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Feasibility Study for a New Treaty and supplementary Protocols to Take Over the Substance of the Constitutional Treaty

– Explanatory Memorandum –

This feasibility study responds to the request made by the ACED to the Robert Schuman Centre at its Berlin meeting of 23 and 24 February 2004.

The study explains the options explored for drafting a New treaty that would take over the "substance" of the Constitutional treaty, as well as the options explored for drafting protocols amending the presently applicable treaties. The actual results of applying the most interesting of these options are presented as Annexes to this memorandum.

This feasibility exercise is being done "*à droit constant*", drawing upon existing clauses of the Constitutional treaty, and upon existing clauses of the presently applicable treaties, i.e. the Treaty on the European Union (TEU) and the Treaty establishing the European Community (TEC), as amended by the Nice treaty. It tries and addresses the questions which have arisen from the consultations between the German Presidency and the member states as far as some changes of formulations of the Constitutional treaty are concerned.

The study does not deal with the question of drafting new texts which could be added to the substance of the Constitutional treaty and to the presently applicable treaties, as for instance clauses on climate change. If the ACED wants to make proposals in this respect, this will be dealt with in a specific section of the final document that will be presented to the public in early June. The study only addresses the issue of the location of such clauses: where would they best be placed in the text of the New treaty and/or protocols?

SUMMARY PRESENTATION OF THE EXPLORED OPTIONS

OPTIONS FOR THE NEW TREATY

Four options have been explored for the text of the **New treaty.** All four options would enable to take over all the innovations contained in the Constitutional treaty, with the exception of symbolic changes like the title of the treaty or the symbols of the Union.

- **The preferred option that comes out of this study** (Annex 1) consists in ***a New treaty of 70 articles organised in XI Titles, with a total of about 12 800 words*** in the French version (as opposed to the 448 articles with a total of about 63 000 words of the Constitutional treaty), plus the protocols which are accompanying the constitutional treaty (especially protocols n° 1 on national parliaments and n° 2 on subsidiarity and proportionality). The New Treaty is taking over the text of Part I of the Constitutional treaty, with 4 kinds of small modifications. The Charter of Fundamental Rights gets binding force by means of a single clause and is thus not reproduced in the text of the Treaty. The innovations of Part III are transformed into ***amendments to the exiting treaties, by means of two supplementary protocols.***

  After consolidation of the amendments, the EU would be governed by ***two treaties and the Charter***[1]: The New treaty's text (almost identical to the text of Part I) would replace the text of the TEU; the amended TEC would contain all the elements on policies of the Union and details of the functioning of the institutions (which corresponds to the content of Part III).

- **A second option** would also consist in a New treaty plus accompanying protocols. It would be to a certain extent similar to the preferred option, but the New treaty would be longer, as it also would include a number of clauses which are to be found in Part III of the Constitutional treaty. The protocols would therefore be somewhat shorter than with the preferred option. The New treaty would have ***a total of 86 articles and about 18 000 words*** in the French version.

  After consolidation of the amendments the EU would be governed by ***two treaties and the Charter***[2], as in the preferred option. The TEU would be somewhat longer than with the preferred option (almost identical to the text of Part I, plus a number of innovations taken over from Part III), and there would be a smaller number of clauses of institutional nature in the TEC (which would correspond to the rest of Part III).

- **A third option** would again consist in a New treaty plus accompanying protocols. It would be quite similar to the preferred option as far as the text of the New treaty and protocols are concerned, with one important difference: The New treaty would not be intended to replace the present TEU, but to complement both the amended TEU and the amended TEC. Therefore *after consolidation* of the amendments, the EU would be governed by three treaties (instead of two) and the Charter[3], i.e. the New treaty (almost identical to the text of Part I), the amended TEU (which would only contain clauses relating to the present second and third pillar) and the amended TEC (largely corresponding to the content of Part III, the rest of which would be in the amended TEU).

