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Edited by Magdalena Góra, Zdzisław Mach and Katarzyna Zielińska

Janusz Józef Węc

Germany's Position on the System Reform of the European Union in 2002–2016

PETER LANG

This book presents the evolution of Germany's stance on the reform of the European Union in the years 2002–2016. The objectives of the book are threefold: first, to analyse the positions of the German government and parliamentary opposition on the reform of the European Union's political system in 2002–2009; second, to describe their stance on the system reform of the Economic and Monetary Union and the Eurozone in 2012–2016; and third, to analyse their positions on the EU immigration crisis in 2015–2016. The study employs a triangulation of a variety of qualitative methods: case-studies, analysis of official documents, literature, speeches and historic items. The result is an in-depth and multidimensional picture of the activities and positions of members of the German government and parliamentary opposition regarding the reform of the EU's political system.

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I dedicate this book to my children:
Paweł, Anna, Mikołaj and Katarzyna

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List of Abbreviations

AA	Auswärtiges Amt
AdG	Archiv der Gegenwart
AfD	Alternative für Deutschland
AFSJ	Area of Freedom, Security and Justice
ARD	Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland
BAMF	Bundesamt für Migration und Flüchtlinge
BdB	Bundesverband deutscher Banken
BMF	Bundesministerium der Finanzen
BMI	Bundesministerium des Innern
BReg	Bundesregierung
BRRD	Bank Recovery and Resolution Directive
BT	Brussels Treaty
BU	Banking Union
Bündnis'90/Die Grünen-BDK	Bundesdelegierten Konferenz des Bündnis'90/ Die Grünen
BVerfG	Bundesverfassungsgericht
CB	Common Backstop
CDU	Christlich Demokratische Union Deutschlands
CDU-BPT	Bundesparteitag der CDU
CDU-Bvo	CDU-Bundesvorstand
CEAS	Common European Asylum System
CEU	Council of the European Union
CFR	Charter of Fundamental Rights
CFSP	Common Foreign and Security Policy
CONV	Convention on the Future of Europe
COSAC	Conference des organismes specialises dans les affaires communautaires
CSDP	Common Security and Defence Policy
CSU	Christlich Soziale Union
CSU	Landesgruppe

CSU-PT	Parteitag der CSU
CSU-Pvo	Parteivorstand der CSU
DB AAEU	Deutscher Bundestag. Ausschuss für die Angelegenheiten der Europäischen Union
DB Drucksache	Deutscher Bundestag. Drucksache
DB Plenarprotokoll	Deutscher Bundestag. Stenographischer Bericht
DCT	Draft treaty establishing a Constitution for Europe
Destatis	Statistisches Bundesamt
DGSD	Deposit Guarantee Scheme Directive
EASO	European Asylum Support Office
EASY	Erstverteilung der Asylbegehrenden
EBCG	European Border and Coast Guard
EBCGA (Frontex)	European Border and Coast Guard Agency (Frontex)
EC	European Council
ECB	European Central Bank
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECOFIN	Economic and Financial Affairs Council
ECTC	European Counter Terrorism Centre
ECU	European Currency Unit
EDIS	European Deposit Insurance Scheme
EFSF	European Financial Stability Facility
EFSM	European Financial Stabilisation Mechanism
EFTA	European Free Trade Association
EMI	European Monetary Institute
EMSC	European Migrant Smuggling Centre
EMU	Economic and Monetary Union
EP	European Parliament
EP/CEU	European Parliament/Council of the European Union
EPP	European People's Party
ESFS	European System of Financial Supervisions
ESM	European Stability Mechanism
EU	European Union
Eurojust	The European Union's Judicial Cooperation Unit
Europol	European Police Office

FAZ	"Frankfurter Allgemeine Zeitung"
FDP	Freie Demokratische Partei
FDP-BPT	Bundesparteitag der FDP
FDP-Bvo	FDP-Bundesvorstand
FR	"Frankfurter Rundschau"
Frontex	Frontières extérieures
HSG	Heads of State or Government
IGC	Intergovernmental Conference
IMF	International Monetary Fund
IOM	International Organisation for Migration
KA	Koalitionsausschuss
Linke-BPT	Bundesparteitag der Linke
MSZ RP	Ministerstwo Spraw Zagranicznych Rzeczypospolitej Polskiej
OCCAR	Organisation conjointe de coopération en matière d'armement
OJ	Official Journal of the European Union
OLAF	European Anti-Fraud Office
ÖVP	Österreichische Volkspartei
PPA	Polish Press Agency
PPEWU	Policy Planning and Early Warning Unit
PSE	"Przegląd Spraw Europejskich"
PSOE	Partido Socialista Obrero Español
RP	"Rzeczpospolita"
SGP	Stability and Growth Pact
SHAPE	Supreme Headquarters Allied Powers Europe
SPD	Sozialdemokratische Partei Deutschlands
SPD-BPT	Bundesparteitag der SPD

SPD-BT-Fraktion	Bundestagsfraktion der SPD
SPD-Bvo	SPD-Bundesvorstand
Spiegel	"Der Spiegel"
SRB	Single Resolution Board
SRF	Single Resolution Fund
SRM	Single Resolution Mechanism
SSM	Single Supervisory Mechanism
TEAEC	European Atomic Energy Community Treaty
TEC	European Community Treaty
TECSC	European Coal and Steel Community Treaty
TEEC	European Economic Community Treaty
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UNHCR	UN High Commissioner for Refugees
WEAG	Western European Armaments Group
WEAO	Western European Armaments Organisation
WEU	Western European Union

Introductory Remarks

This monograph presents the evolution of Germany's stance on the reform of the European Union (EU) in the years 2002–2016. In particular, the research objective pursued in this paper is to analyse the German government's position on the treaty reform of the Union in the years 2002–2009 and, subsequently, changes in the secondary law in 2012–2016 caused by the eurozone debt crisis and the European migrant crisis. Consequently, the time frame adopted in the paper is specified on the one hand by events related to the convocation of the Convention on the Future of Europe in 2002, and on the other by events related to the system reform process in the euro area and changes in the immigration policy, external borders control and asylum policy occurring by 2016. The author formulates three research hypotheses in the paper. The first hypothesis is based on the assumption that the federal government played the leading role in the treaty reform of the EU in the years 2002–2005 and 2005–2009, resulting not only in the internal and external strengthening of the Union but also in a new power structure in the decision-making mechanism of the Council of the European Union (CEU) and the European Council (EC), which proved highly favourable for Germany. The second research hypothesis assumes that the federal government exerted actual impact not only on the dynamics of the eurozone debt crisis but also on the shape of the system reform of the area in the years 2012–2016, thus significantly strengthening Germany's position in the EU in both economic and political sense. According to the third research hypothesis, poor decisions taken by the German government against the European migrant crisis, particularly its unsuccessful attempt to manage the said crisis and also the manner in which policy towards other Member States was pursued with regard to the reform of the Union's immigration policy, external borders control and asylum policy, have consequently compromised Germany's position in this international organisation.

Considering the above, it is the author's intention to answer the following research questions in this monograph: first, what proposals regarding the treaty reform of the EU were put forward by the representatives of Germany at the 2002–2003 Convention and at the Intergovernmental Conferences (IGC) held in 2003–2004 and 2007?; second, what changes in secondary law were demanded by the German government with regard to the system reform of the euro area in the years 2012–2016 and the reform of immigration policy, external borders control and asylum policy of the EU in the years 2015–2016?; third, which of the

German proposals were given priority by the federal government and for what reason?; fourth, how effective were the representatives of Germany and were they successful each time they attempted to force their postulates through?; fifth, what were the similarities and differences between the stances of parties composing government coalitions and the parliamentary opposition on the analysed events?

The said research objectives determine the structure of this monograph, which comprises five chapters. In Chapter I, the evolution of the federal government's stance on the European Union system is presented, starting from the Treaty of Maastricht of 7 February 1992 and ending with the Treaty of Nice of 26 February 2001. Chapter II is dedicated to analysing the impact exerted by the German delegation on the course and outcomes of the 2002–2003 Convention on the Future of Europe and the 2003–2004 intergovernmental conference. Chapter III provides a discussion on the steps taken by the German government during the constitutional crisis of 2005–2006 and the 2007 intergovernmental conference. Chapter IV presents the course of a debate held in Germany on the measures aiming to resolve the 2011–2012 eurozone debt crisis, the resulting evolution of stances held by particular political parties on Germany's EU policy at the turn of 2013, as well as the role the federal government has played in reforming the system of the euro area since 2012. Chapter V aims to discuss the stance of the German government and the opposition parties on the European migrant crisis of 2015–2016, as well as to analyse Germany's impact on changes in immigration policy, external borders control and asylum policy of the EU that were either implemented or drafted at that time.

The monograph draws from the digital Archive database of intergovernmental conferences held in 1996–1997, 2000, 2003–2004 and 2007, and the 2002–2003 Convention on the Future of Europe, as well as the primary and secondary European Union legislation, particularly legislation of the European Commission, the CEU and the European Parliament (EP). Other valuable sources involve final reports on the meetings of the CEU, political conclusions of the EC and the CEU, communications and other documents of the European Commission, as well as analyses and statistical data derived particularly from Eurostat, Frontex and the UN Refugee Agency (UNHCR). Notable German sources include, primarily, minutes of plenary proceedings of the Bundestag and the parliamentary Committee on the Affairs of the European Union, legislative proposals of parliamentary factions and the Bundestag resolutions, judgements of the Bundesverfassungsgericht, resolutions of German political parties adopted by their highest authorities and lower bodies, documents of the Bundesministerium der Finanzen (BMF), the Bundesamt für Migration

und Flüchtlinge (BAMF) and the Erstverteilung der Asylbegehrenden (EASY), speeches of selected German politicians, as well as materials of the Statistisches Bundesamt. Previous research on Germany's stance on the system reform of the EU lacks a monograph that would comprehensively analyse this issue using source materials. In this sense, this paper is a response to the above need that fills the existing gap. It is all the more significant due to the fact that it does not solely discuss the treaty reform already codified in the Treaty of Lisbon of 13 December 2007, but also undertakes to analyse the current concern of systemic changes in the eurozone and the mentioned policies that fall within the area of freedom, security and justice of the European Union.

Chapter I. Germany's Stance on the Establishment and the System Reform of the European Union

The signing of the Single European Act on 17/28 February 1986 that contained provisions concerning the establishment of the internal market by the end of 1992, including the liberalisation of capital movements, in a natural way stepped up the efforts taken by the Member States of the European Communities aiming to form the Economic and Monetary Union (EMU). This was due to the fact that the free movement of capital within the European Communities posed a genuine risk to exchange rate stability. In turn exchange rate volatility could hamper the free flow of goods and services (Oręziak 1998a: 227–228; Oręziak 1998b: 304–305; Gawlikowska-Hueckel, Zielińska-Głębocka 2004: 262). From this standpoint, the establishment of the EMU satisfied not only the interests of France and Germany but also the expectations of other Member States of the European Communities. This idea was supported by the Benelux countries, which had formed the Benelux Economic Union already on 1 November 1960. Economically weaker Member States, such as Greece, Portugal, Spain and Ireland, expected their economies to experience positive outcomes as a result of enhanced integration. Nonetheless, all Member States pursued to undermine the previously dominant position of Deutsche Bank in the European Monetary System. This manifested as a necessity of central banks of the said countries to adapt themselves to the restrictive monetary policy of Deutsche Bank. Still, although Germany could afford such a restrictive policy, among others, due to the strength of the Deutschmark and the many years of low inflation rate, oftentimes it was not consistent with the economic growth policy implemented by other countries. Thus, for most of them the establishment of the EMU, particularly the founding of the European Central Bank (ECB), was to serve as a path towards joint decision-making in monetary policy.[1]

Enhanced integration in the monetary and economic areas, as well as political and military areas within the European Communities was initiated primarily by President of France François Mitterrand. The French President's strategy aimed in particular to form a permanent bond between the uniting Germany and the

1 The increasing asymmetry in the dynamics of economic growth between the Member States of the European Communities, the United States and Japan was highly significant for the former (Węc 2012b: 194–196; Nowak-Far 2001: 57–91).

European Communities, which was expected to counteract the possible growth of German influence in Europe more effectively than before. The strengthening of monetary and economic integration was intended as an "insurance protection" against risk caused by the German reunification (Węc 2012b: 195), since the EMU would further strengthen the bond between the united Germany and the Member States of the European Communities, and Germany would also have to bear the greatestshare of the financial costs arising from the establishment of the EMU. However, enhanced political and military integration was perceived by Mitterrand, as by de Gaulle before him, as a lever enabling the position of France in the international system to be strengthened. Under the said circumstances, the French government, previously highly reluctant to support this idea, started to become one of the major advocates of the establishment of the European Union and the EMU starting from late 1989. The German government, formerly one of the most dedicated supporters of enhanced integration, approved the establishment of the European Union and the EMU, expecting the political and economic position of Germany in these organisations to be further strengthened (Hoffmann 1994: 127–147; Judt 1996).

France, acting in the capacity of the president of the European Communities in the second half of 1989, decided to undertake the diplomatic initiative. At the extraordinary EC meeting in Paris (18 November 1989), it called upon governments of the Member States to convoke an immediate intergovernmental conference. However, this time intentions of the French government were not aligned with the aspirations held by the West German authorities. A few days before the EC meeting in Strasbourg (8–9 December 1989), Chancellor Helmut Kohl warned in his letter to Mitterrand against the intention to convene the conference too soon, as he was convinced that the most significant task to be addressed by his government at that time was the German reunification. Nevertheless, he conditioned West Germany's approval for the founding of the EMU on undertaking parallel actions aiming to form a Political Union and the related reform of the institutional system of the European Communities, particularly to enlarge the competences of the EP (Frenkler 1998: 5).

Further events were determined by conclusions adopted at two EC meetings held in Dublin (25–26 June 1990) and Rome (14–15 December 1990). At the first of the two meetings, the EC approved the joint initiative of President Mitterrand and Chancellor Kohl proposed in April 1990 regarding the convening of two separate intergovernmental conferences. One of the said conferences was intended to address the establishment of a Political Union, whereas the other was to be dedicated to the founding of the EMU (EC. Conclusions, 25–26.06. 1990: 4–6). Six months later, at the meeting in Rome, the EC adopted guidelines

for handling negotiations. The said guidelines specified, among others, that the two conferences were to be held concurrently with their provisions codified under a single international agreement that would be ratified "before the end of 1992" (EC. Conclusions 14–15.12.1990: 9–10).

1 Intergovernmental Conference on Political Union (1990–1991)

The fundamental axis of debate at the intergovernmental conference on the establishment of a Political Union was the system of this new international organisation. Other controversial issues included powers of the EP, economic and social cohesion, common foreign and security policy, as well as some matters concerning the judicial system and internal affairs (Węc 2012b: 201–204; Anderson, Den Boer, Miller 1995: 104–122). On 15–16 April 1991, Luxembourg Foreign Minister Jacques F. Poos presented a draft treaty on political union based on a three-pillar structure. The first pillar was to cover the European Communities that, having formed a common market, were to be transformed into the EMU. These would be largely based on supranational cooperation. Whereas the second and the third pillars were to cover common foreign and security policy, and the judicial system and internal affairs, respectively, subject to the direct control of intergovernmental cooperation. The body intended to keep all the three pillars together was the EC, which was to fulfil a decision-making role in each of the said pillars. Several weeks later, the pillar structure of the future Political Union was opposed by as many as eight of all twelve foreign ministers of the Member States who met at an informal conference in Dresden (2–3 June 1991). Led by Foreign Minister of Germany Hans-Dietrich Genscher and Foreign Minister of the Netherlands Hans van den Broek, they called on the Luxembourg Presidency to devise a new draft treaty proposal that would provide for a single structure of the future Political Union (Brunn 2004: 267–270; Brandstetter 1996: 176–177; Garvert 2007: 1–3).

Highly significant differences between views of governments of particular Member States pertained also to the Union's common foreign and security policy. Though the United Kingdom, Denmark, Portugal and Greece consented to the establishment of the second pillar that was to be based solely on intergovernmental cooperation, Germany, France, the Benelux countries and Italy with the support of the European Commission advocated that it should be granted a greater degree of autonomy and a significant independence from the governments of the Member States in the long run. Moreover, individual delegations were also divided on the possible cooperation in the area of common

defence policy. Germany, France, Belgium, Luxembourg and Spain advocated the establishment of a common defence policy of the Union in the future. In contrast, the United Kingdom, Portugal and the Netherlands considered these proposals with great caution, concerned that this could compromise the role of NATO in Europe (Edwards, Nuttall 1995: 84–103).

On 17–18 June 1991, the Luxembourg Presidency submitted the second draft treaty establishing a Political Union. However, contrary to the Dresden postulates of foreign ministers, the new draft maintained the three-pillar model of the Union, though it strengthened the community method at the same time (Brandstetter 1996: 178–179). The draft was adopted at the Luxembourg EC meeting of 28–29 June 1991 as the starting point for further negotiations. Concurrently, the EC determined four principles the future Political Union ought to be based on, namely: first, an unlimited respect and further development of the binding community law; second, the creation of a single institutional framework; third, the enhancement and enlargement of the European integration process; fourth, compliance with the principle of subsidiarity, as well as economic and social cohesion. Furthermore, the EC declared its support for strengthening the position of the EP in the institutional system by means of extending its supervisory powers (influence on the appointment of staff to the College of the Commission) and legislative powers (the co-decision procedure). An initial consensus was reached also with regard to defence policy of the future Union. Participants of the session agreed that the gradually growing independence of the European Communities in this area ought to constitute a significant contribution to the strengthening of NATO (EC. Conclusions 28–29.06.1991: 1–2).

However, opinions expressed by individual delegations immediately after the meeting still left no illusion as to the difficulties in reaching a consensus. While President Mitterrand openly declared that the establishment of common foreign and security policy was the key issue for France, Chancellor Kohl strongly emphasised the need to form a federal system of the future arguing that "without federal structures and the principle of subsidiarity, there is certainly no future for Europe." Kohl considered a Political Union and the EMU two sides of the same coin. In contrast, Prime Minister of the United Kingdom John Major made sceptical comments on the blueprint for the Union as a whole, though at the same time, he did imply that further meetings of the intergovernmental conference would probably make room for a compromise (Węc 2012b: 202–203).

Following the EC conclusions, Foreign Minister of the Netherlands van den Broek submitted a new draft treaty establishing a Political Union on 24 September

1991. The said draft was substantially different to both former Luxembourg proposals in that instead of being based on the three pillars, the Union was to have a single supranational structure that would cover the European Communities, external relations and internal security. Moreover, the position of the EP in the institutional system was to be strengthened. However, most surprisingly for the Dutch Presidency, the draft was received by the governments of the Member States far less enthusiastically. On 30 September 1991, it was rejected at a meeting in Brussels by a majority of ten votes against two votes in favour, while at the same time, it was recommended that further negotiations should be based on the second Luxembourg draft. Though at the very beginning of June 1991 the establishment of a Political Union as an international organisation with a single system was strongly supported by Germany, the Netherlands, Belgium, Italy, Ireland, Spain and Greece, less than three months later, this willingness was declared by only two Member States, namely, the Netherlands and Belgium, supported by the European Commission and the EP. Despite the fact that the Dutch draft was in many respects consistent with the views of the federal government at the time, Germany distanced itself from the draft as well, eventually supporting the Luxembourg idea of establishing a Political Union based on the three-pillar structure (Mazzucelli 1997: 148; Frenkler 1998: 6–7; Weidenfeld (ed.) 1994: 305–347).

Following the setback experienced in Brussels, the Dutch Presidency submitted on 8 November 1991 its second draft treaty establishing a Political Union, which was essentially based on the principles of the Luxembourg draft of 17 June of that year. This time, it was severely criticised by community institutions, particularly the EP. At the conclave of foreign ministers held in Noordwijk (12–13 November 1991), President of the EP Enrique Crespo defined it as thoroughly insufficient and lacking any vision for the future. Crespo argued that the three-pillar model of the Union does not follow the Dresden recommendations made by foreign ministers, leaving the common foreign and security policy beyond democratic control and limiting the co-decision power of the EP to an overly reduced scope of matters. Crespo's views were shared by Genscher, who proposed that the co-decision procedure should refer to all the areas where the Council of Ministers would act by qualified majority. Still, this proposal was strongly rejected by British Foreign Minister Douglas Hurd, who was willing to grant the EP the right of co-decision in matters regarding the internal market, at best. Most of the meeting participants also disapproved of yet another proposal of the German delegation, which pertained to the incorporation of social policy and at least some issues regarding the judicial system and internal affairs, such as immigration policy, asylum policy or the fight against drug offences, into the first pillar. No consensus was reached also at the meeting of foreign ministers in

Brussels (3–4 December 1991), especially since some delegations submitted new controversial proposals for discussion.[2]

2 Intergovernmental Conference on Economic and Monetary Union (1990–1991)

In the first phase of the intergovernmental conference on the establishment of the EMU held under the auspices of the Luxembourg Presidency, an agreement was reached, among others, on rules of the so-called external monetary policy, i.e. an exchange-rate policy for the European Currency Unit (ECU) in relation to non-Community currencies. The session participants agreed that the most substantial decisions in this regard will be made by the Council of Ministers in consultation with the ECB. Moreover, it was to decide on exchange market interventions implemented by the European System of Central Banks. During the second stage of the session held under the auspices of the Dutch Presidency, a blueprint for the EMU was agreed on, which was based on the objectives of Jacques Delors' report of June 1989. The initial draft was submitted on 29 October 1991 by Dutch Minister of Finance Wim Kok. The said document stipulated that at the very beginning of the second phase of the implementation of the EMU (1 January 1994), treaty provisions should be made for the European Monetary System existing since 13 March 1979 and the European Monetary Institute (EMI) ought to be formed, whereas at the beginning of the third stage of this process (1 January 1997) the ECB was to be founded. In order to join the EMU, each Member State was required to satisfy four convergence criteria. The final version of the draft treaty on the EMU was agreed on by ministers of finance on 1 December 1991 at a meeting in Scheveningen (Węc 2012b: 196–205).

The course of the intergovernmental conference proved that governments of the Member States remained significantly divided on this issue, with the fundamental dividing line still running between France and Germany, and the United Kingdom supported by Denmark. While France and Germany manifested their utmost interest in the blueprint for the EMU, the United Kingdom remained the greatest critic and opponent of this endeavour. Although the German government agreed on economic and monetary integration, it also expected that it will

2 France took the initiative to propose the establishment of a Congress of deputies of national parliaments, whereas Spain proposed that the treaty should involve binding arrangements on a progressive increase in EU financial aid provided to the poorest Member States (Laursen, Vanhoonacker 1992: 37–225; Pryce 1995: 36–52; Corbett, Jacobs, Shackleton 2000: 299–300).

be extended into the political realm. Since the blueprint for the EMU did not provide for a communitarisation of fiscal policy, Germany was concerned that in the future this could lead to colliding interests of the ECB's monetary policy and fiscal policy of individual Member States in the future. The Political Union was to act as a safeguard against tensions between monetary policy and fiscal policy, and to ensure stable functioning of the EMU (Węc 2012b: 205; Pryce 1995: 36–52). The strategy adopted by French and German authorities was perfectly understandable to the British government, though the latter did not share their enthusiasm for monetary integration. Prime Minister Major fully identified with Margaret Thatcher's former opinion that the establishment of the EMU lead to federalism (Węc 2012b: 205). He assured that his government would never sign a treaty that envisaged a common European currency and uniform social legislation. Other representatives of the British government argued that administrative restrictions provided for in the draft treaty concerning size of the budget deficit and the way it was to be financed were redundant, since the Member States' fiscal policy would be far more effectively disciplined by means of market rules (Węc 2012b: 205–206; Oręziak 1998b: 276).

The conclusions adopted at both intergovernmental conferences were approved by the EC with minor amendments during a session held on 9–10 December 1991 in Maastricht and later codified in a single Treaty on European Union (TEU). The EC stated in the conclusions adopted at that time that the intergovernmental conference "reached agreement on the Draft Treaty on European Union based on the texts (doc. SN 252/1/91) concerning Political Union and on the Draft Treaty text concerning Economic and Monetary Union" (EC. Conclusions 9–10.12.1991: 1–3). On 7 February 1992, foreign ministers and ministers of finance of twelve Member States signed the TEU in Maastricht, which entered into force on 1 November 1993 (TEU, OJ C 1992, 191: 1–115).

3 Evolution of German Stance on the EU System Reform in 1996–2001

3.1 Intergovernmental Conference of 1996–1997. The Amsterdam Treaty

While France took the initiative to convene intergovernmental conferences in 1990–1991, the announcement to convene the next IGC was already codified in the Treaty of Maastricht (Article N(2) TEU). The preparatory work for this conference was carried out by a Reflection Group chaired by Carlos Westendorp, the Secretary of State for European Affairs and later Foreign Minister of Spain.

As in the case of previous intergovernmental conferences, the governments of Germany and France strived to exert the greatest impact on the course of the said conference as well. Additionally, the federal government attempted to use the conference to define the new role of the Federal Republic within the European Union and international policy after the German reunification. Both governments submitted as many as four joint drafts of EU system reforms, which were then debated at the conference, though not always receiving recognition from the participants. The drafts included: a draft of 6 December 1995 submitted by Chancellor Kohl and newly elected French President Jacques Chirac; proposals of foreign ministers Klaus Kinkel and Hervé de Charette of 27 February 1996 and 17 October 1996; and Kohl's and Chirac's draft of 9 December 1996.

The first German-French draft reform was submitted to Prime Minister of Spain Felipe Gonzalez and, concurrently, to the President of the EC. Both politicians considered it a priority to amend the draft reform with regard to the institutional system, common foreign and security policy reform, as well as transformations within the judicial system and internal affairs, which would bring the European Union closer to its citizens. Transformations within the institutional system were intended to broaden the application of qualified majority voting in the CEU "while verifying the currently binding weighted voting system," taking into account the possibility to introduce changes in the appointment procedure, the composition and powers of the European Commission, as well as to simplify the cooperation within the 'decision-making triangle' (the European Commission – the CEU – the EP). Overcoming the democracy deficit would require a greater involvement of the EP and national parliaments in the legislative process in the Union, and conditions that would allow the principle of subsidiarity to be reinforced in practice. What is more, in reference to a proposal made by Wolfgang Schäuble, Karl Lamers and Édouard Balladur in 1994,[3] they submitted a postulate for the introduction into the

3 On 1 September 1994, Schäuble and Lamers proposed on behalf of the Christlich Demokratische Union Deutschlands/Christlich Soziale Union (CDU/CSU) parliamentary faction to deepen integration by means of creating a "hard core" in the European Union that would include Germany, France and the Benelux countries. The above listed states were to act as the foundation of the future Political Union. The "hard core" was to be open to the accession of other EU Member States in the future, particularly the United Kingdom. Moreover, Schäuble and Lamers also spoke in favour of granting treaty status to the so-called flexible integration. On 30 August 1994, in *Le Monde* French Prime Minister Balladur put forward a proposal to establish three 'concentric circles' in the European Union. The first of the said circles was to involve countries interested in enhancing cooperation in the field of monetary and security policy based on *acquis communautaire*. The second circle was to involve the remaining

Treaty of Maastricht provisions that would determine conditions for establishing enhanced cooperation as a new integration method stemming from the so-called flexible integration. Such cooperation could not prejudice the uniform institutional framework of the European Union and would have to be open to all Member States willing to join it in the future (Die Reform 1996: 115–117).

Over two months later on 27 February 1996, Foreign Ministers Kinkel and de Charette developed joint guidelines on the reform of the second pillar of the European Union, proposing, among others: that unanimous voting should be dropped as the decision-making rule employed in the common foreign and security policy; the solidarity clause ought to be introduced to the Maastricht Treaty; a policy planning and early warning unit (PPEWU) should be established; the Petersberg tasks, previously under the Western European Union (WEU), ought to be included into the European Union; and WEU should be incorporated into the EU in the future (Die Reform 1996: 118–120).

Although the joint draft devised by Kohl and Chirac suggested that the changes in the institutional system, the reform of the second and third pillars, and the establishment of enhanced cooperation could provide a foundation for a compromise between the governments of both states before the forthcoming intergovernmental conference,[4] de Charette's and Kinkel's guidelines confirmed that one of the key priorities for both these countries was to reform common foreign and security policy of the European Union, nonetheless. Still, the German government aimed also to introduce a radical change in the voting system in the CEU, which for the time being was covertly referred to in Kohl's and Chirac's draft as willingness to verify the "current weighted voting system". In fact, the federal government was explicitly keen to introduce the so-called double majority (i.e. the majority of states and the majority of citizens representing the states) to the qualified majority voting procedure in the CEU, since it would result in a new balance of powers within this institution due to Germany's demographic potential.

When the EC formally opened the conference in Turin on 29 March 1996, the Italian Presidency submitted preliminary reform proposals to the meeting

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Member States and all EU candidate countries. Their cooperation was to be based on a single market, selected community policies and certain aspects of external security. The third 'concentric circle' was to be formed by the remaining European countries whose possible accession to the EU would take place at a later term and whose relations with the Union were to be based on a loose form of economic and political cooperation (Überlegungen 1.09.1994: 1–11; Węc 2012b: 257–261).

4 Which was a success considering the substantially divergent visions of the EU reform presented in 1994 in Schäuble's/Lamers' document and in Balladur's draft.

participants. These outlined four main directions of change. The first one pertained to transformations in the institutional system, including extended use of qualified majority voting in the CEU and the number of commissioners in the European Commission reduced from two to one in case of the largest Member States. The second direction of change provided for a reform of the second pillar of the EU, which consisted in, among others, establishing the position of the High Representative for Foreign Affairs and Security Policy. The third direction of change covered a reform of the third pillar, which involved enhancing the fight against transnational organised crime, increasing the effectiveness of the European Police Office (Europol), as well as ensuring communitarisation of cooperation in the area of visa policy, asylum policy and immigration policy. The fourth direction of the proposed changes involved making the EU closer to its citizens by means of enhancing protection of fundamental rights and civil liberties, as well as tackling unemployment more effectively. The intergovernmental conference under the auspices of the Italian Presidency failed to provide the expected results, as the Italian government succeeded in developing only an interim report that did not solve any of the key issues (IGC 1996, CONF 3860/96: 1–47; CONF 3860/1/96, REV 1 ADD 1: 1–24; CONF 3860/1/96, REV 1: 1–47).

The debate on systemic changes in the European Union under the Irish Presidency was marked by a significant divergence of views between the conference participants. Initially, all delegations (except for the United Kingdom and Sweden) supported the proposal to extend the use of qualified majority voting procedure in the CEU to include both new policies and policies hitherto subject to the unanimity principle. However, many governments lodged numerous objections over time, making their final stance conditional on the said objections being resolved (IGC 1996, CONF 3849/96: 1–12; CONF 3844/96: 1–15; CONF 3846/96: 1–43; CONF 3858/96: 1–7; CONF 3857/96: 1–21; CONF 3882/96: 1; CONF 3926/96: 1–3). Opinions of individual delegations differed substantially also with regard to the introduction of double majority voting in the CEU. As the initiator of this change, Germany manifested the greatest interest in this regard. The stance of the federal government was supported by Italy, the Benelux countries, Denmark and Austria. Portugal, Ireland, Greece, Finland and Sweden opposed any changes in the said area whatsoever. In contrast, France, the United Kingdom and other Member States called for sustaining the present balance between Germany and other large Member States. Hence, the latter were in fact against the introduction of a double majority system despite supporting changes in the very manner of weighting votes in the CEU. The majority of delegations were in favour of creating the High Representative for Foreign Affairs and Security Policy to the CEU. The greatest opposition to this

idea was expressed by the Netherlands suggesting that powers in this area should be delegated to the European Commission and that the function of the Commissioner for Common Foreign and Security Policy should be formed. What is more, serious divergences of views emerged regarding the integration of WEU into the EU, which was postulated by Germany. This idea was firmly opposed by the United Kingdom, Ireland, Sweden and Finland, whereas France acted as a mediator, proposing to strengthen relations between the EU and WEU with both organisations' independent status maintained (Die Reform 1996: 148–188; Wallace 1996: 90–91; Masala 1997: 228–236; Les orientations 1996: 1).

Individual delegations were also divided on the composition of the European Commission. Supporters of a reduced number of commissioners led by Germany, France and Italy argued that this change should result in a 'dissolution' of relations between commissioners and their countries of origin, which would further strengthen the supranational character of that institution and increase the effectiveness of its actions. However, in contrast to Germany and Italy, not only did the French delegation demand a radical cut in the number of commissioners (down to ten) but also advocated that the Commission's powers should be restricted at the very same time, since, according to the delegation, the Commission ought to act based on a precise mandate entrusted to it by the CEU. Nevertheless, the vast majority of delegations (chiefly small countries) postulated that the right to appoint one's representative of the European Commission should be retained. The Benelux countries opposed the prospect of losing their representative in the Commission in the least firm manner. Still, the failure to reach agreement on the composition of the Commission stemmed chiefly from the ambivalent attitude of large Member States. Although Germany, France, the United Kingdom and Spain declared willingness to reduce the total number of commissioners, they openly admitted that they would rather keep one permanent seat at the commission table as a minimum. Such an attitude meant that a possible rotation in the College of the Commission would involve only small states. The strongest call for retaining the right to the representative in the European Commission was made by Germany, whereas the Italian delegation was the only one of all the delegations of large Member States to express willingness to give it up. In contrast, the vast majority of the participants adopted a favourable stance on extending the powers of the President of the European Commission (Die Reform 1996: 152–181; Wallace 1996: 91–92; Dehousse 1999: 93–98).

A similar convergence of views characterised almost all delegations with regard to the increase in the capacities of the EP by means of extending the scope of application of co-decision. The British delegation was in principle the only one to oppose this proposal and to support the strengthening of the role of national

parliaments, as did the French delegation. The most far-reaching changes in this regard were expected by Germany, Italy, Spain, Belgium, Luxembourg, Denmark and Greece, which postulated that co-decision ought to be introduced in all cases where the CEU acted by qualified majority. Moreover, opinions of individual delegations were also strongly divided on the German-French idea of enhanced cooperation, which was first introduced in the mentioned Kohl's and Chirac's draft and then in Kinkel's and de Charette's joint initiative of 17 October 1996. Both Foreign Ministers proposed enhanced cooperation to be extended to cover all the three pillars of the Union, with strictly specified procedures and conditions of use. In this respect, Germany and France were initially supported only by Italy, Belgium and Luxembourg, whereas the remaining Member States lodged numerous objections (IGC 1996, CONF 3957/96: 1; Die Reform 1996: 148–170).

Having familiarised itself with proposals of all delegations, the Irish Presidency developed a draft reform treaty, which was then submitted on 5 December 1996 at an intergovernmental conference and debated on the following day by foreign ministers at a conclave in Brussels (IGC 1996, CONF 2500/96: 1–141). Since the draft was accorded a highly critical reception by France, on 9 December 1996, President Chirac and Chancellor Kohl presented a joint letter to Irish Prime Minister John Bruton demanding that further changes be introduced. These concerned enhanced cooperation, the establishment of the position of the High Representative for Foreign Affairs and Security Policy, a reduction in the number of commissioners in the European Commission, modifications in qualified majority voting in the CEU and redefined thresholds required for undertaking the said procedure (Węc 2012b: 269–270). Although the Irish Presidency took the French-German letter into consideration, it did not bow to all the postulates contained therein. Fearing a negative response from smaller Member States, it did not agree to incorporate in its draft under preparation the proposed changes in the composition of the European Commission, in qualified majority voting in the CEU or to re-define thresholds required for undertaking the said procedure. The draft developed by the Irish Presidency was accepted at the Dublin EC (13–14 December 1996) as the starting point for further negotiations (EC. Conclusions, 13–14.12.1996: 3–4).

Conference meetings gained significant momentum with the assumption of the Dutch Presidency. In the course of negotiations large divergences of views between delegations once again came to light with regard to the institutional system reform. Yet again, most controversy was triggered by proposals concerning changes in qualified majority voting in the CEU. On 24 April 1997, the Dutch Presidency presented two change options for the weighted voting system and two drafts establishing double majority, yet in the course of further

deliberations it spoke unequivocally in favour of a less radical solution, i.e. a change in the weighted voting system. In response, the German government blocked proposals of the Dutch Presidency concerning the use of qualified majority voting in areas of high financial significance, particularly taxes, structural funds, social policy and scientific research (IGC 1996, CONF 3863/97: 1–6; CONF 3839/97: 1–4; CONF 3852/97: 1–3; CONF 3887/97: 1–6; Dehousse 1999: 103–105). Consequently, there were no changes incorporated in the new reform treaty that was adopted later on, even with regard to the weighted voting system.

The further course of these deliberations was impacted in a revolutionary manner by the informal EC meeting held in Noordwijk on 23 May 1997, at which consensus was successfully reached on most issues including changes in the institutional system. The meeting participants agreed that following the Eastern enlargement of the EU, the European Commission should also comprise twenty members, while the largest Member States ought to give up one of their two commissioners. However, no agreement was reached on how this concession ought to be compensated for. At that time, at least officially, this matter was not associated with the above-mentioned changes in qualified majority voting in the CEU, which was supported mainly by Germany and France. Moreover, no conclusions were adopted on the strengthening of the position of the European Commission in the EU institutional system, something smaller Member States were pressing for. However, it was agreed that the position of the President of the European Commission should be strengthened, gaining a direct impact on the election of commissioners and the scope of their powers. What is more, a consensual solution was adopted on the initiative of Germany and France regarding the decision-making procedure in the second pillar. Unanimity was decided to be retained as the voting principle with the so-called constructive abstention introduced in situations where a given decision would cause prejudice to essential national interests of several Member States. However, constructive abstention in itself would not hinder the decision-making process. Eventually, an agreement was also reached with regard to the establishment of the area of freedom, security and justice in the first pillar, as well as partial implementation of the Schengen acquis in the said area (AdG 1997: 42041). At the EC meeting of 16–17 June 1997 in Amsterdam, conclusions of the intergovernmental conference were approved by heads of state or government (EC. Conclusions, 16–17.06.1997: 1). The key change implemented to the draft reform treaty at the said meeting at the request of the United Kingdom, Greece and Austria involved renouncement of enhanced cooperation introduced to the common foreign and security policy. On 2 October 1997, foreign ministers of fifteen EU Member States signed in

Amsterdam a new reform treaty that entered into force on 1 May 1990 (TA, OJ C, 1997, 340: 1–144).

3.2 Intergovernmental Conference of 2000. The Treaty of Nice

The convening of a subsequent intergovernmental conference was heralded in Protocol No. 11 on the institution in the view of the Eastern enlargement of the European Union annexed to TEU, the European Coal and Steel Community Treaty (TECSC), the European Community Treaty (TEC) and the European Atomic Energy Community Treaty (TEAEC). As in the case of the 1996–1997 intergovernmental conference, Germany and France were the first Member States to take a diplomatic initiative in this matter. On 9 June 1998, Chancellor Kohl and President Chirac called upon British Prime Minister Tony Blair acting as the EU President in their joint letter to urgently address three issues at the forthcoming meeting of the EC: the principle of subsidiarity, the related distribution of competences between the Union and the Member States, and changes in the institutional system not addressed at the 1996–1997 intergovernmental conference, on which "an agreement must be reached prior to the anticipated (Eastern) enlargement" of the EU. Kohl and Chirac argued further in the letter that since "some European institutions become increasingly estranged from citizens and their daily-life problems, it would be necessary (…) that members of the European Council initiate a discussion on how to apply the subsidiarity principle in practice to allow for a clear distribution of competences between the EU and the Member States (...). Changes of this sort would have nothing in common with renationalisation, as they would rather correspond to the principle of proportionality, closeness to the citizen and effectiveness (of the EU), and would contribute to the prevention of excessive centralism. Therefore, we ought to (...) allow greater freedom to national-level institutions. Nevertheless, integration in certain areas would undoubtedly require urgent enhancement, particularly as regards common foreign and security policy" (AdG 1999: 42870).

