds of the number of Member States, unless the European Council, acting unanimously, decides to alter this number". However, according to others, including the author of this book, this legal interpretation is not correct, as this phrase should be read in its context. First, it should be read together with paragraph 4 (limiting until 31 October 2014 the composition of one Commissioner per Member State). Second, it should be read particularly together with the next subparagraph of paragraph 5, which sets out the conditions governing the principle of a reduced Commission (establishment of a strictly equal rotation system, reflecting the demographic and geographical range of

A Commission with one Commissioner per Member State runs the risk of falling into intergovernmentalism. Member States tend to identify "their" Commissioner as "their representative" in the Commission, who would be there to defend their national interests. This runs contrary to the spirit and the letter of the Treaties, which demands that the Commission's members are independent from governments.[5] It should be kept in mind that all decisions of the Commission are adopted by a simple majority, with one vote per Commissioner. An "intergovermentalist" trend would jeopardise the legitimacy of the Commission's decisions. On a border case, a majority of 14 Commissioners could 'represent' only 12,65 % of the EU population (adding the population of the 14 smallest Member States). Such a majority could easily outvote the six Commissioners who are nationals of the six largest Member States having more than 70 % of the EU's total population. This is of course theoretical. However, the argument might be used in order to weaken the legitimacy of the Commission's decisions when it deals with politically sensitive dossiers (notably in the field of competition, merger control or State aid). Moreover, as demonstrated by Philippe de SCHOUTHEETE, it is becoming impossible to vote in a Commission composed in such a way, as a non-weighted vote would lack legitimacy. Therefore, decisions are made by consensus, which means that, with 27 members, the Commission can hardly take decisions.

Finally, since the resignation "en masse" of the Santer Commission,[6] the Commission has been weakened by the EP. It is true that the Treaty gives the EP the right to vote a motion of censure on the activities of the Commission (Article 234 of the Treaty on the functioning of the EU – TFEU). Through the years, using this right as a means of pressure, the EP has *de facto* won more powers than those legally conferred on it in the

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all the Member States, which are developed in more detail in Article 244 TFEU). Otherwise, Article 244 TFEU would be deprived of any legal meaning. Read in conformity with these texts, the phrase of §5, 1st subparagraph of Article 17 TEU, therefore **does not allow the European Council to depart from the principle of a smaller Commission**. The purpose and meaning of this sentence is to enable the European Council to further reduce the number of Commissioners when the EU is enlarged to include more Member States, so as to be able to keep a reasonable number of Commissioners. In other words, any decision of the European Council will have to respect both the Treaty principle of the reduction of the number of the members of the Commission and the principle of a strictly equal rotation system. Declaration No. 10 confirms this interpretation: *"(...) when the Commission no longer includes nationals of all Member States, the Commission should (...)"*. The debate on the number of Commissioners might resurface on the occasion of future EU enlargements.

[5] Art. 17(3), 2nd and 3rd subpara., TEU.

[6] The resignation of all members of the Commission presided by Jacques SANTER in 1999 was caused by pressure of the EP which however did not vote a motion of censure.

Treaties. One illustration on this excessive domination of the Commission by the EP may be found in the so-called "Framework Agreements", the adoption of which is imposed on the Commission by the EP at the beginning of each legislature. The last one in particular, concluded in October 2010, shows how much the autonomy of the Commission and of its President are affected by the EP.[7]

Moreover, Member States, and especially the bigger ones, do put strong pressures on the Commission when their national interests are at stake.

III. The relative failure of the European Parliament

The EP often tries (with many successes), through pressure, to get new powers not conferred on it in the Treaties. Its technique is to group together two or several files, some of which require its consent or co decision to be adopted, while the others only require a consultative advice. The EP then makes known that it will give its agreement on the first files only if and when the Council will have accepted its requests on the other files. This is common practice. It is a distortion of the Treaties, as it tends to confer on the EP powers not foreseen in the Treaties, therefore affecting the balance between the institutions.

One might also referring to the continuing disagreement of national Parliaments of the Member States with the request of the EP to play an active role in the security of the CFSP and the CSDP, despite the very limited competences conferred on it by the Treaties.[8]

Despite its success in gaining new powers, the EP might however be regarded as having politically failed, at least relatively.

"Relative failure" means that the EP is "relatively successful". The EU is obviously benefiting from an EP whose members are democratically elected. For example, the EP

[7] See Joseph H.H. WEILER *"Dispatch from the Euro Titanic: And the Orchestra Played On"*, Editorial, European Journal of International Law, Vol. 21, No. 4, 2011.

[8] During its meeting in Budapest on 30-31 May 2011, the 45th meeting of COSAC (Conférence des organes spécialisés dans les affaires communautaires) has adopted the following conclusions on this issue: *"Given the special nature of this policy area, COSAC underlines the crucial role of national Parliaments in the parliamentary scrutiny of the CFSP as well as the CSDP"* (Annex II, Conclusion 2.3, p. 18, doc. 11156/11 dated 6 June 2011).

has played a significant role in the case of the Directive on Services, or on the REACH Regulation.[9] In the future, with its new powers obtained in the Lisbon Treaty, the EP will certainly help re-balancing the trend of the Council, since the 9/11 events, to adopt strong legislation to fight terrorism without always fully respecting fundamental freedoms. The role of the EP in the Area of Freedom, Security and Justice, in which EU legislation is adopted, since the entry into force of the Lisbon Treaty, by co-decision, will be particularly important. Besides, this relative failure is to be mostly imputed, not on the EP or on the MEPs, but on the very structure and essence of the EU.

Member States decided to increase more and more the powers of the EP, Treaty after Treaty. The results of these decisions have not been as positive as expected. The EP is still perceived as not bringing enough legitimacy to the EU.

The turnout for the EP elections has steadily decreased since 1979, date of the first direct elections, from 63 % in 1979 to 43 % in 2009. One may have some doubts about the actual political legitimacy of the EP. Actually, its Members are more accountable to their political party than to their voters. In the EU, there is no Government nor parliamentary majority to support a Government in the EP, and nobody has the power to dissolve the EP before the end of the five year duration of the legislature, even in the case of a very grave problem. Member States have wished to remain free to choose the modalities of the elections to the EP, and they have often chosen proportional representation. Most countries have decided to organize elections in a single national constituency. This system does not allow the voters to know their MEP.

The main weakness of the EP (of course not imputable to it) is that, in Europe, the political game takes place at the national level. The national country of the voters is the place where, through political elections, they are able to choose their government, which is obviously not the case with the EP elections.

Equally not imputable to the EP, is the fact that it does not deal with issues which are the most important for the voters, because these issues remain largely within the

[9] Directive 2006/127 EC on Services in the Internal Market, 12 December 2006, and Regulation EC/1907/2006 on Registration, Evaluation, Authorization and Restriction of Chemicals (REACH), 18 December 2006.

competences of the States, be it unemployment and the labor market, social security and public health, education and training, direct and indirect taxes, public services, decisions on foreign policy, etc.

On the whole, as Joseph H.H. WEILER put it already in 1999:

> *a system that enjoys formal legitimacy may not necessarily enjoy social legitimacy (...) democracy can be measured by the closeness, responsiveness, representativeness, and accountability of the governors to the governed.*[10]

These conditions are not met in the case of the EP. This is why there might probably now be an understanding among most political authorities of the 27 Member States that enhancing further the EP's powers will not help to solve the EU's legitimacy problems, because these problems are not an issue of formal democracy. EU's legitimacy derives to a large extent from the democratic legitimacy of the Member States themselves.[11] Some think that the role of National parliaments in the EU decision-making process should be increased. It is to be stressed that this could be done without amending the EU Treaties.[12]

IV. The difficult birth of the External Action Service

In order to take a major step forward in the field of external affairs, the Lisbon Treaty established a new *"triple-hatted"*[13] High Representative of the Union for Foreign Affairs and Security Policy (HR - Article 18(1) TEU) and an European External Action Service (EEAS; Article 27(3) TEU). In order to allow the EU to progress on European Security

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[10] "The Constitution of Europe", "Do the new clothes have an Emperor? and other essays on European Integration", Joseph H.H. WEILER, Cambridge University Press, 1999 (364 pages), page 81.

[11] According to the former UK Prime Minister Tony BLAIR: *"The European Parliament is more directly democratic but it is more remote from people than their National Parliaments or their elected governments. The Council of Ministers is closer to people in the sense that the British Prime Minister is directly accountable to the British electorate in a very obvious way and yet, in terms of the European decision we take, [the Council] is less directly democratic. That's the dilemma."* Cited in A. MORAVCSIK *"Federalism in the EU: Rhetoric and Reality"*, on page 182.

[12] Firstly, by each Government giving more information and more say to its Parliament, through systematic pre and post briefings of the sessions of the EU Council and of the European Council. Secondly, by collectively helping National Parliaments to exercise their powers under the Lisbon Treaty, through giving them the means to organize a common secretariat, which might be an efficient measure to better coordinate.

[13] The new HR takes over the tasks of the ex HR (Javier SOLANA), of the ex-Commissioner for External Affairs (Benita FERRERO-WALDNER) and of the Minister of Foreign Affairs exercising the semestrial Presidency of the Council of Foreign Affairs.

and Defence Policy (ESDP), the Treaty also provides for the possibility of a permanent structured cooperation between willing Member States *"whose military capabilities fulfill higher criteria"* (Articles 42(6) and 46 TEU and Protocol No. 10).

The probability is that these new provisions will take years before giving actual positive results. At the time of writing (i.e. 18 months after the entry into force of the Lisbon Treaty), the situation has not improved. The new HR, Lady Catherine ASHTON, has so many tasks that it is difficult for her to assume all of them. Moreover, being in the same time in the Council and in the Commission entails difficulties. The mood among foreign Ministers of the Member States is not very good. Cooperation is not perfect, neither with them, nor with the Commission.

The decision to establish the EEAS's organization and functioning foreseen in Art. 27(3) TEU has been adopted on July 26, 2010,[14] but the task of establishing an actual efficient single external service is just beginning, and it will take years before being achieved. As for now, the different services to be merged are still working in a number of different buildings in Brussels, and the unity and *"esprit de corps"* of the new service remain to be built. For the external world and the third countries, positive results are not yet apparent. On the contrary, quarrels on the delimitation of the respective competences of the EU and of the Member States and about the extent of the new powers of the EP in external affairs have been aggravated. Difficulties have prevented the EU Delegations in the world, particularly those accredited to international organizations, to speak with one voice. Finally, Ministers of Defence have decided that, as far as the new possibility of *"permanent structured cooperation"* offered by the Treaty of Lisbon was concerned, the time was not ripe to begin and implement it.

Therefore, the tools given by the Treaty of Lisbon exist, but their concrete implementation is more difficult than was foreseen and, up to the time of writing, the relevance and strength of the EU in the world is generally seen as having diminished during the recent period.

[14] Council Decision 2010/427/EU, published EU OJ L 201/30, August 3, 2010.