- **A fourth option** would consist in one single New treaty, without new protocols. This treaty would only contain amendments to the present treaties, i.e. a list of amendments to 60 out of the 63 articles of the

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[1] Plus the usual protocols and the Euratom treaty.
[2] Plus the usual protocols and the Euratom treaty.
[3] Plus the usual protocols and the Euratom treaty.

treaty on the European Union, and a list of amendments to 217 out of 317 articles the treaty establishing the European Community. This number would be reached by renouncing to amendments to 80 articles of the TEC, for which the wording of Part III of the Constitutional treaty would not have changed their legal significance, but which were deemed to be written in a more appropriate manner[4]. After consolidation the main difference with the other options would be that there would be no overlap between the amended TEU and Part I (or between the amended TEC and Part III, contrary to options Alpha and Beta). The suppression of the pillar structure would not be visible for others than experts in EU law. This version of a New treaty would be hardly possible to understand for others than specialised experts and would therefore be extremely difficult to explain to the public in general, to voters in the countries where referendums are necessary, and to members of parliament in the other cases. The consolidated results would also be very difficult to explain and even to be used by practitioners.

OPTIONS FOR THE SUPPLEMENTARY AMENDING PROTOCOLS

Three options have been explored for the text of the **supplementary amending protocols.**

- **A first option** would consist of a single protocol listing only the amendments to each relevant article of the TEU and TEC, following the order of the presently applicable treaties.

- **A second option** (Annexes 2A and 2B) is being preferred, which is based on applying as far as possible the logic of transparency and legibility. The amendments are therefore being split into two protocols, a *Protocol on the Functioning of the Union*, and a *Protocol on the Development of the Union's Policies in Order to Meet the Challenges of the XXIst Century.* Amendments are then organised by subject matter.

Both options would enable to apply to the TEU and TEC all the innovations contained in the Constitutional treaty and specially those which are somewhat hidden in its Part III.

- **A third option** would be that which has been chosen by Mr Lequiller. It seems far more elegant than our options 1 & 2, as it does not go into the details of the wording of articles. It is also more legible at first sight. There are however some very important drawback in this technique.

Further explanations and assessments of the advantages and drawbacks of the explored options are given in the following section.

[4] These numbers refer to the French versions of the Constitutional treaty, the TEU and the TEC. In other language versions, the numbers might vary slightly, because one of the reasons of the changes in drafting was that the legal experts of the Council have used the opportunity of the 2003-2003 IGC in order to ensure a better correspondence of the different language versions. The annexes of this memorandum are based upon the French version of the treaties, as it is the version used as a basis for work in the Legal services of the Commission and Council.

FURTHER EXPLANATIONS AND ASSESSMENTS OF ADVANTAGES AND DRAWBACKS OF THE EXPLORED OPTIONS

As mentioned earlier, with the exception of option 3 for the protocols, all options explored in this study take over almost all the innovations contained in the Constitutional treaty. They only leave aside the merely symbolic changes like the title of the treaty or the symbols of the Union – which are particularly linked to the constitutional character of the treaty signed in Rome on 29 October 2004. The assumptions underlying this technique are that:

- the reasons which led to reject the treaty in the French and Dutch referendum seem not to be linked to the innovations contained in the Constitutional treaty, put to its supposedly constitutional nature, or to clauses which are already existing in the presently applicable treaty and which are not being repealed by those negative votes;

- the twenty governments who overtly support the Constitutional treaty do not want to give in on these innovations;

- it is the technique which leaves the smallest margin for those governments which might be tempted to reopen the package deal accepted at the European Council of 18 June 2004.

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- **The preferred option for a NEW TREATY** (presented as Annex 1[5]) consists in ***a New treaty of 70 articles organised in XI Titles, with a total of about 12 800 words***[6] in the French version (as opposed to the 448 articles with a total of about 63 000 words of the Constitutional treaty).

  Titles I to IX are taking over the text of Part I of the Constitutional treaty, with 3 small modifications.

  Alternative denominations are explored for the Minister of Foreign Affairs and for the legal acts of the Union. The hypothesis of leaving aside the clause on primacy of EU law is also being explored.

  Title X allows for the transformation of Part III into two protocols.

  Title XI adapts part IV to the New treaty and its protocols.

  The Charter gets binding force through a single clause and the necessary references in some other articles of the New treaty, and Part II is thus not reproduced in the text of the New treaty.

  This New treaty would replace the text of the present Treaty on the European Union (TEU: Maastricht Treaty of 1992 as amended by the treaties of Amsterdam and Nice).

  Instead of Part III of the Constitutional treaty, **the Treaty establishing the European Community** (TEC: Treaty of Rome of 1957 as amended by the Single European Act 1986, and the treaties of Maastricht 1992, Amsterdam 1997 and Nice 2001) **would be amended in order to draw all the necessary consequences of the New treaty** – including the single legal personality of the

[5] The annexes of this memorandum are based upon the French version of the treaties, as it is the version used as a basis for work in the Legal services of the Commission and Council.
[6] This does not include the preamble.