The issue of the application of the principle of subsidiarity and the related distribution of competences between the European Union and the Member States made a strong emotional impact already at the 1996–1997 intergovernmental conference. Though the Member States that supported the reinforcement of the Community method or federal solutions, such as Germany and the Benelux countries, considered the principle of subsidiarity an instrument for enhancing subjectivity of regional structures within the state or even for limiting national sovereignty, the United Kingdom and the Scandinavian countries, for that matter, intended to employ the principle of subsidiarity in order to reclaim

full independence of the state in areas such as education, culture, social policy, healthcare, consumer protection, environmental protection and transport.

Nevertheless, Chirac's and Kohl's views influenced the EC conclusions adopted several days later in Cardiff (15–16 June 1998). The EC declared in the said conclusions that upon the entry into force of the Amsterdam Treaty, relevant decisions would be made "on how and when to tackle the institutional issues not resolved at Amsterdam." Assuming that there is an urgent "need to bring the EU closer to people and to focus it on the issues that matter most to the European citizens," it also supported the intention to enhance "democratic legitimacy and making a reality of subsidiarity" (EC. Conclusions, 15–16.06.1998: 21). One year later, at a meeting held on 3–4 June 1999 in Cologne, the EC announced preparatory works for a subsequent intergovernmental conference, which was to address in principle changes in the composition of the European Commission, qualified majority voting in the CEU (a new method for weighting votes or introducing double majority), as well as a possible extension of the use of qualified majority voting to new cases. Moreover, the conference could also discuss other changes in the treaties related to the institutional system (EC. Conclusions, 3–4.06.1999: 20). The conference agenda was then further specified by the EC at a meeting held on 10–11 December 1999 in Helsinki. At that time, it was agreed that aside from the three so-called Amsterdam leftovers mentioned above, it will also address changes in the institutional system that stem from the planned Eastern enlargement of the European Union that pertain to the EP, the Court of Justice, the Court of Auditors, the Economic and Social Committee and the Committee of the Regions. The conference was intended to commence its proceedings in February 2000 and complete them in December of the same year (EC. Conclusions, 10–11.12.1999: 2).

During the first stage of the intergovernmental conference held under the Portuguese Presidency, the issue of changing the qualified majority voting system in the CEU once again evoked most controversy. As at the 1996–1997 intergovernmental conference, Germany submitted a proposal to incorporate double majority to the said system. As before, the federal government's initiative was supported by Austria, the Benelux countries and Denmark, while Italy was not in favour. However, Germany received support in this matter from yet another country, namely Greece. In turn, the United Kingdom, Portugal and Italy expressed some concerns regarding double majority, though they did not reject it categorically. Whereas the remaining five Member States, particularly France, Spain and Sweden, demanded that changes be introduced only with respect to vote weighting (IGC 2000, CONFER 4717/00: 1–8; CONFER 4719/00: 1–8; CONFER 4720/00: 1–20; CONFER 4721/00: 1–4; CONFER

4722/00: 1–5; CONFER 4723/00: 1–19; CONFER 4712/00: 1–9; CONFER 4733/00: 1–8; CONFER 4745/00: 1–8; CONFER 4733/00: 1–8; 4745/00: 1–8; CONFER 4751/1/00, REV 1: 1–13; Müller-Brandeck-Bocquet 2002: 180–181). Controversies pertained also to the extension of the scope of qualified majority to new cases. Italy and the Benelux countries postulated that qualified majority voting ought to be considered the general decision-making rule, though under the condition that a specific list of exceptions where decisions would be made by unanimity is drawn up. Germany opposed the development of the list of exceptions, assuming that some countries would pursue it as a means for blocking the optional use of this procedure in numerous areas. The development of the said list of exceptions was also opposed for a thoroughly different reason by the United Kingdom and Sweden. The said states demanded that decisions are made on a case-by-case basis, which would apply in all cases where decisions were formerly made by unanimity. In this very way, they intended to limit the possibility of the said procedure being applied in an excessively high number of new cases (IGC 2000, CONFER 4706/1/00, REV 1: 1–8; CONFER 4705/1/00, REV 1: 1–2; CONFER 4734/00: 1–3).

Regarding the composition of the European Commission, the majority of the Member States defended the 'one commissioner per country' principle. This time, Belgium and France, despite postulating a reduction in the number of commissioners at the previous intergovernmental conference, strengthened their stances in this matter. The French delegation was also against further strengthening of the position of the President of the European Commission, arguing that it could cause internal imbalance within the said institution. What is more, the Netherlands proposed defining individual liability of commissioners, which would allow the obligation to dismiss the entire Commission to be avoided in the event that the Parliament's trust is lost by one or more commissioners. The right to dismiss one or more commissioners would fall within the competence of the President of the Commission, still it would require approval of the EC. The vast majority of delegations were convinced of the necessity to enhance the powers of the EP by means of extending the scope of application of the co-decision procedure. Though Germany and the Benelux countries proposed that this procedure should be employed in the very same cases where qualified majority voting was to be binding in the CEU, the majority of delegations demanded that decisions are made on case-by-case basis. Furthermore, the Netherlands postulated that, in the event that the entire European Commission is dismissed, the EP should also be dissolved and new elections ought to be held. The majority of delegations were also in favour of a redistribution of seats in the EP, the Court of Justice, the Court of First Instance, the Economic and Social Committee and the

Committee of the Regions due to the planned Eastern enlargement of the EU. The Netherlands supported by the United Kingdom demanded a more in-depth reform of the Court of Justice and the Court of First Instance that would entail, i.a. delegating some powers of the Court of Justice to the Court of First Instance, as well as a gradual transition from sitting in full to sitting in chambers as regards deciding cases. Many controversies were also provoked by enhanced cooperation (Wiedmann 2001: 185–202). In this regard, the fundamental dividing line ran between those advocating retention of the provisions of the Amsterdam Treaty and those in favour of facilitated conditions for establishing such cooperation binding at the time, which included primarily the removal of veto powers and modification of the requirement that over half of the Member States participate in enhanced cooperation (IGC 2000, CONFER 4713/00: 1–5; CONFER 4715/00: 1–4; CONFER 4727/00: 1–5; CONFER 4744/00: 1–4; CONFER 4746/00: 1–8; Leinen 2000: 73–80).

On 14 June 2000, the Portuguese Presidency submitted an interim report that summarised outcomes of previous deliberations. Regarding the definition of qualified majority, in the said report three options for the application of double majority voting and two drafts regarding simple modification to the weighted voting scheme for the Union in the twenty-seven EU Member States (EU 27) were presented. The first double majority option stipulated 50.1% of the Member States, representing 50.1% of the EU population. The second option involved the existing weighted voting system and introduced a demographic clause. The third option consisted in changing the number of weighed votes and linking it to the demographic clause. In line with the second option, decisions in the CEU were to be adopted by a qualified majority of 96 votes of the total 134 votes, representing 58% of the EU population, whereas the third option envisaged a qualified majority of 214 votes of the total 298 votes cast by 58 or 60% of the EU population. As for the simple modification to the weighted voting scheme, the characteristic feature of the first draft was that it constituted an extrapolation of the system binding at that time and assumed that decisions in the CEU were to be made by a qualified majority of 234 votes of the total 330 votes. Whereas in the second draft, the number of votes for each state was estimated as the square root of its population figure (in millions) rounded to the nearest integer and assumed that the mentioned decisions were to be adopted by a majority of 134 votes of the total 188 votes. As for the extended scope of application of the procedure for qualified majority voting in the CEU, the Portuguese Presidency developed a list of twenty-eight system articles that should be subject to unanimous voting. These pertained to, i.a. common defence, treaty reform, accession of new Member States to the European Union, own resources, a

uniform electoral procedure for the EP, amendments to draft legislation of the European Commission, changes in the minutes on the excessive deficit procedure, amended number of members in the College of the Commission, as well as a second reading in the co-decision procedure following a negative opinion issued by the Commission. Moreover, the presidency submitted a list of twenty-one cases where it proposed application of the co-decision procedure in the legislative process, thus significantly strengthening the role of the EP. Regarding the composition of the European Commission, the presidency proposed that the 'one commissioner per country' principle should be retained, while the position of the President of the Commission should be strengthened at the same time an internal hierarchy should be established or the number of commissioners should be reduced and a rotation system between individual Member States ought to be introduced. Changes concerning the distribution of seats in the EP provided that the existing number of seven hundred members should be maintained (IGC 2000, CONFER 4753/00: 1–19; CONFER 4750/00: 25–93).

During the second stage of the 2000 intergovernmental conference held under the French Presidency, most of issues disputed at that time were successfully solved. First, at the EC meeting in Biarritz (13–14 October 2000) a preliminary consensus was reached on two matters, namely, the extension of the scope of application of qualified majority voting in the CEU and changes in the establishment of enhanced cooperation procedure (IGC 2000, CONFER 4776/00: 1–45; CONFER 4780/00: 1–5).[5] However, the final discussion on the remaining issues

5 As the deliberations of the 2000 intergovernmental conference were gaining momentum, governments of the Member States began submitting more and more new proposals on the system reform of the EU, the most important of which were the initiatives put forward by German Foreign Minister Joschka Fischer (12 May), French President Chirac (27 June) and British Prime Minister Blair (6 October). Fischer spoke in favour of forming a federation of national states and signing a European constitution, while Chirac proposed to deepen integration through enhanced cooperation executed by a "pioneer group" led by France and Germany, whereas Blair urged, among others, that a strict division of powers should be made between the EU and the Member States. However, these initiatives did not make any significant impact on the further course of the intergovernmental conference, though they did raise the participants' awareness of the necessity to implement the EU reform in two stages. This decision was made by foreign ministers of the Member States at an informal meeting in Evian (2–3 September 2000). The first stage ought to provide a consensus on the key changes vital from the perspective of the Eastern enlargement of the EU, while the substantial system reform of the EU was not to be implemented until the second stage together with the optional adoption of a European constitution (Węc 2012b: 310).

was rescheduled to the Nice EC of December 2000, which was intended to close the French Presidency. This was due to the divergence of views between large and small Member States, which was still excessive at the time and, primarily, an overlap between the said views and a clear disagreement between Germany and France, which were caused mainly by the French delegation's withdrawal from previously declared support for the key postulate of the federal government, i.e. to introduce double majority voting in the CEU (Müller-Brandeck-Bocquet, 2002: 180–183; Corbett, Jacobs, Shackleton, 2000: 304). The Nice EC of 7–11 December 2000 was one of the most dramatic deliberations in the history of the European Union (Gray, Stubb, 2001: 15–16). Nevertheless, at the meeting a compromise was successfully reached on all previously unsolved issues, which were combined into one negotiating package. It thus made the adoption of solutions in favour of large Member States easier for medium-sized and small Member States. The modification of the procedure for qualified majority voting in the CEU was a compromise between the double majority system and the simple modification to the weighted voting scheme, particularly between the above-mentioned third option of double majority and the first option of simple modification to the weighted voting scheme, proposed by the Portuguese Presidency in the interim report back on 14 June 2000. The change in the weighted voting system consisted in a significant enhancement in the nominal value of votes of each state in a way that explicitly favoured large Member States. It was concurrently linked to each Member State's right to demand that the respect of the 62% of the EU population threshold is verified. Furthermore, the provision binding at that time was retained, according to which that in cases of drafts submitted by the European Commission, decision-making by qualified majority required approval of the majority of the Member States, while in cases where the proposal is not made by the Commission, approval of two-thirds of the Member States is required. In return for their approval for the mentioned change in the procedure for qualified majority voting, medium-sized and small Member States succeeded in forcing through their proposal to preserve (until the accession of the twenty-seventh state to the EU) the 'one commissioner per country' principle applied for allocating seats in the European Commission in relation to the strengthened position of the President of the Commission. Another concession for medium-sized and small Member States was the new distribution of seats in the EP, which was in favour of the said states to the detriment of large member states. The total number of seats was increased from seven hundred to seven hundred and thirty-two, although the previously discussed minimum number of seats per a Member State was not settled. Hence, Belgium, Greece and Portugal received two seats more than previously (22), while France, the United Kingdom

and Italy lost as many as fifteen seats each (72), whereas Spain lost fourteen seats (50). The only large state to successfully maintain its previous number of seats was Germany (99). Lastly, in return for a smaller number of weighted votes in the CEU granted to Belgium, it was decided that one EC meeting would take place in Brussels starting from 2002 and that all meetings of the said body would be held there following the Union's enlargement, as a result of which the EU was to comprise eighteen states. As for the composition of the European Economic and Social Committee and the Committee of the Regions, a simple rule was adopted to retain the number of representatives of the old Member States and to add representatives of the new Member States according to a key resulting from extrapolation of the distribution of seats binding at the time. Having reached compromise on all the mentioned issues, the EC adopted a preliminary version of the new treaty (IGC 2000, CONFER 4816/00: 1–120). On 26 February 2001, foreign ministers of the Member States signed a new reform treaty in Nice, which entered into force on 1 February 2003 (TN, OJ C, 2001, 80: 1–87).

Importantly, the federal government's agreement to the establishment of the European Union under the Maastricht Treaty of 7 February 1992 indicated that it withdrew from the *iunctim* promoted in the years 1989–1991, which involved a concurrent establishment of a Political Union and the EMU as the prototype of a 'European federal state'. The German government withdrew from the Political Union agenda in favour of the European Union not solely because the former was negated by the majority of the Member States, but also due to the fact that one of the fundamental axioms of Germany's European policy (in force since the time of Chancellor Konrad Adenauer), namely, that the European Federation would facilitate other European countries' approval of the unification, had become obsolete due to the German reunification of 1990 (Węc, 2000: 89–94). The decision on withdrawing from actions aiming to form a Political Union as an international organisation with a uniform political system and complex supranational architecture had a revolutionary impact on further European integration, since as a consequence, a decision was made to establish the European Union, which as a *sui generis* organisation was characterised by a substantial lack of cohesion. Not only was it based on three pillars but also had two different legal orders as its foundations, namely, Community law (the first pillar) and public international law (the second and the third pillars). Moreover, the withdrawal from the Political Union agenda meant for the most part depriving the EMU of the above-mentioned safeguard against tensions occurring between monetary policy and fiscal policy, with its stable operation no longer guaranteed.

At the 1996–1997 intergovernmental conference, apart from the majority of diplomatic initiatives regarding the system reform of the EU being submitted by

Germany and France, many other German proposals found reflection in the new reform treaty. On the initiative of the federal government, enhanced cooperation and most changes in the common foreign and security policy were established in the first and the third pillar of the Union, which involved the creation of a PPEWU, the inclusion of the Petersberg tasks into the EU, and heralded the incorporation of WEU to the EU. However, the German delegation failed, among others, to introduce double majority in the decision-making procedure in the CEU, to limit the number of the European Commissioners by means of a rotation system, to extend the scope of application of the co-decision legislative procedure in the EP to all cases where the CEU acts by qualified majority, to renounce the unanimity rule for decision-making in the common foreign and security policy, and to introduce enhanced cooperation and the solidarity clause to the said policy. Another conclusion that proved inconsistent with the German government's expectations was the decision that the European Commission ought to comprise twenty members even following the Eastern enlargement of the EU, while the largest member states would surrender one of their two commissioners.

At the 2000 intergovernmental conference, the German delegation acted rather alone on many issues. Despite having presented a joint initiative to convene the said conference already in June 1998, the German and French governments did not enjoy a successful collaboration during the negotiations. Though the federal government succeeded in extending enhanced cooperation to the second pillar of the Union, it was unable to force through its main proposal to establish double majority in the CEU, which even led to a disagreement with France. As a result, the resolution of this case was deferred, at least in the view of Germany. What is more, the German delegation failed at its attempts to extend the co-decision legislative procedure in the EP to all cases where the CEU acts by qualified majority, to strengthen the principle of subsidiarity and to establish a strict distribution of competences between the EU and the member states, and to limit the number of European Commissioners by means of introducing a rotation system to the Commission. The modification of the procedure for qualified majority voting made under the Treaty of Nice has brought substantial benefits to all large Member States and candidate countries, i.e. Germany, France, the United Kingdom, Italy, Spain and Poland. The ones to gain the most were Spain and Poland (31% of the voting weight), followed by Germany, France, the United Kingdom and Italy (13% of the voting weight each). Of all the medium-sized member states, the Netherlands was the only one to derive benefits (1% of the voting weight). All the other Member States and candidate countries incurred losses, the greatest of which were experienced by small candidate countries, namely, Latvia, Slovenia, Estonia (50% of the voting weight

each) and Malta (40% of the voting weight). However, the introduction of the 62% minimum EU population threshold favoured the most populated Member States, allowing a given decision to be blocked by a coalition of as few as three of them (e.g. Germany, the United Kingdom, France), even if they fail to form a blocking minority. In turn, blocking of a decision on the basis of the number of votes and not the demographic potential required only an agreement of three large countries (e.g. Spain and Poland) and one medium-sized country with six votes as a minimum (e.g. Lithuania) (Węc 2012b: 312–313).

Chapter II. Germany's Position on the EU System Reform in the Years 2002–2005

1 The 2002–2003 Convention on the Future of Europe. The Draft Constitutional Treaty

1.1 Germany's Influence on the Course of the Convention

The decision to convoke the Convention on the future of Europe was taken by the EC at its meeting of 14–15 December 2001 in Laeken. Moreover, it appointed Valéry Giscard d'Estaing (France) as the president, while appointing Giuliano Amato (Italy) and Jean-Luc Dehaene (Belgium) as vice-presidents of the said meeting. The declaration on the future of the European Union, annexed to the conclusion of the EC, determined the objectives, tasks, structure and the composition of the Convention. The main objective of the Convention was to prepare the 2004 intergovernmental conference intended to address comprehensive system reform of the European Union; previously deferred for several times, the reform was at that time essential in the face of the planned accession of as many as 12 new Member States but also due to challenges the European Union was to face in the first decade of the 21st century. The declaration specified fundamental objectives of the future reform. These pertained to, i.a. the international legal status of the European Union, distributing competences between the EU and the Member States, the status of the Charter of Fundamental Rights (CFR), simplifying the set of legal instruments and legislative procedures, changes in the community institutional system, simplifying treaties, strengthening the role of national parliaments in the Union, overcoming the so-called democracy deficit and making the EU closer to its citizens. The Convention was attended by representatives of the governments of the Member States and candidate countries, members of the EP and representatives of the European Commission. Observer status was granted to representatives of the European Economic and Social Committee, the Committee of the Regions, the European social partners and the European Ombudsman. The Convention's proceedings were to produce a final document that would include recommendations (if an agreement was successfully made) or various optional solutions to a given matter, with an explicitly indicated extent to which individual participants supported each issue. Together with the outcome of the national debates on the future of the European Union, the final document of the Convention was to serve as a starting point for a discussion at an intergovernmental conference, during which final

treaty decisions were to be made regarding the system reform of the EU (EC. Conclusions, 14/15.12.2001: 1, 19–26).

The inaugural session of the Convention was held on 28 February 2002 in Brussels. The Convention's proceedings were arranged into three phases. These included: the listening phase, which consisted in collecting opinions of members of the Convention and all interested circles (February – July 2002); the research phase, which aimed to provide a comparative analysis of all conclusions and proposals submitted with regard to the reform of the European Union and to develop a final document involving an initial working basis for the Constitutional Treaty (September – December 2002); as well as the drafting phase, during which the final version of the Draft Constitutional Treaty was to be agreed (January – June 2003) (Norman 2003: 19–24).

On 22 October 2002, the Presidium of the Convention developed an initial working basis for the Constitutional Treaty. Six days later, it was presented by President Giscard d'Estaing at a plenary session of the Convention. From the moment the said document was developed, the Presidium started exerting an increasingly greater impact on decision-making in key matters at the Convention, which determined to a large extent the final version of the Draft Constitutional Treaty later on. In January 2003, the final phase of the Convention's proceedings began (CONV 574/1/03: 1–13), the outcome of which was the draft treaty establishing a Constitution for Europe (DCT), which was approved by consensus by the Convention's plenary on 13 June (Parts I and II) and 10 July 2003 (Parts III and IV) (Węc 2012b: 339–340; Bachmann 2004; Milton, Keller-Noellet 2005).

1.1.1 Stance of the Government Coalition and the Parliamentary Opposition on System Changes in the EU

From the very beginning, both government coalition parties the Sozialdemokratische Partei Deutschlands (SPD) and Alliance 90/The Greens, and parliamentary opposition parties (particularly the Christlich Demokratische Union Deutschlands [CDU], the Christlich Soziale Union [CSU] and the Freie Demokratische Partei [FDP]) advocated the development of the Draft Constitutional Treaty as the end result of the Convention's proceedings. Thus, their expectations were well ahead of the Laeken declaration, which stipulated development of recommendations for the 2004 intergovernmental conference, at best. In the election manifesto adopted on 2 June 2002 at the Extraordinary Federal Congress in Berlin the SPD considered compiling of the Draft Constitutional Treaty the "major task" of the Convention. It assumed that the draft should strengthen "the parliamentary oversight of the decision-making process" (i.a. by

means of the President of the European Commission elected directly by the EP), introduce a strict distribution of competences between the EU and the Member States with accordance to the principle of subsidiarity, and enhance external and internal security of the European Union (SPD-BPT 2.06.2002: 18–19).

A similar stance was adopted by Alliance 90/The Greens in their election manifesto of 5 May 2002. The said document involved a statement stating that the party representatives were to make every effort to ensure that the Convention successfully develops the Draft Constitutional Treaty, which would guarantee, among others, strengthened axiological foundations of the Union and its "democratisation", "further development of the European social model", a clear distribution of competences of the EU institutions and bodies, as well as a consolidated role of the EP in the EU institutional system owing to, i.a. the right to directly elect the President of the European Commission. However, in contrast to the SPD, the delegates of Alliance 90/The Greens advocated ratification of the Constitutional Treaty in a EU-wide referendum, which would yet require amending the German Constitution (Bündnis'90/Die Grünen-BDK 4–5.05.2002: 84).

In contrast to the SPD or Alliance 90/The Greens, the parliamentary opposition parties called for a considerably broader EU system reform. In its election manifesto adopted on 18 June 2002, the CDU and the CSU stressed the need for a strict distribution of competences between the EU and the Member States, significant changes in the institutional system, strengthened axiological foundations, and an enhanced external security of the EU. In their opinion, the distribution of competences between the Union and the Member States under the treaty provisions ought to "improve public confidence" in this organisation, since it should provide a clear distinction between the responsibilities of the Union, states and regions. According to the CDU and the CSU, the competences of the EU should be "recognisable, foreseeable and limited," whereas the Member States and regions were to maintain their powers permanently (*auf die Dauer*) in areas traditionally subject to them due to civilizational and cultural reasons. The reform of the institutional system of the EU 25 should serve as a means for strengthening the democratic legitimacy of the EU institutions and bodies. To this end, it was necessary to reduce the number of commissioners in the European Commission to enhance its operability, strengthen legislative and budgetary powers of the EP, thus making it a EU legislator equivalent to the CEU, and also to establish qualified majority voting as the decision-making principle in the Council. Unanimous voting was to be retained solely in cases such as treaty revision, accession of new Member States to the EU, tax policy, own resources and using the so-called general bridging clauses (*Generalbrückenklauseln,*

clauses générales de passerelle). The rules for distributing seats in the EP should be amended in a way that would allow them to reflect the demographic potential of the Member States better than before. The strengthening of the axiological foundations of the European Union would take place by including the Charter of Fundamental Rights to the treaty law, while enhanced external security would be achieved by means of introducing profound changes to the common foreign and security policy of the EU (CDU-BPT 16–18.06.2002: 66–67).

The Liberals put forwards proposals that were even more extensive, as they advocated in their election manifesto of 12 May 2002 that the Draft Constitutional Treaty should be developed by the Convention that would stipulate transformation of the European Union into a federation. This required not only a strict distribution of competences between the EU and the Member States but also strengthened axiological foundations of the Union due to the CFR included in the primary legislation of the EU, amended institutional system of the Union, enhanced democratic legitimacy of the decision-making process, and enhanced cooperation between the Member States with regard to external and internal security policy of the EU. However, the FDP opposed excessive changes in this area, particularly proposals to establish the Foreign Minister of the European Union. It argued that "foreign policy and European policy are inseparable," and thus the latter ought to remain within the competence of the Member States. It also called upon the federal government to take action with the aim to amend the Basic Law of the Federal Republic of Germany to hold a referendum on the future Constitutional Treaty (FDP-BPT 10–12.05–2002: 78–79) (cf. Tab. I).

1.1.2 System Changes in the European Union Proposed by the German Delegation

The Federal Republic of Germany was represented at the Convention by Peter Glotz, and from November 2002 by Joschka Fischer, who acted as delegates of the federal government,[1] with Günter Pleuger and Hans Martin Bury serving as their deputies, respectively. The Bundestag was represented by Jürgen Meyer and his deputy chair Peter Altmaier, whereas the Bundesrat was represented by Erwin Teufel and his deputy chairs Wolfgang Senff and Wolfgang Gerhards from March 2003. Furthermore, the meeting of the Convention was attended

1 Germany was the only country aside from France to delegate foreign ministers to the Convention, which gave rise to a justified criticism on the part of delegations of most Member States' governments, as it made the meeting resemble an intergovernmental conference.

Tab. I: Key programme proposals of the SPD, the Greens, the CDU, the CSU, the FDP and the Left regarding the system reform of the EU in the Convention's proceedings in 2002–2003. Source: own study.

Political party	Objective of the Convention's proceedings	Changes to the EU system
SPD	Draft Constitutional Treaty	1. Strict distribution of competences between the EU and the Member States; 2. Enhanced axiological foundations of the EU due to the CFR included in primary law; 3. Reinforced parliamentary oversight of the decision-making process (the President of the EC elected directly by the EP); 4. Improved external and internal security of the EU.
The Greens	Draft Constitutional Treaty	1. Enhanced axiological foundations of the EU; 2. Reinforced parliamentary oversight of the decision-making process (the President of the EC elected directly by the EP); 3. Ratification of the Constitutional Treaty in a EU-wide referendum; 4. Present or future dissolution of Euratom.
CDU	Draft Constitutional Treaty	1. Strict distribution of competences between the EU and the Member States (ensured right of the Member States to determine volumes of admission for third-country nationals and their access to the labour market, organisation and financing of social security systems, and services of general economic interest); 2. Enhanced axiological foundations of the EU due to the CFR included in primary law; 3. Improved operability of the EC due to a reduced number of commissioners; 4. Qualified majority applied as the decision-making rule in the CEU; 5. Extended legislative and budgetary powers of the EP; 6. Improved external security of the EU due to a profound reform of the CFSP; 7. Changes on the internal market (public aid provided by the state in structural policy, opposition against a European tax and extended competences of the EU in energy policy).

(*continued on next page*)

Tab. I: Continued

Political party	Objective of the Convention's proceedings	Changes to the EU system
CSU	Draft Constitutional Treaty	1. Strict distribution of competences between the EU and the Member States; 2. Enhanced axiological foundations of the EU due to the CFR included in primary law; 3. Improved operability of the EC due to a reduced number of commissioners; 4. Qualified majority applied as the decision-making rule in the CEU; 5. Extended legislative and budgetary powers of the EP; 6. Improved external security of the EU due to a profound reform of the CFSP.
FDP	Draft Constitutional Treaty	1. Strict distribution of competences between the EU and the Member States; 2. Enhanced axiological foundations of the EU due to the CFR included in primary law; 3. Reinforced parliamentary oversight of the decision-making process (the President of the EC elected directly by the EP); 4. Improved external and internal security of the EU without the necessity to establish the Foreign Minister of the EU; 5. Changes on the internal market (opposition against a European tax and ensuring the Member States' right to services of general economic interest); 6. The EU transformed into a federation; 7. Referendum on the Constitutional Treaty in Germany.
PDS	No unequivocal position	1. Social Union established within the EU; 2. Weakened CFSP; 3. Referendum on the Constitutional Treaty in Germany or in all the EU Member States.

by German members of the EP Elmar Brok, Sylvia-Yvonne Kaufmann, Joachim Wuermeling and Klaus Hänsch, with the latter being the sole German member of the Convention's Presidium.

1.1.2.1 International Legal Status of the European Union

One of the key issues discussed at the Convention was the transformation of the European Union into an international organisation under international law.

This solution was first advocated by Working Group III (Legal personality). In a report dated 1 October 2002 it proposed that the Draft Constitutional Treaty should include a provision providing the Union with a legal personality. The legal personality of the European Union was to replace the legal personalities of the European Community and the European Atomic Energy Community (Euratom), whereas the EU was to assume all their responsibilities. The replacement of the existing legal personalities would clearly state that the European Union acquired a single legal personality (CONV 305/02: 15). However, some members of Working Group III allowed for the possibility that a separate legal personality of Euratom could be retained, stressing the specificity of the Community that covered quite a narrow area of integration and, moreover, was characterised by a slightly different distribution of competences between the European Commission and the CEU (Herma 2004: 42–43). Quite unexpectedly, the views expressed by the minority of members of Working Group III were shared by the Presidium in the initial working basis of 22 October 2002, which involved provisions on granting a clear legal personality to the European Union (Article 4), revoking former treaties and the legal succession of the future Union with regard to the European Community and the European Union existing at the time (Article X –!) (CONV 369/02: 9, 17).

The issue of the legal personality of the future European Union was then discussed at a heated debate held at the plenary session of the Convention. German delegates Fischer, Wuermeling and Altmaier, as most of the members of the Convention, spoke in favour of granting the European Union the international organisation status. However, they were forcing a joint draft developed with Swedish and Belgian delegates that was supported solely by a minority of the meeting participants, aiming to maintain the organisational separation of Euratom (Węc 2012b: 340–344; Herma 2004: 42–43). This was due to the fact that the latter was to be dissolved in the future as a consequence of a nuclear phase-out intended by governments of the said countries.

Eventually, the Convention adopted provisions on granting a legal personality to the European Union, thus transforming it into an international organisation under international law (Article I-6 DCT). As from the entry into force of the future Constitutional Treaty, the European Union was to receive all rights and obligations of the European Community and the former European Union by way of universal succession (Article IV-3 DCT). Furthermore, the Treaty establishing the European Community and the Treaty on the European Union, as well as acts and international agreements that amended or complemented the former were to be revoked (Article IV-2 DCT). Moreover, the organisational separation of Euratom was retained, resulting in the necessity to modify the TEAEC

of 25 March 1957 to adjust it to the new rules arising from the conclusion of the Constitutional Treaty, particularly in institutional and financial matters (Protocol amending the TEAEC).

The meeting of the Convention also addressed the definition of the European Union. The German delegates were particularly active during the discussions on this subject. Foreign Minister Fischer sought to have the definition of the European Union included into the treaty as a "federation of national states." He also attempted to convince the meeting participants to support the above-mentioned concept he had been promoting since 2000 to transform the EU into a Political Union. Nevertheless, the said proposals were rejected by the Convention's plenary, as was the definition of the EU included in the Presidium's initial working basis of 22 October 2002.[2] In the light of this, on Wuermeling's and Altmaier's initiative (among others), the Convention's plenary adopted a consensual definition stating that the EU "shall coordinate the policies by which the Member States aim to achieve (…) objectives, and shall exercise in the Community way the competences they confer on it" (Article I-1(1) DCT).[3]

1.1.2.2 Axiology of the European Union

During the Convention's proceedings, a dilemma came into light as to how best strengthen the axiology of the future European Union. Working Group II (the Charter of Fundamental Rights) considered three possible scenarios: inclusion of the CFR into the Draft Constitutional Treaty, accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of the Council of Europe of 4 November 1950, and a medium option involving incorporation of the CFR to the draft text and a concurrent creation premises for the future accession of the EU to the mentioned Convention. The incorporation of the CFR to the Draft Constitutional Treaty was particularly strongly advocated by German delegates. Some of them, like Meyer, even called for an inclusion of the Charter of Fundamental Rights in Part I of the draft text instead of Part II due to fundamental rights being of central importance to

2 In the Presidium's initial working basis of 22 October 2002, the European Union was defined in the following words: "A Union of European States which, while retaining their national identities, closely coordinate their policies at the European level, and administer certain common competences on a federal basis" (Article 1(1)) (CONV 369/02: 8).

3 For more clarity, Roman numeration is used throughout the paper to refer to numbers of Articles of Part I of the draft text, since it was later adopted at the intergovernmental conference, and then adopted in the Constitutional Treaty itself.

the constitution but also because it would possibly allow to avoid repetition of some provisions determining the values of the European Union in both parts of the Draft Constitutional Treaty (Meyer 27.02.2003:1; 27.04.2003:1). They (Meyer, Brok) were also qualified as members of a small circle of supporters of incorporating the CFR into the Draft Constitutional Treaty and creating concurrently the legal rationale for future accession of the EU in the ECHR (CONV 724/03:58; Meyer 29.10.2002:1). Eventually, the Convention's plenary decided to include the CFR in Part II of the Draft Constitutional Treaty, which for the first time rendered it legally binding in the European Union (Article II-1–54 DCT). Nevertheless, a decision was taken to form legal grounds for future accession of the EU to the mentioned Convention (Article I-7(2) DCT).

The debate held at the Convention also pertained to the rights of the EU citizens. Some delegates, like Josep Borrell (Spain), called for the said rights to be significantly extended by means of establishing a European referendum (CONV 574/1/03: 66–70). The concept of introducing a provision on the European referendum into the Draft Constitutional Treaty was also supported by Alain Lamassoure (France) and Meyer (Germany) (Meyer 24.04.2003: 1). Furthermore, the latter demanded most categorically that the institution of an individual action brought by the EU citizens before the Court of Justice be established (Meyer 3.10.2002:1). Advocates of both these solutions argued that the introduction of a new mechanism for consulting citizens (a referendum) or citizen identification with the supranational jurisdiction of the European Union (an individual action) could strengthen the role of civil society in the integration process. Both these postulates were rejected by the Convention's Plenary. However, as much as the establishment of a European referendum gave rise to unjustified concerns about the adoption of the very Draft Constitutional Treaty by the Member States, the proposal regarding individual actions seemed well-founded, particularly given that such a legal instrument was successfully had been used in the Council of Europe so far, whereas the binding legislation on the citizens' access to the EU judiciary was quite limited.

Further disagreement at the Convention was triggered also by an issue related to the values of the European Union, namely, the inclusion of an *Invocatio Dei* to the preamble of the Draft Constitutional Treaty. This was pressed for by Vatican, Italy, Poland, Spain and Ireland. However, they encountered a strong opposition mainly from France and the Scandinavian countries. In this situation, Meyer, delegate of the Bundestag, proposed to make the preamble to the CFR the preamble to the Draft Constitutional Treaty. He argued that this would allow to avoid a lengthy debate on religious and spiritual issues, which had already taken place at the previous Convention (Meyer 3.10.2002: 1, 27.02.2003: 1).

Eventually, the preamble to the Draft Constitutional Treaty involved a reference to cultural, religious and humanist heritage in Europe, which consolidated the primary role of a human being in social life and his or her inalienable and inviolable rights, as well as respect of law. Nevertheless, under the influence by primarily German (Brok, Kaufmann), Austrian (Caspar Einem) and British (David Heathcoat-Amory) delegates, a separate Article I-51 "Status of churches and non-confessional organisations" was included in the Draft Constitutional Treaty (CONV 724/03: 63). It provided that the EU "respected and does not prejudice the status under national law of churches and religious associations or communities in the Member States." Though the provisions of Article I-51 of the DCT were based on a slightly modified wording of Declaration No. 11 that was annexed to the Amsterdam Treaty, they were included to the enacting terms of the Draft Constitutional Treaty, in contrast to the said declaration.

1.1.2.3 Distribution of Competences between the European Union and the Member States

On 15 May 2002, Working Group V (Complementary competences) presented a report that brought attention to the distribution of powers between the European Union and the Member States binding at the time. The categories of EU competence included therein were as follows: exclusive competences of the EU, shared and complementary competences in the first pillar; shared and complementary competences in the second pillar; exclusive and shared competences of the EU in the third pillar (CONV 375/1/02: 1–18; CONV 17/02: 2–8; CONV 47/02: 21–29).[4] Members of Working Group V, who criticised previously applied solutions, argued that due to the imprecise distribution of powers, the operation of the European Union appeared to had been or even still was at the time characterised by a tendency to break into areas subject to the competence of the Member States. Numerous members of Working Group V drew attention also to the principle of subsidiarity and proportionality being infringed by the European Union, and to the restrictions regarding the political supervision exercised by the Member States over the observance of the competence distribution rules. The said restrictions consisted in the fact that although parliaments of the Member States could supervise and influence their governments' proceedings in the legislative phase of processing in the European Union (the so-called *a priori* control), they did not exercise any supervision over the observance of the competence

4 Regarding the reform of the third pillar at the meeting of the Convention (Węc 2006c: 111–133).

distribution rules or the principles of subsidiarity and proportionality during the enforcement of Community law in their own countries (the so-called *a posteriori* control). Consequently, some members of Working Group V called for such a permanent mechanism of *a posteriori* control to be established (CONV 47/02: 16–18).

In June 2002, representatives of the German, Polish, British, French and Irish governments developed and submitted to the Secretariat of the Convention a joint memorandum on the distribution of competences. In line with general binding rules of international law, the authors of the memorandum argued that the European Union cannot have competences other than those already determined or those to be determined by the Member States under international agreements (the principle of conferral). The EU competences ought to be executed with accordance to the principles of subsidiarity and proportionality, whereas competences in all areas not defined under international agreements should belong exclusively to the Member States (Węc 2012b: 345).

In accordance with the above opinions, the Convention's Presidium proposed in its initial working basis of 22 October 2002 to establish three basic categories of competence, namely, exclusive competences of the EU, competences shared between the European Union and the Member States, and complementary competences supporting proceedings of the Member States. At a plenary session of the Convention, the discussion focused on, i.a. determining which policies ought to be included in the basic categories of competence and which policies should have their own distinct (specific) categories formed. Opinions expressed by members of the Convention on the Presidium's proposal were very divided. Some delegates, like Ernâni Lopes, representative of the Portugal government, were in principle against the introduction of a distribution of competences stipulated in the Treaty (CONV 574/1/03: 86, 89, 101). However, the vast majority of the Convention members accepted the Presidium's initial working basis, while postulating at the same time that it ought to be complemented. The representatives of the United Kingdom (Peter Hain, Heathcoat-Amory and Lord Tomlinson) and Ireland (Dick Roche) proposed an initiative to include in the Draft Constitutional Treaty an explicit reference to the general rule of international law, stating that exclusive competences of the European Union were to be granted by the Member States, while exercising these competences by the EU in other areas would not limit powers of the Member States. Moreover, Lord Tomlinson demanded that the power to conclude international agreements should be excluded from the category of exclusive competences of the EU. Delegates of the Netherlands led by Gijs de Vriese postulated that a separate category of competence for policies in the freedom, security and justice area

should be created. Meyer, delegate of the Bundestag, spoke in favour of granting broader competences to the European Union in areas previously subject to the second and the third pillar, as well as dissolving the pillar-based structure of the EU (CONV 574/1/03: 81–82, 88; CONV 724/03: 66–79; Meyer 15.04.2002: 1).

