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THE EURO CRISIS, DEMOCRATIC LEGITIMACY AND THE FUTURE TWO-SPEED EUROPE

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- ES GILT DAS GESPROCHENE WORT -

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The accession of the Central and Eastern European countries to the European Union was a historic and happy achievement. These countries have brought with them, not only their culture, but also a well-needed and much welcomed dynamism for more economic growth.
They bear obviously no responsibility for the fact that, before their accession, the EU had, for different reasons, begun to become less relevant in the world and to see the support of its peoples diminish. Everybody knew that a decision-making process and an institutional architecture conceived in the 1950's for six rather homogeneous countries would not be appropriate for a Union of 27 more heterogeneous members. However, despite the time they had to do it, and with a perfect knowledge of the problems due to happen in case of inaction, the "older" members did not have the will and/or courage to prepare the Union for its big enlargement.

It remains that all EU countries, "old" or "new", big or small, Eastern or Western, Northern or Southern, will need the EU in the future. None is able to meet current challenges alone, be it external or internal security, international criminality, climate change and other dangers for the environment, etc. Small, with an aging population, most of them lacking energy resources, often having failed to invest enough in research and development while at the same time having accrued debts, they are confronted with a tougher economic competition of emergent countries. This might, if they do not react, jeopardize their high standard of living and generous social protection.

They nevertheless have a lot of trumps. Together, they can rebound, by improving their macro-economic governance and making their economies more dynamic, so as to better protect the interests and way of life of their peoples. This presupposes a Union able to decide efficiently, able to strictly monitor the correct implementation of its decisions and thereby giving Europe back its place and influence in the world.

The problem is that a lucid and candid assessment of the present situation shows that the EU's potential to help is far from being optimal. The present institutional architecture and the decision-making system are showing signs of growing dysfunction. The basic features have remained basically the same, since the establishment of the EEC in 1957. The EU now has 27 very heterogeneous member states and the system conceived to fit a small number of rather homogeneous countries is clearly ill adapted to this situation:

- the decision-making in the Council is difficult, especially on important subjects, on which unanimity or even common agreement are the rules; the right of veto entails the power to

prevent the others to act; even a qualified majority is difficult to get, and if achieved this is often at the price of reduced ambitions;

- the Commission is weak, both in its role as a locomotive (the proposals presented to the legislator are often too weak) and as a guardian for the respect of the rules by the member states; the rule to have one commissioner per member state, which will probably be readopted through an unfortunate modification of the Lisbon Treaty, leads to less independence, more intergovernmentalism, a more presidential system, and less legitimacy and strength;

- the European Parliament does not bring to the EU all the political legitimacy it needs; the political game is still taking place at the national level and not at the European one, the turn-out of the EP elections has steadily gone down through the years, from 63 % in 1979 to 43 % in 2009.

Thus, the internal market is far from being achieved (see the so-called "Monti Report" prepared last year for the Commission, think about services, and whether it is possible to have a real single market without having at least some minimal social, taxation or environmental rules, etc...) and the "third pillar", which could be helpful to trigger more mobility of persons throughout the EU, is progressing very slowly.

On top of that, the Lisbon Treaty, which did not bring solutions bold enough to solve these problems, did not give the appropriate answers to the lack of dynamism of the "second pillar" and to the growing irrelevance of the EU as a would-be foreign policy actor in the world. The Solutions in the Lisbon Treaty did also not tackle the serious imbalances of the Treaties among which is the fact that the budgetary/economic powers affecting the single currency continue to belong to the national level.

On the whole, the Lisbon Treaty will not deliver, even after a period of adaptation, what is needed to allow a 27-EU to work effectively. The reforms it contains are not on the scale of what is needed. At the same time, the European dream has lost ground. For this trend to be reversed, trust in the European project must be boosted.

Actually, this situation is becoming less and less sustainable. Two facts lead to this conclusion. The first one is the enlargement of the EU: since 2004, the number of its members has practically doubled. The enlargement will continue in the future to the Western Balkans, increasing thereby also its heterogeneity. Thus, the differences and sometimes the divergence among the interests of the member states have grown and will continue to grow. In parallel,

the efficiency of decision-making, with the principle of "one-rule-fits-all", has diminished. The second fact is the euro crisis. The authors of the Maastricht Treaty thought that the imbalance between the economic and the monetary part of the EMU would not have major consequences, partly because of the adoption of the "Stability Pact", partly because of the natural control which would be exercised by the markets. This has proven to be wrong. Most economists today agree that a sustainable solution must involve more integration of the euro area members, with more sharing of powers and a European centre of decision (or of control). This however concerns domains, which are at the heart of the sovereignty of the states and among the most important powers of their national parliaments.
The lack of a sufficient political legitimacy at the European level is making it very difficult to envisage a further share of powers with the European level with regard to these particular domains.
It remains that, despite the present recess, which nobody knows how long it will last, the present situation is unstable, volatile, and economically and politically dangerous.