Union and the suppression of the pillar structure. This amended TEC might be complemented by new legal bases to be agreed upon by the IGC (climate change etc.).

The adaptation of the EC Treaty would be dealt with in two supplementary protocols: a *Protocol on the Functioning of the Union*, and a *Protocol on the Development of the Union's Policies in Order to Meet the Challenges of the XXIst Century*. The second protocol covers the innovations of the Constitutional treaty as far as the detailed distribution of competences between the Union and its member states are concerned, while the first protocol is only of an institutional nature. A single protocol containing the text of these two protocols is also feasible. Such an option would however not make it clear that some amendments are the direct result of the institutional changes in the New treaty, whereas other amendments result in a development of the Union's Policies. Furthermore, if new clauses – e.g. on climate change, etc. – were added by the IGC, their details would fit quite naturally in the second protocol, with the necessary visibility and coherence.

Titles I to IX of the new Treaty are taking over the text of Part I of the Constitutional treaty, with a small number of modifications

i. **Article 7** refers to the **Charter of fundamental rights** as Article I-9 of the Constitutional treaty did. It contains however a supplementary paragraph, which states that with the entry into force of the New treaty, the Charter will become legally binding – in the wording of the Constitutional treaty, which has slightly amended the version of December 2000. This allows avoiding the reproduction of the text of Part II of the Constitutional treaty in the text of the New treaty itself, while producing the same legal effects. In legal and political terms, one may thus say that the new treaty takes over parts I & II of the Constitutional treaty, i.e. its substance. There are also references to the Charter in some other article which are referring to "the Constitution" in Part I.

ii. **The Preamble of the Constitutional treaty, and articles I-1 *Establishment of the Union*, I-2 *The Union's values* and I-8 *The symbols of the Union* are not taken over as such in the New treaty.** The reason is that, together with the title "*Treaty establishing a Constitution for Europe*", they are the clauses of the Constitutional treaty which most specifically point to its constitutional character.

Instead, article 1 of the New treaty would simply take over article 1 of the present TEU – with the necessary adaptations.

The content of article 2 on values would be transferred into article 56 on *Conditions of eligibility and procedure for accession to the Union* (article I-58 of the Constitutional treaty) because this article refers to the values previously enumerated in article I-2. Alternatively, this article 56 could take over the Copenhagen criteria.

There would be no big preamble to the New treaty, which might simply explain in a sentence why there is a need for a new treaty, and which might further on refer to the Berlin Declaration of 25 March 2007.

The Charter of Fundamental rights, which would be published at the same time as the New treaty but as a separate document, would stay with its own Preamble (as in Part II of the Constitutional treaty).

iii. **References to the Constitution** in the wording of the articles of part I **are replaced by references to the New treaty, and/or to the Charter, and/or to the EC treaty,** according to where the corresponding clauses are to be found. References to Part III of the Constitution are systematically replaced by references to the EC treaty.

Furthermore three elements have been explored as a consequence of the questionnaire addressed by the German Presidency to Member States in the week of 16 to 22 April[7], but they have not been incorporated in our drafts:

- A **new denomination** is being explored for the **minister of foreign affairs** : a number of alternative denominations would come to mind. The option of calling him/her simply Commissioner for foreign affairs is probably not available, as it would not make clear that contrary to other members of the Commission, the minister of foreign affairs is submitted to a double accountability, to Parliament and Council.

- **New denominations** are being explored **for the legal acts** (European laws and framework laws, regulations etc.).

It has indeed appeared that some governments ask not to take over the denominations of European laws and framework laws on one side, and European regulation on the other, as they probably understand it as a symbol of the constitutional nature of the treaty.

It has to be underlined that in the Convention's and IGC's work, the adoption of the vocabulary of laws and framework laws was not a consequence of the name "constitutional" treaty, but an answer to the Laeken questions about simplification, democratisation and transparency. It was the result of a work which was reducing the number of different legal acts, and putting order into them, especially in view of distinguishing the acts of a mainly executive nature, to be adopted by the Commission and some other institutions, and the acts which involve the parliament and the Council in its legislative capacity.