B. The EU policies are not successful enough

I. The internal market is far from being achieved

The aim of the internal market is to open the EU internal borders to a free flow of goods, services, capital and workers, as within a Nation-State, in a market of half a billion consumers. This aim is presented as having more or less been achieved, but the fact is that it is not complete, in particular in the area of services. According to the Report of Mario MONTI to José Manuel BARROSO on "A new strategy for the single market":[15]

> *The Single Market is Europe's original idea and unfinished business. In his Political guidelines for this Commission, President Barroso pointed to the gaps and "missing links" that hamper the functioning of the Single Market. Echoing this orientation, the European Council of 26 March 2010 has agreed that the new Europe2020 strategy should address "the main bottlenecks...related to the working of the internal market and infrastructure".*
>
> *"Missing links" and "bottlenecks" mean that, in many areas, the Single Market exists in the books, but, in practice, multiple barriers and regulatory obstacles fragment intra-EU trade and hamper economic initiative and innovation.*

On 27 October 2010, on the basis of the Monti Report, the Commission has produced a Communication "Towards a Single Market Act. For a highly competitive social market economy"[16] which introduces 50 possible proposals, among which one may quote: the EU patent, the management of copyrights, an action plan against counterfeiting and piracy, the development of the internal market in services, the development of electronic commerce in the internal market, a legislative reform of the standardization framework, measures intended to remove obstacles to the internal market on transport, an examination of the deficiencies of the internal market on services to business, legislative proposals on European public procurement legislation, a proposal on the introduction of a common consolidated corporate tax base, an examination of a possible fundamental review of the VAT system, a decision to ensure mutual recognition of e-identification

[15] See Professor Mario Monti Report: "A new Strategy for the Single Market at the service of Europe's Economy and Society", Report to the President of the European Commission José Manuel Barroso, 9 May 2010, http://ec.europa.eu/bepa/pdf/monti (107 pages).

[16] Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: "Towards a Single Market Act. For a Highly Competitive Social Market Economy. 50 Proposals for improving our work, business and exchanges with one another", doc. COM (2010) 608, October 27, 2010 (45 pages).

and e-authentication in the EU, measures on services of general interest, a legislative initiative to reform the systems for the recognition of professional qualifications, a legislative initiative on access to certain basic banking services, a proposed directive geared towards the creation of a single integrated mortgage market, a communication aimed at identifying and eliminating the tax obstacles still facing European citizens, an initiative on the use of alternative dispute resolution in the EU and, last but not least, *"a more resolute policy to enforce the rules of the single market"* (sic !).

The internal market is being made possible by taking some measures in order to prevent distortion of competition between Member States. However, differences in fiscal and social laws were not considered by all Member States as being distortions of competition. Therefore, the Treaty does not make this harmonization a necessary condition for the achievement of the internal market. Adoption of rules in these areas are almost always subject to unanimity voting in the Council. As a result, Member States have retained almost complete freedom in those fields; hence the tensions over what some call "fiscal dumping" or "social dumping"", and the reactions to certain (questionable) judgments of the EU Court of Justice (such as *Viking* and *Laval*[17]). Again, this asymmetry -which is not recognized by all, as some regard this situation as a normal area of competition between the Member States- is not easy to correct, because any solution would have to reconcile contradictory interests according to the Member States concerned. Moreover, possible decisions taken at EU level on such issues should be accompanied by a strong democratic legitimacy of the decision-makers.

On another issue, while the EU allows free movement of persons inside the external borders of its Member States, and that rules and instruments regulating this freedom are decided in a "federal" way, Member States have kept their power to grant their nationality to non-EU citizens, or to allow them to immigrate for long-term stays, thus offering them freedom to move to any other Member State. Moreover, the controls and checks at the external borders of the Schengen area are left to the competent authorities of the Member States, and are not always implemented with the same rigor. The

[17] See Judgments of 11 December 2007, Case C-438/05 *Viking* [2007] ECR I-10806 and of 18 December 2007, Case C-341/05 *Laval* [2007] ECR I-11845.

Commission has no effective means to control the behavior of the Member States at their borders.

Finally, the Commission has sometimes been too weak in implementing rules on State aids.

II. The monetary union of the euro area is fragile because of its imbalances

These imbalances were well known from the beginning (negotiation of the *"Delors report"* and of the Maastricht IGC). At that time, some Member States refused to abandon their powers on their budgetary and economic policies. They argued that the market will help to prevent any crisis and that, with the adoption of a *"Stability and Growth Pact"*, it was not necessary to go further, especially since it was difficult to conceive a centralization of powers on such matters in the EU.

In the present EU, on the one side, the euro is managed in a 'federal' way by the European Central Bank (ECB). On the other side, the fiscal, budgetary and economic policies remain almost completely in the hands of the Member States.[18] For this economic part, up to now, the powers of the EU are, *de jure* or *de facto*, limited to recommendations which are not effectively binding. It is certainly an inescapable fact that there is a necessity for a direct link between these powers and an effective political legitimacy (i.e. the link between the voters and those who decide). This is why solving this asymmetry while keeping the present political features of the EU, represents an almost impossible task. However, a monetary union which is based on loose rules on budget/tax/economic governance will remain incomplete and unsustainable, as the continuing financial crisis which began in 2009 is proving. Many efforts are currently being made, by the European Council and by the "Task Force"[19] under the presidency of Herman Van ROMPUY, by the Commission under the presidency of Jose Manuel BARROSO, by the ECB under the presidency of Jean-Claude TRICHET, by the Council

[18] This imbalance is all the more striking since the EU budget represents around 1 % of the total GNI of the EU, as compared with about 47 % for the budget of all public authorities (national – regional – local) of its 27 Member States (EUROSTAT). The EU does not have the budgetary means at its disposal which could help to deal with an economic and financial crisis.
[19] Final Report by the Task Force, doc. 15302/10, October 21, 2010 (26 pages).

of Ministers of Economic and Financial Affairs under the successive six-monthly presidencies, and by the Euro-Group under the presidency of Jean-Claude JUNCKER. It remains to be seen if these efforts will be tightly coordinated and if they lead to measures actually adopted, implemented and successful. Sufficient.

III. Member States do not cooperate sufficiently in defence matters

There is no internal market for military equipment; there is no opening of public procurement in this domain; there is little cooperation between the Member States in the armament industry. Moreover, the way the participation in EU military operations is working is that the Member States which decide to participate with troops also have to pay for their expenses.[20] Therefore, they "pay twice" (men and money), whereas the Member States which decide not to participate with troops are also free not to contribute to their financing, even though the military operations are carried out on behalf of the EU. This also reflects the reduction of public budgets for defence in Europe. In this domain, there is the risk that the EU becomes rapidly irrelevant, especially if France and the UK[21] decide to reduce their defence budgets as have all other EU Member States.

IV. The very slow progress of the former "Third Pillar"

There are several factors which explain the very slow progress of the work done by the EU in the Area of Freedom, Security and Justice, while this is a field where more cooperation between the Member States, be it for regulating immigration, judicial cooperation in civil law (including family law) and criminal law, or for police cooperation, could positively affect the daily life of Europeans.

The first factor is that the Common Law EU Member States have great difficulties in accepting the rules and procedures which would better suit the other Member States. The second factor is that, in a number of the Member States having acceded in 2004 and 2007, the judicial system is not up to the standards which would be necessary for the other Member States to accept mutual recognition of judgments and other decisions of judicial authorities.

[20] According to the NATO principle: "costs lie where they fall".
[21] The UK Government announced a reduction of its defence budget of 10 to 20 % in 2011.

With the Lisbon Treaty, a number of those matters, although not all, are now covered by QMV in the Council. Rules applicable to the former "First Pillar" are now applicable to those matters, including the ordinary legislative procedure. The Lisbon Treaty should lead to a better democratic accountability, taking into account the co-decision procedure with the EP and, in particular, the new powers conferred on National Parliaments in that field by Article 12(c) TEU, Articles 69, 70, 85 and 88 TFEU and Article 7(2) of the Protocol No. 2 on the application of the principles of proportionality and subsidiarity. A better protection of individual rights should also result from the Treaty, given the fact that the Court of Justice shall, in the future, have full jurisdiction in that field.[22]

However, on the one hand, QMV is not a panacea, because it would be difficult, in this field, to impose rules on Member States when they strongly disagree with their content.[23] On the other hand, unanimity remains applicable in a number of cases. Consequently, closer cooperation among some Member States will probably be unavoidable. For that reason, it has been made easier to authorize it, in cases covered by unanimity, through the "brake-accelerator" mechanism.[24] In this policy maybe even more than in others, there will be no possibility for the EU to progress in the future without, as mentioned in Article 67(1) TFEU, respecting *"the different legal systems and traditions of the Member States"*, therefore without providing more differentiation.

C. The Lisbon Treaty was not on the scale of what was needed

The Lisbon Treaty entered into force on 1st December 2009. However, it already looks outdated. Actually, it was conceived on the basis of the Laeken Declaration, adopted in 2001, and based on the 2002-2003 Convention's work which, also before the 2004-2007 EU enlargements, drafted the failed "Constitution for Europe". Partly due to this appellation, the Constitutional Treaty, and consequently the Lisbon Treaty, because it kept most of the reforms foreseen in the Constitutional Treaty, were considered as substantively reforming the EU.

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[22] After the completion of the five years transitional period and with a possible full "opt out" of the UK (see Title VII of Protocol No. 36 on Transitional Provisions).
[23] See, on this issue, the opinion of the German Constitutional Court in its judgment of June 30, 2009 on the Lisbon Treaty.
[24] See Articles 82(3), 2nd subparagraph, 83(3), 2nd subparagraph, 86(1), 3rd subparagraph and 87(3), 3rd subparagraph TFEU.

This was a misunderstanding. The EU kept the same system of decision-making, and roughly the same unsatisfactory democratic system essentially based on the EP. It is true that some potential progress has been brought by the Lisbon Treaty. The effective concretization of this progress will depend mainly on the political will of the Member States, as well as on the economic situation and on the action of some individual personalities. The most important reforms of the Treaty, which aim at strengthening the EU, its effectiveness and legitimacy, are:

- The "communitarization" of the former "third pillar": as mentioned above, this should allow the EP, the Commission and the Court of Justice to play their full role and therefore to guarantee a better protection of the rights of individuals.
- A significant increase of the powers of the EP: this concerns both the legislative and the international activities of the EU and has been accompanied by the possibility offered to the national Parliaments to control the respect of the application of the principle of subsidiarity by the EU institutions.
- The establishment of two new functions, the full-time President of the European Council, elected for two years and a half and the HR, appointed for five years and who is, at the same time, President of the Council for Foreign Affairs and one of the Vice-Presidents of the Commission and who benefits from the support of the new EEAS.
- The Treaty also contains a new method of calculation of QMV in the Council and a moderate extension of its scope of application.

These main characteristics, accompanied by some other changes, nevertheless do not bring enough improvements to the way the EU is working, as the EU remains affected by major imbalances. These imbalances, some of which are due to the fact that the Union remains a classic international organization in some areas, while working in a federal way in other areas, go to the core of the European project. They create uncertainty and may be a cause of instability. In any case, they make it difficult for the EU to continue to work effectively in a sustainable way.

The imbalance concerning EMU has not been solved. However, it is true that Article 136 TFEU allows the Euro Members to take measures to strengthen the coordination and surveillance of their budgetary discipline and to set out economic policy guidelines.

The imbalance concerning the EU's political legitimacy is also very difficult to fix. The powers attributed by the Lisbon Treaty to national Parliaments, especially on the control of the application of the subsidiarity principle by the EU institutions, are too weak to provide an actual solution to this problem.