Eventually, under a significant influence of the Presidium, the German delegates and most of the members of the Convention, and in opposition to the stance adopted by the British, Portuguese and Italian representatives, a decision was made to establish separate competences in the area of common foreign and security policy including common security and defence policy (CONV 724/03: 79).[5] The introduction of the Presidium's initial working basis was followed by an implementation of specific regulations regarding economic policies of the Member States, subjecting them to the coordinating competences of the European Union. As expected by delegates of France, Belgium and Spain, the proposal extended the effect of coordinating competences of the EU to the area of social and employment policies of the Member States.[6] However, contrary to postulates made by the Dutch delegates, the Convention's plenary did not establish a separate category of competence for policies in the freedom, security and justice area, which fell into the category of shared competences (Węc 2012b: 348–349). Consequently, three basic categories of competence were introduced to the Draft Constitutional Treaty, namely, exclusive competences of the EU, shared competences and supporting, coordinating and complementary competences of the EU with regard to exclusive competences of the Member States, as well as four specific categories of competence (Article I-11 DCT).

A thoroughly new element of the Draft Constitutional Treaty was a clause that allowed for a given Member State to withdraw from the European Union. The said clause was proposed by the Presidium in the initial working basis of 22 October 2002 (Article 46) and led to much controversy among the members of the Convention. Some of them, like Meyer, delegate of the Bundestag, even

5 A provision specifying common security and defence policy was introduced at the Convention at the request of several members of the Convention. The said members were Gianfranco Fini (Italy), Borrell (Spain), Lord Maclennan of Rogart (the United Kingdom), Andrev Duff (the United Kingdom), Alberto Costa (Portugal), Linda McAvan (the United Kingdom), Lopes (Portugal), Roche (Ireland), Giorgos Katiforis (Greece) (CONV 724/03: 3, 68, 79).

6 The said powers were to consist in adopting by the EU general directions, guidelines and initiatives on the coordination of these policies by the Member States. However, these states took the commitment that the said policies be coordinated by the European Union (Article I-14(1–4) DCT).

spoke in favour of revoking the said clause, arguing that a withdrawal of a given Member State from the European Union is in any case possible under the Vienna Convention on the Law of Treaties of 23 May 1969 (*clausula rebus sic stantibus*) (Meyer 25.04.2003: 1). Nevertheless, most members of the Convention including, primarily, Dominique de Villepin (France), Roche (Ireland), Teija Tiilikainen, Kimmo Kiljunen and Matti Vanhanen (Finland), as well as Oguz Demiralp (Turkey), demanded that the said clause is retained and that the procedure determining conditions for a given state's withdrawal from the European Union is strengthened, particularly inclusion of the EC to the EU, which would establish guidelines to be followed by the Council of Ministers in concluding a withdrawal treaty with a given state's government. Eventually, the Convention accepted these postulates, modifying the withdrawal clause accordingly (CONV 724/03: 133–135). Consequently, the Draft Constitutional Treaty stated that a country wishing to withdraw from the European Union would have to notify the EC about its intention. Next, the Council of Ministers was to conclude with the said country an arrangement specifying conditions of withdrawal based on guidelines of the EC, acting by qualified majority without the participation of the country concerned, yet with the approval of the EP (Article I-59(1–2) DCT). The withdrawal would then take effect from the date of entry into force of the withdrawal agreement or, in the case that no such agreement was concluded, two years following the said notification unless the EC decides in agreement with a given state to extend this timeframe (Article I-59(3) DCT).

1.1.2.4 Institutional System

The preparation of the institutional reform at the meeting of the Convention was substantially different to the way other systemic changes in the European Union were developed. The key principles of the reform were formulated not by a Working Group but by the Presidium of the Convention in the form of two reports of 10 January and 23 April 2003. In the first report, the Presidium reviewed the working methods of the Community institutions and bodies, and presented recommendations on the way they should be reformed. It indicated the need to improve the effectiveness and transparency of their work, and to ensure the necessary balance between the key institutions in the enlarged European Union (CONV 477/03: 2–12). In contrast, the other report of the Presidium included specific proposals to implement an in-depth reform of the Community institutional system that referred to, among others, the structure and composition of institutions, the distribution of competences, the decision-making procedure and the definition of qualified majority (CONV 691/03: 2–11). Both

mentioned reports of the Presidium served as the basis for developing a proposal to implement specific changes prepared by the Secretariat of the Convention on 9 May 2003, which were submitted to the Convention during the final phase of its meetings (CONV 709/03: 1–44).

The second report of the Presidium largely drew on proposals included in the joint German-French draft reform of the EU institutional system of 15 January 2003. Developed at the highest political level and signed by Chancellor Gerhard Schröder and President Chirac, it was submitted on the following day to the Convention's Plenary by Foreign Ministers of both countries Fischer and de Villepin (CONV 489/03: 1–7; BReg 2003: 1–2). The draft involved a proposal to introduce a double presidency of the European Union held by the permanent President of the European Council and the President of the European Commission. The idea of establishing a double presidency was intended as a compromise that would reconcile conflicting stances of Germany and France on the institutional reform. Germany approved France's postulate regarding the establishment of the permanent President of the European Council, appointed by that body by qualified majority for a term of office of two years and six months or for a renewable five-year term. France's proposal aimed to improve the activities of the EC, but it also involved elimination of the six-month rotational presidency model binding at the time. France reached out to Germany on the latter's expectation that the President of the European Commission ought to be elected by the EP by qualified majority, whereas the choice was to be approved by the EC, likewise by qualified majority. The President of the European Commission would make decisions on dividing commissioners into two groups, namely, European Commissioners with full powers and commissioners with a limited scope of competences. The said change would provide the President of the Commission with an ever-stronger democratic legitimacy, while the Parliament would obtain additional powers and hence strengthen its position in the institutional system of the EU. The European Commission would be politically accountable both to the EP and to the EC. Moreover, Schröder and Chirac proposed to establish the Foreign Minister of the European Union to chair meetings of the Foreign Affairs Council, take part in the EC sessions and serve as a component member of the European Commission (CONV 489/03: 3–7).

The German-French draft stipulated that the EP and the CEU should jointly exercise legislative power, the CEU acting in principle by qualified majority. In order to ensure transparency of activities of the CEU, its legislative and operational functions would have to be separated from each other. Every instance where the scope of cases to be decided on by the CEU by qualified majority increases ought to be automatically linked to optional application of the legislative procedure of co-decision in the EP. The presidency of the CEU would

vary depending on a given area of activities. Consequently, the presidency of the General Affairs Council would be held by the General Secretary of the Council, while the position of the President of the Foreign Affairs Council would be held by the Foreign Minister of the EU. Whereas the Economic and Financial Affairs Council, the Justice and Foreign Affairs Council, and the Eurogroup would elect presidents from among its members for a term of office of two years. In other formations of the CEU, the presidency would be regulated in a way ensuring that the Member States are allowed to participate in their activities to the greatest extent possible and according to a rotation system based on the principle of equality (CONV 489/03: 5–6).[7]

No significant discussion on the subject of reforming the institutional system took place until 15–16 May 2003. The Presidium's second report and proposals of the Secretariat of the Convention, which largely drew on the German-French proposal of 15 January of that year, encountered much criticism from numerous members of the Convention, particularly those speaking in favour of retaining the provisions of the Treaty of Nice. This pertained in particular, though not exclusively, to the role

7 One week following the declaration of Schröder's and Chirac's joint draft, a new initiative was proposed by European Commissioner for the Enlargement Günter Verheugen (Germany) and Commissioner for Trade Pascal Lamy (France). On 21 January 2003, at the Goethe Institut in Brussels Lamy called upon the French Socialist Party (PS) and the Social Democratic Party of Germany (SPD) to develop a joint plan for establishing a French-German confederation. The said entity would then serve as the "hard core" of the European Union and be open to other Member States. It would have its own armed forces, joint diplomatic representatives abroad and a joint permanent seat in the United Nations Security Council. Lamy and Verheugen presumed that the French-German cooperation would play the key role also in the European Union in the future. In Verheugen's opinion, Germany and France were to act as a "decisive axis of stabilisation" in the future process of European integration. He claimed that no other country managed to develop relations with its neighbours at the time that would be of such a high value as those between Germany and France. This was possible due to the fact that, among others, both countries developed a similar balance in the economic potential and political significance. In reference to the discussion on the institutional reform of the EU, Verheugen expressed his support for conferring legislative powers from the Council of Ministers on the EP, establishing the second parliamentary chamber composed of representatives of national parliaments, further limiting of the composition of the college of the European Commission, as well as giving a full right to vote in the Convention to delegates of candidate countries. At the same time, he was against granting a greater influence on the decision-making process in the Council of Ministers to Germany due to its higher GDP or a higher population figure (Stehmann, 21.01.2003: 1–2).

of and the presidency of the EC, the way of calculating qualified majority in the decision-making in the CEU and the EC, the procedure for the appointment of the President of the European Commission, the procedure for the appointment of and the composition of the college of the Commission, competences and the composition of the EP, the procedure for the establishment of and competences of the Court of Justice and the Court of Auditors, as well as the composition and competences of the Committee of the Regions and the Economic and Social Committee. A plenary debate of the Convention brought nevertheless only minor changes to the Presidium's second report of 23 April and the proposal of the Secretariat of 9 May 2003. This was due to the tactic adopted by the Presidium, which consisted in deferring discussions in this matter until the final weeks of the meeting of the Convention, yet it was also caused by arbitrary decisions taken by this body. For these very reasons, the final version of the Draft Constitutional Treaty was not much different to the contents of the Presidium's second report and the proposal of the Secretariat regarding the part on the institutional system (Węc 2012b: 365–366).

1.1.2.4.1 European Council

Most of the Convention members supported the proposal to transform the EC into an EU institution and decided to establish the position of a permanent president of the said institution[8]. However, they strongly opposed the German-French idea of establishing double presidency of the European Union and to abandon rotational presidency in individual formations of the Council of Ministers. In this situation, the German delegates ceased their attempts to force their solutions thorough. Some of them, e.g. Fischer and Teufel, submitted a proposal that the permanent President of the European Council should be without prejudice to the competences of the Foreign Minister of the EU when representing the EU externally in matters of the common foreign and security policy (CONV 709/03: 11–12).

High emotions were also triggered by the proposal to form a Presidium of the European Council, which would include its component members elected by consensus based on a rotation system. The establishment of the EC Presidium

8 Concerns regarding providing an institutional status to the EC were expressed mainly by Hain (the United Kingdom). Moreover, a group of nearly forty delegates demanded that the EC be excluded from the institutional system (the institutional framework) of the EU. The said group involved, i.a., Roche (Ireland), Lopes and Costa (Portugal), Esko Helle and Kiljunen (Finland), de Vries (the Netherlands), Louis Michel (Belgium), Jacques Santer (Luxembourg), Maria Berger (Austria), Péter Balázs (Hungary), Michael Attalides (Cyprus), Vytenis Andriukaitis (Lithuania), Liene Liepina (Latvia), Tunne Kelam (Estonia) and Adrian Severin (Romania) (CONV 709/03: 3, 5).

was strongly opposed by fifteen delegates led by Fischer and Teufel.[9] As for the German representatives, the initiative to create an EC Presidium and to oblige this body to support actions of the EC President was favoured by Meyer and a group of a few delegates.[10] In contrast to Foreign Minister Fischer and Teufel, delegate of the Bundesrat, from the very beginning of the meeting of the Convention Meyer, representative of the Bundestag, became also known as an advocate of limited competences of the permanent President of the European Council. During a decisive debate on the President's powers he also spoke in favour of establishing the Presidium or the College of the European Council. According to Meyer, the said body ought to be composed of three heads of state or government based on a rotation system representing larger, medium-sized and small Member States, who would advise and control the EC President, while the latter could not represent the European Union externally in matters of the common foreign and security policy (Meyer 15.05.2003: 1). Some delegates spoke in favour of maintaining the composition of the EC existing at the time, particularly to allow EC sessions to be attended by foreign ministers and other competent ministers if required, especially ministers for economy and finance of the EU Member States.[11] In turn, German and Italian representatives of the EP (Kaufmann, Wuermeling and Cristiana Muscardini, respectively) proposed that the composition of the EC should also include the EP President (CONV 709/03: 10).

The Convention's Plenary approved the Presidium's second report with minor amendments, the most significant of which was to abandon the concept of establishing a Presidium of the EC. Eventually, the Draft Constitutional Treaty clearly strengthened the position of the EC in the institutional system of the EU. This was manifested in, among others, an institutional status granted to the Council, the establishment of a permanent President elected (and removed) by the EC by qualified majority (who would hold office for a term of two years and six months, renewable once), as well as the extension of the scope of its competences. The EC President, whose powers in principle remained unchanged, was to prepare and run meetings of the Council, ensuring that consensus is reached in the

9 This group also included, i.a., Henning Christophersen and Helle Thorning-Schmidt (Denmark), Danuta Hübner and Józef Oleksy (Poland), Giorgos Papandreou (Greece), Anne Van Lancker (Belgium) and Lena Hjelm-Wallén (Sweden) (Ibidem: 13).

10 The said group comprised Hubert Haenel and Robert Badinter (France), Einem (Austria) and Alexandru Athanasiu (Romania) (Ibidem: 12).

11 Namely, Pervenche Berès and Olivier Duhamel (France), Hain (the United Kingdom), Valdo Spini (Italy), Lopes (Portugal), Vanhanen (Finland), Johannes Voggenhuber (Austria) and Balázs (Hungary) (Ibidem: 10).

decision-making process, represent the EU externally in matters of common foreign and security policy without prejudice to the competences of the Foreign Minister of the EU, etc. (Article I-18(2), Article I-20(1–4), Article I-21(1–3) DCT).

1.1.2.4.2 Council of Ministers

The discussion on changes in the functioning of the Council of Ministers[12] focused on matters such as rotational presidency, the formation structure of the Council, extending the scope of application of qualified majority voting on new cases, as well as redefining qualified majority. At a plenary session of the Convention, a group of eight delegates, namely Oleksy (Poland), Hain (the United Kingdom), Pierre Lequiller (France), Papandreou (Greece), Berger (Austria), Hjelm-Wallén (Sweden), Ivan Korčok (Slovakia) and Josef Zieleniec (the Czech Republic), submitted a proposal that rotational presidency in individual formations of the Council of Ministers be held by a group of countries, and not one Member State, as exercised so far (CONV 709/03: 10, 16, 18–20). However, the Convention rejected the proposal, just as in the case with the German-French proposal of 15 January 2003 on revoking rotational presidency in individual formations of the Council. Most of its members decided to retain presidency in all Council formations with the exception of the Foreign Affairs Council, which was nevertheless to be held for a minimum term of one year and not, as before, for six months (Article I-23(4) DCT).

In contrast, the members of the Convention were strongly divided on proposals included in the Presidium's report, which heralded significant changes in the structure of individual formations of the Council of Ministers. The Presidium recommended that five formations of the Council should be created to replace nine formations existing at the time. These were to include: the General Affairs Council, the Legislative Council, the Foreign Affairs Council, the Economic and Financial Affairs Council, and the Justice and Security Council. Concurrently, the General Affairs Council, as before, would develop a list of the remaining formations of the Council of Ministers (Article I-23 DCT). However, as many as nine delegates spoke in favour of revoking the entire Article I-23 DCT (CONV 709/03: 16). Some called for retaining only three formations in the Draft Constitutional Treaty, namely, the General Affairs Council, the Legislative Council and the Foreign Affairs Council, arguing that the establishment of

12 A new name for the Council of the European Union will be introduced from then on, namely the Council of Ministers, envisaged in the Draft Constitutional Treaty, and then established under the Constitutional Treaty itself.

other formations would be decided in the future by the General Affairs Council (Kaufmann, Hain). Others proposed that new formations of the Council of Ministers should be established, including, i.a. the Employment and Social Affairs Council (Duhamel and Emilio Gabaglio – European social partners) and the Euro Council (Duhamel, Lequiller) (CONV 709/03: 10, 16, 18–20).

However, most controversy was triggered by a debate on the redefinition of qualified majority, which for tactical reasons was not included in the above-mentioned joint draft developed by Germany and France, yet served as an *idée fixe* of German delegations from as early as the 1996–1997 and 2000 intergovernmental conferences. The Presidium's second report recommended that the qualified majority voting principles of the Nice system ought to be abandoned and replaced with double majority, which would constitute a simple majority of votes of the Member States, representing 60% (3/5) of the EU population. Hence, it would mean giving up weighted voting that used to be binding from the date of entry into force of European Economic Community Treaty (TEEC) and the TEAEC of 25 March 1957, granting one vote to each Member State and correlating the mentioned procedure to the Member States' demographic potential. Regarding the decision-making of the Council of Ministers and the EC, this solution would favour most populous countries, particularly Germany, while drastically scaling down the impact of Spain and Poland.

Unsurprisingly, in the above situation the establishment of double majority and significant extension of the scope of qualified majority voting was most strongly advocated by delegates of the Federal Republic of Germany. One of them, Meyer, representative of Bundestag, openly admitted that the *ceterum censeo* of his participation in the proceedings of the Convention was to seek unanimous voting to be abandoned in favour of double majority voting in the highest possible number of cases reviewed by the Council of Ministers and the EC (Meyer 20.12.2002:1). At the two last plenary sessions of the Convention of 4 and 9 July 2003, Meyer was still making attempts to convince members of the meeting to the idea of extending the scope of qualified majority voting to areas where previously unanimous voting was in principle decided to be retained, namely, tax policy as regards harmonisation of indirect taxes, common foreign and security policy, as well as the procedure for establishing the European Public Prosecutor's Office (Meyer 4.07.2003: 1; 9.07.2003: 1). Meyer's arguments were very frank and equally controversial at the same time, since double majority paired with a radically extended qualified majority would further strengthen Germany's position in the decision-making process of the Council of Ministers and the EC.

In contrast to the intergovernmental conferences held in 1996–1997 and 2000, the German delegates were at that time supported by the representatives of

France. Among the supporters of double majority there were also delegates who strived to reconcile divergent stances of members of the Convention. Some of them submitted a proposal to increase the threshold for the majority representing the EU population up to two-thirds (Teufel, Haenel, Badinter) or three-quarters (Timothy Kirkhope). Others postulated that both majority thresholds ought to be changed to three-quarters of the number of votes of the Member States and a simple majority for the population representing the said states (Jens-Peter Bonde). Nevertheless, some members of the Convention seemed to further worsen the triggered controversy by postulating that the threshold for the EU population in the double majority procedure proposed by the Presidium should be reduced to simple majority (CONV 709/03: 21–22). During the discussion at the Convention, supporters of voting rules adopted under the Treaty of Nice proved to be a minority comprising only thirty delegates led by the representatives of the United Kingdom (Hain, Haethcoat-Amory), Spain (Ana de Palacio), Poland (Hübner, Oleksy), Ireland (Roche), Portugal (Louis Queiró), Sweden (Hjelm-Wallén) and Denmark (Thorning-Schmidt) (CONV 709/03: 21).[13]

Eventually, the Convention's Plenary adopted the Presidium's proposal to replace the Nice system with the double majority system explicitly pressed by Germany and France, as later confirmed by Foreign Minister Fischer in the Committee on the Affairs of the European Union in the Bundestag (DB AAEU. Protokoll 15/26: 17). This implied that qualified majority voting in the Council of Ministers and in the EC would take effect if a given decision was supported by a simple majority of the Member States, representing 60% of the EU population as a minimum. Nevertheless, the Nice system was to be in force until 31 October 2009 (Article I-24(1–3) DCT) (CONV 709/03: 14–22). Moreover, the Convention's plenary extended the scope of application of qualified majority in the Council of Ministers to over 40 new cases. It should be stated once more that provisions that founded the double majority voting system entailed a thoroughly new power balance in the decision-making of the Council of Ministers

13 According to another idea born at the Convention, the so-called super-qualified majority voting could be introduced independently of double majority to the decision-making of the Council of Ministers. This solution was intended to facilitate reaching consensus by the supporters and opponents of the retention of unanimous voting as a decision-making rule in some of the most sensitive areas. It was to cover most of the three-quarters of the Member States, representing three-fifths of the population (Duff) or four-fifths of the Member States, representing three-quarters of the population (Zieleniec), or three-quarters of the Member States, representing three-quarters of the population (Meyer) (Meyer 16.05.2003:1).

and the EC, which, above all, favoured Germany as the most populous country in the European Union.

1.1.2.4.3 Foreign Minister of the European Union

In line with the recommendations of Working Group VII (External Action) and German-French proposals of 15 January 2003, the Presidium of the Convention suggested to the meeting participants that the Foreign Minister of the EU should be established. This idea was supported by a large majority of members of the Convention, particularly German delegates: Brok, Meyer and Glotz (Meyer 11.07.2002: 1; 6.05.2003: 1). Thoroughly different opinions were expressed by representatives of the United Kingdom (Heathcoat-Amory, Kirkhope), Denmark (Bonde) and Sweden (Svensson). Other delegates proposed to establish two (Hübner, Liepina) or even up to five (Roche) positions of vice-ministers of foreign affairs. In turn, French representative Berès quite unexpectedly put forward an initiative to create a different office, namely, the Minister of Economic and Social Affairs (CONV 709/03: 30). The Convention's plenary followed the opinion shared by the majority of the delegates and decided to establish the Foreign Minister of the European Union, who would serve as a member of the Council of Ministers and the European Commission (Articles I-25(3), Articles I-27(3) DCT).

The dispute also pertained to the procedure for the appointment and removal of the Foreign Minister of the European Union. The Presidium did not follow the recommendation made by Working Group VII, according to which the Foreign Minister was to be chosen by the Council of Ministers acting by qualified majority at the level of heads of state or government with the approval of the President of the European Commission and the EP (CONV 459/02: 4–5; CONV 709/03: 30). In line with the Presidium's proposal, this would be made by the EC acting by qualified majority with the approval of the President of the European Commission, yet without the EP. The Presidium's proposal caused discontent among many members of the Convention. The most numerous group of opponents demanded that the EP be involved in the procedure for the appointment of the Foreign Minister of the EU, with thirty-four delegates led by Brok in favour of the hearing of candidates for the said post in the EP, while twelve other delegates postulated that the appointment should take place with the approval of the EP.[14] Moreover, some delegates suggested that

14 The latter included, i.a., Meyer, Wuermeling, Borrell, Duhamel, Muscardini, Severin and Voggenhuber (CONV 709/03: 31).

the Foreign Minister of the EU should be appointed on a proposal from the EC President (de Villepin) or even the President of the European Commission from members of the College of the Commission (Costa, Einem) (CONV 709/03: 31). Furthermore, over ten delegates expressed their support for determining the precise procedure for the removal of the Foreign Minister of the EU, which was omitted in the Presidium's initial working basis. Though representatives of France (Barnier) and the Benelux countries (Santer, Michel and de Vries) proposed that it should be done by the EC, Voggenhuber, representative of Austria, submitted a postulate that the Foreign Minister of the EU is defeated by a motion of no confidence without specifying whether it be adopted by the EP or the EC.[15]

In the end, the Convention adopted nearly all proposals included in the second report of the Presidium, which pertain to, i.a. the procedure for the appointment of a new position and the scope of its competences. Consequently, the Foreign Minister of the EU was to appoint the EC by qualified majority with the consent of the President of the European Commission, acting concurrently as one of its vice-presidents. In line with the same procedure, the EC was to decide on the end of the Foreign Minister's term. The Foreign Minister of the EU ought to direct common foreign and security policy, and bear responsibility for the overall shape of foreign affairs of the Union (Article I-27(1–3) DCT), while the said policy was to be executed together with governments of the Member States (Article I-39(4) DCT).

1.1.2.4.4 European Commission

The discussion dedicated to the European Commission focused on the composition of and the procedure for the appointment of the College, as well as the President's competences. As many as ninety members of the meeting (i.a. delegates from Germany, France, the United Kingdom, Italy, Ireland, Belgium, the Netherlands, Luxembourg, Austria, Denmark, Spain, Portugal, Greece, Poland, Slovakia, Lithuania, Latvia, Estonia and Cyprus) refused the Presidium's proposal that the European Commission ought to comprise the President, the Foreign Minister of the EU acting as its Vice-President, thirteen members of the College, and the so-called delegated members whose number could not exceed the total number of College members (Article I-25(3) DCT).

15 The inclusion of the provision determining procedure for the removal of the Foreign Minister to the Draft Constitutional Treaty was also supported by Duff (the United Kingdom), Hübner (Poland) and Papandreou (Greece) (Ibidem).

They submitted proposals advocating retention of the provisions of the Treaty of Nice on the composition of the College of the European Commission or introduction of a rule according to which each state should have one full representative in the Commission as a minimum.[16] Whereas the meeting participants who supported the Presidium's proposals, which included also a German representative, postulated that delegated members ought to be granted the full right to vote in the College (Wuermeling, Costa, Severin) or demanded that their number and competences be specified in more detail (Haenel and Athanasiu) (CONV 709/03: 24, 29).

The dispute also pertained to the election of the President of the European Commission. Numerous delegates did not approve of the Presidium's proposal, according to which the President was to be elected on an EC's proposal by the EP acting by a majority of its members (Article I-26(1) DCT). Contrary to the German-French proposals of 15 January 2003, Meyer, representative of the Bundestag, expressed his support for the appointment of the President by the EC acting by qualified majority and on the EP's approval. Whereas Foreign Minister Fischer proposed that the election should be made by a special committee composed on an equal basis of representatives of the EC and the EP (CONV 709/03: 26). In contrast, another delegate of the Bundestag Altmaier was a strong supporter of the Presidium's proposal, arguing that it is the only way that would enable citizens of the European Union to indirectly elect and dismiss the President of the European Commission and, consequently, to sanction decisions taken in the EU (Altmaier 23.05.2002).

The meeting participants' opinions proved highly convergent when the powers of the President of the European Commission were under discussion. An attempt to significantly consolidate this position was already made in the Presidium's proposals. The President of the European Commission was to be granted the right to elect Vice-Presidents without a collective approval of the Commission, appointing thirteen commissioners or expressing consent to the EC's decision on the appointment of the Foreign Minister of the EU concurrently acting as one of the Vice-Presidents in the Commission. Nevertheless, a vast number of meeting participants proposed the President's competences

16 The said group included, i.a., Brok, Barnier, Duff, Heathcoat-Amory, António Vitorino, Muscardini, Roche, Michel, de Vries, Santer, Hannes Farnleitner (Austria), Berger, Bonde, Christophersen, de Palacio, Costa, Lopes, Queiró, Hjelm-Wallén, Helle, Papandreou, Marietta Giannakou (Greece), Hübner, Oleksy, Korčok and Juraj Migaš (Slovakia), Kelam, Liepina, Andriukaitis, Peter Serracino Inglott (Malta) and Attalides (Ibidem: 24, 29).

to be further extended. In this regard, the most substantial initiative was launched by a group of twenty-nine delegates demanding that the President of the Commission should be granted powers to remove commissioners without the collective approval of the Commission (CONV 709/03: 28). A debate was also provoked at the plenary session of the Convention by the issue of the election of members of the College of the Commission. Many delegates questioned the Presidium's proposal that each state determined based on a rotation system should provide for a list of three individuals suitable for the position of a commissioner, and that one individual from each submitted list should be chosen by the President-elect as part of the appointment of up to thirteen commissioners, who would then become collectively approved by the EP together with the President-elect (Article I-26(2) DCT). A group of as many as thirty-six delegates led by Brok, Barnier, Vitorino, Berger and Papandreou submitted a proposal that both the President and the members of the College, as well as the Foreign Minister of the EU, should be collectively approved by the EP (CONV 709/03: 27–28).

The Convention accepted the Presidium's report with a few amendments resulting directly or indirectly from the discussion held at plenary sessions. Firstly, it decided that the European Commissioners would be chosen based on a rotation system founded on the principle of equality between the Member States, and that the said principles would be established by the EC by a European decision. Secondly, it accepted the proposal submitted at plenary sessions that the President and the members of the College of the European Commission, including the Foreign Minister of the EU and individuals appointed as commissioners without the right to vote should be all collectively approved by the EP. Thirdly, it accepted proposals of a vast number of delegates and granted the President the right to dismiss European Commissioners and commissioners without collective approval of the Commission. Fourthly, it took into consideration a postulate submitted at the plenary discussion that the initial working basis should include an explicit provision specifying that the Foreign Minister of the EU is allowed to further carry out his or her tasks in the area of common foreign and security policy also in the case where the Parliament adopts the motion of censure against the Commission (Węc 2012b: 373–376). As a result, the Draft Constitutional Treaty stipulated that the College of the European Commission should include the President of the Commission, the Foreign Minister of the EU and thirteen European Commissioners based on a rotation system between the Member States, as well as commissioners without the right to vote, representing all other Member States (Article I-25(30) DCT).

1.1.2.4.5 European Parliament

One of the most contentious issues discussed at a plenary session of the Convention pertaining to the EP was the scope of its legislative powers. Some of the meeting participants advocated they ought to be extended, while others opposed such idea. While a group of twenty-eight delegates led by Brok demanded that the EP be granted a limited right of legislative initiative, and Kirkhope with Antonio Tajani (Italy/EP) even called for the right to legislative initiative to be conferred from the European Commission on the Parliament, Heathcoat-Amory (the United Kingdom) proposed to revoke the provision involved in the second report of the Presidium, according to which "the European Parliament shall, jointly with the Council, enact legislation" (Article I-19 DCT). He argued that, as formerly, the Parliament should only provide support to the Council of Ministers in their legislative actions.[17]

During the final stage of the Convention's meeting aimed to determine the contents of Part IV of the Draft Constitutional Treaty, Meyer, delegate of the Bundestag, took the initiative to consolidate the EP in its role in an ordinary revision of the future treaty. In line with the proposals included in the second report of the Presidium, the EP would have the right to submit a proposal for constitutional amendment to the Council of Ministers, as well as be consulted by the EC prior to deciding on such an amendment. Meyer demanded though that the Draft Constitutional Treaty should include a provision to guarantee the right of the EP to approve decisions of the EC to not convene a Convention if the scope of proposed changes does not justify such a decision (Meyer 4.07.2003: 1; 9.07.2003: 1).

However, the discussion held at the plenary session of the Convention had little impact on shaping provisions concerned with the EP, since the Convention's plenary accepted proposals included in the second report of the Presidium almost without any change. The key proposals consisted in extending the Parliament's legislative powers, with the position it held in the procedure for adopting the annual budget of the future Union was even stronger than that of the Council of Ministers (Article III-310 DCT). Moreover, the mentioned Meyer's proposal to consolidate the Parliament in its role in a regular procedure to revise the constitution was also accepted (Article IV-7(2) DCT). What is more, the plenary decided to increase the total number of the members of the Parliament from seven hundred and thirty-two individuals to seven hundred and thirty-six, thereby reducing

17 Furthermore, Brok, Kaufmann, Wuermeling, Duff, Elena Paciotti (Italy) and Kelam (Estonia) proposed to rename the EP as the citizens' chamber or the European citizens' chamber (Ibidem: 3, 6–8).

the minimum number of mandates down to four, yet without specifying any maximum number of mandates per Member State (Article I-19(2) DCT).

1.1.2.4.6 Court of Justice

During the discussions on amendments in the working methods of the Court of Justice, many delegates disagreed with the Presidium's proposal to retain the appointment procedure existing at the time, i.e. the appointment of the judges and advocates-general by joint agreement with the governments of the Member States for a renewable term of office of six years (Article I-28(2) DCT). They spoke in favour of the said powers being granted to the Council of Ministers, as was the case of the Court of Auditors at the 2000 intergovernmental conference. On the initiative of Brok, McAvan and Voggenhuber, over thirty delegates demanded that the appointment be made by the Council of Ministers by qualified majority and with the prior consent of the EP. Whereas other meeting participants proposed that the appointment should take place under a resolution of the Council of Ministers and be approved by the EP (Borrell), alternatively, that it should take place without the EP (Vitorino). Numerous members of the Convention also questioned the term of office for the judges and advocates-general, suggesting that it should be extended and non-renewable. The largest group of twenty-seven delegates led by Brok advocated the establishment of an eight-year term of office, whereas a slightly smaller group of twenty-six delegates postulated that it should last nine years. Two delegates spoke in favour of extending the term of office to as many as twelve years (CONV 709/03: 35).

Moreover, many delegates reported their concerns and remarks regarding competences of the said institution. Some of them called for a provision that would oblige the Court of Justice to observe constitutions of the Member States (Bonde) and the ECHR (Bonde, Gormley), and that it should have jurisdiction in actions on grounds of infringement of the CFR brought by individuals (Voggenhuber, Duhamel, Berès). Some demanded that the Court of Justice should not undermine decisions made by constitutional courts of the Member States (William Abitbol), while others proposed that common foreign and security policy of the European Union should be thoroughly excluded from the jurisdiction of the Court of Justice (Hain) (CONV 709/03: 33, 36).

Eventually, the Convention accepted the Presidium's report with several amendments regarding nomenclature, structure and competences of the Court of Justice, yet it did not take into consideration proposals submitted largely on Brok's initiative, pertaining to the amendment of the Court of Justice appointment procedure and the term of office of judges and advocates-general. From then on, the Court of Justice was to comprise the European Court of Justice, the

General Court and specialised courts (Article I-28(1) DCT). The most significant change regarding the competences was the granting of the right to review the legality of acts adopted by bodies and agencies of the EU intended to produce legal effects in relation to third parties, the right to investigate actions for failure to act brought by other institutions and the Member States against bodies and agencies of the EU, as well as to improve the effectiveness of sanctioning and enforcement mechanisms in cases where judgements of the Court of Justice are not observed by the Member States (Article III-267 (1–2), Article III-270(1), Article III-272 DCT).

1.1.2.4.7 Court of Auditors

At the plenary session of the Convention on the Court of Auditors, the main focus was put on the procedure for the appointment of the said institution and its competences. Some delegates, e.g. Teufel and McAvan, demanded that the previously binding 'one auditor per country' rule should be abandoned and the number of the members of the said Court ought to be reduced or even radically cut down.[18] Other delegates led by Foreign Minister Fischer proposed to establish in the Court of Auditors a new body of an unspecified name that would perform functions of a supervisory board *sui generis* (CONV 709/03: 40–41). Nevertheless, the Convention's plenary did not approve any of the proposals submitted by the delegates, while it accepted the Presidium's proposals with minor drafting adjustments. Consequently, the Draft Constitutional Treaty did not change much regarding the previously agreed activity of the Court of Auditors.

1.1.2.4.8 European Central Bank

Though the Presidium's proposal concerning the ECB was one of the less controversial issues discussed at the Convention's plenary session, the meeting participants put much focus on competences of the said institution. A group of thirty-six delegates led by the representatives of Germany Brok, Teufel and Wuermeling put forward an initiative to stress actions facilitating "open market economy with free competition" among tasks of the ECB in the part dedicated to supporting the general economic policies of the EU, whereas sixteen other delegates submitted proposals with social matters as their main focus (CONV 709/03: 38–39). As in the case of the Court of Auditors, the Convention's plenary did not accept any of the said proposals submitted by the delegates, adopting the

18 The most far-reaching demands were presented by McAvan, British representative of the EP, who pressed for limiting the number of Auditors down to nine (Ibidem: 41).

Presidium's proposal instead, though with minor amendments (mainly drafting adjustments).

1.1.2.4.9 Committee of the Regions and the Economic and Social Committee

The most heated debate at the discussion held by the Convention was over the composition and competences of the two titular bodies. Serracino-Inglott, representative of the Maltese government, submitted a postulate for a radical reduction of the number of members in both Committees. Moreover, he demanded that the Member States should be able to propose six representatives to each Committee. This was strongly opposed by Meyer, delegate of the Bundestag. He advocated that members of the Committee of the Regions should be chosen by direct elections held by regional or local communities of the Member States, and that the said body ought to be granted the right to bring action for infringement of the principle of subsidiarity before the Court of Justice (Meyer 6.02.2003: 1; 7.02.2003: 1). Thirty-three delegates led by Brok and Giannakou presented an initiative which stated that the Committee of the Regions ensures the respect of cultural differences between the Member States, and that the Economic and Social Committee safeguards the development of relations and dialogue between civil society and the EU. As in the case of the Court of Auditors and the ECB, the Convention's plenary did not approve any of the proposals submitted by the delegates, adopting the Presidium's proposal with minor drafting adjustments instead.

1.1.2.5 Enhanced Cooperation

The discussion held at the Convention proved that the vast majority of its members supported introduction of changes in enhanced cooperation that aimed to make it more flexible. One of these changes concerned a joint proposal submitted by Germany and the Netherlands to increase the role of guardian of the interests of the entire European Union played by the European Commission in this regard (CONV 723/03: 24). Nevertheless, a view that enhanced cooperation should be removed was also expressed by British delegates (Duff) (CONV 724/03: 109). However, the Convention's plenary eventually upheld the opinion of the Presidium, according to which the retention and extension of enhanced cooperation are vital, if for no other reason than the Eastern enlargement of the European Union, since it could prove the best 'means' for advancing special interests and needs of the growing number of the EU Member States (CONV 723/03: 10).

The meeting of the Convention focused on issues such as the number of the Member States vital for establishing enhanced cooperation, the decision-making procedure, the strengthening of the role of the EP, prerequisites to be met by the Council of Ministers for authorising the establishment of enhanced cooperation, as well as the extension of enhanced cooperation to the area of common security and defence policy. The most heated debate pertained to the first of the mentioned matters. Some countries, particularly Finland, Lithuania, Latvia, the Czech Republic and Hungary, supported the idea that enhanced cooperation should be adopted by half of the Member States as a minimum, as stipulated by the Treaty of Amsterdam. French representatives demanded that the Treaty of Nice be respected in the provision stating that the establishment of enhanced cooperation should be subject to the approval of at least eight Member States. Whereas the Presidium of the Convention proposed that the establishment of enhanced cooperation ought to take effect if approved by one-third of the Member States as a minimum. In the end, the Convention's plenary accepted the Presidium's proposal and the said provision was incorporated into the Draft Constitutional Treaty (Article 43(2) DCT). Individual delegations were also strongly divided on the issue of the decision-making procedure in the case of establishing enhanced cooperation. Some of the delegates postulated that the Nice system should be maintained, others pressed for unanimous voting and others again demanded that qualified majority voting should be adopted in this regard. The Convention's plenary decided that decision-making regarding the establishment of enhanced cooperation should be dependent on the procedure binding in a given policy of the EU. In areas where decisions are taken by qualified majority, qualified majority would apply, whereas in areas where unanimous voting applies, unanimity should be maintained. Simultaneously, the possibility to lodge a complaint with the EC due to an important national interest as laid down in the Treaty of Nice for the second pillar of the EU was surrendered, thus making the said institution completely excluded from the enhanced cooperation procedure.[19] The Convention's Plenary also extended the

19 Under the Treaty of Amsterdam, in the first pillar, the right to lodge a complaint with the CEU (comprising the heads of state or government) was granted only if a Member State did not agree to the establishment of enhanced cooperation (decided by qualified majority) due to an important national interest. In such case, the Council made the final decision by acting unanimously. In contrast, in the third pillar, if one Member State exercised the right of veto, the EC was acting unanimously as the review body. Under the Treaty of Nice, the right of veto was removed in the first and the third pillars, thus excluding the CEU (comprising the heads of state or government) and the EC from the

competences of the EP as regards enhanced cooperation by granting it the right to authorise establishment of enhanced cooperation in all EU policies except for common foreign and security policy. For the time being, it granted approval only in areas where co-decision procedure applied (Article III-325(1) DCT).