Against this backdrop, one should think about what could be possible options for a sustainable solution. Among them, one should consider in priority those options, which permit all 27 member states to participate.

The first option would be a revision of the EU Treaties which, in order to be effective, would have to be substantial. If this option appeared politically unrealistic, the second one would be to continue on the present path, which already provides many possibilities of differentiations, opt-outs and enhanced cooperation. If this were to be judged as insufficient to solve the EU's present problems as well, the possibility of a «two-speed Europe» should be examined, with a group of member states playing the role of a temporary «avant-garde». This option could take a "softer" form or a "bolder" one.

The first option would be to substantially modify the current EU Treaties. Actually, if it were true that the member states still needed an efficient EU in the future, and that the present Treaties did not permit the EU to deliver, the logical answer would be to adapt these Treaties.

The EU's decision-making system was constructed in the 1950's for six countries in order to build a common market around the principle of "one-decision-fits-all." Today, the EU is composed of 27 very heterogeneous countries, which distinguish themselves geographically, economically, and historically in many ways. Their degrees of development differ widely. Without counting Luxembourg, the annual GNP per head in 2008 differed according to

member states from 4500 € to 40000 € and the minimum salary per month, in the 20 member states where it exists, is in 2012 inferior to 300 € a month in some members while it exceeds 1400 € in others. It goes without saying that the economic interests of the member states do diverge. While it were conceivable to strive for uniform decisions concerning the internal market to be built for the Six, today it has become extremely difficult to reach uniform decisions that fit the needs and wishes of the 27 in a much large array of issues and policies.

Qualified majority voting is obviously not the panacea that some, in particular in Brussels, are pretending. It would be impossible to impose decisions or legislations on some member states, which would clearly go against their interests.

Looking for solutions through a revision of the Treaties would therefore mean more Qualified Majority Voting (QMV) in some cases, but also much more possibilities of differentiations and more flexible institutions.

First of all, the revision of the Treaties should make sure that the members of the euro area would share with the EU institutions, in one way or another, the final power to adopt their decisions in budgetary and economic policies. The EU decision-making should allow decisions to be taken only for them and by them.

Secondly, the decision-making should allow for taking decisions more rapidly than today, but also, even in other domains than the Economic and Monetary Union (EMU), decisions that would not always be obligatory for all members. The political legitimacy could be improved by giving real power to the national parliaments to participate in the decision-making process, especially in additional fields of cooperation in EMU matters, without diminishing the powers of the European Parliament in the present fields.

However, the EP could be prohibited to interfere with the powers of the Commission to adopt implementing measures and to negotiate international agreements. This is not its role. The strength and independence of the Commission should also be increased by drastically reducing the number of its members. The means of the Commission to control the implementation of the EU law by the member states should be improved.

Actually, it is the entire institutional system, which should be reviewed, including a reduction of the number of members of the EP, of the Court of Justice and of the Court of Auditors.

I have developed these ideas and some others in my little book. However, I will cut short the examination of this first option now, because, as everybody knows, such a revision of the Treaties, which would need the agreement of the 27, looks politically implausible today.

The second best option available is to continue on the path that is presently followed by the EU institutions.

Taking into account what I said earlier on the heterogeneity of the interests and needs of the member states, it is however clear that such a path must be accompanied by the acceptation of more and more differentiation.

Actually, the EU is already working in a multiple-speed way. In certain fields, such as Schengen and the EMU, the Treaties themselves contain the rules and procedures organizing closer cooperation among some member states. The Lisbon treaty opened a similar possibility with respect to a closer cooperation in the field of defence ("permanent structured cooperation"). In specific cases, the treaties allow some member states to "opt-out" from a given policy, such as Denmark for defence, the euro, large parts of the third pillar, or the United Kingdom and Ireland on a number of issues (for the future of the former "third pillar", see Protocol 36 on Transitional Provisions, attached to the Lisbon Treaty, Title VII, Article 10, paragraphs 4 and 5 concerning the UK).