As to the third imbalance, which is between the way the EU's decision-making system is working and the fact that its membership is now of 27 heterogeneous States with extremely different needs, the essential elements of the EU system have basically remained the same for a Union of 27 as they were in 1957 for a Community of six. While it was conceivable to reach uniform decisions concerning the internal market for six relatively homogeneous countries, it has today become difficult to reach uniform decisions fitting the needs and wishes of the 27 in a large array of policies. The system provides for the adoption of one identical decision to be implemented by all 27 ("one-decision-fits-all"), as the "enhanced cooperation" mechanism has nearly never been used. This is inadequate and inefficient, and has not been solved by the Lisbon Treaty.

Therefore, the implementation of the Lisbon Treaty, even after a normal period of adaptation, will not deliver what is needed to allow the EU-27 to work efficiently and with the support of its citizens.

From this assessment, one may conclude that:

- the depth of the EU's current crisis, and the difficulty in solving it, is due to the fact that the EU is simultaneously confronted with three fundamental issues, the crisis due to the imbalances of the economic and monetary union, the political gap between the EU and public opinion and the in-adaptation of the institutions and of their decision-making to the number and heterogeneity of the Member States;
- given the deficiencies and weaknesses of the EU institutions and of their decision-making, the insufficient results of the EU substantive policies, and the wide

difference of the economic and social needs and political desires of its Member States, the reforms of the Lisbon Treaty are not on the scale of what is needed.

CHAPTER 2: POSSIBLE OPTIONS FOR THE FUTURE

Before exploring possible options to develop further closer cooperation among a group of Member States, one should consider options in which all 27 Member States would participate. In such a case, the first option would be to continue on the current path, which is already providing for a number of possibilities of differentiations, opt outs and enhanced cooperations. If such an option would appear to be insufficient in order to solve the present EU problems as described in Chapter 1, the second option would be to consider a revision of the EU treaties which, in order to be appropriate, would have to be substantial. If that second option would appear to be politically unrealistic, then the option of one group of Member States playing the role of an "avant-garde" would have to be considered, either in a "softer" form or in a "bolder" one.

A. Continuing on the current path

In order to try and cope with the growing heterogeneity of its Member States, the EEC, and then the EC and the EU, have, over the years from the Treaty of Rome in 1957 to the Treaty of Lisbon in 2009, developed a great variety of mechanisms: differentiations, opt outs, enhanced cooperations, two speed systems, etc. This began very early, but has known a faster development over these last years, mostly under the pressure of some Member States, which were reluctant to accept the increase of the EU's competences. The result is that the current EU is already working in a multi-speed way. However, this has not allowed the EU to give an adequate answer to the problems resulting from its 2004 and 2007 enlargements.

I. The EU is already working in a multi-speed way

The two concepts of a "multi-speed Europe"

At the price of some simplification, the different formulations to designate a "multi-speed Europe" may be classified in two broad concepts. In all cases, the principle would be that the Member States would do the same things, but not necessarily at the same time and at the same pace. Therefore, this does not include the "à la carte Europe" in

which each Member State would retain freedom of choice on whether to take part in some policies.

- The first concept is known under diverse formulations: *"hard core group"*, *"pioneer group"*, *"avant-garde"*, *"centre of gravity"*, *"two-speed Europe"*.

In this approach, it is foreseen that all Member States will finally take part in all policies, but the calendar for doing so may vary, in order to accommodate differences in political will or economic development. The terminology aims at describing a fixed group of EU Member States which would decide, politically or legally, to cooperate more closely in different areas, in order to go faster than the others. They would continue to be EU Members and to fully respect their Treaties' obligations. Despite having been predicted several times, such closer cooperation has never materialized. Some of the difficult questions it would raise would be to know to which matters closer cooperation would apply and if the group should establish its own organs or use the EU institutions and, in both cases, how this could legally and politically be possible.

- The second concept is also known under a number of formulations: *"flexibility"*, *"differentiation"*, *"variable geometry"*, *"voluntary cooperation"*, and it has an official qualification since its introduction in the Treaties by the Treaty of Amsterdam: *"enhanced cooperation"*.

This concept differs substantially from the first one, because it does not imply a fixed group of Member States cooperating together in different matters.[25] Thus, since the 1997 Amsterdam Treaty, the Treaty's rules for enhanced cooperation allow some Member States to make use of the EU institutions in order to adopt and implement legislation in a given matter, while other Member States do not wish to participate. It can be a cooperation on a case-by-case basis, with different participants in each case. Therefore, this may lead to a "multi-speed Europe". This may also happen outside of the EU framework, without using the institutions.

[25] It had been suggested in 1974 by the German Chancellor Willy BRANDT (Europa Archiv, Doc. 1975, pp. 37-38) and in 1975 by the Belgian Prime Minister TINDEMANS in his Report to the Commission.

The concept of "differentiation" among Member States was already present in the Treaty of Rome in 1957

Even at the time of the 1957 Treaty of Rome establishing the EEC, when the Community was composed of a small number of States presenting significant similarities, economically, socially and politically, it was admitted that, beyond their Treaty's obligations, some Member States could, if they wished to do so, cooperate to go faster than others. Article 233 of the EEC Treaty, (successively renumbered 306 ECT[26] and 350 TFEU,[27] with the same wording) recognizes that cooperation among the Benelux countries may continue to exist and develop. Another example is the continued existence of the Nordic Council, established in 1952 to promote regional, economic and political cooperation between Denmark, Finland, Iceland, Norway and Sweden and which survived the accession in the EU of Denmark first, and of Finland and Sweden later.[28] The Treaty of Rome also contained provisions which provided differentiation among the Member States, either by limiting the territorial scope of application of the Treaty (overseas territories, etc.), or by authorizing specific derogations (inter-German trade, importation of bananas in Germany, safeguard clauses). Treaties of Accession also contain some (in principle temporary) derogations for acceding States.

Leaving those cases apart, there are matters for which the Treaties do not foresee a EU competence. These matters continue therefore to belong to the Member States' competences. There are also matters for which the EU does have potential powers, but which its institutions did not (yet) decide to exercise, at least not exhaustively. In such cases, it remains legally possible for Member States to act, either through national legislation, or through international agreements, possibly concluded with other Member States.

The Treaties authorize some Member States not to participate in important EU policies

This is sometimes designated by the expression "in-built" enhanced cooperation. "In-built" means that this mechanism and its modalities are established once for all by the

[26] Treaty establishing the European Community.
[27] Treaty on the Functioning of the European Union.
[28] See Declaration on Nordic Cooperation in the Act of Accession of Austria, Finland and Sweden to the EU, 1994, OJ C 241/392.

Treaties themselves; it is not necessary anymore to permit it with a case-by-case decision. Both the Schengen Area and the Euro Area have been conceived as beginning with the participation of some Member States, but aiming at covering all EU Member States in the future. Legally, decisions adopted in these areas are part of the "EU acquis". Member States acceding to the Schengen or to the euro areas in the future will therefore have to respect them.

- The Schengen Area

The so-called "Schengen cooperation" aims at totally removing the checks on persons at internal borders and gives access to the "Schengen Information System". It began outside the EU Treaties and institutions, on the basis of an international agreement concluded by a few Member States in 1985-1990. It was incorporated in the EU Treaties by the Amsterdam Treaty in 1999. Today, 22 out of the 27 EU Members fully participate. Moreover, some third States have concluded an agreement with the EU which allows them to participate (Iceland, Norway, Switzerland and Liechtenstein).

The same process was followed in other matters. Thus, this is proving that the development of some policies may begin with a group of Member States and later be enlarged to all Member States of the EU, when experience has demonstrated that it is useful and working.

- The Euro Area

As far as the euro is concerned, the point of departure was the opposite. The euro was conceived to become the currency of all EU Member States. The principle is that all EU Members must have the euro as their currency as soon as they fulfil all conditions required by the Treaty.[29] The other Member States are described in the Treaty as "Member States with a derogation" (see Article 139(1) TFEU). This derogation is temporary. However, both Denmark (Protocol Nr. 16) and the UK (Protocol Nr. 15), at their request, have been given a permanent derogation. Out of the other 25 Member

[29] Participation in the euro area is subject to fulfilling a number of conditions, among which the independence of the National Central Bank and the "convergence criteria" relating to a high degree of price stability, a low budgetary deficit and the durability of limited fluctuation margins within the exchange rate mechanism (see in particular Article 140(1) TFEU and Protocol Nr. 13 on the convergence criteria).

States, seven still have a derogation at the date of writing.[30] After a negative referendum on this issue, Sweden is voluntarily staying out.The TFEU contains provisions offering to the members of the euro area possibilities to develop policies and actions together in the domains of budgetary and economic policies (Article 136), and to have a unified representation or to express common positions in international institutions and conferences (Article 138).

- The permanent structured cooperation in the field of defence

The provisions of the Lisbon Treaty add a new case of "inbuilt enhanced cooperation", i.e. the "permanent structured cooperation" in the field of defence (Articles 42(6) and 46 TEU). This cooperation is open to Member States *"... whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions ..."*. The criteria concerning military capabilities to be fulfilled are set out in Protocol Nr. 10. The Council will decide on the establishment of such cooperation by QMV, while the launching of an enhanced cooperation in the other fields of CFSP require unanimity. At the date of writing, the "permanent structured cooperation" has not yet been launched.

- The Treaties also allow some Member States for "opting-out" from some EU policies

The Treaties provide other kinds of "flexibilities" which have been added to them through Protocols, in order to accommodate specific economic or legal problems (or political preferences) of this or that Member State, often by giving a State the right to "opt out" from a given policy. This is going very far: some Member States, often the UK and Denmark, actually do not participate in important EU common policies:[31]

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[30] The list of the 17 Member States having the euro as their currency is the following: Belgium, Germany, Ireland, Greece, Spain, France, Italy, Cyprus, Luxemburg, Malta, the Netherlands, Austria, Portugal, Slovenia, Slovakia, Finland and, since the 1st January 2011, Estonia.

[31] There are other examples: in its Accession Treaty, in 1994, Sweden was permanently authorized to continue the use on its territory of "snus" (snuff, a kind of chewing tobacco), despite it being illegal in the rest of the EU. The Swedish authorities considered it difficult to go to the referendum on the Accession Treaty without such a permanent derogation, due to the fact that around 10 % of the 8 million voters were "snus" users.

Another permanent derogation is the interdiction for foreigners (i.e. non Danes) to buy secondary houses in Denmark (Protocol No. 32 “added by the Maastricht Treaty). A third example is the special status agreed for the Aaland Islands on certain issues in the Treaty of Accession of Finland in 1994. A fourth example is Protocol No. 35 on Article 40.3.3 of the Constitution of Ireland (which concerns the interdiction of abortion in Ireland).