Since the Treaty of Maastricht, Article 207 of the EC Treaty refers to the Council acting in "*its legislative capacity*", and the Protocol on subsidiarity which was adopted together with the Treaty of Amsterdam refers to "*legislative acts*", which are usually adopted in co-decision by the Council and Parliament. For this reason the Rules of procedure of the Council also refer to "*legislative acts*". The same applies also the Council and Parliament decision on comitology, which now even refers to "*legislative acts*" and to "*quasi-legislative acts*".

The work of the Convention on the legal acts of the Union has to be appreciated in this light. The notion of "*law*" is not a result of some kind of "*statehood*" of the Union. Nor is it the consequence of the fact that the Treaty has a "*constitutional character*". The new categories of acts are the result of the effort of simplification, which is the direct continuation of efforts of the Italian government and some other member states since the negotiation which led to the adoption of the Single European Act in 1986. The reference to "*legislative*" acts is linked to the further democratisation of the Union through the principle of an "*ordinary legislative procedure*" where the Parliament is co-legislator with the Council.

Replacing the vocabulary of the Constitutional treaty, i.e. European laws and framework laws by the presently used vocabulary of directives and regulations would involve very serious drawbacks:

[7] It has been publicised amongst others in the Newsletter of the Delegation of the European Parliament in Paris "Les amis de la Constitution", on 20 April.

- In order to maintain the distinction between "legislative acts" (usually involving the Parliament" and "non legislative" acts, a third category has to be used, which is called regulation in the Constitutional treaty. Another expression like decree or ordinance is difficult to find with precise equivalent in the 23 official languages, and it furthermore bears some strong implications in a series of member states where it would therefore probably create problems of acceptability;

- Using the vocabulary of directives and regulations might lead to leave aside an extremely important aspect of simplification and delivery which had been written down within Part III, namely establishing with clarity when "legislative acts" have to be used, and when not. This could lead to a reduction of the cases where the European Parliament is involved in decision making, as compared to the Constitutional treaty.

- The **suppression** of the **restatement of the principle of primacy** would not make a significant change from the legal point of view, but it would most probably raise some concern with the governments who are attached to the Constitutional treaty and with some specialists, as the mere fact that it would not any more appear in the New treaty could be used as an argument against the persistence of this principle which is established since 42 years in the ECJ's case law.

We have explored an alternative, i.e. referring to principles of the jurisprudence, with an appropriate declaration. We are however conscious that such a formulation might also raise some concern with the UK. Another alternative might be to suppress not only the principle of primacy but also the principle of conferral, which is implied in the fact that from the point of view of international law the EU has the characteristics of an international organisation, and not of a state.

The new title X deals with further clauses about the functioning and policies of the Union, by means of only four articles. Two entirely new short articles refer to the EC treaty for the content – instead of having a full part III. Two other articles take over articles from Part IV of the Constitutional treaty, i.e. the two simplified revision procedures. This would help clarifying to the public that the text of the treaties are not "written into marble", especially as far as the functioning and policies of the Union are concerned.

The new title XI on general and final provisions is taking over most of the provisions of Part IV, which are indispensable for the application of the New treaty and of the amended TEC. It leaves aside the articles of part IV which resulted from the repeal of the present treaties. Part III was necessary because the present treaties were being repealed by the Constitutional treaty. As the New treaty would not repeal the presently applicable treaties, it could dispense with Part III or with a treaty taking over the content of Part III, as long as the presently applicable treaty are amended in order to adapt so that they include the innovations of the "substance" of the Constitutional treaty.

Once the new Treaty and protocols would have entered into force, the **new treaty on the European Union and the amended EC treaty would have the same legal value** – as is the case for the TEU and TEC at present. **Furthermore, the Charter would have the same legal value as the new TEU and the amended TEC.**

There is no need of a clause like the "Spinelli clause" of the 1984 draft EU treaty which had been adopted by the European Parliament. This clause foresaw that in case of conflict, the new treaty would have precedence over the old ones. Indeed, such a clause – which is also advocated by Mr Lequiller – would not be acceptable for those member states who want to have a maximum assurance that future developments of EU competences would not happen without their consent. Such a clause would also place too heavy a political burden on the European Court of Justice, which would have to

decide in the very numerous cases of conflicting interpretations that would result from such a clause clause.

The clauses of the second and third pillar of the TEU which are not being taken over in an amended form in the New treaty would be subsequently amended by the supplementary protocols, and transferred to the EC treaty. Therefore there would be **no doubt as to the fact that there is no pillar structure anymore**.

