Constantinos Simitis

Το έχει ο Πρόεδρος.

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Θέμα: ACED explan. memo NEW VERSION

Συνημμένα: New treaty memorandum-18_05.pdf

New treaty
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Dear all,

attached is a new version of the explanatory memorandum limited to the prefered option. If the group were to decide to publish it together with the declaration, it would only need a few presentational changes which could be made on the spot. The question of the article on values is left between brackets, in order for the group do decide what to do with it.

Jacques

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Florence, 18 May 2007

A New Treaty and supplementary Protocols to Take Over the Substance of the Constitutional Treaty

Feasibility study for the Action Committee for European Democracy

– Explanatory Memorandum –

This feasibility study responds to a request made by the ACED to the Robert Schuman Centre. The study explains how to draft a New treaty that would take over the "substance" of the Constitutional treaty, as well as the protocols that would derive form it in order to amend the presently applicable treaties. The option presented here is deemed to be the best of four different options which have been explored in order to solve this issue.

This feasibility study is 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.

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. 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?

A summary presentation of the New treaty and supplementary protocols is followed by further explanations and an assessment of the proposed solution.

SUMMARY PRESENTATION

THE NEW TREATY

What is proposed here is ***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 of 2004. The relevant protocols which are accompanying the constitutional treaty (especially protocols n° 1 on national parliaments and n° 2 on subsidiarity and proportionality) should be added.

The New treaty is taking over the text of Part I and of Part IV of the Constitutional treaty, with a limited number of small modifications. The Charter of Fundamental Rights gets binding force by means of a single clause and is thus not reproduced within the text of the New treaty.

After consolidation of the amendments introduced by those two supplementary protocols, ***the EU would be governed by two treaties and the Charter***[1]. The New treaty's text would replace the present text of the TEU. The amended text of the TEC would contain all the elements on policies of the Union and details of the functioning of the institutions.

THE SUPPLEMENTARY PROTOCOLS

The innovations which are to be found in Part III of the Constitutional treaty are transformed into amendments to the exiting EU/EC treaties, by means of two supplementary protocols, which would be adopted, be ratified, and enter into force together with the New treaty.

The supplementary protocols are using a technique which follows the classical drafting methods of amending treaties, but with a presentation which is based upon the logic of transparency and legibility. The amendments to the present treaties are therefore being split into two protocols.

A *Protocol on the Development of the Union's Policies in Order to Meet the Challenges of the XXIst Century* incorporates the policy change deriving from the suppression of the pillar structure of the present treaties, as well as the innovations relating to policies which have been adopted during the 2003-2004 intergovernmental conference (IGC). It is conceived as the receptacle for further innovations that might be adopted during the 2007 IGC.

A *Protocol on the Functioning of the Union*, draws the institutional and formal-legal consequences of the New treaty upon the existing treaties.

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

FURTHER EXPLANATIONS AND ASSESSMENT

The proposed New treaty and supplementary protocols take over almost all the innovations contained in the Constitutional treaty. They only leave aside the symbolic changes which were introduced by the Constitutional treaty such as 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 referendums 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 treaties – but which have not been repealed by those negative votes;

- the governments who overtly support keeping the substance of 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, and thus the technique which best guarantees a quick and efficient IGC.

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1. The **NEW TREATY** [2] consists in ***a treaty of 70 articles organised in XI Titles, with a total of about 12 800 words***[3] (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 a few small modifications. Title X allows for the transformation into two supplementary protocols of the innovations which were embedded in Part III of the Constitutional treaty. Title XI adapts the text of Part IV of the Constitutional treaty to the New treaty and its protocols.

The Charter gets binding force through a single clause and a few necessary references in some other articles of the New treaty. Part II of the Constitutional treaty therefore does not need to be reproduced in the text of the New treaty. This would not impede the IGC to decide to include the Charter in the text of its final Act, which would include as usual the treaty as well as all the protocols and declarations adopted together with the 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).

2. **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**

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[2] Annex 1 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.

[3] This does not include the preamble.

the necessary consequences of the New treaty – including the single legal personality of the 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 IGC might decide that after consolidation, the name of the TEC be changed, as already happened with the Maastricht treaty which changed the name of European Economic Community to European Community.

3. **The adaptation of the EC Treaty would be dealt with in two supplementary protocols**: a *Protocol on the Development of the Union's Policies in Order to Meet the Challenges of the XXIst Century* and a *Protocol on the Functioning of the Union*. The first of these supplementary protocols takes over 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 second supplementary protocol is only of an institutional nature.

The division of amendments into two different supplementary protocols is intended to 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 first supplementary protocol, with the necessary visibility and coherence.

4. **Titles I to IX of the new Treaty** are taking over the text of the corresponding titles 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[4]. 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.

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[4] In terms of content, there are three differences between the two texts of the Charter:
i) a small number of minor changes have been introduced in order to correspond to the vocabulary of the constitutional treaty of 2004, e.g. "institutions, organes et organismes de l'Union" instead of "institutions et organes de l'Union";
ii) the language versions other than the 'original' texts in English and French – which had been established by the Convention of 2000 – have been carefully checked and corrected after the IGC in 2004, e.g. where the English and French say "every person", "toute personne", the Italian text said "ogniuno" which means" everyone", chacun", thus not covering legal entities like associations, companies etc.;
iii) the so-called "horizontal clauses" at the end of the Charter have been amended during the Convention and during the IGC, mainly in order to respond to the fears expressed by the British government.

[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.

5. **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 amended EC treaty for the content – instead of part III of the Constitutional treaty. 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.

6. **Title XI on general and final provisions** is taking over most of the provisions of Part IV of the Constitutional treaty, which are indispensable for the application of the New treaty and of the amended TEC. It does not take over 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 treaties are amended in order to adapt so that they include the innovations of the "substance" of the Constitutional treaty.

7. Once the new Treaty and supplementary 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 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 amended by the supplementary protocols[5], 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.

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The **main advantages** of this proposed New treaty are the following:

1. 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, while those of part III being dealt with in supplementary 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.

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

3. The **final consolidated structure** of the primary law of the Union – once all amendments of the two supplementary protocols would have been applied in a new "*consolidated version*" of the treaties – would be made of **only two treaties**[6] **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.

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The supplementary protocols

The drafting method chosen for the supplementary protocols is trying to apply the logic of transparency and legibility to the supplementary protocols, in view of the debates in public opinion.

1. The amendments are being split into two supplementary protocols, a *Protocol on the Development of the Union's Policies in Order to Meet the Challenges of the XXIst Century* and a *Protocol on the Functioning of the Union.*

[5] Annexes 2, 2A, 2B and 2C.
[6] Plus the EURATOM treaty, as would have been the case with the Constitutional treaty.

2. The amendments are organised in each supplementary protocol by subject matter. This is an innovation in amending technique, as usually amending treaties are simply following the order of the articles to be amended. The rationale for an grouping by subject matter is that it clarifies the nature of innovations made by protocols in view of the debates which will necessary take place in national parliaments and might also take place in public opinion.

For the first supplementary protocol, amendments are 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.

The second supplementary protocol contains amendments deriving from the adoption of the new ordinary legislation procedure, 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.), amendments which are the result of a modernisation of the treaties – as had already been done with the Nice Treaty – and amendments which are necessary for formal legal reasons.

3. During the IGC A part of the content of the first supplementary protocol 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. As opposed to this political part of the IGC, the final choice for the precise wording of the amendments which take over innovations that were already embedded in the Constitutional treaty, as well as the exact structure of supplementary protocols are concerned could easily be left to the experts of the Council and member states.

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