Finally, the Treaties contain general rules designed to allow a group of member states to cooperate together. In order to do it, they have to ask the EU institutions for the authorization to do so on a case-by-case basis. This possibility has been introduced in the Treaties since 1999 (Amsterdam Treaty) and modified in 2003 (Nice) and 2009 (Lisbon). However, obstacles to the use of this possibility remain very important. In order to launch a case of closer cooperation, it is not sufficient to fulfil all the substantive conditions required by the treaties, but it is also necessary to get the approval of at least 14 Commissioners out of 27 (while, in practice, the Commission is adopting all its decision by consensus), plus an absolute majority in the European Parliament, plus a qualified majority in the Council. In this context, one has to remember that the Commission has always been hostile to closer cooperation, and that there is a lot of reluctance among a number of member states as well. This explains the difficult conditions required by the treaties and the very few cases of closer cooperation authorized up to now, after 13 years (law applicable to divorce in 2011, European patent on the verge to be launched).

The fear to be relegated to a "second-class" Europe is still very much alive. Up to now, this fear has been greater than the fear of seeing the EU become less efficient, less helpful and less relevant.

However, the recent euro crisis has obliged those member states having the euro as their currency to react and adopt some measures together. Unfortunately, they have not been bold enough to use all legal possibilities offered by article 136 TFEU. This is not so much due to the lack of courage from the Commission, but rather due to the fact that some euro members are not ready to adopt legally binding acts in this domain and/or that these acts would have to be adopted without a sufficient political legitimacy. Therefore, in a first step, they adopted the "Pact for the euro," which became the "Euro-plus-pact" after having admitted for participation the non-euro members willing to do so (due to fear of being relegated in a second class).

The aim of the "Pact" is to establish stronger economic cooperation and convergence. However, one has to recognize that the implementation of this Pact, which is full of wise recommendations and good intentions, remains entirely in the hands of national authorities. Then, during the fall of 2011, the so-called "six-pack" legislation was adopted, which contains legal substantive commitments and is a real progress. More recently, on 2nd March 2012, 25 member states, including of course the 17 euro-ins, have signed the "fiscal compact," an intergovernmental treaty, which has to be ratified by at least 12 euro members in order to enter into force. Ireland has decided to put its ratification to a referendum. Despite the fact that this treaty represents an important symbolic/political step on the way to further coordination of the budgetary and economic policies of the members of the euro area, one has to admit that it does not contain substantial new legal obligations on top of the so-called "six-pack-legislation." Against this backdrop, the question is to know if the present path will permit to do the work in an efficient way. Will it convince the populations whose trust has diminished? Will it convince the financial markets in a durable way? In other words, would countries such as Greece, Portugal and Ireland be able to obtain loans from the markets at "normal" interest rates, without which they might have difficulties ensuring economic growth in their respective countries? If this were to be achieved, it would mean that the present system of the euro area, based on a centralized monetary policy and on a high degree of decentralization of budgetary and economic policy, is viable in the long term.

Therefore, this second option cannot be discarded. In order for it to work, it would however need a lot of political will and a greater discipline of the member states. The recent history

does not incline one towards much optimism, but the current crisis might give the necessary impulse to the political will. On top of that, the political danger is for public opinions to assimilate the European Union with more austerity and less social benefits, without any other purpose, opening the door to populist politicians in all our countries.

If this second option does not work, that means that one should examine the possibility of going towards a "two-speed-Europe." Two options look possible, a softer one and a bolder one.

The third option would consist in politically progressing towards two speeds but without a legal commitment to do it. A number of EU member states, probably on the basis of the current composition of the euro area, would proclaim publicly that they will go ahead by using all existing legal possibilities to cooperate more closely among themselves. It would depend on the political will of these states to decide to which matters their cooperation would apply.

This cooperation should primarily take place within the current EU institutional framework.
If the group were to be composed of the euro area members, it could extensively use all potentialities offered by article 136 TFEU. According to that article, "in order to ensure the proper functioning of EMU...the Council shall...adopt measures specific to those member states whose currency is the euro," while "only members of Council who are representing Member States whose currency is the euro shall take part in the vote." The scope of application of this provision is very wide. Measures adopted on its basis will legally be EU law. One of the problems is that they will have to be proposed by the Commission (composed of 27 members) and to be approved in co-decision by the European Parliament (composed of members elected in the 27 EU states). Would that be easy? One could have doubts about this.

Using the possibility opened by article 138 TFEU, the group could also decide to ensure a unified Council whose taking part in the representation of the euro area in the IMF and the World Bank would follow the same procedures as in article 136, except that the EP would not be involved.