- Denmark, (Protocol Nr. 22), as well as Ireland and the UK (Protocol Nr. 21), do not participate in a number of policies developed by the EU in the area of Freedom, Security and Justice. This is also the case for the free movement of persons (Art. 26 TFEU) and on border checks (Art. 77 TFEU) for Ireland and the UK (Protocol Nr. 20);
- Denmark does not participate in the European Policy on Defence and Security (ESDP): see Article 5, 1st subparagraph, Protocol Nr. 22;
- One may also add that, at the end of the negotiation of the Lisbon Treaty, the UK and Poland obtained a Protocol (Nr. 30) on the EU Charter of Fundamental Rights. This Protocol aims at "... clarifying the application of the Charter in relation to the laws and administrative action of Poland and of the United Kingdom and of its justiciability within Poland and within the United Kingdom". It is seen and called by many as an "opt-out" from the Charter. However, it will probably not have this effect.[32]
- In the domain of Common Foreign Security Policy, including Common Security and Defence Policy (CFSP and CSDP), while the unanimity rule is the normal way to decide in the Council, there is always a possibility for the representative of any Member State to make a so-called "constructive abstention" (Article 31(1) TEU). This is the possibility for a Member of the Council, when abstaining in a vote, to qualify his abstention by making a "formal declaration". This will result in the Member State in question not being obliged to apply the decision, although the decision will nevertheless be taken on behalf of the EU and commit the EU as such. If such "constructive abstentions" represent at least one-third of the Member States comprising at least one-third of the EU population, the "decision shall not be adopted". At the date of writing, constructive abstention has nearly never been used (only once).

[32] See my book on the Lisbon Treaty, pp. 160-163. See also the Report of the UK House of Lords (EU Committee) published March 13, 2008, Volume I, page 102, paragraph 5.87 *"The Protocol is not an opt-out from the Charter. The Charter will apply in the UK, even if its interpretation may be affected by the terms of the Protocol"*.

The Treaty contains rules allowing to decide specific cases of "enhanced cooperation" to be applied on a case-by-case basis at the request of Member States willing to cooperate

Since their modification in 1999, the Treaties provide for rules designed to allow some States, after authorization on a case-by-case basis, to use the EU institutional framework to cooperate between them in areas where the other Member States do not wish to participate. This was done in order to take into account the fact that an EU of 15 could not always find a way to progress acceptable for all, given the growing heterogeneity of economic and social interests, as well as the diversity of political preferences. These so-called "flexibility" provisions represented one of the main features of the 1999 Amsterdam Treaty. This procedure has been used for the first time at the end of 2010.

Even after their modification by the 2003 Nice Treaty and the 2009 Lisbon Treaty, these provisions continue to provide that all members of the EP and all members of the Commission participate in the decision making, whatever their nationality and whatever the number of Member States involved.

Some modifications have been made by the Lisbon Treaty, but conditions of substance to launch a case of enhanced cooperation have essentially remained the same as before (Art. 326 TFEU). They are strict and numerous, but necessary in order to protect the non-participating States. Enhanced cooperation has to *"comply with the Treaties and Union law"*. It *"shall aim to further the objectives of the EU, protect its interests and reinforce its integration process"*. It *"shall be open at any time to all Member States"* (Art. 20(1) TEU). It shall intervene *"as a last resort, when it has been established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole"* (Art. 20(2) TEU). It shall *"not undermine of the internal market or economic, social and territorial cohesion"*. It shall *"not constitute a barrier to or discrimination in trade between Member States"* and not distort competition between them. Of course, there is no possibility of enhanced cooperation in areas covered by an exclusive competence of the EU (Art. 329(1) TFEU). Finally, *"any enhanced cooperation shall respect the competences, rights and obligations of those Member States which do not participate in it"* (Art. 327 TFEU).

Thus, obstacles to enhanced cooperation remain important in the Treaties, due more to procedural requirements than to substantive ones. In order to launch a case, it is not sufficient to respect the substantive conditions required by the Treaties, it is also necessary to have the agreement of:

- 14 Commissioners out of 27,[33]
- an absolute majority of the European Parliament, and
- a qualified majority in the Council.

Therefore, a strong political will of 9 Member States to cooperate among them is not enough, as they have to get this green light from all three EU political institutions. In this context, one has to remember that the Commission has always been politically reluctant to enhanced cooperation. For example, its official communication presented to the Constitutional Convention in 2002, "A project for the EU", showed this negative approach. As to the "Draft Constitution Penelope" prepared by Commission officials at the request of the President of the Commission,[34] it excluded any possibility of enhanced cooperation. The fact is that the Commission fears that the single institutional framework, and its own powers, might be affected. Besides, one has also to take into account that smaller Member States, nationals of which form a majority in the Commission, are often cautious about enhanced cooperation.

Finally, for the first time, the use of the procedure was authorized in December 2010 for a Directive on the law applicable to divorce.[35] The Council gave its authorization for a second case in March 2011 for the creation of an EU patent, at the request of 25 Member States.

[33] A recent example shows that such a decision will not always be easy to reach. After the failure of the Commission's proposal on a Regulation on the law of "cross-borders" divorce in 2008, due to the negative vote of one Member of the Council (Sweden), 10 Member States requested the Commission to launch an enhanced cooperation. The Commission ("Barroso I") refused: see "Bulletin Quotidien Europe", January 16 and 23, 2009. Finally, the following Commission ("Barroso II") accepted to present the proposal in March 2010.

[34] Commission, "Contribution to a Preliminary Project of a Constitution of the EU", December 2002 [http://europa.eu.int/futurum/comm/const]

[35] Council Regulation 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of law applicable to divorce and legal separation, EU OJ L 343, December 29, 2010 (14 Member States are participating).

Other possible cases allowing flexibility and differentiation between Member States

The Treaties contain other provisions where Member States are given the choice to participate or not in an action or policy. This is the case for the European Defence Agency (EDA): see Articles 42(3) and 45 TEU.

Moreover, even when the EU legislator is acting in an area covered by shared competences, as reflected in Protocol Nr. 25, *"when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area."* This means that, outside of these elements - elements which form part of the "acquis" and on which Member States cannot legislate - Member States remain able to legislate or to contract agreements with other States in order to adopt common rules.

Furthermore, the Treaty sometimes leaves flexibility for Member States to act, even in cases where the EU has adopted legislation.

Finally, the formulation of specific EU secondary law itself often leaves flexibility to Member States for its implementation.[36]

II. With the successive enlargements of the EU, interests and needs of the Member States have become extremely different

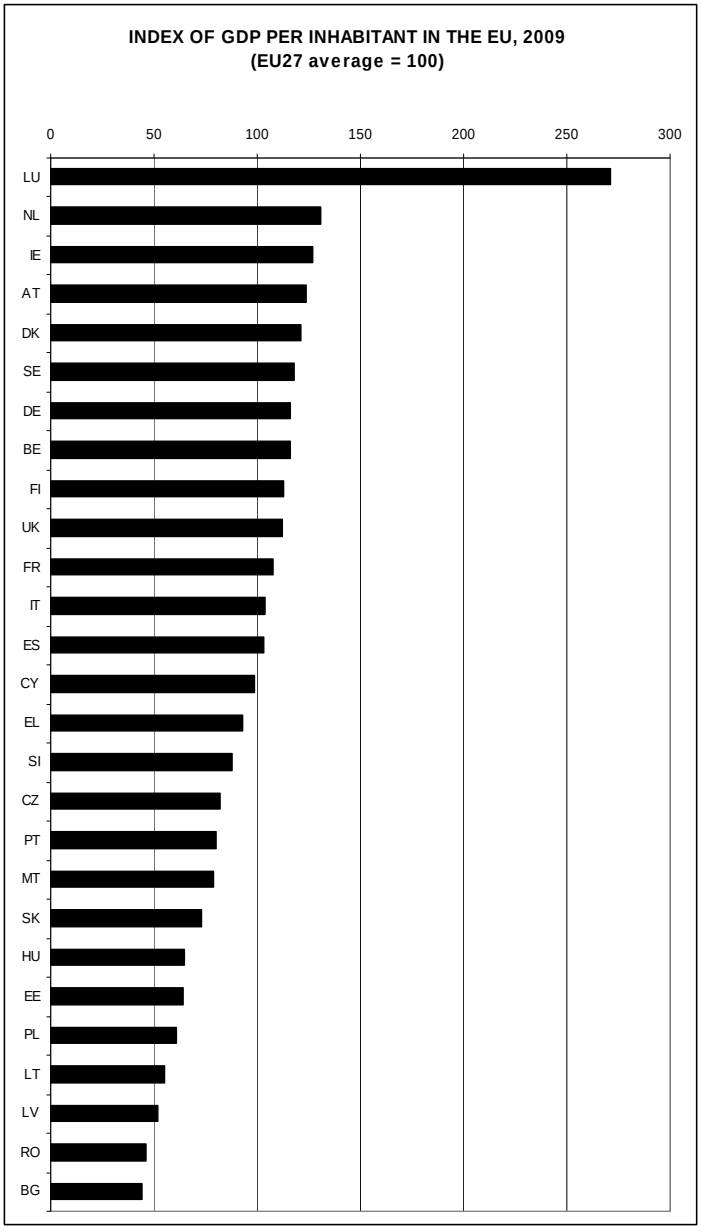
Some of the Member States having acceded the EU in 2004 and in 2007 have very different needs and interests as compared with the others. Some of them have even difficulties in implementing their duty to respect the "acquis", i.e. all legislations and decisions adopted by the EU in the past. This is more particularly the case as regards social rules and norms on the protection of the environment. The administrative structures, the quality of the bodies exercising controls, the quality of the judicial system of some of the 12 "new" Member States, are not up to the level of what they would need in order to be able to guarantee the control of a full implementation of the 90000 pages of legislative "acquis". Therefore, it is quite understandable that, when new proposals

[36] See Claus-Dieter EHLERMANN, "How Flexible is Community Law? An Unusual Approach to the Concept of 'Two Speeds'", Michigan Law Review, Vol. 82, No. 5/6, Festschrift in Honor of Eric Stein (Apr. - May, 1984), pp. 1274-1293.

are being made in order to increase the standards or to improve the rules on the protection of the workers, or of the consumers, or of the environment, the representatives of these countries tend to be reluctant and to push towards a lowering of the ambitions. The opposite attitude would be surprising, as it would go against their own interests. One has to add that, given the composition of the Commission, the ambition of its proposals is already reduced before being presented to the legislator, i.e. the EP and the Council.

The levels of economic development are very different from one Member State to another. Taking into account the figures available for the year 2009, and with 100 as the index average for the EU-27 GDP per capita, seven Member States were below 65 % of this average and two of them were around 45 % of this average.[37] The table reproduced below reflects this situation.[38] As a comparison, for the USA and for the same year 2009, no State was less than 70 % of the average national index.[39]

[37] Source: European Commission, Eurostat, GDP per capita, February 2011.
[38] Source: EUROSTAT.
[39] Source: US Department of Commerce - Bureau of Economic Analysis - GDP per State Statistics, November 2010.



Decisions taken recently concerning the Euro Area

For the time being, the Euro Group has not taken the way of using the legal possibilities offered to it by Article 136 TFEU. The reason is probably that not all its Members seem to be ready to accept legally binding obligations in this very sensitive field. Therefore, they have instead adopted political obligations, in the shape of the "Euro-Plus-Pact", which is briefly described in the following Box.

The "Euro-Plus-Pact"

An illustration of the quick acceleration towards a two-speed EU is the adoption of the "Pact for the Euro" by "the Heads of State or Government of the euro area" on 11 March 2011,[40] which has become the "Euro-Plus-Pact" on 25 March 2011, when 6 other EU Member States[41] joined the 17 of the euro area.