Furthermore, the prerequisites for establishing enhanced cooperation were made substantially less stringent. The provision stipulated in the Treaty of Nice, which implied an obligation of the CEU to verify if integration objectives could be achieved by means of procedures provided under the treaties, was abandoned. From then on, the Council of Ministers was to be tasked only with verifying whether the above-mentioned integration objectives could be achieved by the European Union as a whole (Article 43(2) DCT). Therefore, enhanced cooperation would become more flexible, since having determined the possibility that the said integration objectives are unachievable for the EU as a whole, the CEU was free to initiate an authorisation procedure to establish enhanced cooperation with immediate effect. Moreover, the previously binding reservation on the necessity to respect the provisions of the protocol integrating the Schengen *acquis* to the framework of the European Union was revoked. This was caused, i.a. by the stance adopted by the Presidium and later shared by the Convention's plenary, according to which cooperation within the Schengen system ought to be considered "a variant of the general enhanced cooperation mechanism" (CONV 723/03: 18, 22, 28).

At the meeting of the Convention, much controversy was evoked also by the issue of the extension of enhanced cooperation to the area of common security and defence policy. The possibility to establish enhanced cooperation in this area was advocated at the Convention mainly by Germany and France with the support of Belgium and Luxembourg. The opposite position was taken by the United Kingdom, Ireland, Sweden, Finland, Latvia and Estonia. Concerns in this regard were also reported by the Netherlands, Poland and Denmark (Trzaskowski 2005: 318–319). Nevertheless, the Convention's plenary eventually adopted a compromise stance, namely, the establishment of provisions stipulating that enhanced cooperation would apply in principle to all policies of the EU falling within its exclusive competences, thus also the common security and defence policy (Article I-43(1) DCT).

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discussed procedure. However, under the Treaty of Nice, enhanced cooperation with the right of veto and the possibility lodge a complaint with the EC were introduced to the second pillar. In the case that a Member State exercised the right of veto, the final decision was taken unanimously by the EC.

1.1.2.6 Democratic Legitimacy

Participants of the meeting of the Convention regulated and extended the rules of democratic life in the European Union binding so far: the principle of democratic equality, the principle of representative democracy and the principle of participatory democracy. In these matters, references to provisions incorporated in formerly developed treaties were initiated by representatives of, i.a. Germany (Brok), France (Jacques Floch), Italy (Marco Follini), Poland (Hübner), Portugal (Lopes) and Luxembourg (Santer) (CONV 724/03: 111). The new regulation that specified the principles of participatory democracy was the so-called citizens' initiative. The idea of establishing this regulation was not born until the end of the meeting of the Convention. The inclusion of the said idea to the Draft Constitutional Treaty was initiated and advocated mainly by German representatives. On 5 and 11 June 2003, this initiative was put forward by Meyer, delegate of the Bundestag, whose official proposal in this matter was signed by over fifty delegates (Meyer 5.06.2003: 1; 11.06.2003: 1). As a result, during a plenary session held on 11–13 June 2003, the Convention agreed to introduce a relevant provision to Part I of the Draft Constitutional Treaty already completed at the time. The citizens' initiative was to be put forward by a million individuals (as a minimum) from a considerable number of Member States in matters where implementation of the constitution required a legal act according to citizens (Article I-46(4) DCT).

Another issue discussed at the Convention was the strengthening of the role of national parliaments in the legislative process of the EU. It was addressed by as many as two Working Groups: Working Group IV (The role of national parliaments) and Working Group I (The principle of subsidiarity). The former developed recommendations on the report on the role of national parliaments, while the latter developed recommendations with regard to the observance of the principle of subsidiarity. The recommendations developed by Working Group IV were accepted in principle by the Presidium, and then complemented and by the Convention's Plenary (CONV 353/02: 1–15). At the very discussion at the Convention, only minor adjustments were introduced to the draft report on the role of national parliaments. On the initiative of a group of over sixty delegates led by Brok, Duff and Farnleitner, the list of documents forwarded by the European Commission to national parliaments was extended to include annual legislative work programmes. At the request of German (Altmaier, Wuermeling) and Belgian (Michel, Danny Pieters) delegates, it was decided that both chambers of the parliament would be informed about the activities of EU institutions concurrently if a given Member State operated under a bicameral parliamentary system (CONV 724/03: 136, 138–140). On the initiative of

French and Portugal delegates[20] a provision was included to the draft report, requiring the EP and national parliaments to define and specify the development of effective and systematic interparliamentary cooperation in the EU. At the same time, a proposal for the extension of the competences of the Conference des organismes specialises dans les affaires communautaires (COSAC) and the detailed specification of its role in the EU, developed by a group consisting of over forty members of the Convention led by delegates from the United Kingdom, Portugal, France and Denmark, was rejected.[21]

The recommendations of Working Group I provided for an increased responsibility of the European Commission for respecting the principle of subsidiarity during the stage of the development of a draft legislative act, stipulated the establishment of an early warning mechanism and the empowerment of national parliaments and the Committee of the Regions that enabled them to bring action for infringement of the subsidiarity principle before the Court of Justice. The proposal to establish an early warning mechanism as an instrument for monitoring the respect of the subsidiarity principle was particularly innovative, since for the first time in history national parliaments were to be included in the legislative process of the EU (the so-called 'yellow card procedure') (CONV 286/02: 1–11). The recommendations of Working Group I were accepted in principle by the Presidium, and then complemented and modified by the Convention's plenary. At the request of delegates from Germany (Fischer, Altmaier, Meyer, Wuermeling, Teufel), France (Lequiller), Italy (Dini, Filadelfio Guido Basile), the United Kingdom (Gisela Stuart), Finland (Vanhanen) and the Czech Republic (Zieleniec), an early warning mechanism against the noncompliance of legislative proposals of the European Commission with the subsidiarity principle was extended to both parliamentary chambers of the Member States with a bicameral parliamentary system (CONV 724/03: 146; Meyer 18.03.2003:1). A decision was made on the Presidium's initiative that the European Commission should review (either amend, withdraw or approve) its legislative proposals in cases where their noncompliance with the subsidiarity principle was reported in a justifiable way by one-third of the votes given to national parliaments and their chambers as a minimum (recommendations

20 Specifically, Duhamel and Lequiller (France), Lopes, Eduardo Azevedo, Manuel Lobo Antunes and António Nazaré Pereira (Portugal) (CONV 724/03: 138, 140).

21 Specifically, Stuart, Duff and Kirkhope (the United Kingdom), Azevedo, Nazaré Pereira, Costa and Guilherme d'Oliveira Martins (Portugal), Lequiller (France) and Poul Schlüter (Denmark) (Ibidem: 141).

of Working Group I mentioned national parliaments only). In the case of proposals regarding judicial cooperation in criminal matters and police cooperation elaborated by the Commission or governments of the Member States, the said threshold was estimated at a quarter of the votes given as a minimum. At the same time, it was agreed that in deciding on these matters, unicameral national parliaments ought to have two votes, whereas chambers of bicameral parliaments should have one vote each. Representatives of Germany (Teufel, Meyer), Austria (Farnleitner), the United Kingdom (Duff, Neil MacCormick/PE) and Ireland (John Cushnahan/PE) succeeded in forcing through a postulate to explicitly link the subsidiarity principle with the powers of regional and local authorities of the Member States (CONV 724/03: 62, 146–148; Meyer 18.03.2003: 1).

1.1.2.7 Common Foreign and Security Policy Reform

1.1.2.7.1 Common Foreign and Security Policy

From the very beginning of the Convention, German delegates supported by representatives of France spoke in favour of the communitarisation of the second pillar of the European Union. As early as on 22 November 2002, Fischer and de Villepin demanded in their joint memorandum submitted to the Convention that, i.a. the Foreign Minister of the EU be provided with very broad powers, qualified majority voting is adopted as the decision-making rule in common foreign and security policy, and that the EP is given full control in this respect (CONV 422/02: 1–4; Meyer 11.07.2002: 1; 12.07.2002: 1; 16.05.2003: 1; 5.06.2003: 1; Węc 2004: 13–17).

The German-French postulates were taken into consideration in part in the report of Working Group VII (External Action), which addressed the common foreign and security policy reform. On 16 December 2002, the group submitted its final report to the Convention in which it proposed to combine in one chapter of the Draft Constitutional Treaty all external actions of the EU previously dispersed in numerous treaties, namely, the common foreign and security policy, common commercial policy, cooperation with third countries, humanitarian aid, as well as relations with international organisations and third countries. Apart from the above-mentioned proposals regarding the Foreign Minister of the EU and the Foreign Affairs Council, Working Group VII also recommended to set up EU diplomatic corps accountable to the Foreign Minister; to grant the right to the Foreign Minister of the EU and the European Commission to propose joint legislative initiatives; to extend the scope of qualified majority and to render constructive abstention more flexible; to empower the EC to decide on the further enlargement

of the scope of qualified majority by unanimity under the *passerelle* procedure; to increase expenditure for common foreign and security policy financed by the general budget of the European Union; lastly, to grant more autonomy to the Foreign Minister of the EU in this regard (CONV 459/02: 2, 6–9).

Consequently, Schröder and Chirac proposed two further solutions in the above-mentioned joint German-French draft system reform of the EU of 15 January 2003. Decisions in the area of common foreign and security policy ought to be made in principle by qualified majority, yet unanimous voting should be maintained in issues with military and defence implications. Moreover, in matters related to essential national interests of the Member States a special mediation procedure would apply. If a given decision prejudiced such interests of any Member State, the Foreign Minister of the EU would act as a mediator. In cases where these mediation efforts proved ineffective, the role of a mediator was to be taken by the EC President. Whereas in cases where the actions taken by the latter proved unsuccessful as well, the dispute was to be settled by the EC by qualified majority (CONV 489/03: 6–7).

The proposals elaborated by Schröder and Chirac influenced the plenary session of the Convention, which was reflected in the fact that the decision-making in the area of the common foreign and security policy was one of the most controversial issues discussed at that time. Some members of the Convention including, primarily, German delegates (Meyer, Brok) supported by representatives of France (Lamassoure) and Italy (Dini) proposed that qualified majority ought to be introduced as the general rule in the analysed voting policy. Others, primarily delegates from the United Kingdom (Stuart), demanded that the *status quo* should be maintained, i.e. decisions should be made by unanimity with the exceptions specified under the Treaty of Maastricht, the Treaty of Amsterdam and the Treaty of Nice. Delegates of Germany and France were strongly convinced of the necessity to gradually communitarise the second pillar as well. Meyer, representative of the Bundestag, argued that the following changes would serve as highly significant premises for actions aimed at the above-described objective: the establishment of qualified majority voting as a commonly applicable rule, the resulting consolidation of the role of the Foreign Minister of the EU, as well as the establishment of parliamentary oversight of common foreign and security policy (Meyer 11.07.2002: 1; 12.07.2002:1; 16.05.2003: 1; 5.06.2003: 1).

In the end, the German-French proposals were not reflected in the Draft Constitutional Treaty, though. The Convention adopted intermediate solutions based on the recommendations of Working Group VII (CONV 724/03: 96–98). The only change adopted with regard to the recommendations of the said

Working Group was the provision regarding revocation, which empowered the Foreign Minister of the EU and the European Commission to submit joint legislative initiatives. This change consolidated the Foreign Minister of the EU in his or her role in respect of the European Commission, since the former was granted the right of initiative (acting individually) and was allowed to seek support of the European Commission if required (CONV 724/03: 98). Furthermore, as before, any Member State was free to submit a legislative proposal.

Decisions regarding common foreign and security policy were to be taken in principle by the EC and the Council of Ministers by unanimity, and could only be European decisions. European laws and European framework laws, binding in all other policies of the EU, were explicitly excluded from this area. The EC and the Council of Ministers were to act in this area on a proposal from a government of a given Member State, the Foreign Minister of the EU or the Foreign Minister of the EU supported by the European Commission (Article I-39(7–8) DCT). The Foreign Minister of the EU was to be supported in the performance of his or her duties by the European External Action Service. The latter was to be appointed with the approval of the Council of Ministers and the European Commission in the first year following the entry into force of the Constitutional Treaty. It ought to comprise officials of relevant departments of the General Secretariat of the Council of Ministers, the European Commission, as well as staff seconded from national diplomatic services (Article III-197(3) DCT, declaration on the establishment of the European External Action Service).

The legal status of EU decisions adopted in the area of common foreign and security policy was different to that of EU decisions adopted with regard to other EU policies (Barcz 2003: 513). The Draft Constitutional Treaty extended, though marginally, the scope of matters where the Council of Ministers could adopt decisions by qualified majority. However, these cases were still exceptional. A voting did not take place if a member of the Council of Ministers issued a statement that due to compelling reasons of national policies, he or she intended to oppose the adoption of a decision taken by qualified majority. In such cases, the Council of Ministers may, acting by qualified majority, request that the matter be referred to the EC for decision by unanimity (Article III-201(2) DCT). Moreover, in situations other than provided for in Article III-201(2) DCT, the EC may decide unanimously under the *passerelle* procedure whether the Council of Ministers should act by qualified majority (Article III-201(3) DCT). This created a possibility for further extension of this manner of voting. A new element that emerged in the area of common foreign and security policy was the clearly undermined position of the principle of constructive abstention binding so far, which resulted from linking this rule to the demographic clause. Under the Constitution, EU decisions taken

by unanimity would have no effect if the number of states that abstained from voting and made declarations accordingly was one-third of the total number of the Member States as a minimum, representing one-third of the EU population as a minimum (Article III-201(1) DCT).

1.1.2.7.2 Common Security and Defence Policy

The common security and defence policy reform was developed by Working Group VIII (Defence), which reviewed over forty drafts and proposals submitted by its members or other representatives of the Convention. The most noteworthy of all the said documents was the above-mentioned joint German-French proposal of 22 November 2002 elaborated by Fischer and de Villepin, who called for radical changes in the discussed policy on behalf of the German and French governments. The said changes were to involve, as follows: firstly, to extend enhanced cooperation into the area of common security and defence policy, thus rendering it more flexible; secondly, to ensure that obligations resulting from Article V of the Modified Brussels Treaty of 23 October 1954, including *casus foederis*[22] are assumed by the Member States concerned; thirdly, to establish the European Armaments Agency as a supranational body; fourthly, to facilitate the development of European armaments policy in accordance with the provisions of Article 296(1–2) TEC and to establish the so-called 'structured cooperation' in this area. The last of the mentioned forms of cooperation was to be established directly by the Member States concerned instead of by the EC or the Council of Ministers, which implied that it would be based on the concept of Europe *à la carte,* commonly criticised in many other Member States (including Poland). Moreover, a special protocol ought to be annexed to the Draft Constitutional Treaty, allowing the concerned EU Member States to utilise the existing forms of armaments cooperation, to improve their military capacities and establish new forms of cooperation (harmonisation of military planning, division of tasks, etc.). Moreover, the Foreign Ministers of Germany and France proposed to adopt 'solidarity and common security clause', which would constitute an annex to the Draft Constitutional Treaty, indicating the necessity to address all

22 Codified in Article V of the Modified Brussels Treaty, *casus foederis* obliged the WEU Member States to automatically provide aid to a country under external aggression: "If any of the High Contracting Parties should be the object of an armed attack in Europe, the other High Contracting Parties will, in accordance with the provisions of Article 51 of the Charter of the United Nations, afford the Party so attacked all the military and other aid and assistance in their power" (BT 1954: 3).

security threats in the EU Member States, primarily terrorism, and would allow for the possibility to transform the common security and defence policy into a European Security and Defence Union in the future, thus strengthening the 'EU pillar' of NATO (CONV 422/02: 1–4; Meyer 11.07.2002: 1; 12.07.2002: 1; 16.05.2003: 1; 5.06.2003:1).

Working Group VIII took note of a majority of proposals included in the German-French draft, yet without adopting them. Most of the group members critically assessed the idea of transforming common security and defence policy into a European Security and Defence Union,[23] the intention of making the common security and defence policy subject to enhanced cooperation, as well as the concept of allowing the concerned EU Member States to assume obligations arising from the provisions of the Modified Brussels Treaty, including the *casus foederis* (CONV 461/02: 18–21). Members of Working Group VIII expressed confidence that the adoption of the last of the above-mentioned proposals would be equal to a dissolution of the WEU. However, during the discussion on the *casus foederis*, an idea was born to establish closer cooperation between the concerned EU Member States in the area of mutual defence. Most of the members of Working Group VIII were also in favour of establishing a new form of cooperation called 'structured cooperation', that is, a closer cooperation between the concerned EU Member States that meet higher military capacity criteria regarding, i.a. training, interoperability and the capacity to dislocate armed forces. Moreover, it was agreed that a solidarity clause will be introduced to the enacting terms of the Draft Constitutional Treaty and that a European Armaments and Strategic Research Agency will be founded, though not at the supranational level (which was in fact pursued by the Foreign Ministers of Germany and France), but at the international level instead. Another discussed idea pertained to the establishment of a separate configuration of the Council of Ministers for Security and Defence Policy comprised of Defence Ministers of the Member States. However, Working Group VIII eventually spoke in favour of maintaining the existing regulations that envisaged participation of Defence Ministers in meetings of the General Affairs and External Relations Council or its future counterpart (CONV 461/02: 19, 22–24).

On 16 December 2002, Working Group VIII submitted its final report whereby it recommended that the Convention should introduce the following changes in the common security and defence policy: firstly, to extend the scope of crisis

23 Some members of Working Group VIII supported the German-French proposal to develop a 'solidarity and common security clause' that would recommend the establishment of a European Security and Defence Union (CONV 422/02: 18).

management and to increase the number of the Petersberg tasks; secondly, to ensure higher 'flexibility' in the decision-making and implementation of tasks in the common security and defence policy by means of a more effective employment of the constructive abstention mechanism, and to establish closer cooperation in mutual defence; thirdly, to introduce the solidarity clause in order to allow the Member States to effectively address and respond to terrorist threats, natural disasters or humanitarian disasters using all instruments available to the European Union (military forces, institutions formed for the execution of the Petersberg tasks, police cooperation and judicial cooperation in criminal matters); fourthly, to establish an Armaments and Strategic Research Agency in order to strengthen the defence sector of the EU in terms of industry and technology, and to allow the Member States to implement cooperation programmes using the existing forms of armaments cooperation, particularly cooperation within the Western European Armaments Group (WEAG), the Western European Armaments Organisation (WEAO) and the Western European Armaments Organisation (OCCAR), as well as to support strategic research, including research on military systems operating in outer space; fifthly, to grant the right of initiative (regarding determining the type of operation and measures required for overcoming regional crises) and powers to manage and coordinate defensive actions of the Member States to the Foreign Minister of the EU; sixthly, to ensure sufficient parliamentary oversight of common security and defence policy (i.a. regular consultations and information exchange between competent commissions of the EP and national parliaments) (CONV 461/02: 1–2, 16–25).[24]

Due to the US intervention in Iraq on 20 March 2003, Germany, France, Belgium and Luxembourg reattempted to affect the course of the Convention. At a meeting in Tervuren near Brussels (the so-called 'praline summit') held on 29 April 2003, leaders of the said states, namely, Gerhard Schröder, Jacques Chirac, Guy Verhofstadt and Jean-Claude Juncker expressed their joint support for the founding of the European Security and Defence Union. In a communication issued at the end of the session they called upon the Convention members to establish in the Draft Constitutional Treaty legal framework conditions that would provide grounds for the future establishment of this new EU defence organisation, particularly, to introduce the solidarity clause and the security clause to the enactive terms of the Draft Constitutional Treaty, to redefine objectives of the Petersberg tasks, to create European crisis response forces and a European armaments agency, to extend the scope of enhanced cooperation in common

24 The latter was introduced to the recommendations of Working Group VIII mainly under the pressure exerted by Meyer, delegate of the Bundestag (Meyer 12.07.2012:1).

security and defence policy, to undertake preparations for establishing European rapid reaction forces already at the Convention (with a German-French brigade as the foundation), as well as to establish a European Air Transport Command, a European unit for common defence against ABC weapons and a fully independent European military command headquarters at Tervuren (BReg. Gemeinsame Erklärung 2003: 1–2).[25]

A few weeks later, the Convention's plenary adopted the proposals of Working Group VIII with minor adjustments, yet it did not approve the postulates developed by Schröder, Chirac, Verhofstadt and Juncker regarding the establishment of a European Security and Defence Union. At the request of delegates from Germany (Fischer), France (de Villepin), Spain (Borrell) and the United Kingdom (Hain), the list of objectives to be executed within the framework of the common security and defence policy was extended to involve conflict prevention, allowing the said policy to become better aligned with the provisions of the United Nations Charter (Article 40(1) DCT). The plenary also approved the proposal of representatives of Germany (Fischer), the United Kingdom (Hain), Ireland (Roche), Italy (Fini) and the Netherlands (de Vries) on renaming the agency responsible for armaments policy. The new name of this institution, namely, the European Armaments, Military Capabilities and Research Agency, seemed to better reflect its actual role and tasks (Article I-40(3) DCT). The extension of the scope of application of the solidarity clause proposed by Working Group VIII to cover natural and man-made disasters was

25 It should be noted that participants of the 'praline summit' were one of the strongest opponents in the European Union of the US military intervention in Iraq of 2003, hence, their decisions were largely political. They gave rise to a common discontent both in the majority of Member States and candidate countries, and in the USA. In the EU Member States, particularly the Netherlands, Spain and Italy, the said decisions were considered an attempt to discredit the USA and their European allies who supported the US-led intervention in Iraq. However, on both sides of the Atlantic attention was drawn to the actual threat for European security arising from the said decisions. Some European politicians were concerned that the said decisions might result in a division within the European Union (Tony Blair) or significantly compromise the position of NATO in Europe (Jośe Maria Aznar). As for the USA, the idea of establishing a EU operational planning staff at Tervuren gave rise to particular concerns, as it was interpreted as an attempt to duplicate NATO structures. Likewise, the unambiguously political nature of the 'praline summit' was stressed in Poland, yet without concealing the fact that the proposals submitted there might, if implemented, contribute to undermining the entire transatlantic cooperation (Węc 2011: 109–110; Miszczak 2005: 99–101).

supported at the Convention particularly by Fischer, Villepin, Hain, Farnleitner, Roche, Kiljunen and Michel (CONV 724/03: 104). On the initiative of a group comprising over thirty delegates led by Brok (Germany), the Earl of Stockton (the United Kingdom) and Giannakou (Greece), a requirement for the EP to seek regular consultations with the Foreign Minister of the EU on main aspects of common security and defence policy was introduced (CONV 724/03: 101–103). At the same time, the plenary rejected Meyer's proposal that decision-making in the area of the common security and defence policy should be made by a super-qualified majority of three-quarters of the votes of the Member States, representing three-quarters of the EU population as a minimum (Meyer, 16.05.2003: 1). In contrast to the stance adopted by a large group of delegates, including Polish representatives, the Convention's plenary decided that structural cooperation should be established by the governments of the Member States, and not by the EU institutions. Consequently, the said cooperation procedure could be initiated outside the EU by intergovernmental agreements.

Nevertheless, the most substantial amendment established by the Convention's plenary in common security and defence policy was the introduction of the *casus foederis*, i.e. the EU mutual defence clause, in that area. It was a reference to the above-mentioned proposal of 22 November 2002 developed by Fischer and de Villepin but also to the report of Working Group VIII of 16 December of that year. According to the clause, in cases where one of the Member States partaking in mutual defence becomes the object of an armed attack on its own territory, other states participating in mutual defence must provide military and other aid by all the means in their power, in accordance with Article 51 of the Charter of the United Nations. The execution of cooperation in the area of mutual defence was conditioned under the pressure of Danish delegates (Christophersen, Thorning-Schmidt) on close cooperation between the participating countries and the North Atlantic Alliance (Article I-40(2, 7) DCT) (CONV 724/03: 103). In turn, under the pressure exerted by representatives of neutral countries or those pursuing a neutrality policy (Austria, Sweden, Finland and Ireland) it was agreed that the decision to establish common security and defence policy ought to be adopted by the Member States "in accordance with their respective constitutional requirements" (Article 40(2) DCT). The list of countries participating in mutual defence was to be subject in the future to a special declaration annexed to the Draft Constitutional Treaty (Article III-214(1) DCT). At the meeting of the Convention, all attempts at specifying the contents of such a declaration proved unsuccessful. Nevertheless, the greatest weakness of the *casus foederis* was that it lacked any implementing legislation as its basis, which rendered its application unclear.

Following the proposals of Working Group VIII, the Draft Constitutional Treaty stated that common security and defence policy constitute an integral part of common foreign and security policy (Article I-40(1) DCT). The EU decisions pertaining to the implementation of tasks and objectives in this area were to be taken by the Council of Ministers by unanimity at the request of the Foreign Minister of the EU or a government of a given Member State. Where relevant, the Foreign Minister together with the European Commission might propose both national resources and EU instruments to be applied (Article I-40(4) DCT). The draft increased the number of the Petersberg tasks from three up to six. Tasks implemented as part of the Petersberg tasks were to be executed using measures provided by the Member States (Article I-40(1) DCT). The Member States, which together form multinational armed forces, were to make them available to the EU for implementation of tasks and objectives in the area of common security and defence policy (Article I-40(3) DCT). The solidarity clause stated that the Member States ought to undertake joint measures in cases where one of the Member States becomes the object of a terrorist attack, a natural or a man-made disaster (Article I-42(1) DCT). Structural cooperation should be established between the EU Member States that fulfil higher military capability criteria and wish to enter into more binding commitments in matters of common security and defence policy (Article I-40(6) DCT). The decision to establish such cooperation was to be taken by the Member States themselves, and not by the EU institutions (Article I-40(6), Article III-213(1) DCT). The list of countries interested in establishing structural cooperation, as well as the criteria and obligations with regard to military capabilities were to be specified in the future in a dedicated protocol annexed to the Draft Constitutional Treaty (Article III-213(1) DCT). However, attempts made at the Convention with the aim to develop such protocol proves unsuccessful, whereas the European Armaments, Military Capabilities and Research Agency was to address, i.a. the extension of the industrial and technological base in the defence sector and the need to specify operational requirements, capabilities and armaments in the EU defence policy (Article I-40(3), Article III-212(1) DCT).

1.1.2.8 Reform of the Area of Freedom, Security and Justice

The reform of the area of freedom, security and justice was addressed by Working Group X (Freedom, security and justice), which presented its final report to the Convention on 2 December 2002. The members of Working Group X agreed that the reform ought to consist in the establishment of a single legal and institutional framework, and a systematic separation of 'operational' and 'legislative'

tasks implemented in the freedom, security and justice area. Consequently, Working Group X proposed to combine both parts of the area of freedom, security and justice, previously covered by the first and the third pillars, under one chapter of the Draft Constitutional Treaty. From then on, the said elements would become part of the EU policies and internal activities. The single legal and institutional framework would combine "elements of the Community method with mechanisms allowing in some cases for reinforced co-operation of operational collaboration at Union level, and the involvement of national parliaments, in order to consider the specific features of the area of police and criminal law." Whereas the separation of legislative and operational tasks ought to consist in an explicit distinction between law making and enhanced intergovernmental cooperation of an operational nature at EU level (CONV 426/02: 1–3).

After a several months' long session, Working Group X agreed on a package of recommendations covering legislative and operational changes to be introduced in the first and the third pillars, followed by a recommendation for the Convention to implement the following legislative changes in the first pillar: to establish a common regulation in the areas of asylum policy and the policy on refugees and displaced persons, which would require amending Article 63(1–2) TEC; to adopt the solidarity principle and just allocation of responsibilities between the Member States (including financial matters) as the point of departure for implementing asylum policy and the policy on refugees and displaced persons; to introduce qualified majority voting and the co-decision procedure with regard to matters pertaining to asylum seekers, refugees and displaced persons, to determine the principles of and the legal grounds for common immigration policy that would allow the EU to support the Member States in integrating legally residing third-country nationals; to maintain the provisions of Article 63(3–4) TEC on common immigration policy; to introduce qualified majority voting to common immigration policy with respect of the Member States' right to determine volumes of admission for third-country nationals coming to their territories seeking employment or self-employment; to simplify regulations concerning common visa policy and subjecting it to qualified majority voting and co-decision procedure; to gradually deploy the common integrated external borders surveillance system, which would require an amendment of Article 62(2) TEC, yet with standards and procedures provided for in the Schengen system applied during external borders control retained and perfected; to maintain previously binding principles of judicial cooperation in civil cases with cross-border implications; to introduce qualified majority voting and the co-decision procedure to the judicial cooperation in matters regarding parental responsibility.

Regarding the third pillar, the following legislative changes were recommended by Working Group X: to execute a legal instruments reform consisting in replacing framework decisions, decisions and common stances previously adopted in this area with legislation binding in the first pillar, i.e. regulations, directives, decisions or, alternatively, to replace them with completely new legal instruments that might possibly be proposed by Working Group IX (Simplification)[26]; to further specify the law-making competences of the European Union, i.a. by introducing the principle of mutual recognition of judgements and judicial decisions of one Member State by authorities of other Member States, and to align provisions set out in specific areas of substantive criminal law and criminal procedural law; to introduce qualified majority voting and the co-decision procedure in judicial cooperation in criminal matters and in police cooperation as a rule binding in the legislative process; to retain the previous distribution of the right of initiative between the European Commission and the governments of the Member States, though the latter could be empowered to put forward a legislative proposal if supported by a quarter of the Member States (which was a substantial change) (CONV 426/02: 7–15).

Moreover, the members of Working Group X agreed that the previously applied operational cooperation lacked "efficiency, transparency and accountability". The 'operational' powers were shared by police and judicial authorities of the Member States, as well as by the European bodies, such as Europol, the European Union's Judicial Cooperation Unit (Eurojust) and the European Anti-Fraud Office (OLAF). It was agreed that one of the key challenges regarding the Eastern enlargement of the EU is to ensure effective external border surveillance. Consequently, Working Group X recommended the following operational changes to be introduced in the first and the third pillars: to empower the Article 36 Committee, as an advisory body to the Council of Ministers, to coordinate and control operational cooperation (i.a. police cooperation, fact-finding missions, cooperation between Europol and Eurojust, and civil defence);[27] to gradually deploy the common integrated external borders surveillance system and to consider the possibility to create a common border control corps in the future that would cooperate with border guards of the

26 This proposal also entailed surrendering conventions previously employed in the third pillar, yet binding only when accepted by half of the Member States as a minimum (Article 34 TEU, Nice version). Conventions that were not yet ratified by the Member States at the time were to be transformed into regulations and directives or new legislation to replace the latter (CONV 426/02: 7–8).

27 As previously, personal data exchange would be handled by Europol, Eurojust, the Schengen system and a customs information system (CONV 426/02: 16).

Member States; to specify the objectives of actions taken by Europol and Eurojust in a more 'flexible' manner than before; to create the European Prosecutor-General or the European Public Prosecutor's Office that would address serious transnational crime against EU financial interests (CONV 426/02: 15–20).

Furthermore, Working Group X proposed to extend the jurisdiction of the Court of Justice over the entire area of freedom, security and justice, particularly, to eliminate restrictions binding at the time as regards submitting requests for preliminary rulings and actions for the annulment.[28] However, some members of the group proposed to maintain the regulation that was in force at the time, according to which the Court of Justice had no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services in a given Member State, or to review the performance of the Member States' competences as regards the maintenance of public order and the safeguarding of internal security (CONV 426/02: 25).

All members of Working Group X were fully aware of the significance of the area of freedom, security and justice for national sovereignty. Hence, they advocated that powers of national parliaments ought to be substantially strengthened in the Member States. They proposed to include national parliaments in the process of determining strategic guidelines and priorities in judicial cooperation in criminal matters by the EC or the Council of Ministers at the level of heads of states or government; to establish systematic conferences or joint sessions of parliamentary commissions responsible for the judicial system and internal affairs; to implement the early warning mechanism proposed by Working Group I (the Principle of Subsidiarity), and to include national parliaments in the so-called peer review mechanism and examination of annual Europol reviews (CONV 426/02: 22–23).

The plenary debate at the Convention was marked by an exchange of views largely on the integration method in judicial cooperation in criminal matters and police cooperation (the third pillar), competences of institutions and the decision-making in the area of freedom, security and justice. German delegates supported by representatives of Austria and the Benelux countries were the

28 Under Article 35(1–3) TEU (Nice version), competences of national courts regarding submission of requests for preliminary rulings was conditioned on it being approved by the Member States in a relevant declaration. Article 35(6) TEU restricted the right to take action for annulment only to the Member States and the European Commission. Whereas Article 68(1) TEC allowed requests for preliminary rulings to be submitted only by the highest jurisdictions.

strongest advocates of further communitarisation of all policies within the said area. However, delegates of the United Kingdom, Ireland and representatives of the Scandinavian countries negated this idea, proposing instead that the mentioned policies ought to be covered in the principles of enhanced intergovernmental cooperation of the Member States (CONV 821/03: 72; Meyer 6.06.2002: 1).

Much controversy at the Convention was evoked by competences of institutions and the decision-making in policies falling in the area of freedom, security and justice. As many as twenty-six delegates led by Brok, representative of Germany, opposed the EC's involvement in legislative and operational planning within the area of these policies, rightly stating that the said institution does not have any legislative powers. Another German representative Kaufmann proposed that the EC should determine strategic guidelines for legislative and operational planning but only with the consent of the EP (Article III-159 DCT). Another eighteen discussion participants led by Duff (the United Kingdom) and Paciotti (Italy) pressed for the European Commission to be extensively included in the proceedings of the Standing Committee on Operational Cooperation on Internal Security of the EU (Article III-162 DCT). Whereas Hübner, Polish representative, put forward an initiative to introduce to Article III-162 DCT a regulation stating that the mentioned Committee would act under the auspices of the Council of Ministers (CONV 821/03: 73).

The key amendments submitted by members of the Convention at a debate on judicial cooperation in criminal matters pertained to the decision-making of the Council of Ministers. Lopes, Portuguese representative, proposed that unanimous voting should be applied in the adoption of European laws and European framework laws stipulated in Article III-171(1–2) DCT, whereas delegates of the Austrian (Farnleitner) and the British government (Hain) spoke in favour of unanimous voting in the adoption of European framework laws specified under Article III-171(2) DCT. In contrast, twenty other participants presented a postulate that the Council of Ministers should not act by unanimity but by super-qualified majority, adopting European decisions determining other specific aspects of criminal proceedings that were to be subject to minimum rules (i.a. Michel and Paciotti). Voting principles in the Council of Ministers became the major issue in discussions on cross-border criminality. Some members of the Convention, such as Lopes, Roche and de Vries, spoke in favour of establishing unanimity in the adoption of both European framework laws laying down minimum rules for crime and sanctions imposed both on serious crime with a cross-border dimension and European decisions that would determine other areas of such crime in the future (Article III-172(1–2)

DCT). German delegates Teufel and Wuermeling postulated that unanimous voting ought to be established at least in cases where new regulations would result in a compulsory change in the binding provisions of law in at least one Member State. They also demanded that a provision allowing for the adoption of European decisions determining other areas of cross-border criminality be revoked. Nevertheless, the proposal put forward by the representatives of Germany was strongly opposed by ten other delegates who advocated replacing the mentioned European decisions with European laws enacted under the co-decision procedure (de Villepin) or by European decisions accepted by super-qualified majority (i.a. Michel and Paciotti) (CONV 821/03: 88–91).

What is more, legislative procedures and voting rules for the decision-making in the Council of Ministers proved the most time-consuming issues also at a debate on the European Police Office and the Judicial Cooperation Unit. Some delegates, such as Lopes, Roche and de Vries, supported the establishment of unanimity in voting on European laws determining the structure, the functioning and the scope of operations taken by Eurojust and Europol, as well as European laws specifying conditions to be met by the EP and national parliaments for participating in the review of proceedings taken by these bodies (Article III-174(2), Article III-177(2) DCT). German and British delegates proposed that the Council of Ministers should be free to make European decisions on new tasks of Europol (Altmaier and Wuermeling) and Eurojust (Hain) by unanimity. In contrast, Teufel, delegate of the Bundesrat, presented an initiative to include in the Draft Constitutional Treaty a provision stating that police cooperation determined under Article III-176(1–3) DCT is without prejudice to bilateral and multilateral agreements concluded between the Member States regarding cross-border cooperation. In turn, as many as twenty-three discussion participants, including the German delegates, proposed that European laws or European framework laws determining the conditions and restrictions regarding actions taken by relevant bodies of the Member States (listed in Article III-171 and Article III-176 DCT) within the territory of another Member State, in relation to and under agreement with authorities of the said state, should be adopted by co-decision and, consequently, by qualified (Kaufmann, Duhamel, Berès) or super-qualified majority (i.a. Michel and Paciotti); alternatively, unanimous voting was proposed to be in force only until 31 October 2009 (Meyer, Barnier, Vitorino) (CONV 821/03: 93, 95, 97; Meyer 6.12.2002: 1).

At the request of nine delegates led by Michel (Belgium) and Voggenhuber (Austria), a proposal was developed to withdraw the right of initiative in judicial cooperation in criminal matters and in police cooperation from governments of the Member States. Other delegates pressed for the said rights to be limited to a

right to submit legislative proposals by a group of governments of the Member States through the European Commission (Duff). Whereas Gijs de Vries, delegate of the Dutch government, put forward an initiative to include in the Draft Constitutional Treaty a provision allowing for requests for preliminary rulings to be submitted to the Court of Justice only by the highest jurisdictions of the Member States in the following policies: border control policy, asylum policy, immigration policy, judicial cooperation in criminal matters and police cooperation. In turn, six participants of the discussion led by Tiilikainen, representative of the Finnish government, pressed for revocation of national parliaments' rights to ensure compliance of legislative proposals and initiatives in judicial cooperation in criminal matters and police cooperation with the principle of subsidiarity (Article III-160 DCT) (CONV 821/03: 74, 78–79). However, the above postulates were strongly opposed by Meyer, delegate of the Bundestag, who argued that the involvement of national parliaments in the European integration enhances the democratic legitimacy of this process and contributes to its communitarisation (Meyer 6.06.2002: 1). At the plenary session of the Convention, the most controversy was triggered by a proposal to establish a European Public Prosecutor's Office as a new authority devoted to tackling serious crime with a cross-border dimension and crime against EU financial interests. The creation of such authority was supported not only by the majority of the Convention participants but also by German and French delegates who made no secret of the fact that they wished a decision was reached in this matter as early as possible. Some of them pressed the Council of Ministers to vote on the European act on the establishment of the European Public Prosecutor's office by co-decision (i.a. Brok, Lamassoure and Lequiller) or by super-qualified majority (Michel, Paciotti) as part of the implementation of the future Constitutional Treaty, or demanded that the Council of Ministers could decide in this matter only until 31 October 2009 (Meyer, Barnier, Vitorino). Lequiller called for including in the Draft Constitutional Treaty a provision establishing the European Public Prosecutor's Office five years following the entry into force of the treaty at the latest. Haenel proposed that the European Public Prosecutor's Office be founded by means of enhanced cooperation of the Member States. In turn, nine members of the Convention led by Hain, Roche and Tiilikainen strongly opposed the idea of establishing a European Public Prosecutor's Office. Different views emerged also with regard to competences of the new office. As many as twenty-six delegates, including nearly all representatives of Germany (Brok, Teufel, Wuermeling and Altmaier) were in favour of restricting the competences to be held by the European Public Prosecutor's Office to investigation of crime against the EU financial interests. Meyer repeatedly stressed the necessity to establish a completely independent European Public Prosecutor's Office and the necessity to

provide the said Office, Eurojust and OLAF with effective measures to prosecute and combat the growing incidence of crime against the EU financial interests.[29] In turn, Teufel presented an initiative that the European Public Prosecutor's Office should be empowered to manage Europol-led investigations in the future (CONV 821/03: 94; Meyer 3.04.2003: 1).