In order to avoid being assimilated to an entity exclusively turned towards imposing strict economic measures to its members, with the risk of opening the door to populists, the group could decide to extend its cooperation to other policies, such as:

- a minimal approximation of national legislation in taxation and in social policies (such as establishing a common minimum salary, or harmonizing the age and conditions of retirement),

- the adoption of common measures regarding immigration policy,

- the development of enhanced cooperation in judicial cooperation, especially with respect to civil matters, concerning for example family law with border implications,

- the implementation of the "permanent structured cooperation" in the field of defence, as foreseen in the Lisbon Treaty (articles 42(3), 46 and protocol N°10), and in participating in projects of the European Defence Agency.

On top of these possible cooperations within the EU institutional framework, the group could also consider measures to be taken outside of this framework, i.e. in an purely inter-governmental way, including:

- measures to strengthen the European Stability Mechanism (ESM) or to strengthen the "Euro Pact" (if the use of article 136 TFEU appears impracticable), or to de facto strengthen their cooperation in the Bretton Woods institutions (if the use of article 138 TFEU appears impracticable),

- or the voluntary approximation of national laws in a given area, without making it a EU measure adopted in enhanced cooperation,

- or industrial cooperation on specific projects, including in the armament industry.

One of the issues for the participating states would be to decide whether to make a commitment to participate in all areas of the list of projects and areas of cooperation or if each of them would keep the liberty to opt out from specific cases or areas.

An obligatory domain of participation would probably have to be the policies and actions necessary to strengthen and stabilize the euro area in a sustainable way. The more the group were united around a significant number of areas of cooperation, the more coherent the results would be and the easier they could be presented to the public.

If, on the contrary, each participant remains free to participate in other subjects than the EMU related ones, the group risks to be perceived as a patchwork and to confuse further the already complex image of Europe. A possible weakness would obviously emerge, if non-legally

binding inter-governmental cooperation were exclusively followed, as this would result in less efficiency. In principle, intergovernmental cooperation entails the adoption of decisions through common agreement and not QMV, the absence of control by the Commission and by the Court of Justice regarding the implementation by the participating states of the decisions taken in common, as well as the absence of sanctions. Therefore, it would be much more efficient to remain within the EU institutional framework for decisions making.

However, in that case, another important weakness would be the functioning of the institutions. For a number of cooperations, the EU institutions would obviously continue to play their role under the Treaty, with their full composition as provided for in that Treaty. That would not be the case for the Council where, when a case of enhanced cooperation is authorized, only participating members have the right to vote, but it would apply with respect of the EP and for the Commission. This might obviously raise some difficulties for the participating states. However as it were impossible to modify this aspect, this could push these states towards developing their cooperation outside of the EU framework, which could lead to a form of inefficient inter-governmental cooperation.

That is one of the reasons why one could consider the fourth option, in which an international agreement, "additional" to the EU Treaties, would legally bind the participating states. It would allow them to define in an optimal way the organs, rules and procedures that would govern the development of their cooperation. Just like the preceding option, the aim would be to allow some member states, probably a group constituted around the members of the euro area, to cooperate together at a faster pace than the other EU members.

One of the differences with the preceding option is that the group would be legally established, through the conclusion of an international agreement.

This option would present many advantages, but would also raise a number of legal, institutional and political questions regarding:

- its legal feasibility;

- the substantive areas that could be the subject to closer cooperation;

- the institutional arrangements and their relation with the EU institutions;

- the guarantees to be given to the other EU members for the protection of their rights and interests.

Let us look briefly at these four important questions.

As for the legal feasibility, the possible additional treaty would obviously have to be perfectly compatible with the EU Treaties. The participating states would continue to be bound by these Treaties and by the law adopted on their basis. Under those conditions, nothing in international law or in EU law prevents some EU member states from concluding new treaties between themselves, and to organize their joint cooperation as they wish, including by establishing specific organs and procedures.

As to the substantive areas that could be the subject of closer cooperation, they could be similar to those quoted under the preceding option, but could go a step further; they could be aimed at:

- acts and measures concerning the economic component of the EMU, going beyond the existing obligations under the "six-pack-legislation" and under the "fiscal compact," with a real power of control or decision conferred to central organs, including the power to adopt sanctions against participating states, which are not respecting their obligations;

- measures harmonizing both tax legislation (for example, as a minimum, a common basis for the assessment of corporate taxes) and social legislation (such as linking the age and conditions of retirement to current demographic trends or measures aimed at promoting labour mobility);

- security and defence measures: on top of the possible cooperations mentioned in the preceding option, one could think about organizing shared public procurement in the area of the industry of armament and common planning of future needs to prepare such procurement;

- acts in some areas of the former third pillar, as mentioned in the preceding option, to which one could add the conferral of new rights for citizens and measures aimed at favouring their mobility.