The aim of the Pact is to establish a stronger economic coordination for competitiveness and convergence in the euro area. It focuses on matters under national powers and will fully respect the integrity of the Single Market. The policies and measures it mentions are not precise, because it will be for each State to formulate and adopt them. As described by the President of the European Council, their adoption will depend on the pressure of the markets, of the institutions, and of "a strong peer pressure". In other words, it is not a legally binding instrument. The commitments taken in the Pact will not be fully integrated within the EU institutional framework. In other terms, despite the role attributed to it by the Pact, the Commission will not be able to seize the EU Court of Justice if a participating State does not respect its commitments.

Each year, each euro area Member will present its concrete commitments, which will be thereafter be included in the National Reform and Stability or Convergence Programs which have to be drawn by the Member States in the framework of the implementation of Article 121 TFEU. These Programs will be subject to a regular surveillance by the Commission, the formations of the Council and the Euro Group, and monitored politically every year by the Heads of State or Government of the euro area and participating countries, on the basis of a report by the Commission.

The four objectives pursued are the following:

- foster competitiveness: the Pact mentions, *inter alia*, that wages must evolve in line with productivity, that wage setting arrangements and indexation mechanisms should be reviewed, that unjustified restrictions on professional services and the retail sector should

[40] See Internet, homepage of the Council of the EU.
[41] Bulgaria, Denmark, Latvia, Lithuania, Poland and Romania. Therefore, only four EU Member States have not accepted the Pact: the Czech Republic, Hungary, Sweden and the UK. It is possible that both the Czech Republic and Sweden might join in the near future.

be removed, etc.;

- foster employment: some reforms are mentioned, such as labour market reform to promote "flexicurity", lifelong training, tax reforms, etc.;
- enhance the sustainability of public finances: are mentioned the sustainability of pensions, health and social benefits, aligning the pension system to the demographic situation, limiting early retirement schemes; legal commitment to a "debt-brake" is also mentioned;
- reinforce financial stability: the level of private debt for banks, households and non-financial firms will be closely monitored.

For each of those four objectives, the Pact has a series of indicators which will be politically monitored by the Heads of State or Government. In addition to these objectives, the Pact also mentions a *"pragmatic coordination of tax policies"* and the possible development of *"a common corporate tax base"*.

In parallel with the Pact, the Heads of State or Government of the euro area decided that the agreed lending capacity of 440 billion euros of the present European Financial Stability Facility (EFSF) will be made actually effective (instead of 250 billion effective before), and that the future European Stability Mechanism (ESM), to become operational in 2013,[42] will have an overall effective lending capacity of 500 billion euros. The ESM (like the EFSF) will provide assistance when requested by a euro area member and when such intervention will be deemed indispensable to safeguard the stability of the euro area as a whole, that decision being taken unanimously by the euro area Members. EU Member States non-members of the euro area will be able to participate on an *ad hoc* basis alongside the ESM in financial assistance operations to euro area Members.

Disputes between a euro area Member and the ESM not solved by the Board of Governors (the 17 Ministers of Finance), shall be submitted to the EU Court of Justice (Art. 273 TFEU).

[42] Taking into account the future modification of Article 136 TFEU by the addition of a new paragraph, *"The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality"*.

Remarks:

The aim of the "Euro-Plus-Pact" is to try and establish a stronger economic coordination among the Euro States and, beyond, in the entire EU. The Pact concerns matters covered by the Member States' competences. It is not a legally binding instrument. The policies and measures which it refers to are not described in precise terms. It will be for each State to describe them and to adopt, according to its own national legal requirements, and the corresponding decisions which will not be EU legal acts. Therefore, the Pact is a cooperation which will mainly take place outside the EU institutional framework, and not within it. As such, the Pact will not be implemented following the EU procedures on decision-making (QMV), as all decisions should be taken by intergovernmental common agreement. It will not benefit from the capacity of the Commission and of the Court of Justice to control the implementation of the measures taken and to adopt possible sanctions.

B. Substantively revising the Treaties

If the assessment of the present situation made in Chapter 1 is correct, this means that while the Member States will, in the future, still be in need of the EU, the EU will not be able to help, given its present institutional architecture, procedures and rules. The logical answer to this dilemma would be that the Treaties should be substantively modified.

Such a revision would be based on the recognition that, with 27 very heterogeneous Members, and the perspective of welcoming Croatia in 2013, and Iceland maybe later, the EU has become an entirely new entity. One may add that some or all of the other Western Balkan countries might also join the EU, maybe, in the 2020's (Albania, Bosnia-Herzegovina, the Former Yugoslav Republic Of Macedonia (FYROM), Kosovo, Montenegro and Serbia), plus maybe later Georgia, or Moldova, or perhaps even Ukraine, without even talking about Turkey.[43] Such an entity could not work efficiently

[43] The accession of Turkey to the EU does not look realistic and will probably not happen, unless the EU changes drastically. This is not linked to religion, as shows the fact that some Muslim countries will probably accede to the EU in the future, such as Albania (70 % of its population is Muslim), Bosnia-and-Herzegovina (60 %) or Kosovo (90 %). The first reason is that the accession of Turkey would mean the mutation of the EU from a cohesive political entity into an international organization grouping very heterogeneous States not sharing completely the same fundamental values and the same historic roots.

on the basis of a system conceived for six Member States of a comparable degree of economic development and with the same political desire to integrate.

In order to increase efficiency, one should re-reconsider:

- the nomination, composition, role and independence of the Commission: ideally, the Commission should be small and its members independent from their Member State of origin;
- the efficiency of controlling the implementation of the decisions;
- the composition of other institutions (Court of Justice, Court of Auditors);
- the decision-making system in the Council.

In order to improve an actual democratic legitimacy of the EU, one should consider:

- possible reforms of the EP: these reforms should address its composition, the making of the lists of candidates and modalities of election of its members and powers. An important issue to be considered would be if, in a case of enhanced cooperation, the EP Members representing the people of a Member State which is not participating should be allowed to participate in votes concerning that case;
- a greater involvement of national Parliaments: role and powers, coordination at the EU level, with a Secretariat and modern means allowing them to consult each other and participate efficiently in the control of the respect of the principle of subsidiarity by the EU institutions and in the control of decisions taken in the fields of foreign and defence policies.

In order to have more flexibility:

This issue is as important as the two first ones; the feasibility and opportunity of a number of reforms could be considered:

- A reform of the mechanism of enhanced cooperation: if the Commission were to be composed of one member per Member State, one should face the reality. The reality, that everybody knows but which is not politically correct to express, is that, when there

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The second reason is that such an accession would certainly prevent the EU institutions from developing the most important existing EU policies : economic and social cohesion, common agricultural policy, social policy, area of freedom, security and justice, foreign policy, etc. It is however obvious that a fundamental aim of the foreign policy of the EU must be to keep Turkey, a great country and a great civilization, as a friend, ally and partner as close as possible.

is one Commissioner per Member State, one of the aims pursued by such a rule is obviously that, inter alia with his other tasks, each Commissioner takes care, within the Commission, of the interests of its country of origin. Therefore, in the case of an enhanced cooperation, it would be logical that the Commissioners having the nationalities of non-participating Member States should not participate in the deliberations, and should not participate in discussions on that matter with the EP and the Council.

- Other ideas could be explored, for example to build on the mechanism of the "constructive abstention" which exists in the area of CFSP (Article 31(1), 2nd subparagraph, TEU), [44] or to extend the scope of application of the so-called "brake/accelerator" mechanism (see for example Article 82(3) TFEU) to a number of domains currently covered by unanimity voting in the Council.

The European Parliament (EP) and the Commission have often stressed that the only solution for the EU to become more efficient was simply to get rid of the unanimity rule for the revision of the Treaties. This is simplistic and not realistic.

Both the EP and the Commission have made suggestions according to which amendments could have entered into force even if not concluded by all Member States. Adopting amendments to the Treaties in such a way is not acceptable for the Member States. There is not any Government or Parliament of the 27 EU Member States which would accept such a rule, because it might jeopardize their vital interests. Imagine a majority of Member States wishing to give new powers to the EU in the domain of defence, while some EU States are neutral, or to decide that the Schengen rules would be obligatory for all Member States, or that criminal law would become an exclusive competence of the EU, etc. It is clear that common agreement will, in the future, remain the rule to agree on a revision of the treaties.

[44] *"When abstaining in a vote, any member of the Council may qualify its abstention by making a formal declaration under the present subparagraph. In that case, it shall not be obliged to apply the decision, but shall accept that the decision commits the Union. In a spirit of mutual solidarity, the Member State concerned shall refrain from any action likely to conflict with or impede Union action based on that decision and the other Member States shall respect its position. If the members of the Council qualifying their abstention in this way represent at least one third of the Member States comprising at least one third of the population of the Union, the decision shall not be adopted."*

However, at least at the time of writing, any revision 0f the EU Treaties looks politically implausible.

C. Closer cooperation: The "Soft" Option

A group of Member States, probably based on the composition of the euro area, could decide, acting on the basis of the current Treaties, to develop together a number of cases of enhanced cooperation within (and possibly also outside) the existing EU institutional and legal framework.

I. Cooperation within the EU's institutional framework

i. As far as the euro area is concerned and if composed of the euro area Members:

a) The group could use extensively all potentialities offered by Article 136 TFEU:

According to Article 136(1) TFEU, *"In order to ensure the proper functioning of economic and monetary union, (...), the Council shall (...) adopt measures specific to those Member States whose currency is the euro"*. Article 136(2) provides that *"... only members of the Council representing Member States whose currency is the euro shall take part in the vote"*. The Council will be able to take measures *"to strengthen the coordination and surveillance of their* [Members States whose currency is the euro] *budgetary discipline"* and *"to set out economic policy guidelines for them, while ensuring that they are compatible with those adopted for the whole of the Union and are kept under surveillance"*. In other words, the scope of application of Article 136 is extremely large, because many measures may be qualified as *"strengthening the coordination and surveillance"* of the budgetary discipline of those States, or as *"setting out economic policy guidelines"* for them. Measures adopted on the basis of Article 136 TFEU will become part of the *"acquis"* and will have to be applied by Member States which will become Members of the euro area in the future. It might then be appropriate to adopt measures to help them to adapt without difficulty if such measures appear necessary.

The Euro Group, composed of the Ministers of Finance of the Member States of the euro area, is informal. According to Article 137 TFEU and Article 1 of Protocol Nr. 14: *"The Ministers of the Member States whose currency is the euro shall meet informally"*.

Thus, it is not allowed to take legal decisions. All legal decisions shall continue to be taken by the Council with its 27 Members, where only the 17 "euro-ins" will have the right to vote. The proposals shall have to come from the Commission (composed of 27 members). All decisions which, according to the applicable provisions of the Treaty, have to be taken on the basis of the ordinary legislative procedure, shall need the agreement of the EP (composed of deputies elected in each of the 27 Member States).

b) The group could also decide to ensure the single external representation of the euro area in the financial international organisations (International Monetary Fund and World Bank), using the potentialities offered by Article 138 TFEU:

Article 138(1) TFEU provides that: *"In order to secure the euro's place in the international monetary system, the Council, on a proposal from the Commission, shall adopt a decision establishing common positions on matters of particular interest for economic and monetary union within the competent international financial institutions and conferences".* According to Article 138(2), *"The Council, on a proposal from the Commission, may adopt appropriate measures to ensure unified representation within the international financial institutions and conferences".* Article 138(3) provides that *"... only members of the Council representing Member States whose currency is the euro shall take part in the vote".* The implementation of that Article may have substantive consequences. It is entirely in the hands of the Members of the euro area to decide to have a unified representation in the International Monetary Fund (IMF) and the World Bank and indeed in all international institutions and conferences. Again, this will be dependent on a proposal by the Commission (27 members) but would not legally need either the agreement or the consultation of the EP.