In order to avoid any legal confusion, **the words "European Community" would be replaced by "European Union"** in the text of the EC treaty. If needed, the IGC could decide to change the name of the EC treaty in order to further underline that there is only one European Union. Conversely it could decide to keep the name of the treaty in order to underline the continuity with the present treaties, and insert into the TEC a clause stating the identity between European Community and European Union.

The **main advantages** of **this option** are the following:

- It follows a technique which allows **reducing to a minimum the negotiations** upon what should be taken over from the Constitutional treaty in a new treaty. The repartition of clauses between parts I and III serves as simple and clear guideline. Only clauses of part I are taken over in the New treaty, those of part III being dealt with in protocols. It would therefore make it easier for the IGC to quickly achieve a political agreement on the method and to delegate the technical work to the legal experts from the member states and the General secretariat of the Council. At political level, the IGC could therefore entirely concentrate upon the drafting of possible new clauses like legal bases for climate change etc.

- It results in a **short and readable** text for a New treaty – as Part I of the Constitutional treaty was intended.

- The **final consolidated structure** of the primary law of the Union – once all amendments of the two protocols would have been applied in a new "*consolidated version*" of the treaties – would be made of **only two treaties**[8] **and the Charter**, and a number of protocols equivalent to those which accompany the Constitutional treaty. Separating the Charter from the two treaties solves the formal problem of the strange position of its Preamble in the Constitutional treaty, i.e. after the articles of Part I. The Charter has its own numbering of articles and is thus easy to reproduce and distribute separately to citizens.

The **main drawbacks** of this **option** could be the following:

- The **New treaty does not contain all the innovations** of the Constitutional treaty, because some of them are contained in Part III: this is true for institutional details and for new or modified legal bases for EU action (like civil protection, tourism, administrative cooperation etc.). One needs to read the protocols to have a complete overview.

- The **new treaty might appear more innovating than it really** is – a problem which was already present with the Constitutional treaty. Indeed even Part I was already often drawing on existing clauses of the present treaties. This kind of optical illusion is however less extended with the

[8] Plus the EURATOM treaty, as would have been the case with the Constitutional treaty.

preferred option than it was the case with the Constitutional treaty, because Part III is not taken over in the treaty itself.

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- **A SECOND OPTION** would also consist in a New treaty plus accompanying protocols. It would be to a certain extent similar to the preferred option, but the New treaty would be longer, as it also would include a number of clauses which are to be found in Part III of the Constitutional treaty. The protocols would therefore be somewhat shorter than with the preferred option. The New treaty would have ***a total of 86 articles and about 18 000 words*** in the French version. This option would adopt the technique used by Mr Lequiller (Chairman of the EU Standing delegation of the French National Assembly on EU affairs and former member of the Convention). It would however have to take into account some of the legal technical problems that Mr Lequiller's draft did not consider (general and final and transitional clauses), or which he did solve in a manner that would probably not be acceptable to member states (Mr Lequiller is using the Spinelli clause). It would have to be more exhaustive than the draft proposed by Mr Lequiller.

  As opposed to our preferred option– which follows the division of the Constitutional treaty between parts I and III –, **this second option would raise the question of the criteria** to be used in order **to choose which clauses from part III would be taken over** in the New treaty, and which clauses would simply be treated as amendments to be inserted in the protocols. The dilemmas linked to these choices are illustrated not only by the draft proposed by Mr Lequiller, but also by those proposed by MEPs Andrew Duff and Gérard Onesta, who have explored the possibilities of splitting the Constitutional treaty in two (a "Constitution" and a "Treaty").

  A **first possible criterion** would be that of the "**constitutional character**" of the clauses which would have to be taken over. It is the criterion used by MEP Onesta. His draft shows clearly that there is ample room for discussion of what has a "constitutional character" and what does not. This is opening the door for very long negotiation. The same would apply to the criterion of the "substance" of the constitutional treaty, as it is not defined anywhere.

  A **second possible criterion** would be that of the "**innovations**". One would take over the clauses of Part III that represent an innovation as regards the present treaties, and which do not derive from the mechanical application of the innovations of Part I/the New treaty. This would result in taking over not only institutional changes, but also some modifications in the formulation of legal bases of the EC Treaty (for instance the new article III-284 on civil protection, or the addition in article 65 TEC on judicial cooperation in civil matters, the addition of "effective access to justice"). The New treaty would therefore contain a series of minor changes on policies which would make it very difficult to understand, and deprive it from its character of a framework treaty.