Proposals submitted by the Presidium, which pertained to border control policy and asylum policy (Article III-167 DCT), and judicial cooperation in civil matters (Article III-170 DCT) proved to have less emotional appeal. As before, German representatives pressed for the highest number of amendments in Article III-167 DCT. Teufel, delegate of the Bundesrat, submitted a postulate for the introduction into the Draft Constitutional Treaty a provision that would allow the Member States to reinstate control on internal borders of the EU, if required. Teufel and Wuermeling demanded together that Article III-167 DCT be complemented with a provision stating that the Member States have an exclusive competence regarding the access to national labour markets. Whereas Kaufmann presented an initiative that the EP should approve (instead of merely being consulted, as proposed by the Presidium) the Council of Ministers' decision to adopt the European resolutions or European decisions involving provisional measures for the benefit of the concerned Member State(s) when the latter find themselves in an emergency situation due to a sudden admission of third-country nationals in high numbers (Article III-167(3) DCT) (CONV 821/03: 81–82).

The representatives of Germany and Austria dominated also a debate on immigration policy. Yet again, they were focused primarily on the access of immigrants to the labour market. A group of thirty delegates led by Brok, Teufel, Wuermeling, Altmaier and Farnleitner proposed to include in Article III-168 DCT a provision stating that it is without prejudice to the exclusive competence of the Member States regarding accessibility of their labour markets, as well as the right to determine volumes of admission for immigrants seeking employment. Moreover, German politicians demanded that the entire immigration policy be subject to the principle of unanimity (Teufel) or that the

29 Meyer argued that the establishment of an independent European Public Prosecutor's Office was the only measure capable of lowering the number of corruption and frauds in the European Union, which were estimated at about 1 billion euros per year according to OLAF. Increasingly often, European officials are not the only one involved in such cases, followed up representatives of the governments of the Member States. It would be difficult to imagine such cases handled by national public prosecutor's offices related to instructions obtained from their governments or other national governments (Meyer 6.06.2002:1; 6.12.2002:1).

said principle is maintained until the Council of Ministers specifies detailed rules for common immigration policy, that is, for an indefinite period of time (Fischer). Hain, delegate of the British government, put forward an initiative to restrict the principle of unanimity solely to matters concerned with migrants' access to the labour market and social insurance (CONV 821/03: 83–84).

In principle, the Convention accepted all recommendations of Working Group X, some of which were amended or modified, and then included in the Draft Constitutional Treaty. In turn, changes agreed as a result of the discussion at the Convention were limited to three matters only: firstly, at the request of the Convention's Presidium, the general provisions set out in Section 1, Chapter IV, an article was added stating that the said provisions do not prejudice obligations executed by the Member States as regards the maintenance of public order and the safeguarding of internal security (Article III-163 DCT); secondly, on a proposal from German and Austrian delegates, Article III-168 DCT was complemented with an additional paragraph stating that it is without prejudice to the right of the Member States to determine volumes of admission for third-country nationals arriving in their territories seeking employment or self-employment; thirdly, at the request of the Presidium of the Convention, item d was included to the above-mentioned Article III-168(2) DCT, stipulating that European laws and European framework laws also lay down measures against trafficking, particularly trafficking in women and children.

Eventually, the Draft Constitutional Treaty provided for a cohesive area of freedom, security and justice established as a result of three types of undertaken proceedings: firstly, the adoption of European laws and European framework laws with the aim to make national legislative acts in border control policy, asylum policy, immigration policy, judicial cooperation in civil matters, judicial cooperation in criminal matters and police cooperation more cohesive; secondly, the enhancement of mutual trust between competent authorities of the Member States, particularly based on the mutual recognition of judicial and extrajudicial decisions; thirdly, the operational cooperation between competent authorities of the Member States, including police forces, customs and other services specialised in detection and prevention of crime (Article I-41(1) DCT). The process of forming the area of freedom, security and justice would take place full respect for fundamental rights and taking into consideration various traditions and legal systems of the Member States. The draft introduced the principle of mutual recognition of judgements, judicial and extrajudicial decisions of a Member State by authorities of other Member States. The mutual recognition of judgements and judicial decisions in criminal matters was to be applied in harmonising the provisions of criminal law where necessary. The EU

was to ensure the absence of external border controls for persons and the development of a common asylum policy, immigration policy and external border control policy based on solidarity between the Member States. Moreover, it was expected to make every effort to ensure a high level of protection using measures to prevent and combat crime, racism and xenophobia, as well as measures to coordinate and facilitate cooperation between police forces, judicial authorities and other competent authorities (Article III-158(1–4) DCT).

The Draft Constitutional Treaty established significant changes in the decision-making in the area of freedom, security and justice. In contrast to the postulates of German delegates, it granted the EC the power to determine the directions of legislative proceedings and operational planning in this regard (Article III-159 DCT). The co-decision was intended as the primary legislative procedure in this area. New legislative acts – European laws and European framework laws, which replaced previously applied framework decisions and decisions, were to be jointly adopted by the Council of Ministers and the EP in principle on the proposal of the European Commission (Article I-33(1), Article III-302(1–14) DCT). As an exception to this principle, some legislation was to be adopted by the very same institutions but on the proposal of the European Commission or a quarter of the Member States in judicial cooperation in criminal matters and police cooperation (Article III-165 DCT). Consequently, legislation in the area of freedom, security and justice was to be adopted by the Council of Ministers by qualified majority as a rule, while unanimous voting was to be employed only in specific cases (CONV 821/03: 157–159). The Draft Constitutional Treaty eliminated previous diversification in the jurisdiction of the Court of Justice in policies falling in the area of freedom, security and justice. However, this jurisdiction could not cover matters relating to ensuring and maintenance of internal security in individual Member States. The Court of Justice would only have jurisdiction over operations of law-enforcement services carried out based on the EU law, while it would have no jurisdiction to review the validity or proportionality of actions taken by the police or other law-enforcement services in a Member State, or to review the performance of obligations of the Member States as regards the maintenance of public order and the safeguarding of internal security if the said activities were subject to internal law of Member States (Article III-283 DCT). Furthermore, the Draft Constitutional Treaty created legal grounds for the future enlargement of competences held by Europol (Article III-177(1–3) DCT) and Eurojust (Article III-174(1–2) DCT), as well as for the establishment of the European Public Prosecutor's Office of Eurojust (Article III-175(1–2) DCT).

1.2 Convention's Draft Reviewed by the Coalition Government (SPD/Alliance 90/The Greens)

On 16 June 2003, the SPD Federal Executive Board adopted a resolution stating that the Draft Constitutional Treaty was "a good compromise that ought to be adopted at the forthcoming intergovernmental conference as the Constitutional Treaty for Europe." According to the members of the Federal Executive Board, the draft met most of the previously formulated postulates of the political platform resolutions of social democrats. These pertained primarily to the CFR, the institutional system reform that ensured higher effectiveness and transparency of proceedings in the European Union but also the so-called democracy deficit, which was partially successfully reduced, among others, owing to the establishment of a citizens' initiative. The authors of the resolutions saw the incorporation of the CFR to the Draft Constitutional Treaty as an achievement of the Convention that was particularly significant for SPD, as it safeguarded, i.a. fundamental social rights. This, in turn, created an opportunity to establish "a specific model of a social state that would protect an individual in urgent need (*Notsituationen*)" in the future European Union. The authors did not hide the fact that the incorporation of the entire CFR to the draft, including the part on fundamental social rights, was a success of representatives of all social democratic parties at the Convention, whose determination allowed them to overcome an exceptionally strong opposition of representatives of the conservative, Christian democratic and liberal parties in this regard. The incorporation of the CFR provided an indication that the European Union could be transformed into a community of values fostering the development of "a specific social model with strong foundations for the prosperity of citizens, freedom, fundamental rights, solidarity, democracy and social market economy," whereas the citizens' initiative strengthened the legitimation of the European Union in the eyes of societies of the Member States and the candidate countries (SPD-Bvo 16.06.2003: 1). Of all the areas requiring "further action towards integration," the first one to be indicated by members of the SPD Federal Executive Board was the common foreign and security policy, where qualified majority voting ought to be established as the decision-making rule in the Council of Ministers. They also called upon all German political parties represented in the Bundestag to vote in favour of the Constitutional Treaty during the ratification proceedings. At the same time, they called upon Christian democratic parties, particularly the CSU, to give up on "populist accusations" directed at the federal government, as they could prejudice the "consensus in the area of European policy" in the Federal Republic of Germany, which had provided quantifiable benefits, both political

and economic, over the previous decades and to undermine the credibility of the German government in Europe or even threaten the entire process of the European integration (SPD-Bvo 16.06.2003: 1).

On 26 June 2003, at a parliamentary debate in the Bundestag held with the aim to review the Draft Constitutional Treaty, the government coalition SPD/Alliance 90/The Greens pointed to the revolutionary impact of the said document on the future fate of the European integration. Foreign Minister Fischer, who submitted government declaration, was convinced of the seriousness of the moment and its exceptional value for the future of the European integration. He called the document developed by the Convention "the draft of the century," arguing that the European Union was to experience the greatest breakthrough in its entire history. Fischer strongly believed that the Draft Constitutional Treaty met most expectations and postulates of the federal government, particularly, it introduced long-awaited strict distribution of competences between the EU and the Member States, and an early warning mechanism that ensured a greater influence on the EU legislative proceedings for national parliaments, consolidated the European Commission and EP in their roles of institutions representing community interests, simplified legal instruments, extended the scope of matters subject to qualified majority voting, and established the Foreign Minister of the EU, whose competences involved providing new impetus to the common foreign and security policy and ensuring its higher effectiveness. Moreover, Fischer drew attention to the fact that some Member States and candidate countries could have some objections regarding certain provisions in the draft treaty. However, as he sincerely admitted himself, in the view of German interests, discussing these issues once again at the forthcoming intergovernmental conference was not desirable. With this in mind, Fischer warned the Member States and candidate countries against "unpacking" the package of regulations developed by the Convention, since in such an event they would have to "assume the responsibility for developing a new compromise themselves" (DB Plenarprotokoll 15/53: 4312–4313).

According to Minister of State for Europe in the Auswärtiges Amt Hans Martin Bury, by its very nature the European Constitution could not be a document that fully addressed each and every specific interest of the Member States and candidate countries. Preserving the "European diversity" stemming from different traditions of statehood, national, cultural and civilizational identity of the countries of the 'Old Continent' required consensual solutions. Thus, the basic criterion for reviewing the Draft Constitutional Treaty should not lie in national interests of the Member States or candidate countries but in the interests of the EU citizens instead. Therefore, when attempting to assess achievements

of the Convention one should ask a question about the extent to which this document was citizen-based and citizen-oriented. In Bury's opinion, the Draft Constitutional Treaty met the criteria for a citizen-based project, as it was developed with the significant participation of representatives of the European Commission, the EP and national parliaments. Moreover, it was based on "long-approved self-regulatory mechanisms of highly developed European communities," being at the same time "an expression of a manifestation of the nature of civil societies of the Member States that provided them with new possibilities for progress (*Freiräume*) at the European level." The Draft Constitutional Treaty was also a citizen-oriented project, since "it improved the Union's transparency in internal activities and the capacity to act outside the EU, thus fulfilling the well-grounded expectations of European citizens regarding the working methods of the European Union." Its transparency as regards internal proceedings manifested in, among others, well-arranged and fewer legal instruments, simplified and fewer legislative procedures, and a lower 'democracy deficit'. It all made the EU gradually closer to its citizens. The key criterion for consolidation the Union in its role outside the EU was seen to lie in the development of "a common European awareness" in the area of the common foreign and security policy. However, this goal seemed far off. For that very reason, the most important instruments for improving the effectiveness of the Union in this area so far was the establishment of the Foreign Minister of the EU. The said position gave "a face to the European foreign policy" and made it recognisable. In order to allow the European Union to "speak in one voice" in matters regarding the common foreign and security policy, one would also have to pursue a broader scope of qualified majority voting in the decision-making in the Council of Ministers. Whereas strengthening the Union's effectiveness in the security policy would require a common security strategy, which was to be developed by the EC at a meeting in Brussels in December 2003, and own armed forces. A European army would come into existence through enhanced cooperation executed by "the avant-garde of the Member States." Such a cooperation would have to be open for all Member States and candidate countries. The new European army "could not be directed against NATO," but should strengthen "the European pillar in the Euro-Atlantic partnership" instead. Since previous experiences of the European Union proved that the significance of this organisation grows only in areas characterised by "well-developed integration" (e.g. common commercial policy, monetary policy or internal market), further strengthening of the EU would require a fast-track integration process with respect to other policies, for which the Draft Constitutional Treaty provided essential framework conditions (DB Plenarprotokoll 15/53: 4337–4339).

With undisguised satisfaction, Fischer and Bury pointed also to the draft provisions that strengthened the supranational architecture, the Community method and the identity of the future European Union. These included, i.a. introducing the CFR to the draft treaty; adopting a regular legislative procedure as the dominant legislative procedure and making qualified majority voting the general decision-making rule in the Council of Ministers; strengthening the community method in the institutional triangle (the European Commission – the EP – the Council of Ministers); dissolving the pillar-based structure; forming the European Defence Agency and the European Public Prosecutor's Office, as well as establishing a citizens' initiative. They also argued that the Draft Constitutional Treaty provided framework conditions essential for fast-tracking the integration process in the area of freedom, security and justice, as well as in the common foreign and security policy of the European Union. Therefore, they expressed hope that adoption of the draft treaty would bring in the future further growth of the international position of the Union (DB Plenarprotokoll 15/53: 4312–4315; 4337–4339; DB Drucksache 15/1212: 1–2).

The opinions of the representatives of the federal government were shared by representatives of the parliamentary factions forming the government coalition. Members of the SPD commonly indicated the revolutionary meaning of the Draft Constitutional Treaty for the enlarging and deepening of the European integration, particularly considering that these two objectives were perceived by all previous coalition governments in Germany as "two sides of the same coin" (Günter Gloser). They also stressed the effectiveness of the system reform method adopted by the Convention, which involved participation of representatives of the EP, national parliaments and civil society (Gloser, Michael Roth). They claimed that many provisions of the draft, e.g. regulations on social market economy, gender equality or solidarity between generations were well aligned with the social democratic vision of the state and society (Roth). However, according to the stance adopted by members of the SPD, the system reform of the EU ought not to end with the establishment of the Draft Constitutional Treaty. In contrast, this process ought to be continued at both major levels of integration, namely, the national and the European level. To this end, it is vital to further strengthen the impact exerted by national parliaments on the legislative process in the EU (Roth), as well as to increase the Union's activity in common foreign and security policy, so that it could function as one of the major 'global actors' in the international policy, side to side with the USA (Markus Meckel). Some members of the SPD parliamentary faction strongly opposed any attempts to create "the avant-garde of the Member States" and to allow them to undertake a selective enhanced cooperation to implement objectives and integration tasks, as they assumed that

the best way to reinvigorate the integration process and further system reforms of the EU is to gradually surrender unanimity in the decision-making in the Council of Ministers with regard to as many EU policies as possible (Roth) (DB Plenarprotokoll 15/53: 4318–4320, 4326–4330, 4353–4354).

Members of the parliamentary faction Alliance 90/The Greens viewed the Draft Constitutional Treaty as a big 'milestone' in the history of the European Union and "the most rock-solid foundation" the "European home has ever been based on". Nevertheless, they approached considerations and discussions on the target model of European integration (*finalité politique*) with much caution, as until quite recently the former were absorbing politicians from the government coalition. In their opinion, it would be difficult to impose the final model of the EU system on future generations. Moreover, they pointed to the fact that it is inevitable that integration is deepened in policies based on intergovernmental cooperation, i.e. common foreign and security policy, judicial cooperation in criminal matters and police cooperation (Anna Lührmann). They also demanded that the European Union elaborates a cohesive and modern security strategy in foreign policy that would allow it to act in international relations as an independent actor (Rainder Steenblock). They postulated that the European Atomic Energy Community should be dissolved in the future, arguing that the vast majority of the Member States and candidate countries do not have any nuclear power plants or declared to pursue nuclear phase-out (e.g. Germany, Belgium), either by ceasing to operate existing plants or not constructing new ones. Furthermore, members of the parliamentary faction Alliance 90/The Greens in line with its election manifesto were strongly in favour of adopting the Draft Constitutional Treaty by referendum, which would require an amendment in the Basic Law of the Federal Republic of Germany(Lührmann) (DB Plenarprotokoll 15/53: 4322–4323, 4331–4333).

The session ended with the parliamentary factions the SPD and Alliance 90/The Greens submitting to the Bundestag a draft resolution on the work of the Convention. The draft was unanimously approved by an all-party vote and forwarded for further proceedings to the Committee on the Affairs of the European Union of the Bundestag. Parliamentary factions of the government coalition spoke very well of the Convention's achievements in the document, noting that it includes a programme for a thorough system reform of the EU. In their view, the most significant achievements of the Convention included rendering the CFR legally binding; the legitimation of the EU as a union of citizens and a union of Member States, and the granting of legal personality to the EU; the dissolution of the pillar-based structure; the strengthening of the subsidiarity principle and national parliaments; the introduction of a strict distribution of competences between the EU and the Member States; the consolidation of the EP and the

President of the European Commission in their roles; the transformation of the co-decision procedure to an ordinary legislative procedure; the establishment of the Foreign Minister of the EU and a citizens' initiative. They strongly believed that the method for reforming the European Union adopted by the Convention proved successful and contributed to a strengthened role of parliamentarianism, democracy and transparency in the EU operations. Therefore, the Bundestag ought to support the parliamentary factions of the government coalition in their efforts to make the Convention an institution responsible for changes in the European constitution also in the future (DB Drucksache 15/1212: 1–2).

At the same time, the parliamentary factions SPD and Alliance 90/The Greens expressed their regret that the breakthrough in the form of the establishment of qualified majority as the voting rule in the Council of Ministers was not achieved in all areas of EU activity. For that very reason, they called upon German delegates for the Convention and government representatives at the intergovernmental conference to "maintain their vote in favour of extending the scope of matters subject to qualified majority voting in the Council (of Ministers)", particularly in common foreign and security policy.[30] In addition, the parliamentary factions SPD and Alliance 90/The Greens stated that the Treaty establishing the European Atomic Energy Community of 25 March 1957 "fails to keep pace with the times and should be amended in the future," whilst the energy sector ought to be governed by normal legislative and budgetary procedures, as well as the law of the market (DB Drucksache 15/1212: 2–3).

One week later, the case of Euratom was discussed once again in the Bundestag.

On 2 July 2003, during a 'question hour', Gesine Lötzsch (Non-attached Member) addressed the federal government to specify what it intended to do in the nearest future to lead to the dissolution of the European Atomic Energy Community and what measures it was willing to take to include this matter in the agenda of the next intergovernmental conference. In her response, Minister of State in the Auswärtiges Amt Kerstin Müller (Alliance 90/The Greens) ensured that at the Convention representatives of the federal government, particularly Foreign Minister Fischer, had undertaken essential measures aiming to fundamentally amend the provisions of the TEAEC. However, a consensus on a peaceful use of nuclear energy proved beyond reach due to a divergence of views among

30 The appeal in this matter to the representatives of the German government delegation at the intergovernmental conference must have been surprising given the earlier statements of Fischer and other politicians from the SPD/Alliance 90/The Greens coalition, claiming that the package of regulations set by the Convention should not be "unpacked".

delegations participating in the Convention with Germany and Belgium being the only supporters of an opt-out of a peaceful use of nuclear energy. Instead of leading to a fundamental change in the TEAEC, the federal government managed only to develop a consensual solution stating that it will not constitute an element of the future constitution. The above solution "created an opportunity to revise the treaty at a later term." Consequently, as ensured by Minister of State Müller, the federal government will continue to consistently "strive for forcing its position through," taking initiative in the future to "convene an intergovernmental conference in his regard" (DB Plenarprotokoll 15/55: 4547–4548).

On 3 July 2003, the SPD representative Rolf Mützenich questioned the opinion propagated by some of the government coalition and the parliamentary opposition politicians, according to whom common security and defence policy ought to be "a litmus paper" ensuring the willingness of individual EU Member States to form "European partnership". According to Mützenich, "the partnership of democratic countries" should be formed primarily "based on a more enhanced civilian cooperation, and not a military integration", since common security and defence policy comprised two elements, namely, defence policy and crisis management. Both these elements ought to be mutually recognised as equivalent. Therefore, arms control and disarmament operations should be as important as defence cooperation. The common security and defence policy should also be "a trademark" of "a culture of moderation". With this in mind, Mützenich criticised the Convention's decision to establish and "to provide a constitutional status" to the Armaments, Military Capabilities and Research Agency. The SPD politician was convinced that "the civil character of the common (security and defence) policy would be much better supported by, e.g. Arms Control and Disarmament Agency" (DB Plenarprotokoll 15/56: 4750–4751).

1.3 Review of Convention's Draft by the Parliamentary Opposition (CDU/CSU, FDP and PDS)

1.3.1 Christian Democratic Parties

On 20 June 2003, the Presidiums of the CDU and the CSU adopted a joint resolution on the Draft Constitutional Treaty. They stressed that the draft is compliant with their views and concepts in many significant areas, and that it is a good response to the "existing EU reform crisis." In this view, they regarded the following provisions included in the draft as its key elements: the establishment of competence distribution categories with due regard to the principle of conferral (*Einzelermächtigung*), the principle of subsidiarity and the principle of proportionality; the empowerment of national parliaments with instruments for carrying

out effective control over the legislative proceedings of the EU (an early warning mechanism, the right to bring action before the Court of Justice); the conferral of the legally binding force on the CFR, thus strengthening citizens' rights against the EU institutions and providing grounds for transforming the EU into a community of values; the strengthening of democratic legitimacy of the EU by making the European Commission more closely linked to the EP (electing the President of the European Commission) and increasing its influence on the ordinary legislative procedure; the improvement of the transparency of the Union's proceedings by means of allowing open sessions for legislative proposals in the Council of Ministers; the enhancement of the Union's performance by limiting the number of members in the College of the European Commission, establishing the permanent President of the European Council and the Foreign Minister of the EU; the introduction of double majority voting in the decision-making in the Council of Ministers and the substantial extension of the scope of matters subject to this type of voting; the prohibition to harmonise legal provisions in many areas reserved for the Member States (e.g. education and culture), as well as the respect of the rights of regional and local governments, as well as the status of churches and religious communities (CDU und CSU 20.06.2003: 1–2).

At the same time, the Presidiums of CDU and CSU stated that the Convention failed at settling numerous issues in Part I the Draft Constitutional Treaty, particularly those concerned with the powers of the European Union. In their opinion, the provisions on the Union's competences regarding coordination of economic policies and employment under the draft treaty needed to be further specified in a manner that would rule out "central control of economic policy" of the Member States (Article I-14 DCT). Considering that Germany is the highest-ranking net contributor in the EU, in terms of its financial interests it would be essential to reinstate unanimous voting in matters concerned with mutual relations between individual categories of own resources (Article I-53 DCT). Federal states (*Bundesländer*) ought to have the right to delegate their representatives to all formations of the Council of Ministers and not solely to the General Affairs and Legislative Council in cases where matters concerning their powers are discussed (Article I-22 to 23 DCT). Under the *passerelle* procedure, decisions of the EC allowing the Council of Ministers to act by qualified majority in areas where the Draft Constitutional Treaty provided for unanimous voting should be subject to former approval of national parliaments. However, the Draft Constitutional Treaty stipulated that national parliaments were only to be informed of such decisions (Article I-24(4) DCT), whilst the approval of national parliaments should be ensured by the German national law adopted at the time the Constitutional Treaty was ratified. This would imply that the Federal

Chancellor would be allowed to approve such decisions in the EC only upon an approval granted by the German parliament (CDU und CSU 20.06.2003: 2–3).

As for Part III and Part IV of the Draft Constitutional Treaty, which were to be further elaborated during three final plenary sessions of the Convention in July 2003, the Presidiums of CDU and CSU presented the following postulates: to reserve the right of the EU Member States to determine volumes of admission for third-country nationals and their access to the labour market, and to leave these matters to be voted by unanimity, if required (Article III-168 DCT); to further specify the so-called internal market clause in a manner that would eliminate the possibility to introduce a European tax (Article III-62(1) DCT); to amend the free competition law in a manner allowing for public aid (*Beihilfe*) to be granted to the Member States in the area of structural policy, provided that such an amendment would not entail the risk of a considerable (*spürbar*) breach of the rules of the common commercial policy; to ensure the responsibility of the Member States for organising and financing welfare benefits awarded under social security systems (i.a. recognition of insurance periods and export of benefits vital for the free movement of persons), as well as broad competences in providing social assistance (*Sozialhilfe*); to maintain the principles regarding the operation of energy policy (existing at the time and based on market rules), i.e. to revoke new rights granted to the European Union in this area under the Convention's draft; to exclude benefits of general economic interest (*Daseinsvorsorge* – regulations concerned with public service in federal states and municipalities) from the category of coordinating competences, complementary competences and supporting competences, since otherwise the European Union would have an excessive right to intervene in areas formerly reserved for the Member States; to make each and every amendment in the European Constitution dependent on a unanimous approval of the governments of the Member States and ratification according to their constitutional requirements. At the very same time, the Christian democratic parties reserved the right to provide the final review of the Draft Constitutional Treaty following the Convention's proceedings and to re-determine their stance before the forthcoming intergovernmental conference (CDU und CSU 20.06.2003: 3–4).

At the above-mentioned parliamentary debate held in the Bundestag on 26 June 2003, the positive views of the government coalition on the Draft Constitutional Treaty and the activities of German delegates at the Convention were to a large extent shared by members of the CDU. Some of them, e.g. Minister President of Baden-Württemberg Erwin Teufel (CDU), noted that the key achievements of the government involved the introduction of double majority to the decision-making in the Council of Ministers and the EC. What

is more, Teufel recommended that the federal government should not allow any discussions on the regulations concerning the institutional system of the EU to be held at the pledged intergovernmental conference, as it would reignite the dispute over double majority:

"I think that the Federal Republic of Germany – the federal government, the Bundestag and the Bundesrat – should take into account this resolution and pause for thought ten times before leading again to the 'unpacking' of the (entire) package of regulations or before risking such a possibility"(DB Plenarprotokoll 15/53: 4317).

However, according to Teufel, in a situation where other Member States submitted amendments, the German delegation should present its postulates as well. Particularly, it ought to demand that the preamble be complemented with the *Invocatio Dei* or, at least, with a reference to Christianity as one of the major foundations of the European civilisation; that regulations on the protection of the family and marriage are included in the provisions on the protection of children's rights in the Draft Constitutional Treaty (Article II-24 DCT); that the right to determine volumes of admission for immigrants and their access to national labour markets be excluded from the scope of shared competences and maintained subject to exclusive competences of the Member States (Article III-168 DCT), as well as other changes not mentioned in the resolution of the Presidiums of the CDU and the CSU of 20 June 2003 (DB Plenarprotokoll 15/53: 4315–4318).

President of the CDU/CSU Working Group on the European Union Peter Hintze (CDU) was convinced that the course of the Convention's meeting clearly indicated a "victory of democracy over diplomacy pursued behind the closed doors." However, at the same time, he also spoke against a referendum on the European constitution supported by Alliance 90/The Greens and the opposition party FDP, indicating France's negative experience of 1992 related to a plebiscite on the Maastricht Treaty (DB Plenarprotokoll 15/53: 4324–4325).[31] Thomas Silberhorn (CDU) stated that the provisions of the Draft Constitutional Treaty on national parliaments were ambivalent, as the draft text had a considerable impact on strengthening the competences of the said parliaments in monitoring the respect of the principle of subsidiarity by means of an early warning mechanism and the national parliaments' right to bring action before the Court of Justice via the governments of the Member States. Nevertheless, it "brutally reduced" the powers they held at the time in some areas, particularly in the EU financial policy. This was due to the fact that for the first time two different legislative procedures were introduced for determining the own resources of the EU.

31 However, Foreign Minister Fischer opposed the referendum.

The establishment of upper limits of the EU own resources, the determining of the new resources and the elimination of the existing resources were to fall by a European law within the competences of the Council of Ministers, which was to act by unanimity after consulting the EP, whereas the Member States were to approve the law in line with their constitutional requirements (Article 53(3) DCT). However, other details concerning the system of own resources were to be determined by the Council of Ministers by a European law approved by qualified majority (instead of by unanimity, as before) after the approval of the EP (Article 53(4) DCT). Unlike before, enactment of such law did not require ratification by the Member States. Consequently, the Council of Ministers of the European Union could theoretically decide to change the VAT regime without the approval of national parliaments, with all the Member States obliged to pay it to the general budget of the European Union. Since such a decision did not require unanimous approval of the Member States, it could possibly be enacted against Germany's interests, given that Germany was the highest-ranking net contributor in the EU (DB Plenarprotokoll 15/53: 4352–4353).

In contrast to the CDU members, members of its sister party CSU were highly critical of the attitude and activities of German delegates at the Convention. Gerd Müller (CSU) blamed the federal government for presenting no coherent concept for the system reform of the EU and not drawing from proposals provided in the Schäuble's/Bocklet's memorandum,[32] limiting its efforts solely to submitting about 200 more or less significant proposals for amendments. In his view, the delegates of the German government seemed to be "hiding their proposals behind the back of France", lacking the courage and determination to articulate their own concepts and ideas more boldly. According to Müller, the greatest concern and doubts were triggered by the provisions of the Draft Constitutional Treaty pertaining to the distribution of competences between the European Union and the Member States. The CSU politician argued that the draft text gave the EU too many new powers, promoted centralisation of the decision-making at the European level and, thus, did not mark a path towards a federation the Union could follow, but rather provided conditions for forming an 'executive democracy' (*Exekutivdemokratie*) within the EU. In his view, the Union gained new powers in areas formerly

32 On 26 November 2001, a group of experts headed by Wolfgang Schäuble (CDU) and Reinhold Bocklet (CSU) developed a memorandum on the system reform of the EU, the principles of which were frequently referred to by both Christian democratic parties in the following years, especially CSU. The content of Schäuble's/Bocklet's memorandum (Bocklet, Schäuble 2003: 1–25).

reserved for the Member States, i.a. protection and improvement of human health, vocational training, sports, youth policy, culture, civil protection, research (supporting competences, coordinating competences and complementary competences), immigration policy, judicial cooperation in criminal matters and police cooperation (shared competences), as well as economic policy and employment policy (coordinating competences) (DB Plenarprotokoll 15/53: 4339–4340).

1.3.2 Liberals

On 19 June 2003, Vide-President of FDP Werner Hoyer in his statement made at the end of a joint meeting of leaders of liberal parties in Thessaloniki called the Draft Constitutional Treaty "a good base for the future intergovernmental conference." In his opinion, the key amendment to be urgently incorporated in the draft text during the last sessions of the Convention or at the intergovernmental conference was to be the rule for decision-making in the EC by super-qualified or qualified majority if the said decisions pertained to draft legislation submitted by the Foreign Minister of the EU supported by the European Commission (Article I-39(7–8) DCT). Concurrently, Hoyer spoke in favour of further enhancement of cooperation between the EU Member States in the area of common security and defence policy (Hoyer 2003: 1).

On 26 June 2003, at a parliamentary debate in the Bundestag, the FDP members (as was the case with the CDU) shared the opinion of the government coalition on the great importance of the said document for Germany and Europe. At the same time, they were the ones who most strongly pressed for a referendum in Germany on the future European Constitution (Sabine Leutheusser-Schnarrenberger). They referred to the Draft Constitutional Treaty as "a decisive step towards overcoming the division of Europe" and noted its unquestionable strengths, i.e. the provisions on the enhancement of powers held by the EP and the President of the European Commission, the incorporation of the CFR into the Draft Constitutional Treaty, the observance of the principle of subsidiarity, or the limitation of the so-called legitimation deficit in the EU. Nevertheless, they expressed their regrets about the German delegation's failure to establish qualified majority voting as a rule in the decision-making in the Council of Ministers in the common foreign and security policy area. They argued that in the future, activities of the Foreign Minister of the EU could be paralysed as a result, since despite having the right of initiative, it would be very difficult to make decisions in the said area by unanimity. Consequently, the Constitutional Treaty will probably need to be revised shortly after entering into force. For that

very reason, they stressed once again that it would be much more reasonable to introduce certain amendments to the draft text, e.g. the super-qualified majority voting, already during the three final meetings of the Convention or, ultimately, at the intergovernmental conference (Leutheusser-Schnarrenberger, Hoyer) (DB Plenarprotokoll 15/53: 4318–4320, 4330–4331).[33]

The provisions of the Draft Constitutional Treaty that were considered most controversial by the parliamentary opposition were also discussed at a meeting of the Bundestag on 3 July 2003. Leutheusser-Schnarrenberger, representative of the FDP parliamentary faction, addressed German representatives at the Convention to ensure that the so-called internal market clause is further specified at the final round of the meeting in a way that would eliminate the possible introduction of a European tax, the exclusion of services of general economic interest from the scope of coordinating competences, complementary competences and supporting competences, as well as the establishment of qualified majority voting as a rule applied in decision-making in the Council of Ministers in matters related to common foreign and security policy. In the event that the above amendment cannot be forced through at the Convention, the German delegation should attempt to do so "possibly without the need to unpack the entire package" at the intergovernmental conference (DB Plenarprotokoll 15/56: 4631–4632).

1.3.3 PDS

The stance adopted by the PDS on the Draft Constitutional Treaty was fundamentally different to those of other opposition parties. In general, the PDS members tended to be highly critical of the draft text, therefore, at a parliamentary debate held on 26 June 2003 in the Bundestag, Gesine Lötzsch demanded that a referendum on the Constitutional Treaty be held in all EU Member States (DB Plenarprotokoll 15/53: 4346–4348). In contrast, Petra Pau (Non-attached

33 As early as on 7 May 2003, the parliamentary faction of FDP submitted in the Bundestag a draft legislation regarding the above-mentioned guidelines of the heads of state or government of Germany, France, Belgium and Luxembourg of 29 April of that year, which had been adopted earlier at the praline summit. The said faction was highly critical of, i.a., the intention of establishing a European Security and Defence Union, to launch preparations for forming a European rapid reaction force at the Convention, as well as to establish a European Air Transport Command, a European unit for common defence against ABC weapons and a European military command headquarters at Tervuren. According to the FDP members, these proposals could be perceived as a sign of political pressure exerted on the Convention members by Germany, France, Belgium and Luxembourg (DB Drucksache 15/942: 1–2. DB Plenarprotokoll 15/53: 4354).

Member) in her appearance before the Bundestag on 3 July 2003 referred to the draft text as the Convention's achievement, though she had a critical view on some provisions included therein. She argued that the PDS had always supported "the European Union as a Social Union pursuing foreign and security policy with the aim to maintain peace." For that very reason, PDS opposed the Eastern enlargement of NATO while favouring the inclusion of the former Eastern Bloc countries to the European Union. Consequently, Pau called upon all the political parties represented in the Bundestag to approve a referendum in Germany on the future European constitution as the most reliable criterion for legitimising the said constitution in German society (DB Plenarprotokoll 15/56: 4637–4638). A few months later, on 25 September 2003, Pau's criticism extrapolated *ad absurdum* when at her appearance before the Bundestag she stated that the Convention's draft in its part concerned with common foreign and security policy obliges the EU Member States to pursue a policy oriented to further develop armed forces and did not preclude preventive wars (DB Plenarprotokoll 15/63: 5318).

2 Intergovernmental Conference of 2003–2004. The Constitutional Treaty

2.1 German Government's Run-Up to the Intergovernmental Conference

The preparations for the intergovernmental conference commenced in Germany with an extraordinary meeting of the Committee on the Affairs of the European Union held on 23 July 2003 in the Bundestag. It was attended by German delegates of the Convention Joschka Fischer, Jürgen Meyer and Peter Altmaier. They all agreed that the Draft Constitutional Treaty could be a groundbreaking document for the future development of European integration, with great satisfaction drawing particular attention to those provisions of the draft that were significant for deepening the integration process. These included incorporating the CFR into the primary law, which was to act as the foundation for transforming the EU into a community of values in the future; making the ordinary legislative procedure the prevailing procedure in the legislative process; adopting qualified majority voting as the decision-making rule in the Council of Ministers; strengthening the community method within the institutional triangle (the European Commission – the EP – the Council of Ministers); establishing the European Armaments, Military Capabilities and Research Agency; creating conditions for the future transformation of Eurojust into the

European Public Prosecutor's Office, as well as establishing a citizens' initiative (DB AAEU. Protokoll 15/26: 17–18, 20–23).

The other provisions of the Draft Constitutional Treaty that were fully aligned with "specific German interests" laid down by the German delegates of the Convention included: maintaining the existing competences of the Member States regarding access to labour markets; maintaining a separate status of the Treaty establishing the European Atomic Energy Community; creating a transparent distribution of competences between the European Union and the Member States modelled on the distribution of legislative powers between the federation and the federal states in Germany (Fischer); extending the scope of application and enhancing the principle of subsidiarity that ensures the role of national parliaments as institutions monitoring the observance of the said principle in the "European legislative process," as well as regulating the set of legal instruments (Fischer, Meyer). They believed that the Draft Constitutional Treaty offered good prospects for further dynamical development of the Union's institutional system, at the same time restricting the issue of rotation within the European Commission (Fischer) for European legislation (i.e. secondary EU legislation instead of primary EU legislation, as applied so far), which could be easily amended. Moreover, the said draft safeguarded the superior powers of the Member States, making the conferral of these powers on the EU subject to national parliaments' approval in the form of a legislative act requiring ratification (Fischer) (DB AAEU. Protokoll 15/26: 17).

At the same time, the German delegates of the Convention expressed their disappointment with the fact that the draft text did not involve provisions advocated by the federal government from the very beginning, such as the introduction of qualified majority voting as a rule for the decision-making rule in tax policy, common foreign and security policy, as well as non-inclusion of services of general economic interest in the category of coordinating competences, complementary competences and supporting competences but preserving them within the scope of exclusive competences of the Member States instead (Fischer, Meyer, Altmaier). Nevertheless, the German delegates of the Convention voted against attempts that had already emerged in some Member States and candidate countries at the time to "unpack" the package of regulations set out by the Convention, arguing that attempts to reach again a consensus in this matter may prove futile (DB AAEU. Protokoll 15/26: 16–24). Fischer considered the Draft Constitutional Treaty "a good compromise that makes no one fully satisfied, yet is acceptable for everyone." Simultaneously, the Foreign Minister of Germany announced that the federal government would make every necessary effort to ensure that the meeting of the intergovernmental conference led by Italy came to

an end as early as in December 2003, while the Constitutional Treaty was signed in early May 2004 at the latest under the Irish Presidency (DB AAEU. Protokoll 15/26: 19). Thus, the federal government intended to prevent another debate on the most controversial issues of the system reform of the EU from taking place but, above all, to exclude from such a debate institutional matters, particularly the issue of qualified majority voting in the Council of Ministers and the EC.