If the euro area countries decided to use fully the extensive potentialities offered by Articles 136 and 138 TFEU, this would entail a dramatic change of the EU. Actually, the establishment of a "two-speed Europe" would not need any other legal text to become a reality. These texts exist. They might be implemented at any time, should the political will exist. Besides, nothing would prevent the 17 Members of the euro area from deciding to have regular meetings of their Heads of State or Government, as they did on 11 March 2011.

ii. Cooperation in the domain of Defence and Security could be developed through:

- the implementation of the "permanent structured cooperation" (PSC) foreseen by the Lisbon Treaty (art. 42(6) and 46 TEU and Protocol Nr. 10);
- the participation in projects in the framework of the European Defence Agency (EDA), art. 42(3) and 45 TEU, in particular 45(2);
- the participation in groups of Member Sates (which are willing and have the necessary capabilities), tasked by the Council to implement Council decisions for joint operations or tasks involving the use of civilian and military means (art. 44 TEU);
- the suggestions made by France and Germany during the 2002-2003 Convention.[45]

This, in no case, should mean that those States participating in such cooperations would have either a common army or a common defence. It is clear also that each participating State shall always keep its exclusive right to decide on any engagement of its armed forces in any circumstances.

iii. For the other domains covered by the TFEU, the Group could cooperate by using the general enhanced cooperation rules provided by the Treaties:

a) in the field of the former "third pillar:"

- criminal law:
- judicial cooperation in civil matters and especially family law with cross-border implications

b) in some specific domains of what used to be called the "first pillar:"

- taxation: both direct and indirect
- social policy
- environmental policy
- public health, education, culture, civil protection, etc.
- coordination of policies on movements of persons and control of immigration would appear to be a priority, taking into account the flux of immigrants which will become necessary in the future, given the EU's demographic trends.

[45] Doc. CONV 422/02, 22 Nov. 2002.

c) by adopting procedural measures in the field of foreign policy

In this field, the group should avoid to take any foreign policy decision which would distinguish it from the EU27; therefore, only procedural measures should be aimed at, such as: joint embassies or joint services for consulates, joint visits by foreign affairs ministers to third countries, temporary exchange of diplomats or common training for diplomats.

Any of these measures should be preceded by information and consultation of the other EU Member States within the Council (see Articles 32 to 35 TEU).

II. Possible additional cooperation, not legally binding, outside the EU institutional framework

- The group of participating States could choose to continue on the *"intergovernmental"* path taken with the adoption of the "Euro-Plus-Pact", for example by adopting a gentleman's agreement on possible sanctions against those which would not respect jointly agreed rules,[46] as well as other "intergovernmental" decisions concerning their budgetary deficit and their debt, coordinating their economic policies, partially harmonizing their taxation system, etc. They could also, as long as the potentialities offered by Article 138 TFEU would not be used by the Euro Group, coordinate in an informal way their positions in international financial organizations and conferences, at least on a case-by-case basis.
- Voluntary approximation of national legislations could be envisaged for social and environment policies, in cases where it would not be possible (or desired) to apply the EU rules on enhanced cooperation.
- Defence and Security: the participating States could organize armament cooperation and the opening of defence procurement, in order to consolidate their defence industries (personnel vehicles, air transport, helicopters, naval shipyards, etc.). Cooperation in this area does already exist between a number of EU Member States:

[46] If it were considered that the currently discussed six EU legislative acts on economic governance are not sufficient: four of these proposals include a reform of the EU Stability and Growth Pact aimed at enhancing the surveillance of fiscal policies, introducing provisions on national fiscal frameworks, and applying enforcement measures for non-compliant Member States more consistently and at an earlier stage (doc. 7960/11, ECOFIN Council, 15 March 2011).

- within the framework of OCCAR,[47] the Organization for Joint Armament Cooperation, which has been established in November 1996 by Belgium, France, Germany, Italy, Spain and the UK *"in order to enable a strengthening of the competitiveness of a European defence technological and industrial base"*;
- as well as on the basis of the "Letter of intent/Framework Agreement" (actually an international agreement) signed on 27 July 2000 by France, Germany, Italy, Spain, Sweden and the UK, which aims in particular at harmonizing rules related to defence procurement *"in order to facilitate the restructuring of the European Defence Industry"*.

Cooperation could also be developed in operational defence projects, such as the Eurocorps (established in 1992 with armed forces from Belgium, France, Germany, Luxembourg and Spain) and Eurofor (European Rapid Operational Force, established between France, Italy, Portugal and Spain, which is also the case for Euromafor in the field of naval forces). This could appear to be impossible for neutral EU Member States.

- The participating Member States could also envisage intergovernmental joint projects in the fields of energy, industry, and research and development, as it is already the case.

III. Feasibility and Difficulties

The participating States could adopt a Political Declaration in which they would commit themselves to participate to an agreed list of projects and areas of cooperation. One of the issues would be for them to decide if they commit themselves to participate in this full list, or if it would be admitted that this would be a free choice. The participation of all in economic, taxation and budgetary policies would probably be required. Cooperation by all in the full list would permit to have a coherent group and a more visible project. One may also note that, under this principle, and if participation in the cooperation in defence matters were to be required, some members of the euro area would not be able to qualify without abandoning their neutrality or policy of neutrality. Requesting the participation in the Schengen area would cause further difficulties for Ireland. On the contrary, if each participating State would remain free of choosing the

[47] French acronym for: Organisation Conjointe de Coopération en Matière d'Armement.

areas in which it shall participate, the project would be more flexible, but this would risk adding further complexity, to decrease its political visibility and, therefore, its attraction for the citizens. The coherence of the group would permit to stress the political dimension of the project, explaining the leap in more coordination and more solidarity that it would represent for the participating States.

A possible weakness would appear if non-legally binding intergovernmental cooperation would be followed exclusively, as this would result in less efficiency. Measures would be more difficult to adopt, as this would always require common agreement, and their respect would not be fully guaranteed, as there will be neither a "guardian" nor "sanctions". The way to avoid these difficulties would be to stick to decisions taken within the EU institutional framework. However, this is not the way which has been chosen in March 2011 with the "Euro-Plus-Pact".

For cooperations within the EU framework, the EU institutions would continue to play their role under the Treaties, with their full composition, with the exception of the Council, for which the Treaty provides that only participating Member States' representatives have the right to vote.[48]

As to the Members of the Commission, according to the Treaties, they must be independent from their State of origin. This is legal theory. Everybody knows that political reality is different. This is shown, for example, by the criticisms addressed to Lady ASHTON because, due to her heavy schedule as the EU High Representative, she has not the time to attend all Commission's meetings. According to the British press, Lady ASHTON should defend the interests of the UK in the Commission. Actually, these views of the British press are probably shared, not only by the national press of other countries, but also by national political authorities.

This issue deserves to be discussed.

[48] See Art. 20(2) TEU: *"The decision authorising enhanced cooperation shall be adopted by the Council..."* and, in order to adopt decisions to develop the cooperation, Art. 20(3): *"All members of the Council may participate in its deliberations, but only members of the Council representing Member States participating in enhanced cooperation shall take part in the vote"* (see also Art. 330 TFEU). The rule is the same for the Schengen area and for the euro area.

The same reasoning is valid for the EP.

It remains that rules concerning the modalities of vote in the EP and in the Commission are contained in the Treaties, which do not provide for any exception in cases of enhanced cooperation. Therefore, all members of the EP and of the Commission shall be allowed to vote, not only to authorize new cases of enhanced cooperation, but also in all subsequent decisions to develop, modify or implement these cases. It is probable that there would not be unanimity of the 27 Member States to decide to modify the Treaties on such an issue.

On the whole, this "soft" option would be far from revolutionary. It would not entail any amendment to the Treaties, or the adoption of a new treaty by the participating States. It would obviously not aim at transforming the EU into a federal State. It would simply allow the EU, as it is today, to work better, while not changing its characteristics, powers or rules. It would also allow the participating States to present their citizens with a complete, coherent and palatable project for their future, rather than limiting themselves to a list of measures for economic austerity, reduced social welfare and budgetary restraint. However , the fact that the Treaty procedures would not be changed and that, consequently all members of the EP and of the Commission would participate in the decision making, would probably push the participating States to develop their cooperation in an intergovernmental way, outside of the institutional framework of the EU, which would make it less efficient.

D. Closer cooperation: The "Bolder" Option

With this *"bolder"* option, the euro area's closer cooperation would be developed further through an additional treaty compatible with EU treaties

I. Possible substantive content of closer cooperation in an additional treaty

The primary principle of an "avant-garde" group would be that all participating States should be fully committed to participate in all domains of cooperation, none of these domains being optional. In legal terms, it would be possible to consider very large domains of potential cooperation, as long as the good functioning of the internal market,

the "acquis communautaire", as well as all the other rules of the Treaties, would be respected. Despite these strict requirements, important areas are possible "candidates:"

i. The economic component of the economic and monetary union

The group of participating States, if composed of the euro area countries, could use extensively all possibilities offered by Articles 136 and 138 TFEU, as described above in the "soft" option. On top of that, with an additional treaty, the participating States could decide to take further legally binding commitments. It is not the place here to go into details on the substance of such commitments, which are of an economic nature. However, one may think about decisions with an important impact on the convergence of budgetary and economic policies and which would result in a closer solidarity among the participants, for example:

- stricter budgetary rules, accompanied by a close examination by peers of draft national budgets; the obligation to respect a maximum level of budgetary deficit could be enforceable; the level of debts could be regulated (commitment to introduce an amendment in each national Constitution?) and controlled by an independent organ;
- harmonizing measures concerning both fiscal (for example through the creation of a common basis for assessment of corporate taxes, which might be followed by a beginning of approximation of national laws) and social legislation (such as linking the age and conditions of retirement to the actual demographic trends, or measures aimed at promoting labour mobility); participating States could agree to invest a given percentage of their budget or of their GNP in research and development;
- possible sanctions against States not respecting these rules;
- any decision would be submitted to an efficient democratic control (see below);
- participating States could establish a European debt agency,[49] or some other mechanism which would help to establish more solidarity among the participating States.