  Furthermore, as clauses on policies would be split between the New treaty and the amended EC treaty, it would create the impression that there are two categories of policies, with a hierarchy between them. To a certain extent this might seem to be already the case with the Constitutional treaty, because Part I contains "specific provisions" applicable to the foreign and security policy, to the common security and defence policy and to the area of freedom, security and justice. But these "specific provisions" may also be considered as more extended clauses on competences and hence their place in the New treaty is justified, as it was in Part I.

A **third possible criterion** would be to limit the choice of clauses to take over from Part III to "**innovations**" which have an "**institutional character**" (not "constitutional") and which do not automatically derive from the New treaty. It seems to be the idea of Mr Lequiller's draft. We have explored that direction in a more comprehensive way than Mr Lequiller's draft. For instance, whereas Mr Lequiller's draft takes over the budgetary procedure, but not the ordinary legislative procedure, we would take over both of them. With this criterion of "innovations with an institutional character" it would be logical to leave the other innovations relating to specific legal bases to a specific Protocol like the *Protocol on the Development of the Union's Policies in Order to Meet the Challenges of the XXIst Century* which we propose.

The **final consolidated structure** of the primary law of the Union would be the same as in option Alpha: **only two treaties and the Charter**[9].

The **main advantage** of this second option, as opposed to our preferred option, would be to enable to be more comprehensive in taking over the institutional innovations of the Constitutional treaty into the New treaty.

Its **main drawback** would however be that there is still ample room for discussion about which clauses of Part III should be taken over in the New treaty, and which clauses should be dealt with by the *Protocol on the Functioning of the Union*. It might even lead to limit the New treaty to what is really an innovation as compared to the present treaties, and hence result in a treaty which is close to option Delta, but shorter: the so much criticised "mini treaty". If on the contrary one would attempt to take over all the innovations, the proposed New treaty would be quite unbalanced in its wording, with some very long articles on institutional details taken over from Part III.

- **AN THIRD OPTION** could be envisaged, similar to our preferred option as far as the text of the New treaty is concerned. It would again consist in a New treaty plus accompanying protocols. There would be one important difference to the preferred option: the New treaty would not be intended to replace the present TEU, but to complement both the amended TEU and the amended TEC. The protocols would be similar to the protocols of our preferred option, with an important exception: there would be no need to transfer amended clauses from the TEU into the TEC.

  The **end result after consolidation** would therefore be **different** from the preferred option. Instead of two treaties[10] and the Charter there would be three treaties: the New treaty, the amended EU treaty, and the amended EC treaty (plus the Charter). The EU treaty would only contain a few articles, i.e. those articles on the second and third pillar which have not been taken over in an amended form in Part I of the Constitutional treaty.

  The only possible **advantage** of this third option as compared with the two first options would be to further contribute to insist on the continuity with the present treaties. The main **drawback** of this option is that the end result after consolidation would be particularly inelegant and complicated to handle. It would also give the impression that the pillar structure is maintained.

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[9] Plus the EURATOM treaty, as would have been the case with the Constitutional treaty.
[10] Plus the EURATOM treaty, as would have been the case with the Constitutional treaty.

- A FOURTH OPTION would consist in **one single New treaty, without new supplementary protocols**. It would follow the technique that was adopted for the Single European Act of 1986, the Maastricht treaty of 1992, the Amsterdam treaty of 1997 and the Nice treaty of 2001.

  This treaty would only contain amendments to the present treaties, i.e. a list of amendments to 60 out of the 63 articles of the treaty on the European Union and a list of amendments to 217 out of 317 articles the treaty establishing the European Community. This number would be reached by renouncing to amendments to 80 articles, of the TEC, which would not have changed their legal significance but were deemed to be written in a more appropriate manner[11].

  After consolidation of the amendments the EU would be governed by ***two treaties and the Charter***, i.e. the amended TEU and the amended TEC[12]. The main difference with the three first options would be that there would be no overlap between the amended TEU and Part I (nor between the amended TEC and Part III, contrary to options one and two). The suppression of the pillar structure would not be visible for others than experts in EU law.

  The only **advantage** of this option is that it is the most simple to realise from a technical point of view and that it minimises possible confusions between what is new and what has already been approved by previous ratifications. The technique followed would be that of the first option which has been explored for the protocols.