During the discussion on the Draft Constitutional Treaty, all members of the Committee on the Affairs of the European Union in the Bundestag, representing opposition factions stressed the great importance this document had for further European integration. Some of them, as was the case with Foreign Minister Fischer, perceived it as a European "draft of the century" (Hintze). Others compared it to the draft text developed at the Constitutional Convention at Herrenchiemsee, which in 1948–1949 served the Parliamentary Council as one of the three fundamental documents for elaborating the Basic Law of the Federal Republic of Germany (Müller). However, it was the Christian democratic politicians who submitted the most critical remarks regarding the Convention's draft. According to Müller, it failed to provide an outline of the system model for the EU advocated by the Christian democratic parties, i.e. a model based on strong "federal" grounds and "competitiveness in social and economic areas." The CSU politician emphasised once again that the new powers of the European Union granted under the draft would foster centralisation of this international organisation. In his view, the position of the EP in the EU was insufficiently strengthened as well, which manifested in, i.a. the said institution being granted no new powers in the area of legislative initiative. In spite of this fact, the CDU/CSU members (except for Fischer) negated proposals of Alliance 90/The Greens and FDP as regards a referendum on the Constitutional Treaty in Germany, whose results were everything but certain (DB AAEU. Protokoll 15/26: 25, 27, 32–33, 319).

Representatives of all parliamentary factions expressed their belief that the Convention proved fully effective as an institution far better placed to execute the system reform of the EU than the intergovernmental conference, as over 2/3 of all delegates it comprised were representatives of the EP and national parliaments. They also had the very same stance as the federal government that the package of regulations adopted under the Draft Constitutional Treaty should be prevented from being "unpacked" at the forthcoming intergovernmental conference. However, they expressed their interest in the German government's tactic in the event of a possible resumption of negotiations on the draft at the conference. Michael Roth (SPD) argued that the federal government should take precautions and ought not to limit its actions only to guarding former provisions of the draft text. He also asked Fischer to present before the

Committee on the Affairs of the European Union the issues in dispute that could lead to a conflict of interests with governments of other Member States at the forthcoming conference. Veronika Bellmann (CDU/CSU) indicated a report of the Members of the EP and national parliaments of Denmark, Ireland, the United Kingdom and the Czech Republic, which involved critical opinions on both the Draft Constitutional Treaty and the non-democratic decision-making at the Convention's meeting. Günter Gloser (SPD) put forward a proposal to initiate consultations with the French or the French and Polish governments as part of the Weimar Triangle to allow these countries to develop a common stance before the forthcoming intergovernmental conference. Some of the meeting participants did not hide the fact that in the event that negotiations on the Draft Constitutional Treaty were resumed, the federal government should propose amendments involving, i.a. to introduce qualified majority voting as the general rule in common foreign and security policy; to grant the right to approve decisions of the EC to national parliaments, allowing the Council of Ministers to act by qualified majority in areas where the Constitutional Treaty envisaged unanimous voting (the *passerelle* procedure) (Hintze); to reduce the transition period for setting new rules for establishing and setting up the composition of the European Commission (Roth); to eliminate the position of the EC President (Türk), to exclude social policy, public health policy and research from the category of shared competences (Hintze) and services of general economic interest from the category of coordinating competences, complementary competences and supporting competences (Hintze, Müller, Silberhorn), as well as to include the *Invocatio Dei* to the preamble of the future constitution (Müller) (DB AAEU. Protokoll 15/26: 24–27, 30–33, 35).[34]

The issue of the German delegation's participation in the intergovernmental conference was discussed also at the meeting of the Bundestag on 10 September 2003, which was dedicated to preparing a draft budget for the upcoming year. Chancellor Gerhard Schröder, who presented his opinion in this matter for the first time at the Bundestag, maintained that the Draft Constitutional Treaty was "a well-balanced compromise as a whole." Each attempt to initiate discussion on the package of regulations involved in the draft posed a threat to its cohesion and could even possibly end in a failure of the entire Convention's acquis. The

34 In the Resolution of the 68th CSU Congress, the said party's approval of the ratification of the European Constitution was made subject to the introduction of the *Invocatio Dei* and the postulate of the German Catholic Church on the protection of marriage and family to the Draft Constitutional Treaty (DB AAEU. Protokoll 15/26: 24).

Chancellor's stance in this regard was strengthened by a similar view presented by the French government:

"We agree with our French friends and others that the Convention has submitted in fact a very good draft constitution. In the current circumstances, it is a successful attempt to reasonably regulate mutual relations between (the EU) institutions. In Europe, this is naturally by far more difficult than in a given Member State. However, the relations between the European level and national states have been settled reasonably. Lastly, we too are all convinced that the inclusion of the Charter of Fundamental Rights into a constitution of this sort was a good project and the right thing to do. To conclude, it is indeed a successful draft. (...) Once we unpack this package, we will not be able to create a better one, if any at all. We all share this fear. For that very reason, Germany will pursue maintenance of the entire package at the intergovernmental conference" (DB AAEU. Protokoll 15/26: 20–21).

Foreign Minister Fischer argued that experiences arising from past intergovernmental conferences indicate that the states participating in the said meetings are driven by far more "rightful national interests" than in the case of the Convention's meetings. Therefore, it was highly unlikely that at the forthcoming intergovernmental conference they would be capable of creating something more than the submitted draft text. However, Fischer attempted to somewhat soften the Chancellor's stance, thus modifying his former point of view. Contrary to his pervious claims, the Foreign Minister assured that the federal government would undoubtedly approve all positive changes proposed in the draft provided that agreement was reached in this matter. Otherwise, the German delegation should show decisiveness vital for signing the Draft Constitutional Treaty in the existing form (DB AAEU. Protokoll 15/26: 71). The parliamentary factions SPD, Alliance 90/The Greens, members of the CDU and some MPs from the FDP identified themselves with the stance adopted by the federal government on the negotiation tactics at the intergovernmental conference. Speaking on behalf of the social democrats, Gloser ensured the Chancellor of full support in this matter. At the same time, he levelled hard criticism against a controversial statement of Edmund Stoiber, Chairman of the CSU, who several weeks earlier demanded that the Draft Constitutional Treaty be renegotiated mainly due to insufficient powers (as he claimed) of the federal states and *Landtags* in the reformed European Union. This was followed by the SPD MP calling upon the parliamentary faction CDU/CSU to determine a clear and precise stance on the said draft treaty, and to the German delegation's negotiations at the forthcoming intergovernmental conference. Peter Hintze was highly critical of the European policy formerly pursued by

the federal government, and alleged that Schröder and Fischer infringed fundamental rules governing the mentioned policy in the years 1949–1998. As far as the European policy of Germany was based at the time (in his view) on three well-balanced pillars, namely, friendship with France, transatlantic partnership with the USA and "fair relations" (*fairen Umgang*) with smaller EU Member States, under the government led by Schröder/Fischer, two of the said three pillars were destroyed: relations with the USA and relations with smaller EU Member States. Furthermore, the relations with Central and Eastern European countries aspiring for EU membership deteriorated. Consequently, Hintze called upon the federal government to restore the balance between the mentioned pillars of the European policy of Germany as soon as possible, and to improve relations with the candidate countries. In general, he considered the Convention's initial working basis a good compromise nevertheless and advocated it at the intergovernmental conference. He also expressed his hope that in the event that a discussion on the Draft Constitutional Treaty was launched, the federal government would include in the agenda of the conference all postulates of the Christian democratic parties submitted in the course of the previous debate on the said document (DB AAEU. Protokoll 15/26: 95–96). A similar opinion on the federal government's tactics at the intergovernmental conference was presented by Hoyer (FDP). His conviction was confirmed by all major amendments proposed by the Member States and the candidate countries after the end of the Convention's meeting. He criticised them, seeing them as "ill-directed." He argued that the countries that dare to re-open the submitted 'package of regulations' included in the draft constitutional not only would not "improve the overall treaty or the European Constitution but compromise it instead" (DB AAEU. Protokoll 15/26: 88). Hoyer's views were questioned by Chairman of the FDP Guido Westerwelle, who referred to the excessively strong opposition of the federal government against attempts to relaunch the discussion on the Draft Constitutional Treaty as a possible "diplomatic mistake" (DB AAEU. Protokoll 15/26: 26). The most extreme position on the federal government's tactics at the forthcoming intergovernmental conference was presented by the CSU deputies. Yet again, harsh criticism was aimed particularly against Foreign Minister Fischer, who was accused of megalomania, indecisiveness and completely failing to elaborate his own concept of the system reform of the EU presented in 2000 during the famous speech at the Humboldt University in Berlin, as well as of ignoring postulates of Christian democratic parties in this regard, which were included in Schäuble's/Blocket's memorandum (Müller). Displeased with the 'wait and see' approach adopted by the federal government, they strongly demanded that negotiations on the

Draft Constitutional Treaty be resumed (Müller, Glos) (DB AAEU. Protokoll 15/26: 11, 98–99).

On 29 September 2003, the Presidiums of the CDU and the CSU in line with the above-mentioned decision of 20 June of that year nevertheless adopted a resolution that determined their joint official stance on the forthcoming intergovernmental conference. The Christian democratic parties stressed that they believed the Draft Constitutional Treaty would undoubtedly foster democratic principles and make the actions taken by the EU both more effective and transparent. At the same time, they stated that the said draft treaty failed to meet their expectations in numerous essential matters. The CDU and the CSU were particularly concerned with those provisions of the draft text that improved the dynamics of the EU centralisation process. This was manifested particularly in numerous new competences being granted to the EU or in the existing ones being extended, though they were formerly successfully implemented by the Member States and required no decision-making at the European level (services of general economic interest, economic policy, social policy, and judicial cooperation in criminal matters). The Christian democratic parties were also concerned with regulations that limited the former competences of the Member States, such as the simplified treaty revision procedure (the *passerelle* procedure) (CDU und CSU 29.09.2003: 1–3). The Christian democratic parties hoped that following consultations with individual Member States and candidate countries, the Italian Presidency would submit a number of amendments to the draft treaty regarding issues not formerly agreed at the Convention.

As a result, they called upon the federal government to present the Italian Presidency with the following postulates: first, to introduce the *Invocatio Dei* to the preamble; second, to maintain unanimity as the binding voting rule in immigration policy and to limit the powers of the European Union in this area to specifying minimum norms; third, to revoke the new powers of the European Union as regards services of general economic interest; fourth, to create the possibility for the federal states to delegate their representatives to all formations of the Council of Ministers and not solely to the General Affairs and Legislative Council in cases where issues related to their powers are discussed at meetings; fifth, to restrict the Union's competences to coordinate economic policy and employment policy, and to revoke the so-called open coordination method in social policy and labour law, health policy, as well as the policy areas concerned with industry and research; sixth, to ensure stable prices as the Union's priority objective; seventh, to further specify the so-called internal market clause in a way that would exclude, i.a. the introduction of a European tax; eight, to extend the powers of the Member States in regional policy due

to limited financial capabilities of the EU; ninth; to revoke new competences of the EU in the area of energy policy; tenth, to preserve the formerly binding ordinary treaty revision procedure and to not include any new simplified procedure amending the Constitutional Treaty. At the same time, the CDU and the CSU called upon the other German political parties to ensure for the Bundestag and the Bundesrat the statutory right to approve decisions taken by the EC during the ratification of the Constitutional Treaty, thus allowing the Council of Ministers of the European Union to act by qualified majority in areas formerly subject to unanimous voting under the Constitutional Treaty (the *passerelle* procedure). The Christian democratic parties welcomed postulates of small and medium-sized Member States and candidate countries regarding the introduction of changes in the institutional system of the EU, including, i.a. to strengthen their impact on the decision-making in the Council of Ministers and the EC; to establish a group leadership in the Council of Ministers, as well as to restore the principle under which each Member State was to fully participate in the College of the European Commission. Consequently, they urged the federal government to take care that interests of the mentioned countries are "given more consideration" at the intergovernmental conference without undermining the institutional balance in the EU, and without leading to an excessive concentration of tasks within the European Commission (CDU und CSU 29.09.2003: 3–5).

A similar stance was also adopted by politicians of the opposition party FDP. On 4 October 2003, Leutheusser-Schnarrenberger, European policy expert from the FDP parliamentary faction, called on the federal government to take the postulates of small and medium-sized Member States regarding amendments to the Draft Constitutional Treaty "more seriously." At the same time, she expressed her view that expectations of these states stem from, i.a. the federal government's "omission", as it used to back the largest Member States and underestimated negotiations with small and medium-sized Member States and candidate countries as being "less effective for the public." However, the FDP member considered the possible resumption of negotiations on the entire Draft Constitutional Treaty a grave mistake, since reaching a more consensual solution at the intergovernmental conference was unrealistic. The conference should only aim to reach agreement on amendments to the existing draft text, the most important of which were, according to Leutheusser-Schnarrenberger, to introduce price stability to the set of EU objectives and to remove the veto right of the Member States with regard to policies in the area of freedom, security and justice, as well as in the common foreign and security policy (Leutheusser-Schnarrenberger 4.10.2003: 1).

2.2 Meetings of the Intergovernmental Conference

2.2.1 Federal Government's Diplomatic Efforts to Maintain the status quo *Specified under the Draft Constitutional Treaty*

At the intergovernmental conference held in 2003–2004, the German delegation was one of the very few who strongly advocated that the *status quo* agreed under the Convention's draft be maintained. However, the said document was still seen as politically controversial in many Member States and countries aspiring for EU membership. The said controversy pertained to the introduction of a new balance of powers and the need to protect one's own national interests with the prospect of enlarging the EU up to twenty-five (and further to twenty-seven) Member States. The concerns of countries who questioned some provisions of the Convention's draft were serious enough to make the resumption of negotiations in this matter at the intergovernmental conference essential. This in turn significantly reduced the chances of reaching a compromise in a short time.

In August 2003 the representatives of the federal government launched a series of intensive diplomatic consultations with the Member States and the candidate countries to support their tactical principle that the *status quo* specified under the Convention's draft must be maintained at any cost. On 26 August 2003, during his visit to Prague, Foreign Minister Fischer warned his Czech counterpart Cyril Svoboda against opening discussions on controversial provisions of the draft. He argued that the compromise forged by the Convention gives due consideration to the interests of small and large Member States and candidate countries. Whereas each attempt to "unpack" the set of regulations provided under the draft could as a consequence lead to the entire document being discussed from scratch, causing an unquestionably serious political crisis in the European Union. Fischer was not convinced by Svoboda's opinion that the draft text involved provisions requiring a thorough and comprehensive discussion at the forthcoming intergovernmental conference. Otherwise, as the Czech Foreign Minister argued, the said conference would be unnecessary (RP 27.08.2003: 1).

Despite the warnings from the German government, on 1 September 2003 a meeting of Deputy Ministers of Foreign Affairs of fifteen Member States and candidate countries was held in Prague, who demanded that the Convention's draft text be amended accordingly. The meeting was attended by representatives of seven Member States (Denmark, Finland, Sweden, Ireland, Portugal, Austria and Greece) and eight candidate countries (Poland, the Czech Republic, Slovakia, Hungary, Lithuania, Latvia, Estonia and Slovenia). Though the meeting participants agreed that the Draft Constitutional Treaty would be a sound basis for further discussions, they proposed to include five significant amendments to the said document: to

maintain the strong position of medium-sized and small Member States in the Council of Ministers; to grant each state the right to one Commissioner in the European Commission; to introduce the veto power to social policy, tax policy and the common security and defence policy; to prevent military alliances that would aim to compete with NATO from forming in the European Union, and to include the *Invocatio Dei* to the treaty preamble. In mid-September 2003, the proposals presented by the participants of the meeting of Deputy Ministers of Foreign Affairs of the fifteen Member States and candidate countries held in Prague received support from Malta and Cyprus (Węc 2012b: 386).

In response to the decisions of Deputy Ministers of Foreign Affairs of the fifteen Member States and candidate countries, former President of the Convention Giscard d'Estaing, who appeared before the EP on 3 September 2003, warned against attempts to introduce amendments to the draft treaty. He argued that such changes would compromise its entire structure or even prompt citizens of the Member States in the enlarged EU to vote against it in referenda. The former French President's concerns were not shared by President of the European Commission Romano Prodi, who at the very same meeting expressed his support for those advocating the introduction of major amendments to the draft treaty. However, only one of the amendments presented by Prodi was compliant with the proposals of the mentioned fifteen European countries, namely, to grant each Member State the right to one commissioner in the College of the European Commission. Moreover, the President of the European Commission spoke in favour of limiting the scope of the veto right in the decision-making in the Council of Ministers and establishing one more (apart from the *passerelle* procedure) simplified treaty revision procedure. Prodi did not share d'Estaing's view that a European constitution would be a "document for centuries," and as such, he believed that the need for amending the document would appear only in the vague future (Węc 2012b: 386–387).

On 10 September 2003, the Polish government received a negotiating mandate for the forthcoming intergovernmental conference. According to the mandate, Poland was going to demand at the conference that four amendments be incorporated to the Draft Constitutional Treaty: to retain the rules of qualified majority voting as specified in the Treaty of Nice in the decision-making in the Council of Ministers; to grant all Member States of the enlarged European Union the right to one commissioner with full voting rights in the College of the European Commission; to establish the so-called group presidency (comprising several states) in all formations of the Council of Ministers except for the Foreign Affairs Council, and to prevent the structural cooperation within the European Union from being employed for creating a military alliance that would aim to compete with NATO (RP 10.09.2003: 1).

Eight days later, Chancellor Schröder and President Chirac warned the resisting countries yet again against starting a discussion on amendments to the draft treaty, since it could lead to an escalation of new demands and disrupt the meeting of the intergovernmental conference as a result. However, at that time this view was not shared by German Commissioner for Enlargement Günter Verheugen, who on the very next day at a press conference in Berlin warned that "a failure to have considered the reservations of new countries regarding the draft constitution will increase the risk of the Treaty being rejected." On his part, Verheugen expressed his support only for the granting of one commissioner in the College of the European Commission to each Member State, though he was against retaining the rules of qualified majority voting specified in the Treaty of Nice in the decision-making in the Council of Ministers (Węc 2012b: 387).

Nevertheless, Verheugen's call failed to change the federal government's opinion in this matter. This was manifested at Schröder's and Prime Minister Miller's meeting held on 22 September 2003 in Gelsenkirchen as part of the sixth German-Polish intergovernmental consultations. Both sides merely presented official positions of their governments. Regarding the most controversial issue, i.e. double majority voting in the decision-making in the Council of Ministers, both heads of government stated that despite little room for manoeuvre in this regard, a measure of consensus should continue to be negotiated. Chancellor Schröder stressed that the federal government's approval of the qualified majority voting rules specified under the Treaty of Nice in December 2000 was solely due to pressure exerted by the French delegation. However, he believed that the altered position of France allowed for adopting more democratic rules for qualified majority voting in the Draft Constitutional Treaty, thus giving higher-populated countries more influence on the decisions taken in the Council of Ministers. According to Schröder, abandoning the Nice system would allow 80% of the EU Member States, representing 20% of the population, to outvote other countries, e.g. Germany in financial matters (RP 23.09.2003: 1). When relating his meeting with the Chancellor of Germany on the following day, the Prime Minister of Poland claimed that during the consultations with the German delegation he did not hear "any convincing arguments (…) for changing the manner of weighting votes developed in Nice, since it has not even entered into force." At the same time, Miller expressed his hope that the German government was more likely to approve the remaining three Polish proposals regarding amendments to the Draft Constitutional Treaty (PAP 23.09.2003: 1–2).

At a meeting in New York on 24 September 2003, only two days after the German-Polish government consultations, representatives of nine Member States (except for Germany, France, the United Kingdom, Italy, Spain and

Greece) and all candidate countries (except for Bulgaria and Romania) called upon the Italian Presidency to allow all proposals regarding the Constitutional Treaty to be freely submitted and discussed at the intergovernmental conference. Foreign Ministers of Finland and Austria Erkki Tuomioja and Benita Ferrero-Waldner, respectively, while appearing at a press conference on their behalf, stressed that representatives of the nineteen Member States and candidate countries did not agree and did not intend to submit any joint postulates at the time, yet they demanded that the forthcoming intergovernmental conference was open, and that larger Member States did not exert excessive pressure on other countries. This was clearly hinted at the federal government's stance on the need to not 'unpack' the package of the Convention's agreements. Five days later, at a meeting of Foreign Ministers of all future participants of the intergovernmental conference held in Brussels, the proposal of the Italian Presidency to discuss at the conference only amendments supported by the majority was rejected (Węc 2012b: 387–388).

Although the absence of the representative of Spain at the meeting in New York might seem surprising, two days later, Foreign Ministers Włodzimierz Cimoszewicz and Ana de Palacio noted in *Financial Times* once again that the views of the Polish and the Spanish governments regarding the amendments to the Draft Constitutional Treaty are convergent. They both stressed that their greatest joint postulate at the intergovernmental conference pertains to retaining the Nice system of qualified majority voting. This was due to the fact that they both believed the voting system adopted in Nice ensured balance between small, medium-sized and large Member States in the enlarged European Union, whereas the double majority system proposed by the Convention gave an advantage to four large Member States, of which only three could jointly block all decisions. The Polish and Spanish Foreign Ministers also questioned the stance adopted by Germany and France on the double majority system proposed in the Draft Constitutional Treaty as being more democratic and resulting in an improved legitimacy of EU actions. Moreover, they noted that the Convention was not authorised to revise the Nice system (RP 27.09.2003: 1).

2.2.2 Federal Government's Tactics at the Intergovernmental Conference

The meetings of the intergovernmental conference were held from 4 October 2003 to 18 June 2004 under the auspices of two presidencies, namely, the Italian Presidency and the Irish Presidency. The first phase of the conference, which took place during the last three months of the Italian Presidency (from 4 October to 31 December 2003), produced insignificant results, since

the final compromise was successfully reached only in a few less contentious issues. Whereas the second phase of the intergovernmental conference (from 1 January to 18 June 2003) involved highly intensive bilateral consultations conducted by the Irish Presidency with the Member States and candidate countries, allowing for directions of a possible consensus and its outline to be determined with regard to other contentious issues. Nevertheless, these matters remained without a final solution until the EC session in Brussels of 17–18 June 2004 (IGC 2003/2004. Negotiations: 2–7). Several months later, on 29 October 2004, the Treaty establishing a Constitution for Europe was signed in Rome by heads of state or government and foreign ministers of 25 EU Member States.

The course of meetings during the first phase of the intergovernmental conference held under the auspices of the Italian Presidency was substantially crippled by a stance adopted by the German government supported in some matters by delegations of France and Italy, as well as by the European Commission. The tactics of the German government consisted in preventing the opening of discussions on the Convention's draft and ensuring that the Constitutional Treaty is signed as soon as possible. Consequently, with the above-mentioned political support of most parliamentary factions in the Bundestag (except for the CSU and the PDS), the German delegation consistently opposed introduction of any amendments to the Draft Constitutional Treaty, arguing that once reached, a compromise in a matter as complex as a European constitution would be hard to achieve again (IGC 2003. CIG 14/03: 1).

The federal governments showed its willingness to negotiate only in matters not definitively set out in the Draft Constitutional Treaty that were already commonly seen at the Convention as requiring further consideration at the intergovernmental conference. These were, i.a. changes in provisions specifying structural cooperation and the *casus foederis* in the common security and defence policy. Therefore, one of the few matters on which a compromise was successfully reached already during the first phase of the intergovernmental conference under the auspices of the Italian Presidency was the very issue of structural cooperation and the contents of the *casus foederis*.

The said compromise was facilitated by a former agreement concluded between Germany, France and the United Kingdom on rules governing the common security and defence policy, including, i.a. abandoning the establishment of a European Security and Defence Union and a EU operational planning staff at Tervuren. The way to the compromise was paved by the attitude adopted by British Prime Minister Blair. At an informal meeting of heads of the said states held in Berlin on 28 October 2003, Blair agreed to establish a small planning unit of the European Union Military Staff (EUMS), whereas Chirac and Schröder

ensured that in cases of operations conducted with the use of measures provided by NATO, planning remains within the scope of tasks of the Supreme Headquarters Allied Powers Europe (SHAPE), thus allowing to avoid, among others, disputes over competences between NATO and the EU. Consequently, at the meeting of Foreign Ministers of the EU Member States in Naples (28–29 November 2003), it was agreed that in order to facilitate cooperation at operational level between NATO and the European Union, a NATO liaison team would be formed within the framework of the EUMS, while the above-mentioned permanent planning unit would be created within the framework of the SHAPE and based within the EUMS (IGC 2003/2004. Negotiations: 8).

At the very same meeting, the Italian Presidency submitted a postulate for adjusting provisions on structural cooperation to enhanced cooperation rules (IGC 2003. CIG 52/03: 8). In contrast to the provisions set out in the Convention's draft text, structural cooperation was to be permanent (Article I-40(6) DCT). Moreover, it was to be initiated by institutions of the future European Union, and not by the governments of the Member States, and it would have to be open to all Member States, and not only a few. Therefore, it was no longer a cooperation implemented in line with the concept of Europa *à la carte* envisaged *de facto* by the Convention's draft. Having arrived at a compromise on the rules of permanent structural cooperation, the Italian Presidency also brought about the agreement on the *casus foederis*. In order to meet the expectations of, among others, the United Kingdom and Poland, the Italian Presidency proposed to complement formerly adopted provisions of the clause with regulations specifying that cooperation in this area must be without prejudice to obligations of the EU Member States arising from their simultaneous adherence to NATO (IGC 2003. CIG 52/03 ADD 1: 24). In turn, at the EC meeting in Brussels of 12–13 December 2003, the Presidency tabled an amendment to meet the expectations of neutral states or those pursuing a neutrality policy (Austria, Finland, Sweden and Ireland). According to the said amendment, obligations arising from the implementation of this clause were to have no effect on the specific nature of their security and defence policy (Article I-40(7) DCT). Thus, the dispute over structural cooperation and the contents of the *casus foederis* was solved (IGC 2003. CIG 60/03 ADD 1: 33).

In other matters that oftentimes evoked reasonable controversy at the meetings of the intergovernmental conference, the German delegation attempted to retain the provisions of the Convention's draft at all cost. The most characteristic examples supporting this thesis were controversies related to group presidency of the European Union and the definition of qualified majority in the Council of Ministers and the EC. Though the idea of group presidency, which was initiated

by the representatives of Poland and the United Kingdom, was supported (or at least not rejected) by the vast majority of delegations, it was opposed only by the Federal Republic of Germany and the European Commission (IGC 2003. CIG 1/03: 1–3). While Poland and Spain were interested in revising the definition of qualified majority, the Federal Republic of Germany was against it, this time backed by the vast majority of delegations and resorting to its regular arguments that once implemented, it might compromise the cohesion of the entire package of institutional regulations.

The matter of group presidency and the definition of qualified majority were not settled during the first phase of the intergovernmental conference. At the mentioned EC meeting in Brussels of December 2003, the Italian government submitted a proposal that in all formations of the Council of Ministers (except for the General Affairs Council and the Foreign Affairs Council) presidency was to be held by three states over a continuous eighteen-month period. In contrast, group presidency of the General Affairs Council and COREPER I and COREPER II was to be held in rotation by the component Member States in turn for a six-month term (IGC 2003. CIG 60/03 ADD 1: 9–10). However, the proposal of the Italian government still raised doubts among some delegations, such as the representatives of Germany, resulting in the final decision in this matter being deferred (Węc 2012b: 400–406). The dispute on the definition of qualified majority was far more significant, since it pertained to the decision-making mechanism in the European Union. At the mentioned EC session of December 2003, the Italian Presidency proposed that the meeting should be continued in the form of strictly confidential negotiations with individual delegations, a method referred to in the EU jargon as the confessional (Tallberg 2006: 115). The key objective of these encounters was to allow the Presidency to examine the opportunity for a compromise on defining qualified majority. However, the bilateral negotiations conducted by the Presidency failed to bring any solution in this matter. Some delegations, particularly the German delegation, strongly supported the provisions of the Draft Constitutional Treaty. In contrast, the representatives of Poland and Spain defended the provisions of the Treaty of Nice. Moreover, unofficially submitted proposals for indirect solutions, i.e. altering the required qualified majority thresholds that proved unacceptable for many delegations, including the representatives of Germany (EC. Conclusions, 12/13.12.2003:1). The lack of agreement on this subject, which was mainly due to the federal government's intransigence, ultimately contributed to the meetings of the intergovernmental conference not being round off as originally planned, i.e. by the end of 2003 (IGC 2003. CIG 5/03, Anlage: 1). That did not prevent Chancellor Schröder from holding Poland and Spain at fault

for the unsuccessful outcome of the negotiations, blaming them for allowing "national egoism to outweigh the common European interest" and threatening them with a vision of a "two-speed Europe" (Spiegel 13.12.2003: 1).[35]

Both above-described issues remained one of the most contentious also in the second phase of the intergovernmental conference held under the auspices of the Irish Presidency. A compromise on group presidency was successfully reached in May 2004. According to the said consensual solution, each member of a group comprising three countries (*trojki*) holding an eighteen-month presidency of the Council of Ministers was to chair all its formations for a term of six months (except for the Foreign Affairs Council), whereas the other members were expected to support the President in all his or her duties based on a common group presidency programme (IGC 2003. CIG 73/04: 16–21).

Regarding qualified majority in the decision-making of the Council of Ministers and the EC, the ultimate agreement in this matter was not reached until the decisive EC session in Brussels of 17–18 June 2004. The consensus was possible owing to governments of three countries (Germany, Spain and Poland) that modified their stances. On 13 February 2004, Foreign Minister Fischer marked willingness to compromise in his speech made in the Bundestag, while on 7 March of that year the federal government first advocated a possible change in the thresholds in the qualified majority voting system established by the Convention. The rise to power of the local socialist party (*Partido Socialista Obrero Español* – PSOE) in Spain on 15 March and the declaration of newly-appointed Prime Minister José Luis Zapatero on his government's interest in a possibly most urgent adoption of a European Constitution by the intergovernmental conference not only did provide a chance for a compromise but also forced Poland to thoroughly change its negotiation tactics applied at the time. Consequently, at the EC session of 25–26 March 2004, the Polish delegation announced abandoning the Nice system for the first time and expressed willingness to seek compromise based on double

35 In October 2003, Poland submitted a proposal to extend provisions included in the so-called 'German Articles' that approved the federal government's initiative to grant public aid to economies of "certain areas of the Federal Republic of Germany affected by the division of Germany" as compliant with the competition rules binding on the common market (Article III-56(2c) DCT), or allowed for the use of measures in common transport policy "to the extent that such measures are required in order to compensate for the economic disadvantages caused by the division of Germany to the economy of certain areas of the Federal Republic affected by that division" (Article III-141 DCT). Likewise, this proposal of the Polish government met with strong opposition from the German government (IGC 2003. CIG 37/03: 13).

majority proposed under the Convention's draft. Furthermore, the Polish government expected its partners to present the very same level of openness in seeking mutually satisfying solutions (Węc 2012b: 410). At the said meeting, the Irish Presidency expressed its belief that the issue of defining qualified majority could be solved by modifying the proposals under the Draft Constitutional Treaty in a way ensuring more effective decision-making with due account of the specific interests of individual Member States (IGC 2003. CIG 70/04: 4).

Based on consultations with governments of the Member States, the Presidency concluded that a compromise could be reached on the condition that the threshold population is raised. However, since retaining the parity between the two thresholds or the smallest difference between them was of high importance to some delegations, the Irish government proposed to raise both thresholds simultaneously. There was one advantage to this solution, namely, it made the difference between both thresholds only slightly greater than that envisaged by the Draft Constitutional Treaty. Moreover, the Irish government presented an initiative to consider the possibility to determine additional solutions as regards blocking minority. Eventually, it also supported the idea that abstentions, formerly in practice treated as votes against, should not be considered at all in qualified majority voting, as it would substantially improve the efficiency of the decision-making process (IGC 2003. CIG 77/04: 2).

At the meeting of Foreign Ministers held on 24 May 2004, all delegations were already fully in favour of the idea of establishing a double majority system. However, there were still some strikingly sharp differences between their views on the level of thresholds that were to be binding in the new voting procedure. Few delegations demanded that the double majority system is retained with parity thresholds for countries and citizens proposed in the Draft Constitutional Treaty (50–60%). Representatives of small Member States were in favour of introducing parity between the two thresholds ranging from 50–50% to 60–60% with a clear preference for the former. At the same time, they were against introducing any security mechanism to the new system. The thing that representatives of both large and small Member States supposedly had in common was a belief that it was necessary to find a political compromise that would act as an integral part of the entire package of institutional regulations (Węc 2012b: 411).

The compromise was not successfully reached until the EC joint session in Brussels held in June 2004. It consisted in introducing three changes to the definition of qualified majority in the Council of Ministers and the EC: raising both thresholds from 50% of the Member States and 60% of the EU population to 55% and 65%, respectively; adjusting blocking minority comprising four countries representing 35% of the EU population to the said change; establishing an additional

consultation mechanism (a modified version of the Ioannina mechanism) binding from 1 November 2009 to at least 2014, with the Council of Ministers acting by qualified majority was allowed to adopt a European decision to revoke it (Article I-24(1–3) DCT) (IGC 2003. CIG 83/04: 7–9; CIG 84/04: 7–9; CIG 85/04: 8–9).

In other contentious issues settled during the first or the second phase of the conference, the representatives of Germany changed their former position in that they often unofficially supported proposals of other delegations or asked for support themselves, particularly when the postulated changes proved compliant with the expectations of the federal government itself or the opposition parties, especially the CDU, CSU and FDP. This pertained particularly to eleven amendments to the Draft Constitutional Treaty. The first of the said amendments consisted in an inclusion of a reference to the cultural, religious and humanist legacy of Europe in the preamble (Poland, Spain, Ireland, Malta, Portugal, Slovakia, the Czech Republic and Lithuania[36]). The second amendment consisted in an inclusion of a postulate that the European Union would ensure price stability (the ECB) on the list of EU objectives. The third amendment can be simplified an attempt to further specify the conditions for proposing EU citizens' initiative by obligating the legislator to determine under a European law a minimum number of Member States citizens presenting such initiatives must come from (Slovakia). The fourth amendment concerned a revocation of the attempt to concentrate legislative powers within a single formation of the Council of Ministers (the General Affairs and Legislative Council) and a retainment of the principle applied at the time, according to which each formation of the Council of Ministers was to hold legislative competences (most Member States, including Poland).[37] Based on the fifth amendment, the scope of acting by qualified majority was to be extended to over forty new cases (most Member States and the European Commission). The sixth amendment pertained to an increase in the number of component members of the EP to seven hundred and fifty MEPs. The minimum number of mandates per country was to be six and the maximum

36 The names provided in brackets in this paragraph refer to the Member States or EU institutions that initiated the listed changes to the DCT.

37 This contentious issue was settled already at the first phase of the international conference under the auspices of the Italian Presidency. The German delegation did not make any reference to the controversial issue of the legislative tasks of the Council of Ministers, while as regards the number and the establishment of other formations of the Council of Ministers, it adopted the Convention's provisions as its base, proposing that the EC draws a list of such entities established by a European decision under the provisions of the Constitutional Treaty (Article I-23(3) DCT).

number was to be ninety-six, while the DCT envisaged as many as seven hundred and thirty-six MEPs with no thresholds specified (most Member States and the Irish Presidency). The seventh amendment consisted in an establishment of an appeal procedure (security clause) in social security for employees migrating from EU Member States or those self-employed (Luxembourg). It could be initiated by any Member State in the event that according to the latter a given draft European law or European framework law that determines the procedure for calculating and paying benefits poses a risk of prejudice to fundamental principles or financial balance in the social security system of that state (Article III-21 DCT). Under the eight amendment, two changes were introduced in the provisions on services of general economic interest: a reference to the principle of respecting the national identities of the Member States and a provisions according to which European laws establishing rules and measures vital for implementing such rules should be without prejudice to the competences of the Member States to provide, commission and finance such services (Article III-6 DCT) (the Italian Presidency, Austria).[38] The ninth amendment consisted in an introduction of three modifications to the *passerelle* procedure, allowing for revising the provisions of Part III of the Draft Constitutional Treaty. From then on, a negative vote of only one national parliament, of which the EC was notified within six months, prevented the said Council from acting by unanimity to empower the Council of Ministers to replace unanimous voting with qualified majority voting or to replace a special legislative procedure with an ordinary legislative procedure (under the Convention's draft, national parliaments were only to be notified of that fact). Both decisions of the EC required the approval of the EP acting by majority of votes of its component members (previously, it was only consulted – and solely regarding a change in the legislative procedure). Moreover, the *passerelle* procedure could not be applied in decisions with military or security implications in the part concerned with replacing unanimous voting with qualified majority voting (Article 24(4) DCT) (the Italian Presidency). The tenth amendment provided the basis for establishing the second simplified treaty revision procedure (the *passerelle* procedure being the first) applied in the EU

38 At the EC meeting in Brussels of 12–13 December 2003, the Italian Presidency proposed a consensual solution that was to reconcile divergent stances of individual delegations. It did not provide a 'central' role in rendering such services to "local and regional authorities", as preferred by Austria and unofficially by Germany, though it did not deprive the EU of its powers to approve European laws in this area either, which was strongly demanded by the Netherlands, Spain and Finland (IGC 2003. CIG 52/03 ADD 1: 47; CIG 60/03 ADD 1: 58).

politics and internal actions. The EC was allowed to adopt a European decision that changed all or some of the provisions of Title III of Part III of the Treaty having consulted the EP, the European Commission and the ECB (in cases of institutional changes in monetary policy) beforehand. The enter into force of this decision was nevertheless dependent on it being ratified by all the Member States (Greece and the European Commission). The eleventh amendment consisted in a reestablishment of unanimous voting in adopting a multiannual financial framework post-2013, as well as an establishment of a specific *passerelle* clause in this regard. The latter allowed the EC to adopt by unanimity a European decision that empowered the Council of Ministers to decide on the said matter by qualified majority. This change was clearly beneficial to net contributors in the European Union (Article I-54(4) DCT) (the Irish Presidency, the Netherlands, the Czech Republic, Slovakia, Lithuania, Latvia, ECOFIN).

At the same time, the German delegation failed to obtain even 'silent support' from other Member States for postulates submitted by the federal government during the preparatory work for the intergovernmental conference, such as to make qualified majority voting the dominant decision-making procedure in tax policy[39] and in the common foreign and security policy; not to include services of general economic interest in the category of coordinating competences, complementary competences and supporting competences but to leave them within the scope of exclusive competences of the Member States. Since the federal government was consistently pursuing its tactics of not presenting in principle any serious amendments to the Draft Constitutional Treaty, it considered itself not linked to the above-mentioned postulates of the parliamentary opposition, the most important being: to include the *Invocatio Dei* in the Treaty preamble; to retain unanimity as the binding rule in immigration policy and to limit the powers of the EU in this area to setting minimum norms; to restrict the competences of the EU to coordinate employment and economic policy; to extend the powers of the Member States in regional policy due to limited financial capabilities of the EU; to revoke new powers of the EU in energy policy; to retain the previously binding ordinary treaty revision procedure and not to introduce any new simplified procedure for amending the Constitutional Treaty; to limit the transition period for setting new rules for establishing and appointing the European Commission; to abolish the office of the permanent President of the European Council, as well as to leave social policy, public health policy and research policy outside the scope of shared competences.