[49] See the proposal made by Jean-Claude JUNCKER, Prime Minister and Treasury Minister of Luxembourg and Giulio TREMONTI, Minister of economy and finance of Italy, in "Financial Times", 6 December 2010, under the title : "Euro-wide bonds would help to end the crisis".

ii. Security and defence policy

This is an area for which neither the EU Treaties, other international commitments, or the constitutions (except for some of the neutral countries) present obstacles. The obstacles are the divergence of political opinions, the lack of political will and the lack of mutual trust between the Member States. In the hypothesis that a group of States would trust each other enough to adopt the measures described above in the economic and monetary field, which would lead to more solidarity among them, it would look logical that the same States (without the neutral ones) should be able to adopt equally bold measures in this area as well, for example, on top of the possible cooperations referred to in the *"softer"* option:

- organizing common public procurements in the domain of security and defence and planning together future needs in order to prepare those procurements;
- organizing battalions able and ready to go for missions abroad at a given distance for a given period of time, for instance by joining already existing cooperations in that field, such as the Franco-German brigade, the "Eurocorps" or "Eurofor";
- making a commitment not to reduce the national defence budget below a given threshold; this looks difficult in a period of budgetary restraint, but one has to take into account the possible "disengagement" of the USA, at least from what they consider to be the "back-yard" of the EU.

If some Member States accepted to go further than OCCAR and the Letter of Intent/Framework Agreement, by launching joint programs in weapons research and development, they would achieve economies of scale and strengthen their respective industries of armament. Again, such options would not entail an EU army, an EU Defence or EU decisions as to the engagement of troops.

iii. Areas which were covered in the past by the former "third pillar"

The possible cooperation in that field would be the same as in the *"softer"* option. On top of that, one could consider possible new rights for the citizens: provisions could be envisaged aiming at a better equality of rights for citizens of other participating States who have been living in a given participating State during a period of time to be determined, for example the right to vote and to be a candidate in political elections (see

Article 25 TFEU); other measures aimed at favouring the mobility of EU citizens could be imagined.

For the other fields (former first pillar, foreign policy), possible cooperation would be the same as in the *"softer"* option.

II. Would it be necessary and legally feasible to create a new institutional framework different from the EU one?

It would obviously be politically and legally simpler and better to avoid establishing new institutions or organs, as this might entail political tensions and legal difficulties. However, it has already be stressed that, given their composition, the EP and the Commission could hardly exercise their functions for a smaller group of States. If the establishment of new organs would therefore be difficult to avoid, this should be as light as possible and inspired by the EU's institutional framework, while trying to avoid its deficiencies. In any case, the authority of the Court of Justice of the EU should not be affected.

i. A Parliamentary Organ different from the European Parliament

The first and absolute priority would be to establish the closer cooperation under an efficient and legitimate democratic control. In order to do that, it would seem difficult to use the EP in its full composition, because its Members represent the peoples of the 27 Member States. This could lead to paradoxical cases, in which MEPs from the participating States would vote a given proposed measure, but that this measure would not be adopted, because MEPs from the non participating Member States would vote against. A priori, it would look feasible to use only the MEPs representing the Member States having ratified the additional treaty, as it was proposed in the past, but it might arguably be opposed as going against the letter and the spirit of the provisions of the Treaty on the present composition of the EP (see Art. 10(2) TEU).

Therefore, in order to find an acceptable solution, without modifying the current EU Treaties, one would have to look outside the EP. If it were to be the case, the choice could be to organize direct elections to elect a smaller European Parliamentary Organ, or to turn towards National Parliaments as a basis for establishing a new Parliamentary

Organ. The history of the EU, i.e. the relative failure of the EP, may favour the second solution, especially because an additional treaty would not create a new international organization, but would only establish new forms of cooperation among the participating States. Moreover, this would avoid the confusing establishment of a new elected European parliamentary organ, whose members would be elected in a similar way as the MEPs.

If this choice were to be made, then two questions would have to be answered:

- what would be the powers of this Organ?
- how many deputies should be attributed to each Member State?

As for the powers of this new Parliamentary Organ, it would seem appropriate to confer upon it similar legislative powers as the EP has in the EU after the entry into force of the Lisbon Treaty. On top of these powers, it might also seem appropriate to confer on it a power of legislative initiative, which could be shared with the executive powers (see below). As for the numbers, this would be a difficult issue, as the criteria to be taken into account would be several and diverse: not creating a too big assembly, not being too far from the democratic principle of "one man, one vote", while allowing the less populated participating States to be sufficiently represented but also avoiding new problems with the German Constitutional Court, etc.

ii. <u>The Heads of State or Government of the participating States and members of their Governments would meet in parallel with the European Council and the EU Council</u>

It would be difficult to envisage that, in meetings of 27 taking place in the EU framework, only those Prime Ministers and Ministers representing the participating States would deliberate and decide on issues concerning them, on the basis of another text than the EU Treaties. In the past, it was decided that, if a Member State is not participating in a policy, its representatives do not take part in the Council's deliberations on that policy. This was, for example, the solution adopted for the UK in the Social Protocol. Therefore, the establishment of new organs, parallel to the European Council and to the Council, would be difficult to avoid. The frequency of their meetings could be similar to those of the corresponding EU institutions; actually, they

might be organised in parallel to those meetings ("back to back"), as is already the case for the Ministers of Finance and as it has been the case for the Heads of State or Government on 11 March 2011.

iii. A new Administrative Authority, distinct from the European Commission

In 2000, Jacques DELORS wrote: *"I think the Commission could fulfil the same function that it does for the Union, since it is the guardian of the European interest".*[50] One may disagree with that opinion. The Commission, composed of 27 members, each of the nationality of one of the EU States, could hardly take decisions for a group comprising only a fraction of those. But it is true that its tasks, or, at least, some of the tasks conferred on it by the EU Treaties, should have to be fulfilled in the system to be built by an additional treaty, for instance in an organ to be established and which could be called the "Administrative Authority".

Taking into account the fact that, if the EU Commission has become weaker over the years, it is particularly due to its composition and to the pressure of the EP, it could be imagined that these features would not be retained in an additional treaty. It would be appropriate that the number of "Administrators" should be adapted to the tasks to be fulfilled, and not be dependent of the number of participating States. In order to help them being more efficient and independent, this number could, for instance, be as low as five or seven. These members could be elected by the Parliamentary organ, for example among the members of the national Governments of the participating States (or among the members of their national Parliaments). They could be elected for a fixed duration, for example of six years, and this duration might be non-renewable, in order to strengthen their independence; in such a case however, in order to preserve continuity, two or three members could be elected for a second and last term, or the first appointments could be for different durations.

The major task of the Administrative Authority would be to control the correct application of all acts and measures adopted on the basis of the additional treaty and to bring infringement action against the participating States to the Administrative Court if needed. An important issue would be to decide if the Administrative Authority would be

[50] CER Bull. 14, 2000.

put in charge of preparing the legislative proposals, in the same way and with the same monopoly as the EU Commission does. If that task would not be conferred on the Administrative Authority, as this could require too great human resources, the question would be to decide who would do it. Would it be possible to outsource this task to the Government/Administration of a given participating State? Or to all of them on a rotating basis? Or to obtain the authorization of the 27 EU Member States that the EU Commission itself could be entrusted to do it (in that case, would it be with its 27 members or only those nationals of the participating States)? Or leave it to the Administrative Authority to get help from the participating States when needed? This last option might appear, at least at first sight, to be flexible, pragmatic and workable. Finally, the participating States might envisage to give to the Administrative Authority the non-exclusive power to launch legislative initiatives, shared with the organs representing the Governments and with the Parliamentary organ.

iv. The Court of Justice

The establishment of a new tribunal ought to be avoided, because of the risks of conflicts with the Court of Justice of the EU. Therefore, the participating States could confer on the Court of Justice of the EU itself new tasks related to the additional treaty, if the other EU Member States and the Court would agree.[51]

[51] If this proved not to be possible, another option would be to create a new tribunal. In that case, it would be essential to avoid inconsistencies between the case law of this tribunal and the EU's Court. Plainly said, this means that the new tribunal should not put in jeopardy the case law of the Court. Therefore, the new tribunal should be linked by the case-law of the EU Court in the same way as the EFTA Court is. It should be obliged, by a provision of the additional treaty, to fully respect the past case-law of the Court and to take due account of its future case-law. This is what is provided for by the EFTA Court of Justice - see: Carl BAUDENBACHER: *"The EFTA Court: an actor in the European judicial dialogue"* Fordham International Law Journal 2004-2005, pp. 353-391. If created, the new tribunal could be called "Administrative Tribunal" and, as it is already the case of the EU Court of Justice and of the EFTA Court, could be based in Luxembourg. The number of its Members should be adapted to the tasks to be fulfilled, and not be dependent of the number of participating States. Therefore, this number could, for example, be limited to three or five. These members could be appointed by a simple majority vote by the Heads of State or Government of the participating States, for example for a fixed duration of nine years, non renewable, in order to strengthen their independence. Their appointment should be subject to a positive advice of the Committee established under Article 255 of the TFEU (after authorization of the 27 EU Member States). The first appointment could be for a different duration for some members, in order to preserve continuity. The Administrative Tribunal should be in charge of controlling the correct application, by the participating States, of legislation/regulations adopted on the basis of the additional treaty. The Administrative Authority and the participating States should be able to seize the Administrative Tribunal. At first sight, there would be no need to have a system of preliminary ruling.

The Central Bank

The European Central Bank (ECB) shall continue to exercise fully its role. The additional treaty would not change anything.

v. The Court of Auditors

The participating States could confer to the EU's Court of Auditors the task of controlling the accounts and the implementation of "their" budget, which will unavoidably have to be separated from the EU budget. This would have to be accepted by the 27 EU Member States.[52]

vi. The Economic and Social Committee and the Committee of the Regions

If it was desired that all or some legal acts should be submitted for advice to the Economic and Social Committee or/and to the Committee of the Regions of the EU, it could be decided that all members of these Committees, who are not bound by any mandatory instructions and are independent in the performance of their exclusively advisory duties, take part in all discussions.

vii. Budget and Decision making

It would be necessary to have a budget separate from the EU budget. All financial consequences entailed by the implementation of an additional treaty should be borne by the participating States only.

As to the decision-making system, possible innovations might be considered:

- to share the legislative initiative between three organs (the Committee of Ministers, the Administrative Authority and the Parliamentary Organ);
- to provide that legislative acts could be adopted through co decision between the Parliamentary Organ and the Committee of Ministers, according to rules identical, *mutatis mutandis,* to those set up for the EU in the Lisbon Treaty, except the rule

[52] If this were not possible, another option could be to establish a small organ of control, the number of its Members being limited to three or five. The role of this organ should be similar to the role of the EU Court of Auditors. Its Members could be appointed by a simple majority vote by the Heads of State or Government of the participating States for a fixed duration of nine years, not renewable, in order to strengthen their independence. Their appointment should also be subject to a positive advice given by the Committee established on the basis of Article 255 TFEU. The first appointment could be for a different duration for some members, in order to preserve continuity. A third option might be to confer the task of auditing the accounts to the participating States on a rotating basis (see example of the OECD).

according to which the EU Council needs unanimity in order to modify a proposal of the Commission;

- to provide that all decisions could be taken through QMV by the Committee of Ministers, this meaning that unanimity would no longer be a rule for adopting decisions. However, a fundamental distinction could be made between two categories of decisions: for the first category, participating States would not be obliged to implement the decisions concerned when their Minister would have voted negatively; for the second category, acts adopted would be obligatory for all participating States, even those whose Minister would have voted against;
- to provide that, for the second category, a "strengthened" qualified majority would be required, for example 80 % of the votes and 80 % of the population, the blocking minority being composed of at least three participating States.