As to the institutional framework, it would of course be politically and legally better and simpler to avoid establishing new organs. However, given that they comprise representatives or nationals of all EU member states, the EP and the Commission could hardly exercise their functions for a smaller group of states. The establishment of new organs would therefore be difficult to avoid, but this should be kept light and minimal.

The first and absolute priority would be to establish the closer cooperation under an effective and legitimate democratic control. It would be legally and politically difficult to give this

control to those MEPs who are elected in the participating states. A new parliamentary organ would be necessary, and the simplest way to do it, avoiding two parallel «European elections», would be to create an organ composed of representatives of the national parliaments concerned. This organ should be as small as possible, while taking into account the principle of democratic representation. This organ could have legislative powers similar to those of the EP in the EU, to which one could add a say in important decisions to be made in EMU matters even if not of a legislative character, and a non-exclusive power of legislative initiative. On their side, the Heads of State or Government of the participating states - and the members of their governments - could meet in parallel with the European Council and with the different formations of the EU Council. They would have their own presidency and could have similar powers, mutadis mutandis, to those of the European Council and the Council, to which one could add a non-exclusive power of legislative initiative. The weight of the votes of their members could be the same as in the EU.

The additional treaty should not create another "Commission." However, some of the tasks conferred to the Commission in the EU could be entrusted to a small administrative authority. Its major task would be to control the correct application by the participating states of the decisions adopted on the basis of the additional treaty and, if needed, to bring infringement actions against those states before the Court of Justice. The administrative authority could also have a non-exclusive power of legislative initiative. It should not be allowed to establish a new bureaucracy in order to fulfil its tasks. It should rather be allowed to out-source the preparation of its tasks, either to the EU Commission (with the authorization of the 27) or, on a case-by-case basis, to the administration of this or that participating state, or even, in some cases, to a private entity.

If the other EU member states and the EU Court of Justice would agree, the participating states could confer new tasks related to the additional treaty to the EU Court. If this was not agreed, but one cannot see why this could be the case, a solution similar to the one retained for the European Free Trade Association (EFTA) Court would be available, which would avoid the risk of conflicts of interpretation with the EU Court of Justice.

As to the procedure according to which legislative measures could be adopted under the additional treaty, on top of the procedures already mentioned, one could think about providing that all legislative acts would be adopted by QMV, meaning that unanimity would disappear. However, a distinction could be made between two categories of decisions. For the first category, participating states would not be obliged to implement acts on which their minister

would have voted negatively. For the second category, the acts adopted would be obligatory even for those voting against, but a "strengthened" Qualified Majority (QM) would be required, for example 80% of the votes and 80% of the populations, a blocking minority being composed of at least three participating states.

Finally, it is essential that participating states to a possible additional treaty should take into account the concerns of the other EU members. This is essential. Clarity and transparency would be very important. Moreover, the additional treaty could establish legal rules to ensure the continuing implementation of the letter and spirit of the EU Treaties by the temporary avant-garde, including of course the internal market rules. This should be put under the judicial control of the EU Court of Justice, which could be seized by any EU member state or by the Commission. The additional treaty should not only be opened to accession by the other EU members, but also establish the conditions under which, if willing, they might be helped to join as soon as possible.

The EU is confronted with a difficult challenge. While support of the public opinion is diminishing, and while the its institutions are not working in an optimal way on the basis of their current and ill-adapted rules and procedures, the EU must solve the acute crisis of the euro area.

Continuing to work on the present path might work, but it entails the risk either of a reduction of the EU's the ambitions , or even of a splitting up in the case of divergences on how to solve a serious economic and financial crisis, which unfortunately cannot be ruled out.

Therefore, instead of lamenting and vilipending a possible "division of Europe", it would be wiser to face realities.

The states having the euro as their currency probably have no other solution than further integrating some of their policies. Other member states cannot or do not want to follow. Therefore, appropriate means have to be found in order to protect the rights and interests of all EU member states, in or outside the euro area. If an avant-garde were to materialise further, it should have the means to do what is necessary in order to stabilise the euro area in a durable way, which would obviously be good for all.

At the same time, it would be necessary to ensure the continuing implementation of the letter and spirit of the EU Treaties, under judicial control, as well as to remain open to the others and help those willing to join to do it as soon as possible. Each EU member state should be

able to choose its own way and speed, in accordance with its needs and interests. The EU should try and help all.

There is no reason to be pessimistic. However, there is no time to waste. Nobody knows how long the current recess will last. It is time to act.