39 At the request of the United Kingdom, Poland and Spain, the entire tax policy was subject to the rule of unanimity.

2.3 Ratification of the Constitutional Treaty in Germany

The Constitutional Treaty was an agreement of unlimited duration. It was ratified by all Member States in line with relevant constitutional requirements. The Federal Republic of Germany was among the first Member States to initiate the ratification procedure for the Constitutional Treaty.[40] During the ratification debate held in the Bundestag on 12 May 2005, German politicians stressed almost in full agreement the fundamental significance of the Treaty for the system reform of the EU. Chancellor Schröder noted that the Treaty reorganises, improves and harmonises the previously binding treaty bases of the European Communities and the European Union, and also creates grounds for a new enlargement strategy and enhancement process with regard to the European integration. Owing to the Treaty, the European Union was to be capable of a more effective action at the international level and "easier in terms of political governance." It was expected to become more democratic and closer to its citizens. Schröder emphasised that one of the major achievements of the Treaty was to establish for the first time in the history of the European Union a rigid distribution of competences between the Union and the Member States. He openly expressed his satisfaction with the introduction of double majority in the Council of Ministers and the EC, which was in his opinion allegedly more democratic, safeguarding the 'one vote per citizen' principle. However, the Chancellor disregarded the fact that according to the voting theory, the EU citizens' influence on the vote in the CEU and the EC would be far more democratic if the importance of a given state in the vote was approximately proportionate to the square root of its population figure, and not to the population figure itself. Schröder also drew attention to the significantly strengthened position of the EP in the EU institutional system and of national parliaments in the EU legislative process. He perceived enhanced cooperation in the common foreign and security policy but also in the policy of freedom, security and justice area as an important step towards deepened integration process. The Chancellor also noted the historical rank of the Constitutional Treaty, arguing that the federal government under his lead continued to pursue the European policy of former German governments, for whom, as for the government in power at the time, "Europe is a national interest," and "a guarantee for a free, dignified life." In this sense, he saw the

40 The presented Treaty was approved already in 2004, first by Lithuania (11 November) and Hungary (20 December), followed in the first five months of 2005 by Slovenia (1 February), Spain (20 February), Italy (6 April), Greece (19 April), Slovakia (11 May) and Austria (25 May).

Constitutional Treaty as "the culmination of work of two or three generations" of Germans. The Chancellor's arguments were complemented by Chairman of the parliamentary faction SPD Franz Müntefering, who stressed the importance of the CFR as the integral part of the Constitutional Treaty, a "core of common European values with a human being in its very centre." He also pointed out that the position of national parliaments was significantly strengthened in the EU legislative process by means of establishing an early warning mechanism and granting them the right to bring action before the Court of Justice via their governments in cases where the subsidiarity principle was infringed by the European Commission in draft legislation it prepared (DB Plenarprotokoll 15/175: 16348–16351, 16355–16358).

Foreign Minister Fischer noted three aspects of the process of the system reform of the EU that were expected to contribute to a more effective functioning of this international organisation in the future. The first aspect concerned amendments in the common foreign and security policy that allowed for a greater capacity to act (*Handlungsfähigkeit*) and improved Germany's role in the 21st-century international politics. The second aspect consisted in the inclusion of the CFR in the Constitutional Treaty, which took place mainly on the initiative of the German government supported by all parliamentary factions represented in the Bundestag (as stressed by Fischer) and was unquestionably an even greater success of the European Union given that the Treaty envisaged the area of freedom, security and justice to be extended and strengthened at the same time. The third important concern (in Fischer's view) was the 'democratisation' of the EU institutional system, which manifested, i.a. in the creation of legal grounds for electing the President of the European Commission by the EP, extending the scope of the EP's legislative competences, as well as consolidating national parliaments in their position in the EU legislative process, as depicted above (the early warning mechanism and the right to bring action before the Court of Justice) (DB Plenarprotokoll 15/175: 16361–16363).

For Leader of the parliamentary faction CDU/CSU Angela Merkel, the key achievement of the Constitutional Treaty was the strengthening of the principles of democracy and subsidiarity, the common foreign and security policy and policies in the area of freedom, security and justice within the European Union. She stressed that systemic changes in these areas ought to serve both for overcoming the legitimation deficit of the EU due to extended powers of the EP and for strengthening the role of national parliaments, while contributing to the consolidation of the EU at the international level owing to the reform of the common foreign and security policy, as well as policies determining the internal security of the EU. Whereas the Leader of the parliamentary faction CDU/CSU saw the

introduction of the double majority system to the decision-making procedure in the Council of Ministers and the EC as a great diplomatic success of Germany (DB Plenarprotokoll 15/175: 16351–16355).

Leader of the parliamentary faction FDP Wolfgang Gerhardt marked that the Constitutional Treaty failed to meet all expectations of German Liberals concerning, e.g. the powers of the European Commission as regards the procedure avoid excessive deficit and the common foreign and security policy (maintaining unanimous voting as the decision-making rule). However, it also consolidated the EP in its role played in the EU institutional system, extended the powers of national parliaments in the EU legislative process with regard to the observance of the subsidiarity principle, significantly extended the scope of qualified majority in the decision-making of the Council of Ministers and improved the protection of fundamental rights and human rights by incorporating the CFR into the primary law of the European Union. When complementing Gerhardt's statement, FDP European policy expert Leutheusser-Schnarrenberger provided excessive arguments, claiming that without the Constitutional Treaty, the only alternative left for the European Union would be to return to the a free trade area. However, such a solution not only would be a step backwards but would also conflict with the aim to strengthen the EU on the international front pursued at the time by the Member States (DB Plenarprotokoll 15/175: 16359–16360, 16371–16372).

The debate on the Constitutional Treaty closed with a vote on the adoption of the Ratification Act. On 12 May 2005, the Bundestag approved the ratification of the Treaty by a qualified majority of two-thirds of the votes cast. In the vote on the Ratification Act, 569 SPD MPs, Alliance 90/The Greens MPs, FDP MPs and some of the CDU/CSU MPs voted for, 23 CDU/CSU Deputies and Non-attached Members voted against, while 2 SPD MPs abstained (DB Plenarprotokoll 15/175: 16384–16386). On 27 May 2005, the ratification of the Treaty was also approved by the Bundesrat by a qualified majority of two-thirds of the votes. Representatives of 15 federal states voted for the Ratification Act. A representative of Mecklenburg-West Pomerania was the only one who abstained, since the Treaty was outright rejected by the PDS, a coalition partner in the said federal state. At that time, the conclusion of the ratification procedure still required the signature of the President of Germany.

As in the case of the intergovernmental conference of 1996–1997, at the session of the Convention on the Future of Europe (2002–2003) Germany and France attempted to exert the greatest pressure on negotiations, with the German delegation being one of the most active participants. Under their influence numerous provisions specifying the scope of the system reform of the EU were included

in the Draft Constitutional Treaty. The said provisions were as follows: first, the granting of an international status within the meaning of the international law to the European Union, while maintaining Euratom a separate body in organisational terms (Article 6 DCT, protocol amending the TEAEC) (Herma 2004: 42–43)[41]; second, the strengthening of the EU axiology by rendering the Charter of Fundamental Rights legally binding and creating legal grounds for the future accession of the EU to the ECHR (Article 7(1–2) DCT) (Meyer 29.10.2002: 1; CONV 724/03: 58); third, the establishment of separate competences in the area of common foreign and security policy, including common security and defence policy (Article 15(1–2) DCT) (CONV 724/03: 79); fourth, the strengthening of the position of the EP in the institutional system of the European Union by providing it with the right to elect the President of the European Commission, the extension of its competences regarding the procedure for adopting the general budget, as well as empowering the EP to approve decisions of the EC not to convene a Convention by means of a constitution revision (Article 26(1), Article III-310 (1–9), Article IV-7(2) DCT) (Meyer 4.07.2003: 1; 9.07.2003: 1); fifth, the consolidation of the President of the European Commission in his or her role by providing him or her with the right to appoint commissioners with full competences (the so-called European Commissioners) and commissioners without the right to vote (Article 25(3), Article 26(2) DCT); sixth, the introduction of double majority to the decision-making of the Council of Ministers and the extension of its scope to the EC (Article 24(1)); seventh, the granting of a public character to legislative meetings of the Council of Ministers (Article 23(1) DCT); eighth, the establishment of the Foreign Minister of the EU, who would at the same time serve as a member of the Council of Ministers and the European Commission (Article 25(3), Article 27(3) DCT); ninth, the consolidation of the role of national parliaments in the EU legislative process by means of establishing an early warning mechanism and empowering them to bring actions before the Court of Justice against draft legislation that prejudice the principle of subsidiarity (Protocol No. 2 annexed to the DCT); tenth, the establishment of a citizens' initiative (Article 46(4) DCT); eleventh, the creation of legal grounds for establishing the European Armaments, Military Capabilities and Research Agency in the common security and defence policy (Article 40(3) DCT); twelfth,

41 The organisational separateness of Euratom was justified by, i.a., issues related to internal policy of Germany, whose government (as was the case with the Belgian and the Swedish governments it was supported by in this matter) had been pursuing nuclear phase-out for several years at the time.

the inclusion of common security and defence policy excluding structural cooperation to the enhanced cooperation, where a form of cooperation based on the idea of Europe *à la carte* was to be binding (Article I-43(1) DCT); thirteenth, the inclusion of a provision that would give an exclusive competence to the Member States as regards determining volumes of admission for third-country nationals entering the national labour market in the area of immigration policy (Article III-168(5) DCT); fourteenth, the forming of the basis in the treaty for establishing the European Public Prosecutor's Office as a new authority acting against serious crime with a cross-border dimension and crime against the EU financial interests (Article III-175(1–3) DCT) (CONV 821/03: 94).

Nevertheless, numerous proposals submitted by the representatives of Germany at the session of the Convention were not approved by the Working Group experts or the plenary of the Convention itself. The German draft aiming to communitarise the second pillar of the EU was rejected. The unsuccessful initiatives concerned, particularly, consolidating the Foreign Minister of the EU in his or her role, establishing qualified majority voting as the decision-making rule in the common foreign and security policy, and providing the EP with full oversight of the said policy area (CONV 461/02: 18–21). Another failure concerned the attempt to base the European Armaments, Military Capabilities and Research Agency at supranational level and to create legal grounds for the future transformation of the common security and defence policy into a European Security and Defence Union that would strengthen the 'European pillar of NATO'. Furthermore, the plenary of the Convention did not approve of the idea of applying unanimity rule in the entire immigration policy (CONV 821/03: 83–84).

The German delegation was one of the most active advocates of the EU system reform at the session of the Convention. However, at the intergovernmental conference in 2003–2004, it was making every effort to maintain the provisions set out in the Draft Constitutional Treaty. The tactics adopted by the federal government consisted in preventing discussions at all cost, particularly with regard to provisions on the institutional system of the EU. In this particular case, the federal government argued that once initiated, such a discussion might lead to the entire package of regulations included in the Convention's draft being "unpacked". The said tactics proved successful, since the German delegation managed to retain the key institutional solutions foreseen by the Draft Constitutional Treaty, primarily the definition of qualified majority in the Council of Ministers and the EC that was highly beneficial for Germany. The federal government manifested its willingness to negotiate only in matters that were not ultimately settled by the Convention anyway. These included, i.a. provisions specifying structural cooperation and the *casus foederis* in the common security and defence policy. Regarding

other cases of dispute solved during the first or the second phase of the intergovernmental conference the representatives of Germany changed their former position in that they often supported proposals of other delegations or asked others to support them, particularly in cases where the postulated amendments were compliant with the expectations of the federal government itself or those of the opposition parties, especially the CDU, the CSU and the FDP.

Chapter III. Germany's Stance on the EU System Reform in the Years 2005–2009

1 Germany's Run-Up to the Presidency of the European Union during the Constitutional Crisis

The ratification of the Constitutional Treaty encountered unexpected difficulties already in 2005, when it was rejected by referendum first in France (29 May), and then in the Netherlands (1 June) by citizens of the said countries. The negative outcomes of the referenda in France and the Netherlands triggered a serious political crisis in the European Union called the constitutional crisis. In this situation, heads of state or government of the EU Member States adopted on 18 June 2005 in Brussels a declaration stating that the rejection of the Treaty by France and the Netherlands requires introduction of a "period of reflection". The said period, which was to take one year, was intended to serve for launching in each Member State a broad debate on the Treaty ratification process with citizens, civil society, social partners, national parliaments and political parties (EC. Declaration HSG 16–17.06.2005: 1–2; Węc 2006b).

A discussion on this subject was continued at the EC meeting in Brussels of 15–16 June 2006. The EC appreciated the "period of reflection" at the time and called upon the European Union to undertake a two-pronged action aiming to restore public confidence in the EU. First, it would require exploiting possibilities offered by treaties existing at the time for consolidating national parliaments in their position in the Union, introducing changes in immigration policy and creating grounds for common energy policy. Second, steps should be taken simultaneously to overcome the constitutional crisis and to conclude the system reform of the EU. Consequently, the EC decided that in the first half of 2007 the German Presidency, having conducted thorough consultations with the Member States, will present before the EC a report involving an assessment of the debate so far on the future of the Constitutional Treaty and an analysis of further developments. On this basis, the EC was to decide on "how to continue the reform process (…) during the second semester of 2008 at the latest", i.e. under the French Presidency (EC. Conclusions, 15/16.06.2006:17). Although the meeting participants did not formally extend the "period of reflection", it became clear that fundamental decisions on the EU Treaty reform were postponed until the second half of 2008.

Immediately after the negative outcomes of the referenda in France and the Netherlands, the German government, as well as governments of Austria, Ireland, Spain, Estonia and Lithuania, joined a small group of countries supporting the adoption of the Constitutional Treaty without any major modifications (Thalmaier 2006: 4–10). Its stance on this case did not change even when the CDU/CSU/SPD grand coalition came to power in Germany in November 2005, and remained fundamentally the same until 1 January 2007, when the Federal Republic of Germany took over the Presidency of the EU. However, in the years 2004–2005 highly important changes occurred in German European policy. After the greatest enlargement in the history of the European Union of 2004 and the unsuccessful constitutional referenda in France and the Netherlands that followed, the strategy earlier employed in German European policy, which considered deepening and extending the scope of integration implemented within the EU as two sides of the same coin, was replaced with a strategy aiming to consolidate the Union both internally and externally. The exhaustion of the European Union's capacity for integration was already referred to in June 2005 by Angela Merkel, leader of the parliamentary faction CDU/CSU and the candidate of Christian democratic parties for Chancellor in the upcoming parliamentary elections. In her opinion, the EU reached its limits while implementing the enlargement strategy so far. For that very reason, Merkel proposed that the EU first delivers on its promise of accession made to Bulgaria, Romania and Croatia, and then develops an alternative political strategy. Moreover, she spoke in favour of changes in the distribution of competences between the EU and the Member States proposed by the Constitutional Treaty by means of establishing a mechanism that would allow competences to be conferred back upon the Member States (PAP 23.06.2005).

From the perspective of Germany, the system reform envisaged by the Constitutional Treaty played a highly important role in the strategy of internal and external consolidation of the EU. It was one of the reasons why the German government was so explicitly keen to ensure that the Treaty enters into force. In a new coalition agreement of 11 November 2005, the CDU/CSU/SPD supported, among others, "continuation of the ratification of the European Constitutional Treaty in the first half of 2006, which shall be given a new impulse under the German Presidency in the first half of 2007." The coalition also proposed further systemic changes in the European Union that were even to go beyond the provisions of the Constitutional Treaty. The said changes were to take the form of regulations ensuring that competences of the Member States are not undermined (*Aushöhlung*) by the European Union and that the intergovernmental architecture within the EU would be strengthened by encouraging the EC to "employ its right to prompt (*aufzufordern*) the European Commission in

individual cases to withdraw its draft legislative acts," and even the withdrawal of "existing legislative provisions, if needed" (CDU/CSU/SPD-Koalitionsvertrag 11.11.2005: 147–151). Consequently, on 30 November 2005, newly-appointed Chancellor Angela Merkel in the political platform declaration of the CDU/CSU/SPD coalition government submitted to the Bundestag ensured that her cabinet was substantially interested in "the success of the Constitutional Treaty, even if today it seems somewhat illusory" (DB Plenarprotokoll 16/4: 88). Justifying her stance in this matter, Merkel clearly stated that the Treaty will considerably strengthen the identity of the European Union, an element "Europe cannot do without", referring to obligations of the Christian democratic parties and social democrats arising from the coalition agreement.

On 11 May 2006, Merkel specified for the first time in a government announcement on European policy the concept of internal and external consolidation (*Verfasstheit*) of the European Union. Considering the negative outcomes of the referenda in France and the Netherlands as a "step backwards" in the treaty reform process, the Chancellor of Germany stressed once again that the European Union "strictly needs a Constitutional Treaty", as it would ensure for the EU a full capability to act. In this context, she drew attention to the provisions of the Treaty that consolidated the EU from inside and outside, namely: extension of the EU axiology, strict distribution of competences between the EU and the Member States, increased competences of national parliaments in the EU legislative process, strengthened common foreign and security policy, as well as changes in the institutional system, particularly aiming at establishing the office of the Foreign Minister of the EU, providing the EP with powers to elect the President of the European Commission, determining the new composition of the European Commission and introducing double majority in the decision-making in the Council of Ministers. Nevertheless, the Chancellor of Germany did not hide that the inclusion of a reference to the Christian roots of the Europeans to the Constitutional Treaty was a matter of high importance. Moreover, she suggested that the provisions of Constitutional Treaty specifying categories of competence distributed between the EU and the Member States could be amended. This would consist in, i.a. creating formal possibilities for redelegating to the Member States competences in some policies subject at the time to the category of shared competences. However, in each case this would take place only if seen as beneficial for the EU citizens, their social security, employment, as well as internal and external security. At the same time, Merkel stated reassuringly, to a great surprise, "we urgently need a Constitutional Treaty to make Europe capable to act. This issue shall be further addressed by the German Presidency" (DB Plenarprotokoll 16/35: 2892–2895). It was a clear declaration, though, that

during its EU Presidency in the first half of 2007, the German government will focus on settling the future of the Constitutional Treaty.

On 22 September 2006, in her speech delivered in the Bertelsmann Foundation at the opening of an international forum titled *The Future of the European Union*, Chancellor Merkel specified five priorities governments of the Member States should focus on in the coming years, namely: further development of axiology, enhanced integration, extended internal cohesion, the challenges of globalisation and the Constitution of the EU. According to Merkel, the development of the Union's axiological foundation should consist in, among others, creating conditions for an intercultural dialogue, including an inter-religious dialogue. Consequently, this would require resumption of discussions on the inclusion of the *Invocatio Dei* to the preamble of the Constitutional Treaty. In this respect, the Chancellor stated that the German Presidency will refer to this issue in a special declaration of the EU to be signed by heads of state or government on 25 March 2007 on the occasion of the fiftieth anniversary of the Treaties of Rome (Merkel 22.09.2006: 3–10).[1]

In Merkel's opinion, the enhanced integration and internal consolidation of the European Union should take precedence over the Union's enlargement strategy, as a simultaneous implementation of both these objectives was unrealistic from the point of view of the German government, especially after the greatest enlargement in the history of the European Union of 1 May 2004 and in the face of the accession of Romania and Bulgaria planned for 1 January 2007. Thus, the strategy of simultaneous enhancement and enlargement of the EU so far required the above-mentioned strategy of the internal and external consolidation of the EU. The programme of internal consolidation envisaged by the Constitutional Treaty was aimed to improve the cohesion of the European Union. However, the internal cohesion of the EU was to be consistently developed by, i.a. completing the internal market, research and technological development, addressing the issue of excessive bureaucracy, and strengthening parliamentary control in the EU. One of the major challenges facing the European Union was also the globalisation process. In order to be recognised as an important actor on the international arena, the EU had to become consolidated also externally. A programme for such consolidation was provided by the Constitutional

1 Merkel's speech largely drew on the so-called Plan D of the European Commission (democracy, dialogue and discussion) of 13 October 2005, the latter's contribution to the debate on the future of the Constitutional Treaty (Commission, Communication COM (2005) 494: 1–3; Hobe 2007: 73–74).

Treaty, involving, i.a. establishment of a new office of the Foreign Minister of the EU, enhancement of cooperation between the EU Member States within international organisations. However, the external consolidation of the EU would require further strengthening, primarily by means of consistently extending the scope of the common foreign and security policy of the EU. Therefore, the analysed Merkel's speech, as in the case with her *exposé* of 11 May 2006, clearly exposed the relation between the internal and external consolidation of the EU and its system reform, codified in the Constitutional Treaty. As in the case of the mentioned *exposé*, the Chancellor of Germanys supported rather the conclusion that the internal and external consolidation of the European Union should be conditioned on completing the system reform of the EU. For that very reason, Merkel unequivocally advocated that the Constitutional Treaty ought to be retained in its current form (Węc 2016: 54–55).

When preparing the action programme for its EU Presidency in the first half of 2007, the German government was well aware of the challenges to be faced. In a working document *Auswärtiges Amt*, which served as the basis for developing the said programme, the focus was put on the obligation of the federal government to elaborate "a proposal for further action with regard to the Constitution that would be acceptable" for every EU Member State, particularly France and the Netherlands. This was caused by the need to take into consideration opinions of the governments of the said countries that for obvious reasons categorically opposed re-submission of same treaty for ratification. Nevertheless, the German government assumed the Member States that did not "ratify the treaty cannot impose their position on those that did." Moreover, it opposed any incomplete solutions, i.e. conducting a system reform of the EU based on treaties existing at the time or even concluding a new revision treaty, the latter solution being supported by increasingly more politicians of the governments of the EU Member States over the year 2006 (Silberberg 4.10.2006: 1). Thus, though Chancellor Merkel, as was the case with Prime Minister of Spain Zapatero and Prime Minister of Ireland Berti Ahern, unequivocally supported over the year the ratification of the Constitutional Treaty in a barely modified form and the continuation of the ratification process, French Minister of the Interior and future French presidential candidate Nicolas Sarkozy demanded already in January 2006 that a mini treaty limited to provisions of the constitutional Part I be arranged. Furthermore, in September 2006, he stated that the Constitutional Treaty was dead and further specified his former proposal to conclude a mini treaty. In April 2006 heads of the French Ministry of Foreign and European Affairs sent to the President of the Austrian Presidency a note involving plans to address the constitutional crisis based on treaties in force. At the same time,

Prime Minister of the Netherlands Jan Peter Balkenende demanded that the Member States conclude a new revision treaty, which would serve as an alternative for the Constitutional Treaty. The signing of a revision treaty was also supported by British Prime Minister Blair and Foreign Minister of Italy Massimo D'Alema, though the latter made this decision conditional upon at least Parts I and II of the Constitutional Treaty being included to the revision treaty (Thalmaier 2006: 1–12). Considering the strongly diverging stances, Merkel's cabinet stood out among governments of the EU Member States owing to its rigorous consistency in assessing the Constitutional Treaty, yet it also limited its very own room for manoeuvre required to make the future compromise, which could be crucial given the fact that Germany was to assume the Presidency of the European Union.

On 30 November 2006, the federal government submitted a programme of the German Presidency titled *Europe – Succeeding together*. The said programme specified four priorities, the first of which directly pertained to the issue of overcoming the constitutional crisis. It also declared intensive consultations with the governments of the Member States, the EU institutions and bodies "to continue the EU reform process." As a result of the said consultations, the German Presidency was expected to develop and submit to the EC of 21–22 June 2007 a report on the future of the Constitutional Treaty, which in turn was to decide on "how the EU reform procedure should be continued" (Präsidenschaftsprogramm 2006: 1–6). Therefore, the federal government not only was determined to retain the Constitutional Treaty but also announced a new impetus to be provided to the ratification process. Although several scenarios for overcoming the constitutional crisis had been considered in Germany until the end of 2006, the federal government's belief in the necessity of signing the new revision treaty became increasingly significant with the approaching EU Presidency, though the said revision treaty was to be based to a considerable extent on the provisions of the Constitutional Treaty (Węc 2006d: 214–215; Maurer 2005: 165–184; Maurer 2006: 1–36).

2 German Presidency of the European Union

The assumption of the Presidency of the European Union on 1 January 2007 undoubtedly required Germany to make its former stance on the Constitutional Treaty more flexible, since each Presidency has always been confronted with the question of what is more important: defending one's own national interests or ensuring effectiveness of actions of the entire European Union. In her opening speech in the EP on 17 January 2007, Chancellor Merkel announced the end of the "period of reflection"

on the Constitutional Treaty declared by the EC in June 2005. In accordance with the tradition, she also discussed the programme of her Presidency, pointing to all the above-mentioned policy priorities. In reference to the first priority of the system reform of the EU, Merkel drew attention once again to the revolutionary impact of the Constitutional Treaty both for the very internal reform and the position of the EU on the international arena. In line with the EC conclusions of June 2006, she declared that new decisions with regard to the Treaty should be made by the end of the German Presidency. Therefore, she stated that the federal government will seek to develop not only a report, as obliged by the EC conclusions of June 2006 but also to present a 'schedule' for the future of the Treaty, which was not mentioned in the conclusions. It was in the interest of the European Union, the Member States and the EU citizens, she claimed, to ensure that the process of the system reform of the EU "is successfully concluded (*einem guten Ende*) before the forthcoming EP elections in the (late) spring of 2009" (Merkel 17.01.2007: 4–5).

Importantly, this declaration made by Merkel was certainly a surprise, since it assumed settling the future of the system reform of the EU a year and a half before the date provided in the EC conclusions of June 2006. However, the declaration was not necessarily in conflict with the contents of the said conclusions, as the latter involved a statement of fairly general wording that the decision on "how to continue the reform process" should be taken "during the second semester of 2008 at the latest" (EU. Conclusions, 15–16.06.2006: 17).

2.1 Berlin Declaration

Prior to the decisive settlement on the future of the Constitutional Treaty, an issue of developing a political declaration to mark the fiftieth anniversary of the signing of treaties establishing the European Economic Community and the European Atomic Energy Community was put on the agenda of the German Presidency — a task it was obliged to address under the EC conclusions of June 2006, as mentioned above (EU. Conclusions, 15/16.06.2006: 16–17). The development and drafting of the declaration were preceded by confidential diplomatic consultations between the German government and representatives of the Member States conducted using the 'confessional' method. Held from January to March 2007, the said consultations were held on behalf of the German government by German Foreign Secretary of State Reinhard Silberberg and Director of European Affairs in the Federal Chancellery Uwe Corsepius. Each Member State was represented by two so-called sherpas. Poland was represented by Marek Cichocki and Ewa Ośniecka-Tamecka. Other individuals engaged in the negotiations were representatives of the European Commission and the EP. The

first phase of the consultations ended in early February 2007, resulting in a preliminary draft declaration developed by the German delegation in agreement with the representatives of individual Member States. At the end of February of that year, the said draft was also consulted with the representatives of the European Commission and the EP (Goosmann 2007: 254).

The course of the said consultations demonstrated to the German Presidency significant differences among governments of the Member States regarding their views on the content of the declaration. Most controversy was triggered by the issue of possible incorporation of formulations regarding the future of the Constitutional Treaty, the *Invocatio Dei*, guarantees on national sovereignty of the EU Member States, a reference to European solidarity, common currency (the euro) and the social dimension of the EU.

The German government did not hide that it intended to investigate positions of individual Member States on the possibility to overcome the constitutional crisis during the consultations. According to German Foreign Minister Frank-Walter Steinmeier (SPD), the declaration was to involve a commitment of the Member States to imminently create necessary grounds for completing the system reform of the EU before the EP election of 2009 (Steinmeier 14.03.2007: 1). Similar expectations were presented by EP President Hans-Gert Pöttering (CDU), who postulated that the declaration should involve a formulation on the necessity to retain the 'substance' of the Constitutional Treaty including Part II with the Charter of Fundamental Rights. The stance adopted by the German Presidency on this issue was supported by other Member States. Austria pressed for including in the declaration a paragraph on the necessity for the German Presidency to develop a 'roadmap' for further proceedings regarding the Constitutional Treaty. Whereas Romania expected the contents of the declaration to be combined with the agenda of the EC meeting planned for June 2007. However, many Member States acted with utmost restraint in this matter (e.g. Finland and France) or even strongly opposed the mentioned proposals (e.g. the Czech Republic, the United Kingdom and Poland). Czech Prime Minister Mirek Topolanek argued that the declaration should involve only formulations pertaining to the past, particularly the achievements in the field of European integration so far. At the same time, he warned that the dispute on the Constitutional Treaty might put at risk the very idea of adopting the declaration. The Czech Prime Minister's opinion was fully supported by British Minister for Europe Geoff Hoon and some French and Finnish diplomats. A similar stance on the Constitutional Treaty was presented by Poland, which additionally demanded incorporating to the declaration the *Invocatio Dei,* guarantees on national sovereignty of the EU Member States and a reference to European solidarity (Goosmann 2007: 252–254).

Initially, the German Presidency supported (at least tactically) Poland's postulate to include the *Invocatio Dei*, yet as a result of France's firm opposition and doubts of other countries, it changed its position in this matter. It was not only until Chancellor Merkel's visit to Poland on 16–17 March 2007, particularly the meeting with President Lech Kaczyński in Jurata, that Poland's support for the declaration was obtained. According to Poland's expectations, the declaration was to include a reference to sovereignty of the Member States and to the solidarity principle. Kaczyński agreed to abandon the *Invocatio Dei* and accepted Germany's position that the declaration was to serve as a starting point for further proceedings on the Constitutional Treaty. The President justified the change in his view and emphasized that "Poland has reservations about the provisions of the Berlin Declaration, but if we did not sign it, we would be the only country that would not do it" (Węc 2016: 62–63). Some commentators considered that, given the above, Poland thus gave permission for the adoption of the Berlin Declaration (Presse 19.03.2007). Apparently, Kaczyński had no intention of having a direct contribution to blocking the development of the declaration, still, changing his mind did not mean that Poland gave up on all its former reservations.

Nevertheless, the Czech Republic continued to lodge serious objections regarding both the contents of the declaration and the way in which the German Presidency held diplomatic consultations. On 22 March 2007, three days before the signing of the declaration, the Czech government highly criticised the fact that the declaration specified the date of the EP elections of 2009 as the date of resolving the dispute on the Constitutional Treaty. Therefore, Czech negotiator Jan Zahradil openly warned the Presidency that Germany was hence assuming all responsibility for the drafted text, contrary to the Czech Republics' expectations (Węc 2016: 63–64). Nevertheless, the German Presidency approved the final version of the declaration on 24 March 2007.

On the following day, Angela Merkel, José Manuel Barroso and Hans-Gert Pöttering officially signed the *Declaration on the occasion of the 50th anniversary of the signature of the Treaty of Rome* in the German Historical Museum in Berlin. The declaration was an unquestionable diplomatic success of Germany, though offset by the Presidency's abandonment of the original intention that the declaration would be signed by heads of state or government. This was due to the German delegation's concern that such a solution would require all details of the developed document to be fully consulted with the twenty-six governments, which could put at risk the very idea of adopting the declaration. With this in mind, a decision was made that the declaration will be signed in the presence of heads of state or government of all the EU Member States by the German Presidency, the President of the European Commission and the EP President (Goosmann: 256–257).

The Berlin Declaration comprises an introduction and three chapters. Chapter III involves commitments related to the future of the European Union. The signatories ensured therein that the Union "will continue to promote democracy, stability and prosperity beyond its borders", and also "always renew the political shape of Europe in keeping with the times." At the same time, they committed to place "the European Union on a renewed common basis before the European Parliament elections in 2009" (Declaration 25.03.2007: 1–2).

Nevertheless, opinions were divided on the last of the listed commitments included in the Berlin Declaration. At a joint press conference attended by Merkel, Barroso and Pöttering, which was organised at the conclusion of the anniversary celebrations in Berlin, the Chancellor made it clear that the German Presidency considered the declaration a great success also in the sense that the said document was to serve as a starting point for the final settlement regarding the future of the system reform of the EU. Consequently, Merkel declared that at the forthcoming EC session of June 2007, a 'schedule' for the new treaty will be established, followed by an intergovernmental conference. It was the first very clear statement that a new international agreement will be elaborated based on the 'substance' of the Constitutional Treaty by the intergovernmental conference. The contents of the Berlin Declaration were similarly interpreted by Pöttering and Barroso. The former even claimed that the declaration stated the issue of the Constitutional Treaty would be resolved until June 2009. Therefore, as Pöttering argued, the ratification of the new treaty (which at that time would probably have a different title with the substance of the Constitutional Treaty preserved regardless) was to be completed by June 2009 (Merkel, Barroso, Pöttering 25.03.2007: 1–2).

However, at the very same time, Czech President Václav Klaus indicated that Berlin Declaration did not have legally binding force, meaning that the commitment to place "the European Union on a renewed common basis" was only of political significance. Other critics also pointed to the fact that even the politically binding force of the declaration is extremely doubtful due to the method applied by the German Presidency for holding diplomatic consultations and the lack of any public debate on the provisions of the said declaration (Goosmann 2007: 257). Moreover, Polish President Kaczyński also questioned parts of the declaration that referred to process of the system reform of the EU ending by June 2009 (Węc 2016: 67).

Importantly, the formulation in the Berlin Declaration of placing the EU on a renewed common basis by June 2009 unquestionably expressed willingness to complete the system reform of the EU by that time. In this sense, the declaration could be considered by the German Presidency as an important step towards this

goal, as it was the first document since the rejection of the Constitutional Treaty in the 2005 referenda held in France and the Netherlands to contain a clear political message addressed to all Member States on undertaking new actions to overcome the constitutional crisis and to complete the system reform of the EU.

2.2 Mandate for the Intergovernmental Conference

During the negotiations on the Berlin Declaration, in March 2007 at the latest, the German government changed its former stance on the future of the Constitutional Treaty and the conduct of negotiations with other Member States. From then on, negotiations held at the level of sherpas were to be aimed at concluding a new revision treaty, which was the essence of the first change. However, it was largely to be based on the provisions of the Constitutional Treaty, since retaining the Constitutional Treaty at all cost became thoroughly unrealistic, particularly given the above-mentioned proposals made in 2006 by government representatives of some Member States. Nevertheless, the German government planned to act very arbitrarily during diplomatic negotiations dedicated to overcoming the constitutional crisis. At first, it intended to take into consideration, above all, the position of the French and the Dutch governments, assuming that the Constitutional Treaty could not be resubmitted for ratification in its original form in the said two countries. The second position on this unofficial scale of priorities, which was nevertheless applied by the German government, was taken by the Member States that did not ratify the Constitutional Treaty at all or did not intend to do so under the German Presidency. The Member States that already ratified the Constitutional Treaty were ranked third, which was the third change (Maurer 2008: 6–7).

The methodology of the federal government's actions involved confidential bilateral consultations and multilateral discussions with sherpas previously appointed for negotiations on the Berlin Declaration, with the aim to investigate stances of individual Member States on the treaty reform. In order to ensure that consultations are fully confidential, not only did the German Presidency intentionally limit the exchange of views between individual delegations (as the first plenary meeting of the sherpas did not take place until 15 May 2007) but also presented no interim report on the said consultations.

The first (initial) phase of the bilateral consultations took place in February and March 2007. As a result, the German Presidency developed an informal questionnaire containing twelve most important (according to the German Presidency) amendment proposals to the Constitutional Treaty with opinions given by the Member States that adopted a clear stance on these issues. In early April 2007, the said questionnaire was sent to governments of the Member

States. At the same time, the Presidency requested them to provide any other proposals on which they conditioned their support for the future Treaty. The first proposal included in the questionnaire pertained to the reestablishment of the classic treaty revision method while granting a single legal personality to the EU. This would mean a renouncement of the revocation of TEU and TEC, as stipulated by the Constitutional Treaty. In this matter, France spoke in favour of a consolidated mini treaty that would revise the treaties in force, the United Kingdom advocated only technical changes in the said treaties, whereas the Czech Republic and the Netherlands demanded that all analogies to the constitution be avoided. In line with the second proposal, Part I of the Constitutional Treaty (specifying the most important institutional provisions, objectives, values and the working methods of the EU) would be retained. This solution was favoured primarily by France and Italy. The third and the fourth proposals concerned 'de-constitutionalisation' of the Constitutional Treaty, i.e. abandoning the title of the document, the title of the Foreign Minister of the EU, new names of legal acts (European laws and European framework laws), as well as symbols of the EU, such as the flag, the anthem, the motto, the currency and Europe Day. This was expected mainly by the Netherlands, the United Kingdom, the Czech Republic and Poland, whereas nearly all Member States (except for Belgium and Luxembourg) demanded that the EU symbols be abandoned. The fifth proposal concerned abandonment of articles on the primacy of the EU law over national law. This was advocated by the Netherlands, the United Kingdom, the Czech Republic and Poland. In turn, the United Kingdom with the support of Poland were in favour of replacing Part II of the Constitutional Treaty (the Charter of Fundamental Rights) with a special regulation referring to the CFR that would make it legally binding (which constituted the sixth proposal). The seventh proposal concerned the retention of the package of institutional regulations specified in the Constitutional Treaty. This solution was favoured by most Member States, while it was strongly objected by Poland with the support of the Czech Republic. The eighth proposal contained a question on the retention of other systemic changes envisaged by the Constitutional Treaty. This later inspired the Netherlands and the United Kingdom to propose a postulate for strengthening the position of national parliaments in the EU legislative process. The ninth proposal concerned the introduction to the future Treaty new provisions on energy policy, climate and illegal immigration. This proposal was created by the United Kingdom, Poland, Lithuania, Latvia, Estonia, Hungary, Germany, Austria and the Netherlands. In turn, France and the Netherlands with the support of Austria and Germany were in favour of granting treaty status to the Copenhagen criteria or including a special referring regulation to the Treaty (which constituted the

tenth proposal). The eleventh proposal foresaw the strengthening of the social dimension of the EU in the future Treaty. This was particularly sought by France, Germany and Belgium. The twelfth proposal concerned the possibility to give some Member States opt-out measures and/or special rules of enhanced cooperation in areas where the powers of the EU institutions were to be strengthened. Opt-out measures were supported by the United Kingdom and Poland, while enhanced cooperation was favoured by Belgium, Luxembourg, Italy and Germany (Węc 2016: 68–70).

This informal questionnaire provided a clear picture of the scope of the emerging changes proposed by individual Member States and confirmed that the German Presidency considered the Constitutional Treaty not solely a starting point but also the foundation of the system reform of the EU. According to the Presidency, the changes in the Constitutional Treaty were to be limited to what is necessary, yet they also were intended to allow for a compromise and to ensure that the future Treaty is ratified by all Member States. The mentioned questionnaire constituted the foundation of the second phase of confidential bilateral consultations between the German Presidency and the sherpas, which took place on 23 April – 4 May 2007. As a result, nearly all Member States initially accepted the listed proposals. The most contentious issues identified during that phase of consultations were subject to negotiations held between the highest representatives of the German Presidency and their partners from individual Member States (Węc 2016: 70–71). Moreover, in close consultation with the German Presidency, the newly elected French President Nicolas Sarkozy, as well as Prime Ministers of Spain (Zapatero), Luxembourg (Juncker) and Italy (Silvio Berlusconi) held exploratory discussions with leaders of the United Kingdom, Poland and the Czech Republic.

On 15 May 2007, the first plenary session of the sherpas took place in Berlin, indicating that consultations held at this level entered a phase of multilateral negotiations. On 6 June of that year, the sherpas submitted to the German Presidency a preliminary report on the results of the bilateral and the multilateral consultations that contained important information on the possibility to reach compromise on the most contentious issues. The list of twelve proposals from early April 2007 was scaled down to three openly disputed matters, namely, symbols of the EU, the primacy of EU law over national law and the legal nature of the Charter of Fundamental Rights. Furthermore, four new postulates submitted during consultations by some Member States required clarification. The United Kingdom advocated the introduction of regulations that would clearly stress the specificity of the common foreign and security policy, as well as the common security and defence policy of the European Union. The Czech Republic demanded the

distribution of competences between the EU and the Member States be further specified and that provisions on delegating competences back to the Member States by the EU be adopted. The Netherlands pressed for further strengthening of the role played of national parliaments in the EU legislative process (the so-called 'red card' procedure). Whereas Poland expected, above all, that qualified majority in the decision-making in the CEU and the EC will be redefined (Maurer 2008: 4–5).