  The main **drawbacks** of this option would be that the suppression of the pillar structure would not be visible for others than experts in EU law. It would be impossible to get a general picture of the changes by looking at the new treaties, contrary to the three first options, which follow in that sense the logic of the Constitutional treaty. It would also make it more tempting for some governments to try and reduce the scope of changes as compared to the Constitutional treaty, as the consequences of a limitation in the number of amendments would not become immediately visible. Such a version of a New treaty would be hardly possible to understand for others than specialised experts and would therefore be extremely difficult to explain to the public, to voters in the countries where referendums are necessary, and to members of parliament in the other cases. The consolidated results would also be very difficult to explain and also to be used by practitioners.

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Options for the protocols

Any of the options for protocols explored here might be adapted to three first options which have been explored for the New treaty. The differences between these protocol options relate to their legibility and to the transparency of the process, having in mind the debates that will take place in Parliaments and in public opinion, especially in those countries where a referendum will be held, due to legal constraints or to the initiative of national political leaders. There are no differences between the two first options in legal terms. There are also no differences between the two first options as far as the end result after consolidation is concerned. Option 3 on the contrary generates some new issues which are briefly discussed. A very important difference between option one and option two is the fact that the second options makes it far more easy to differentiate between merely technical adaptations, which would be covered by the first protocol, and which could easily be handled at the

[11] These numbers refer to the French versions of the Constitutional treaty, the TEU and the TEC. In other language versions, the numbers might vary slightly, because one of the reasons of the changes in drafting was that the legal experts of the Council have used the opportunity of the 2003-2003 IGC in order to ensure a better correspondence of the different language versions.
[12] Plus the EURATOM treaty, as would have been the case with the Constitutional treaty.

level of legal experts of the IGC, and adaptations relating to policies, which would be dealt with in the second protocol, and which would probably need more discussion at the political level in the IGC.

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- **Option 1** would consist in a single protocol, listing all the amendments to each relevant article of the TEU and TEC, following the order of the presently applicable treaties.
  The amendment technique would often to be the presentation of the entire new text of articles or at least paragraphs which are modified. Indeed, in most cases there are too many words and/or expressions modified in the same article or paragraph, and it is therefore not possible to draft the amendments in the most classical form, i.e. "*in article* xxx *the words* mmm *will be replace by the words* nnn".
  The wording of title X of the New treaty would be adapted to the existence of a single Protocol.
  The resulting text, before consolidation, would be very long and only meaningful for experts in EU law.

- **Option 2 (Annexes 2A and 2B)** is trying to apply the logic of transparency and legibility to the protocols, in view of the debates in public opinion.
  First, the amendments are being split into two protocols, a *Protocol on the Functioning of the Union*, and a *Protocol on the Development of the Union's Policies in Order to Meet the Challenges of the XXIst Century.*
  Second, amendments are organised in each protocol by subject matter.
  For the first protocol these would be for instance amendments deriving from the adoption of new instruments (European laws and framework laws and European regulations and decisions, instead of directives, regulations, decisions, framework decisions etc.), amendments deriving from the creation of new institutions (Minister of Foreign Affairs etc.).
  For the second protocol, they could also be grouped in order to put the major innovations at the forefront: amendments relating to the Union's external action, amendments relating to the area of freedom, security and justice, amendments relating to the internal market, etc. Here again the presentation should be as transparent as possible.
  There are different possible choices within this option, which have only consequences in terms of legibility, but no legal or political consequences. **Annexes 2A and 2B** are exploring one of these possibilities. The final choice could easily be left to the experts of the Council and member states as far as the structure of protocols are concerned, while the content of the second part, would have to be discussed at political level as far as new policy elements are concerned, which had not been discussed in the IGC of 2003-2004, like for instance climate change.

- **Option 3** is the option which been chosen by Mr Lequiller. It is far more elegant as it does not go into the details of the wording of articles. It is also more legible at first sight. There are however some important drawbacks in this technique.
  First, it leaves room for interpretation of what is exactly meant by the protocol. The consolidation of the amendments therefore leaves room for negotiation and for discussion on the interpretation of the relevant treaty provisions. A good number of governments are certainly not ready to accept such a degree of uncertainty.
  Second, these protocols are based on a selection of provisions from Part III which would be taken over. This opens the door for negotiations about which provisions should be taken over and which not, and choices to be made are not technical but political. Hence the IGC would probably need far more time to come to an agreement than with options 1 and 2.

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