III. Feasibility

i. Compatibility of an additional treaty with international and EU law

The 1969 Vienna Convention on the Law of Treaties, which largely reflects customary international law, does not prohibit the negotiation and conclusion of an additional treaty among some of the Parties to a multilateral treaty (see, *a contrario*, Article 41) . An additional treaty would not require the consent of the other EU Member States, under the condition that their interests would not be harmed and that EU Treaties and EU law would remain fully applicable. Similarly, nothing in EU law prevents two or more EU Member States to conclude new treaties among them, under the same conditions, i.e. that they would remain fully bound by their obligations under the EU treaties, and that any amendment to the EU Treaties could only be adopted by all EU Members.

Furthermore, some people have raised a possible problem with the application of the European Court of Justice's ERTA case law to the acts adopted by the participating States.[53] This would not be the case, as the ERTA case-law plays if and only if the EU itself has an exclusive or exercised competence in a given area. The fact that a number

[53] Case 22/70, ERTA Commission v. Council [1971], ECR 263. Under this case law, the EU has exclusive competence to enter into an international commitment if and to the extent that it has exercised its (internal or external) competence in the field concerned.

of Member States exercise their national powers together would not entail any "ERTA's effect".

Other observers thought that aiming at the objectives of the EU treaties is an exclusivity of the full EU membership and would be legally doubtful for a smaller group. However, this is not legally correct, as Protocol No. 25 shows, even in a case where the EU would have begun to adopt acts in order to aim at an EU objective: *"(...) when the Union has taken action in a certain area, the scope of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area".*

Finally, the decision on the institutional arrangements in an additional treaty might lead to the establishment of new organs playing roles comparable to those conferred in the EU Treaties on the EP and the Commission. In that case, and as far as these new organs would be composed only of nationals of the participating States, this might be criticized as "by-passing" the normal rules of the Treaties. Although one might understand the political criticisms that such institutional arrangements might provoke, there would not be any serious ground for criticizing their legality. As long as a Member State remains free to act in a given area while respecting its legal obligations under the EU Treaties, this Member State has also the right to join forces with other Member States willing to do so. Together, they have the right to organize their joint cooperation, including by establishing their own institutional structures and legal procedures, it being understood that their closer cooperation will never be an obstacle to the EU institutions acting under the rules of the EU Treaties' and that they alone will continue to develop the "acquis communautaire" legally binding on present and future EU Member States.

ii. <u>How should the group be composed</u>?

The Member States concerned could decide on the composition of their group on the basis of purely political criteria. They could also build their group by taking into account the willingness to go ahead demonstrated by Member States in the past, i.e. by limiting the group to those having used the existing possibilities of closer cooperation already offered by the Treaties, especially by being a member of the euro area (which, at the time of writing, would include up to 17 Member States out of 27).

This would not mean that all Member States actually participating in the euro area at the time when the decision would be made would automatically participate in an additional treaty. Each State would naturally be free to decide to participate or not, taking into account the conditions to be fulfilled, or the measures to be agreed upon. One could imagine that tough conditions might be imposed on the convergence of budgetary and economic policies, reflecting the fact that, in parallel, the solidarity among participating States would be increased as compared to the present situation. Legally, the conditions formalized in an additional treaty, unless adopted later by the EU Council on the basis of Article 136 TFEU, will not be part of the "acquis" and, therefore, will not become automatically binding for the Member States which will join the euro area in the future.

iii. How to guarantee the rights and interests of the non-participating EU Member States?

In order to be efficient, such a guarantee should be accompanied by a control by organs fulfilling three conditions, i.e. to be trusted by the non-participating EU Member States, to have a right of decision and of sanction, and to have a recognized authority. This would lead to the conclusion that such control would have to be exercised by the Commission and the Court of Justice of the EU themselves. This should be provided in the additional treaty. The Commission or any EU Member State should be able to seize the EU Court of Justice of any infringement to the EU Treaties and to EU law by one participating State.

iv. Difficulties

The establishment of new bodies to permit closer cooperation between some EU Member States would be criticized as complicating the picture of Europe for the citizens. However, firstly, the creation of a single *"avant-garde"* would be a simplification as compared with the present and complicate patchwork; secondly and in any case, without the creation of such new bodies, it will not be possible to realize the project, the reason being that an additional treaty can be ratified by the willing Member States only. If it had to become a revision of the EU Treaties, which would be the case if one desired to change the rules of the Treaties on the participation of the members of the EP and of the Commission to the decision-making vote in cases of enhanced cooperation

(modification of Title IV TEU and of Part VI, Title III, TFEU), such a text would have to be ratified by all 27 Member States. This would be a non-starter and would put an end to the project.

CONCLUSION

The European Union is in crisis.

At the same time, when the support of its public opinion is diminishing, it must try and solve the acute problems of the euro area, while its institutions are not working properly on the basis of their current rules and procedures, which are inadequate given the current composition of the EU.

As the EU's Member States will need its help in the future, something has to be done.

The option of substantively revising the EU Treaties looks unrealistic.

Continuing to work on the current path might entail the risks either of a slow reduction in the ambitions of the EU, which could become a progressively less significant actor in the world and less able to help its Member States, or even of a splitting up of the EU, in case of divergences on how to solve a serious economic and financial crisis.

Therefore, the options of a closer cooperation, probably based on the composition of the euro area, should be seriously considered. Both the "softer" and the "bolder" options will of course be criticized. The following criticisms would probably be raised:

- *increasing complexity*: this would be true without an unified "avant-garde"; but if a substantial group of Member States would accept to go ahead together in all domains, this would simplify the picture, while the EU is now becoming more and more divided into a complicated patchwork of different sub-groups;
- *creating an inner group imposing its political will on the others* or condemning the new Member States to an *inferior peripheral status*: this is not correct, as the members of the group shall have to respect all EU decisions, which would continue to be taken according to the current EU rules, by the EU institutions in their present composition;
- *dividing Eastern and Western countries*: this would not be the case, as good candidates for the group might be for instance Estonia, Slovakia or Slovenia, and most probably within a few years, Poland and some others, while Denmark, the UK or Sweden might prefer to stay out of the group;

- *establishing a federal European State*: this is obviously out of question, as the present characteristics of the EU would remain the same, with no power or very little in the most important areas of States' activities (army, police, education, social security, public transport and public services in general, etc.), with very small financial resources (around 1 % GDP, i.e. a diminution since and despite the enlargement from 15 to 27 Member States), with very small powers of implementation (EU law is implemented by Member States administrations[54]), and while any change of the Treaties, whatever its importance, will always have to be agreed unanimously by all Member States' governments and by their Parliament or by referendum. *The purpose of the EU is to help and to strengthen its Member States, not to weaken or to abolish them*. Under both options, the EU will not become a State, which neither its Member States, nor its citizens want;
- *difficulties for potential participating States to agree on a common list of domains in which they would accept to cooperate together*: this would be the most pertinent and serious criticism. Would countries like Finland, Germany or the Netherlands agree with Greece, Ireland or Portugal on a common list of social, fiscal and economic (legally binding) measures to be taken? Would Germany accept common endeavours in the military domain, or in EU penal legislation? The thrust of the problem is there. The political hypothesis is that the euro crisis might be such, that it could oblige the euro Member States to adopt tough and legally binding measures. But these measures could appear difficult to be tolerated by the voters in some countries (see the present reactions both in Portugal and in Finland), and could risk opening a door to populist political parties. In such an hypothesis, interested Governments might find it wiser to include those measures in a much wider project, providing more European integration and solidarity and hope for the future.

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[54] The Commission has less than 13 000 officials of the "A" grade (permanent and non-permanent included), while the number of citizens of the EU is more than 500 000 000. Since its origins, the EEC-EC-EU is based on the "principle of indirect administration", which reflects the fact that Member States do not wish to endow the EU with the large administrative infrastructure which would be necessary to enable it to implement EU legislation. It is only in very exceptional cases that the Commission has a power to adopt implementing decisions. This system is reflected in Art. 4(3) TEU which obliges Member States to take *".. any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union"* (compare to Article 83 of the German Fundamental Law).

The world changes more and more rapidly. Globalization is a reality. At the scale of the world, individual EU Member States are geographically small, economically fragile, and demographically in a declining and ageing trend. In the future, they will continue to need the EU to meet the huge challenges they face to preserve their prosperity, their internal and external security and maintain a safe environment, to organize a better controlled immigration, etc. The EU must be able to help. However, with its present institutions and procedures, the EU is slow, heavy, not flexible enough, not able to adapt and decide rapidly. The implementation of the Lisbon Treaty, even after a normal period of adaptation, will probably not deliver what is needed. Status quo and the system of "one-decision-fits-all" are not satisfactory. Taking into account the diversity of the interests and needs of its 27 Members, and given the way its decisions are taken, this might lead to an EU taking fewer and too modest decisions.

Decreasing efficiency and relevance are not the only issues. The cohesiveness and identity of the EU has suffered from the huge and rapid 2004-2007 enlargements. European citizens, who no longer understand what the purpose of the EU is, what its political aims are and what its political borders will be, tend to withdraw their support. The support of the populations and the political legitimacy of the EU have decreased, taking also into account the relative failure of the European Parliament. Regaining this support, while fighting populism, is a necessity. To do so, at the same time as difficult decisions have to be taken in order to solve the euro crisis, an ambitious project is needed. The EU should not be seen only as imposing less social benefits and more austere economic policies; it should offer a wider political project.

Since the best suited option, which would consist of a substantive revision of the Treaties, is politically unrealistic, time is approaching when the choice will be between the status quo, which might mean a diluted EU, going slowly on the way to stagnation and irrelevance, and an EU which would accept, as a temporary measure, more differentiation than it is the case now between its Member States. The fact is that a number of the 27 Member States are not presently in a position to accept the measures which would be necessary in order to strengthen the EU and in particular to stabilize the euro area. Therefore, one has to try and find another feasible option, in which the euro area countries should probably be in the first stage.

The recognition and better organization of a temporary "avant-garde" group, which is *de facto* already imposing itself in actual life, could allow for progressively reducing and eventually putting an end to some of the imbalances which affect the strength and effectiveness of the EU, and which have not been resolved by the Lisbon Treaty:

- for economic and monetary union, a better convergence of the budgetary and economic policies of the Member States concerned;
- favoring the mobility of EU citizens through recognizing new political and social rights and solving cross-border family law issues;
- in relation to the internal market, a reduction of the differences in tax and social national laws;
- a correction to the asymmetry between the external and the internal movement of persons, a strict implementation of the Schengen rules, as well as a better organization and control of immigration;
- a full participation in the Common Security and Defence Policy and closer cooperation in the sphere of defence;
- last but not least, the effective political democratic legitimacy of these policies could be improved through an increased role given to the national Parliaments of participating States.

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It is argued that this Paper shows that the legal difficulties of such an enterprise are not insurmountable. If there is a political will, institutional and legal solutions are available. As a *"soft"* option, the interested Member States could simply choose to use all possibilities offered by the current Treaties. As a *"bolder"* option, the adoption of an additional treaty among them, although complex, is legally feasible. Both options would allow those States to enlarge and strengthen their present closer cooperation.

This could open the way to the other Member States, which would be welcomed and helped to join when they are ready to do so. It would allow to prepare for a future European Union of the 27 (and more) which, without aiming for federalism, would be more dynamic and effective, more legitimate, present and active in the external world and more responsive to the needs of Europeans in the decades to come.