On 14 June 2007, based on a preliminary report prepared by the sherpas, the German Presidency presented a final report on its own proceedings. It was the only official report of the Presidency on the results of the bilateral and multilateral consultations it conducted. It was stated in the report that after two years of uncertainty stemming from the constitutional crisis, final decisions must be taken on the treaty reform, since further uncertainty in this matter will compromise the Union's capability to act. What is more, the Presidency noted that there is a high demand in the Member States for higher effectiveness, strengthened democratic working methods and improved coherence of external actions of the EU. At the same time, it referred to the allegedly unanimous position of the Member States incorporated in the Berlin Declaration, which concerned the necessity for a new international agreement to enter into force before the EP elections of 2009. The Presidency also indicated that all Member States approved four issues: the reestablishment of the traditional treaty revision method as a path leading to the signature of a new international agreement at the intergovernmental conference; the 'de-constitutionalisation' of the Constitutional Treaty; the retainment of the institutional reform package; and the inclusion to the new Treaty of provisions that were not included in the Constitutional Treaty and pertained to the area of energy security, combating climate change and granting treaty status to the Copenhagen criteria. However, these provisions could not contribute to the extension of the Union's competences in the listed areas. At the same time, the Presidency stated that several issues, including the above-mentioned proposals submitted by the Member States during consultations, would require further discussion. These included: symbols of the EU, the primacy of EU law over national law, the legal nature of the Charter of Fundamental Rights, the specificity of the common foreign and security policy, further specifying the distribution of competences between the EU and the Member States, consolidating national parliaments in the EU, and the scope of changes in terminology (Report 14.06.2007: 2–5).

In its recommendations, the Presidency called on the EC to decide to convene an intergovernmental conference as soon as possible at its session in June 2007. However, this would require the EC to adopt a precise and comprehensive mandate for the conference at the very same session. This in turn would allow for concluding negotiations on the signature of the new treaty by the end of 2007. The Presidency

proposed to return to the classic treaty amendment method. Consequently, the intergovernmental conference was to develop a treaty reforming the European Union that would amend, yet not revoke, the treaties in force. The Treaty on the European Union would maintain its current name, whereas the Treaty establishing the European Community would become a Treaty on the Functioning of the European Union (TFEU). Both treaties would have the very same legal power and would provide the foundation for the EU, while the Union itself would be granted a legal personality for the first time (Report 14.06.2007: 5).

The results of the negotiations held with governments of individual EU Member States were presented by Chancellor Merkel in a government statement made on 14 June 2007 in the Bundestag. The Chancellor justified therein the need for basing the reform treaty on the Constitutional Treaty, pointed to the necessity for a stricter distribution of competences between the EU and the Member States with the aim to strengthen their national identities, and declared abandonment of granting treaty status to the EU symbols. Merkel regarded the issue of redefining qualified majority in the decision-making in the Council of Ministers and the EC as one of the matters yet to be solved, which in her opinion should be done unanimously for the benefit of the entire European Union (DB Plenarprotokoll 16/103: 10568–10569).

On the very same day, on the proposal of the CDU/CSU/SPD government coalition, the Bundestag adopted a resolution titled *In favour of an effective solution to concerns on the consolidation of the European Union: in favour of a clear and precise mandate for the intergovernmental conference* by large majority. It was stated in the resolution that the reforms stipulated by the Constitutional Treaty remained "substantial grounds for improving the legitimacy and transparency of the European Union, as well as increasing its capacity to act." At the same time, the Bundestag called on the federal government to maintain at the negotiations all institutional provisions and political objectives of the EU contained in Part I of the Constitutional Treaty, which in its view was a satisfying compromise between the Member States. These involved, in particular, a legal personality granted to the European Union; inclusion of the CFR to primary law; introduction of a strict distribution of competences between the EU and the Member States; establishment of double majority in the decision-making in the CEU and the EC, as well as extended scope of double majority to new cases; consolidated role of the EP owing to an extended scope of its competences and the co-decision procedure transformed into and ordinary legislative procedure; establishment of a permanent President of the European Council; strengthened common foreign and security policy; limited composition of the European Commission, and also a strengthened role of national parliaments in the EU legislative process due to

an early warning mechanism (the 'yellow card' procedure), and the right to bring action before the Court of Justice for infringement of the subsidiarity principle in EU legislation (DB Drucksache 16/5601: 1–3).

On 14 June 2007, the Presidency's final report with a diplomatic note that contained a new questionnaire (this time an official one) was forwarded to all Member States. In the said note, foreign ministers of the Member States were called to present answers to five questions within three days at the session of the General and Foreign Affairs Council of 17–18 June 2007. The Presidency asked in the note if the Member States agree to the following changes: to return to the traditional treaty revision method; to grant legal personality to the European Union; to abandon the pillar-based structure of the UE while retaining the specificity of the common foreign and security policy of the EU; to retain the full text of the Charter of Fundamental Rights in the new treaty or to exclude it from the treaty and to make it legally binding under a special regulation introduced therein; to introduce changes in terminology, particularly to abandon the term 'constitution' and to grant treaty status to symbols of the EU; to grant primacy to EU law over national law (Note 14.06.2007: 1–2). Importantly, the questionnaire did not refer to many important unresolved disputes, such as: further specifying the distribution of competences between the EU and the Member States, defining qualified majority in the CEU and the EC, the role of national parliaments in the European Union, energy policy, combating climate change and combating climate change and granting treaty status to the Copenhagen criteria.

The questions provided in the said questionnaire were to be discussed at the session of the General and Foreign Affairs Council of 17–18 June 2007 in Luxembourg at the level of foreign ministers. However, the meeting was in fact limited to individual delegations' agreement or disagreement with the Presidency's proposals, and the matter was deferred until the EC meeting in Brussels planned for 21–22 June 2007, where a compromise was to be sought. Therefore, the German Presidency clearly indicated that it intended to limit the scope of discussion in the final phase of negotiations as much as possible. However, the course of the session of the General and Foreign Affairs Council, particularly the atmosphere and the number of reservations clearly indicated that the reaching a consensus in Brussels aby heads of state or government will be neither easy nor obvious (Kremer 2008: 25–26; Herma 2008: 8–9).

Based on the Presidency's final report of, German sherpas prepared the first version of a mandate for the intergovernmental conference. Multilateral consultations on the report and the draft mandate were continued on 19 June 2007 at the second plenary session of sherpas. The issue that was most interesting for the Polish delegation, namely, the re-defining of qualified majority in

the CEU and the EC, was included merely as a footnote (!) stating that it was demanded only by two Member States, with no information on which states in particular (Herma 2008: 6–7; Kremer 2008: 25). Following amendments proposed by the Legal Service of the General Secretariat of the CEU, the second version of the mandate was discussed at the third plenary session of sherpas held on 22 June 2007 (Maurer 2008: 5). The second version of the mandate included amendments proposed by individual Member States directly before the meeting and at the EC meeting in Brussels.

The EC meeting held in Brussels, which was originally intended to take place on 21 and 22 June 2007, went on until the early hours of 23 June of that year. Though it was not the longest one, it was definitely one of the most dramatic sessions in the history of the European Union. Negotiations were held both on issues already considered by the German Presidency in its report as 'pre-agreed' and those seen as requiring further discussion. Moreover, at the EC meeting, delegations of numerous Member States submitted new proposals for amendments to the draft mandate, with the highest number of concerns regarding the draft mandate expressed by governments of the United Kingdom, Poland, the Czech Republic and the Netherlands.

The British delegation opposed, most of all, the proposal to make the Charter of Fundamental Rights legally binding. It also demanded that the scope of qualified majority voting be limited in the area of the common foreign and security policy, and in policies of the freedom, security and justice area, as well as that competences of the Foreign Minister of the EU be scaled down. The representatives of Poland called for five fundamental changes in the draft mandate: first, to modify the definition of qualified majority in the CEU and the EC; second, to further specify regulations on the distribution of competences between the EU and the Member States, to specify provisions on national security clearly stating that it falls within exclusive competences of the Member States, and to further specify provisions on the legal personality of the future European Union; third, to abandon the treaty status that was to be granted to the principle of the primacy of EU law over national law; fourth, not to include the CFR in the new treaty; fifth, to introduce the solidarity principle to energy policy and to further specify the principles of energy security. As for the definition of qualified majority, the Polish government proposed to modify double majority stipulated by the Constitutional Treaty (55% of votes of the Member States as a minimum, representing 65% of the EU population as a minimum). The said modification would consist in lowering the threshold population from 65% to 62% and increasing the threshold number of the Member States required for creating a blocking minority from 4 to 5 or 6, while maintaining the threshold of 55% of votes of all states necessary for forming a qualified majority.

The Polish government, which lost the most on the abandonment of the Nice system by the EU, argued that in line with the voting theory, the EU citizens would have the equal impact on the outcome of a vote in the CEU and the EC if the significance of a given state in a vote was approximately proportionate to the square root of its population figure, and not the population figure itself. Importantly, the system of equal influence (square root) referred to the principle of degressive proportionality applied for calculating a distribution of mandates in the EP. Whereas the very threshold population of 62% was applied in the CEU in acting by qualified majority in line with the rules of the Nice system. The Polish government intended to make the blocking minority include 38% of the EU population and at least 5 or 6 Member States. Consequently, the average population share of a blocking state would equal to 7.6% of the EU population, i.e. approximately the population share of Poland in the total EU population, which was 7.7% (Kremer 2008: 28–29).

As was the case with the German Presidency, Poland also supported the main postulate of the Czech Republic for further specification of the provisions on the categories of competences shared between the EU and the Member States. In this regard, the Czech government even demanded that a mechanism be established for delegating competences back to the Member States by the EU. The Czech Republic and Romania were in favour of the Dutch main postulate for the strengthening of the role of national parliaments in the EU legislative process. In this matter, the Dutch delegation pressed for a 'red card' procedure, i.e. provisions allowing for draft legislation of the European Commission to be blocked directly by national parliaments in a situation where they consider that such drafts prejudice the subsidiarity principle. Likewise, many delegations mutually supported their proposals in other cases or even submitted largely identical postulates. A convergence of views characterised primarily the stances adopted by Poland and the United Kingdom on further specification of provisions in the area of national security, the opinions of Poland and Lithuania on the introduction of the solidarity principle in energy policy and the specification of principles of energy security, the expectations of Poland, France and the Netherlands on the CFR not being included in the new treaty, the desiderata of Poland, the United Kingdom and the Netherlands with regard to abandoning the concept of granting treaty status to the primacy of EU law over national law, the proposals of the Netherlands and Germany regarding partial exclusion of services of general economic interest from the scope of Community regulations on competition, the efforts of France supported by Germany as regards exclusion of the provision on free and undistorted competition from the list of EU objectives, the postulates of Poland and most Member States regarding further specification of provisions on the legal personality of the EU, i.e. explaining whether the

future European Union will have a legal personality at the time the new treaty enters into force or whether it will take over the legal personality of the European Community (Kremer 2008: 28–29).

Nevertheless, during the discussion held at the EC meeting, there was a number of votes against many of the mentioned postulates. Belgium proved particularly active in this regard, as it even succeeded at forming *ad hoc* a coalition with Italy, Luxembourg, Greece, Spain, Slovenia and Hungary. Delegations of these states opposed, i.a. the establishment of the 'red card' procedure, the revocation of the idea of granting treaty status to the principle of the primacy of EU law over national law, as well as previously agreed modifications in the common foreign and security policy of the EU. Moreover, the Belgian government demanded that the threshold be changed for the Member States willing to establish enhanced cooperation from the one-third of the total number of the Member States stipulated by the Constitutional Treaty to nine (Węc 2016:75–79).

As a result of highly intensive and occasionally dramatic negotiations, the participants of the EC meeting eventually managed to reach a compromise on most contentious issues. Only delegations of three states, namely, the United Kingdom, the Netherlands and Poland failed to force through all their postulates. The failed attempts involved the British initiative to limit the scope of qualified majority voting in the common foreign and security policy and in the area of freedom, security and justice, to restrict competences of the Foreign Minister of the EU, and to deprive the Charter of Fundamental Rights of the legal force. Nevertheless, the British delegation managed to achieve a compromise, which entailed a change in the name of the Foreign Minister of the EU to the High Representative of the Union for Foreign Affairs and Security Policy. It also obtained assurance that the future treaty might be extended to include a special protocol to prevent British citizens from pursuing some claims arising from the Charter of Fundamental Rights before British courts. This was followed by a reservation made by Poland and Ireland in the negotiating mandate to the right to join the said protocol, which was hereinafter referred to as the British protocol. Though the Dutch delegation did not manage to convince the meeting participants to establish the 'red card' procedure instead of the 'yellow card' procedure, the dispute on this issue ended in an agreement that the protocol on the principles of subsidiarity and proportionality annexed to the future treaty would include a slightly less radical procedure of the so-called 'orange card', which is discussed below. Together with the 'yellow card' procedure it was to serve as an integral part of the early warning system. However, the 'orange card' procedure consolidated the EU legislators (the EP and the CEU) in their roles instead of strengthening the role of national parliaments in monitoring the respect of the

principle of subsidiarity, as demanded by the Dutch delegation. The Polish delegation also failed to force through its main postulate for the modification of the definition of qualified majority in the CEU and the EC, still, other proposals of Poland were taken into consideration by the meeting participants.

The discussion on modifying qualified majority led to a severe disagreement within the EC. The position adopted by the Polish delegation was substantially undermined by the fact that from the very beginning, the solution it proposed was opposed by nearly all governments. What is more, Prime Minister Jarosław Kaczyński's unfortunate speech made shortly before the EC meeting was very poorly received by the meeting participants. In his speech, Kaczyński referred to wartime losses incurred by Poland during World War II, which he used as an argument in his attempt to retain the Nice system (Węc 2016: 80). In this atmosphere, President Lech Kaczyński at first attempted to defend Poland's proposal regarding the square root system, which nevertheless proved ineffective.[2] Only the representatives of the Czech government lent silent support to Poland on condition that the said issue would not block the entire negotiations as a result. In this situation, on the night of 21 to 22 June 2007, President Lech Kaczyński suggested in a conversation with Chancellor Merkel that the Nice system should be retained until 2020 in return for Poland's possible surrender of the square root system. Likewise, the said proposal was opposed by Merkel, who demanded that the mentioned period be shortened to 2014. For a long time, the conversations held on this issue between Merkel and Lech Kaczyński on the second day of the meeting did not bring any results. In that situation, Prime Minister Kaczyński in an interview for Polish television in Warsaw threatened that if the new proposal of Poland was not adopted, his government would veto such decision and the summit would be hence knocked flat. Nevertheless, Jarosław Kaczyński's dicey opening proved thoroughly ineffective, since the German Presidency, acting in agreement with several other

2 The Poland's proposal might have been approved if it had not been strongly opposed by Germany, the state that would benefit the most from double majority, as well as if not for the lack of interest on the part of medium-sized and small Member States, which either did not gain anything from double majority or enjoyed solely insignificant benefits (e.g. the Netherlands). Moreover, the proposal was submitted too late to allow the Polish government to effectively form an *ad hoc* coalition of Member States to force it through. This was caused, among others, by the tactics adopted by the German Presidency, which consisted in fast-tracking the sherpas' proceedings in the last weeks of its term and by the fact that, contrary to the expectations of other EU Member States, the German Presidency prepared a draft mandate for the intergovernmental conference, which already contained a prepared draft revision treaty (Węc 2016: 80–81).

delegations, warned the Polish delegation that it could propose the EC to adopt a mandate for the intergovernmental conference regardless of the opposing position adopted by Poland, whereas the convening of the conference would be exercised by a simple majority (Węc 2016: 80–81: Herma 2008: 12). Though such a solution was compatible with Article 48 TEU, it would be the second time in the history of the European Community and the European Union since 1985 when an intergovernmental conference was convened regardless of a different position adopted by one of the Member States (Węc 2012b: 185).

However, at that time the decisive stance of Chancellor Merkel was criticised by several states, particularly the Czech Republic and Lithuania. A representative of the Czech delegation declared to support Poland in its stance against the adoption of the mandate in the presented version. In this situation, a compromise was yet again attempted by French President Sarkozy and British Prime Minister Blair, who tried to convince Prime Minister Kaczyński by telephone to adopt the German proposal. Shortly after, the last chance was offered by Prime Minister of Luxembourg Jean-Claude Juncker and Chancellor of Austria Alfred Gusenbauer, suggesting that the decision-making by double majority should enter into force already in 2014 with a transition period that would end by 2017, allowing each Member State to apply the Nice system if required. Moreover, in line with President Sarkozy's former idea, the criteria for the applicability of the so-called Ioannina mechanism were to be modified after 2017. The change was to involve a reduction in both threshold population and threshold of the number of Member States from 75% to 55%, which was essential for forming a blocking minority. Though the proposals of Luxembourg and Austria were opposed by Belgian Prime Minister Verhofstadt, eventually he withdrew his reservations and thus, in the early hours of 23 June, a consensus was successfully reached (Węc 2016: 81–82).

Shortly after, the EC adopted the final version of the mandate, which was to provide "the exclusive basis and framework for the work of the IGC (…)." The conference was tasked with developing a draft revision treaty referred to as the reform treaty. In line with the provisions of the mandate, the reform treaty was to contain two substantive clauses amending TEU and TEC, with the latter titled the TFEU. Whereas technical changes in the TEAEC (and in the protocols annexed to the treaty) should be introduced under protocols annexed to the reform treaty in accordance with the provisions adopted at the intergovernmental conference of 2003–2004 (EC. Conclusions [IGC mandate], 21–22.06.2007:16–31). The mandate provided for a transfer of a majority of the provisions of the Constitutional Treaty to the revision treaty, with most of them incorporated into TEU and others into TFEU. At the same time, it contained provisions that depart from the Constitutional Treaty, agreed during

consultations held by the German Presidency (the original version of the mandate of 19 June 2007), and later at the EC meeting in Brussels in June of that year (the original version of the mandate of 23 June 2007). These were to be incorporated both into TEU and TFEU, as well as into protocols and declarations annexed to these international agreements (Węc 2016: 82–84; Herma 2008: 9–14).

The EC conclusions of 21–23 June 2007 involve a report of the German Presidency that was "welcomed" by the Council, which agreed that "settling this issue quickly is a priority." To this end, the EC called on the Portuguese government, which was to assume Presidency in the second semester of 2007, to take immediate action in accordance with the provisions of Article 48 of TEU with the aim to convene an intergovernmental conference by the end of July 2007. In the further part of the conclusions, the EC stressed yet again that works of the said conference ought to be conducted strictly in accordance with the mandate adopted on 23 June 2007. Consequently, it also invited the Portuguese government to compile a new draft treaty based on the provisions of the mandate and to submit it immediately after the opening of the conference meeting. The said meeting was to be concluded "as quickly as possible, and in any case before the end of 2007, so as to allow for sufficient time to ratify the resulting Treaty before the EP elections in June 2009" (EC. Conclusions, 21–22.06.2007: 2).

Owing to the great determination, highly precise methodology of proceedings decisions that were and often arbitrary, the German Presidency not only did prepare a report on the condition of the discussion on the reform of the EU so far, as obliged by the above-mentioned EC conclusions of June 2006 but also compiled a comprehensive draft mandate for the future intergovernmental conference. The said draft envisaged the signing of the new revision treaty that was to change treaties in force at the time and to maintain about 90% of the provisions provided in the Constitutional Treaty.

3 Intergovernmental Conference of 2007. The Treaty of Lisbon

3.1 Meetings of the Intergovernmental Conference

The intergovernmental conference opened the meeting on 23 July 2007 in Lisbon. The said meeting was held at the level of foreign ministers, yet the crucial role was played by Working Group comprising legal experts. This was due to the fact, that at that time the conference had an almost-complete draft revision treaty at disposal, which was drafted by the Legal Service of the General Secretariat of the CEU in principle based on the negotiating mandate. Nevertheless, the actions of Working Group were not limited merely to drafting adjustments to the draft

treaty but also involved introducing essential amendments[3] to the said document. On 18–19 October 2007, at an unfortunate meeting in Lisbon, the EC adopted the draft treaty reforming the European Union. Less than two months later on 13 December of that year, heads of state or government and Foreign Ministers of the twenty-seven Member States met again in the capital of Portugal to officially sign the new treaty, which was called the Treaty of Lisbon from then on. The said document involved provisions revising the Treaty on the European Union and the Treaty establishing the European Community. Moreover, under Protocol No. 2 annexed to the Treaty of Lisbon, the Treaty establishing the European Atomic Energy Community was also amended (TL, OJ C, 2010, 83: 309).

Less than three weeks prior to the inauguration of the intergovernmental conference, on 4 July 2007, a special debate on the treaty reform in the EU was held in the Bundestag. Members of parliamentary factions forming the government coalition pointed to the great success of the German Presidency, i.e. the drafting of the mandate containing an almost-complete revision treaty. Angelica Schwall-Düren (SPD) noted that this circumstance to a great extent facilitated the end of the struggle for the system reform of the EU undertaken by the Portuguese Presidency. An even more explicit and descriptive statement was made by Gunther Kirchbaum (CDU/CSU), who claimed that owing to the work of the German Presidency, "80% of tasks" to be otherwise tackled by the intergovernmental conference were "already solved", while "the last 20% (…) are to be solved by the Portuguese Presidency." He also expressed his appreciation for the methodology and the style of work adopted by the entire federal government, "whose actions were consistent, conscientious and level-handed even in relations with smaller Member States." Referring to the controversial situation with Poland regarding the modification of double majority and the strengthening of a blocking minority, Schwall-Düren claimed arbitrarily that Germany "need Poland to manifest confident behaviour (*selbstbewusstes*) and

3 These included, i.a. the preamble to the reform treaty, transitional provisions on the status of legislative act ors adopted as part of judicial cooperation in criminal matters and police cooperation, the extension of the provisions of Protocol No. 4 on the position of the United Kingdom and Ireland (annexed to TEU and TEC under the Treaty of Amsterdam) on judicial cooperation in criminal matters and police cooperation and laws building upon the Schengen *acquis*, changes in the EU institutional framework, further specification of some provisions on legislative procedures and acts, provisions on the EU citizenship, the method for issuing the Charter of Fundamental Rights, provisions on increasing the number of Advocates General in the Court of Justice (Węc 2016: 92–99).

willingness to constructive cooperation without a stigma (*geprägt*) of permanent distrust towards the European Union." Michael Roth (SPD) regretted that "the dispute on the demands of the Polish delegation appeared to have formed a barrier between the allegedly small and the allegedly large states," while "in reality, the small EU Member States are large states as well," and "Germany has always been as a good promoter of small Member States' interests." Thomas Silberhorn (CDU/CSU) admitted that in early 2007, no one in Germany ever expected that the federal government would succeed in elaborating anything more than a "roadmap" (*Zeitplan*) for the forthcoming intergovernmental conference, and yet it managed to compile not only a mandate but also an almost-complete draft revision treaty (DB Plenarprotokoll 16/107: 10988–10991, 10997–10999).

All representatives of the government coalition who participated in the debate emphasised that the system solutions incorporated in the draft mandate will substantially strengthen both internal cohesion and international position of the European Union. According to Roth, this draft satisfied four fundamental expectations of the Bundestag: first, it granted a legal personality to the EU and transformed it into an international organisation; second, it dissolved the pillar-based structure; third, it introduced the CFR to primary law of the EU; fourth, it maintained the compromise established under the Constitutional Treaty on changes in the EU institutional system. However, Roth was critical about the British protocol that concerned the CFR, the provisions that allowed the Member States to receive back their competences formerly granted to the European Union, as well as changes introduced as part of the so-called 'de-constitutionalisation' of the Constitutional Treaty (abandoning the following terms: constitution, European law, European framework law, Foreign Minister of the EU; grating treaty status to symbols of the EU, etc.). Consequently, the SPD member the system reform of the EU to be continued in the future and the paradigm in the functioning of the EU to be shifted, which was to involve "abandoning unilateral focus on economic matters" and giving a greater value to the principle of solidarity. Since the regulations contained in the draft mandate were in his opinion thoroughly insufficient for overcoming the democratic crisis in the EU, the primary objective of subsequent treaty reform was to strengthen its parliamentary legitimation (DB Plenarprotokoll 16/107: 10996–10998).

The CDU/CSU member Silberhorn had a somewhat different opinion on the draft mandate. In his view, the key objective of the system reform of the EU was to amend the institutional system in a way that would strengthen the European Union both internally and externally. He attached particular importance to the following changes: to introduce qualified majority voting as the decision-making principle in the CEU, to establish the double majority system in the CEU and

the EC, to consolidate the President of the European Commission in his or her role and to create the office of the High Representative of the Union for Foreign Affairs and Security Policy. Moreover, Silberhorn considered the establishment of a strict distribution of competences between the EU and the Member States, and the possibility for the latter to receive back powers formerly delegated to the EU a highly important *novum*. In his opinion, these changes should result in restricted competences of the Court of Justice of the EU or even in some of its judgements from several past years being overturned. Furthermore, he placed much significance on restrictions regarding the application of the flexibility clause, particularly the provision laying down that the said clause must not be used for strengthening the powers of the EU and for circumventing the treaty revision procedure. This was due to the fact in the past, the flexibility clause was repeatedly used for unjustified extension of the EU competences to the detriment of the Member States. As for weaknesses, Silberhorn considered competences grated to national parliaments in the EU legislative process to be the weak points of the draft mandate, though "rather insignificant". Nevertheless, he expressed his hope that in the case of the 'orange card' procedure, the EP or the CEU will have the power to efficiently block drafts of the European Commission that would prejudice the subsidiarity principle (DB Plenarprotokoll 16/107: 10999).

In general, representatives of the parliamentary opposition positively assessed the draft mandate (except for the Left), pointing out mainly to provisions that strengthened the position of the EU. However, Markus Löning (FDP) regretted that under the influence exerted by President Sarkozy, the term "undisrupted competition on the internal market" was excluded from the list of objectives pursued by the Union specified in the draft mandate, whereas as a result of Lech Kaczyński's opposition, the double majority system was not to apply until 2014. According to Löning, the said system was to be introduced somewhat sooner due to its significance for the democratisation of the European Union, as it reflected "our understanding of democracy, namely, the 'one vote per citizen' principle." The FDP MP ignored on that occasion the above-mentioned stance of the Polish delegation, which indicated, referring to the voting theory, that the most democratic decision-making system in the CEU was the square root system. Furthermore, Jürgen Trittin (Alliance 90/The Greens) criticised the fact that the double majority system was not to apply until 2014. In contrast to Löning, he drew attention to provisions that unquestionably strengthened the democratisation process within the EU, such as restricting the veto right of the Member States by substantially extending the scope of qualified majority in the CEU, enhancing the decision-making powers of the EP, strengthening the position of national parliaments in the EU legislative process, as well as rendering the CFR legally binding. In turn,

Alexander Ulrich, representative of the Left, did not spare the federal government harsh criticism for the style and methodology applied in the run-up to the intergovernmental conference. Although the German Presidency was to be held following the concept "Europe–Succeeding Together", the federal government failed to encourage direct participation of citizens and – which was even worse – did not ensure that the Bundestag was engaged in a constructive manner. The European concept was also undermined by the dispute with Poland on double majority, in principle used by Germany to exploit its position of a 'stronger' Member State acting against a 'weaker' one. Moreover, the dramatic course of the EC meeting in June was not to be blamed on Poland alone, since other delegations were interested in modifying the double majority system as well. Referring to the provision included in the draft treaty on deferring the date of the entry into force of double majority until 2014, which was criticised by some MPs, Ulrich noted that exceptional provisions were in fact oftentimes applied with regard to the United Kingdom, and that the Polish delegation "has done nothing more than exercise its right guaranteed under the treaties in force." Regarding the entirety of systemic changes in the EU proposed in the draft, Ulrich referred to a postulate on the necessity for adopting a new treaty in a general EU referendum, as raised repeatedly by the Left for several years (DB Plenarprotokoll 16/107: 10993–10994).

The tactics adopted by the federal government at the intergovernmental conference of 2007 were similar to those employed in the proceedings of the German delegation at the intergovernmental conference of 2003–2004. The primary concern of the German government was to ensure that the mandate adopted by the EC in June 2007 was the only foundation and the sole framework for the conference to build on. Moreover, it pursued to further specify the treaty provisions that were not ultimately settled in the mandate or supported (oftentimes unofficially) proposals and postulates of other countries. Consequently, the representatives of Germany contributed to, among others, providing the final form to provisions specifying rules of qualified majority voting in the CEU and the EC (the double majority system), the provisions allowing for conferring competences from the EU back on the Member States, regulations strengthening the position of national parliaments in the EU legislative process, as well as norms referring to social security systems of the Member States and services of general economic interest. Furthermore, the German delegation together with other countries demanded that the ECB be left outside the institutional framework of the EU, that treaty status is granted to the Copenhagen criteria and that a special declaration on symbols of the EU is developed.

In consequence, the intergovernmental conference approved under Article 16 TEU that the double majority system was to enter into force on 1 November

2014. In Protocol No. 36 on transitional provisions it provided that during the transitional period of 1 November 2014 – 31 March 2017 rules of the Nice system are allowed to be employed, whereas from 1 April 2017 voting is to be executed solely by double majority (Article 16 TEU, Article 3(1–4) Protocol No. 36). The same timeframe was to apply to reduced threshold population and threshold of the number of Member States from 75 to 55% under the Ioannina mechanism, which was essential for forming a blocking minority, thus making it considerably more flexible (Declaration No. 7). Moreover, under the influence of the Polish delegation the intergovernmental conference adopted Protocol No. 9, stating that a change or a revocation of the Ioannina mechanism by the CEU requires a unanimous approval of the EC (Protocol No. 9).

On the initiative of the Czech Republic supported by Germany and Poland, a mechanism was established to allow for competences to be delegated back from the EU to the Member States (Declaration No. 18). On the proposal of the Netherlands, which received support from, i.a, the delegations of Germany, the Czech Republic and Romania, the 'orange card' procedure was incorporated to the early warning system, which was to strengthen the role of the EP and the CEU in monitoring the respect of the subsidiarity principle in a situation where national parliaments decided by a majority of over 50% votes that a proposal for a legislative act of the European Commission reviewed under the ordinary legislative procedure is not compliant with the subsidiarity principle (Article 7(3) Protocol No. 2). On the initiative of Germany and the Netherlands, the intergovernmental conference also adopted Protocol No. 26 annexed to TEU and TFEU, which indicated, i.a. the fundamental role and the broad powers of national, regional and local authorities with regard to providing, commissioning and organising business services of general economic interest in a way most aligned with the needs of consumers. Moreover, the Protocol upheld the exclusive competence of the Member States in the area of providing, commissioning and organising non-economic services of general interest (Article 1–2 of Protocol No. 26).

Furthermore, with the support of the German delegation, the conference consolidated the referral procedure specified under Article 48 TFEU concerning the adoption of legislative acts on coordinating social security systems by qualified majority. This was possible due to a reservation that in the case where no consensus is reached in this matter in the EC within four months, a given proposed act would be deemed not adopted regardless whether the EC asks the European Commission to draw up a new legislative proposal (as stipulated by the Constitutional Treaty) or if no action is taken in this regard. The coordination of social security systems was to secure for employed and self-employed

migrant workers resident in the territories of the Member States aggregation of all periods for the purpose of acquiring the right to benefits and payment of benefits (in accordance with the right to freedom of movement). However, it was subject to the condition that the mentioned legislative act specifying the procedure for calculating the amount of benefits and payment of benefits does not affect the fundamental principles or the financial balance of the social security system of the host Member State (Article 48 TFEU).

Moreover, the conference adopted on the initiative of Germany, Spain and Luxembourg Declaration No. 52 on the symbols of the European Union. This was related to the revoked provisions of the Constitutional Treaty under which the said symbols acquired treaty status. The declaration, ultimately signed by Germany, Spain, Luxembourg and twelve other Member States, stated that the flag of the EU, featuring a circle of twelve gold stars on a blue background, the anthem based on *Ode to Joy* from Ludwig van Beethoven's 9th Symphony, the motto "United in diversity", the euro serving as the EU currency and Europe Day held on 9 May – all remain considered symbols of the sense of community of the EU citizens and their relation with the organisation (Węc 2016: 102–103, 107).

The German delegation failed to force through its stance on two issues it considered essential. When the Portuguese Presidency, which followed the opinion of the legal experts of Working Group, decided to include the ECB to the Union's institutional framework, governments of Germany, Spain, the Netherlands, Denmark and Luxembourg together with the President of the ECB opposed the above solution for fear of politicisation of the said institution. Nevertheless, the Portuguese Presidency supported by the European Commission and governments of several other Member States managed to force through this decision (Article 13 TEU). It was argued that the principle of institutional balance in the EU, which implied that each institution should act in accordance with its competences conferred on it by the treaties under specified conditions and purposes, provides a sufficient safeguard against politicisation of the ECB (Węc 2016: 97–98). Likewise, efforts taken by the delegations of France and the Netherlands with the support of Germany and Austria to complement Article 49 TEU with clear accession criteria, particularly, to grant treaty status to the Copenhagen criteria, proved unsuccessful.

3.2 Ratification Process of the Treaty of Lisbon and the Judgement of the Federal Constitutional Court in Germany

As in the case with the Constitutional Treaty, the Federal Republic of Germany was among the first Member States to initiate the ratification procedure for the Treaty

of Lisbon. At the ratification debate held in the Bundestag on 24 April 2008, the representatives of the government and the parliamentary opposition in almost full agreement stressed the historical significance of the treaty for the system reform of the EU. In her speech, Chancellor Merkel pointed to eight issues she considered the most essential for the success of the said reform. These included: first, to extend the procedure for decision-making in the CEU by a qualified majority to improve the decision-making system and the effectiveness of the EU comprising twenty-seven Member States; second, to introduce double majority voting to the decision-making in the CEU and the EC. However, this time Chancellor Merkel did not emphasise this change as a condition for improving the political importance of Germany in the decision-making system, as was the case on 12 May 2005 at the ratification debate on the Constitutional Treaty but referred to the principle of democracy instead, which provided that each citizen of the European Union should have the very same influence on decisions taken; third, to establish a strict distribution of competences between the EU and the Member State, and – in contrast to the Constitutional Treaty – a new mechanism allowing for competences to be conferred back from the EU on the Member States; fourth, to enhance cooperation in the area of freedom, security and justice, which was highly important given new challenges to be faced by the European Union (i.a. combating terrorism and organised cross-border crime); fifth, to introduce regulations allowing for a common fight against climate change and solidary cooperation in the area of energy policy; sixth, to render the CFR legally binding, which (according to Merkel) provided grounds for shaping "the European economic and social model" in the future, which was to reflect the German model of social market economy; seventh, to consolidate the position of national parliaments in the EU legislative process by establishing an early warning mechanism (equipped with the 'yellow card' and the 'orange card' procedures) (*ex ante* control), and granting each national parliament the right to bring action before the Court of Justice of the EU to review the legality of formerly adopted legislative acts suspected to be in breach of the subsidiary principle (*ex post* control); eighth, to establish two new offices, namely, the EC President and the High Representative of the Union for Foreign Affairs and Security Policy with the primary objective being to strengthen the capacity of the EU to act on the international arena. In Markel's opinion, all the mentioned systemic changes should contribute to an internal and external strengthening of the European Union, which was beneficial also for Germany, and which ought to be the principle of an effective European policy pursued by every German government (DB Plenarprotokoll 16/157: 16451–16454).

The revolutionary impact of the Treaty of Lisbon was also indicated by representatives of all parliamentary factions represented in the Bundestag (except

for the Left). According to the leader of Chairman of the FDP Guido Westerwelle, the said treaty was, above all, an outcome of the European enlargement in the years 2004–2007. Though he considered the Constitutional Treaty adopted by referendum a far better solution to the system reform of the EU, the Treaty of Lisbon ensured the "essential capacity to act" for the EU 27, consolidating its position in international politics and constituted a reasonable answer to the challenge of globalisation. The last of the listed opinions was shared by Deputy Chairman of the Alliance 90/The Greens group Jürgen Trittin, who claimed that the European Union was the best answer at the time for the major challenges of globalisation, whereas the "substance" (*Kern*) of the Treaty of Lisbon are system reforms of the EU that foster "democratisation" of the Union and improve its "capacity to act" on the international arena. In turn, Chairman of the SPD Kurt Beck considered the Treaty of Lisbon a culmination of the unification of Europe that was taking place from the end of World War II. According to Beck, the major systemic changes of the EU stipulated by the treaty were the provisions that were to improve the functioning of the EU institutions and consolidate the position of national parliaments in the EU legislative process. Opinions on the decisive role of the Treaty of Lisbon for the European integration were also shared by Prime Minister of Bavaria Günther Beckstein (CSU). In his view, the most noteworthy provisions of the treaty were primarily those regulations that strengthened the axiology of the European Union, consolidated the position of national parliaments in the EU legislative process, strengthened common foreign and security policy, as well as policies in the area of freedom, security and justice. However, during parliamentary debates of 2003–2005, Beckstein, as was the case with the CSU members, continued to express his serious doubts as to the distribution of competences between the EU and the Member States provided by the treaty. In his opinion, the above distribution gave the European Union in many areas excessive powers that might have been much better exercised by the Member States or even federal states or regions. The said areas involved, in his view, i.a. sports, tourism, services of general economic interest, and even asylum and immigration policy (DB Plenarprotokoll 16/157: 16454–16459, 16462–16469).

Still, the most critical opinions on the Treaty of Lisbon, as during the debate on the Constitutional Treaty of 2005, were expressed by representatives of the Left. Primarily, they demanded that the treaty be ratified by a EU-wide referendum. At the very beginning of his speech, Lothar Bisky stressed that the entire Left will vote against the treaty. He claimed that the new international agreement nevertheless involved some positive systemic changes compared to the Treaty of Nice. The said changes were, i.a. provisions that extended the legislative powers of

the EP or consolidated the role of national parliaments in the EU legislative process. However, it does contain numerous provisions that might pose risk in the future, such as those establishing permanent structural cooperation, which could be the first step towards a "European military nucleus" (*militärisches Kerneuropa*) or prove harmful to the EU citizens, such as provisions on competition and price stability with regard to the EMU (DB Plenarprotokoll 16/157: 16460–16463).

The debate on the Treaty of Lisbon was wound up with a vote on the Ratification Act. On 24 April 2008, the Bundestag ratified the Treaty of Lisbon by a qualified majority of two-thirds of the votes. As many as 515 deputies of the SPD, the FDP, Alliance 90/The Greens and the CDU/CSU voted in favour of the Ratification Act, 58 deputies of the Left, Non-attached members and some of the CDU/CSU voted against, while 1 deputy of the Alliance 90/The Greens abstained (DB Plenarprotokoll 16/157: 16483–16485). On 23 May 2008, the act was approved by the Bundesrat by a majority of two-thirds of the votes. As in the case of the Constitutional Treaty, 15 federal states voted in favour of the Ratification Act. A representative of Berlin was the only one who abstained due to a strong opposition of the Left, a coalition partner of the SPD in the said federal state. Actions against the Treaty of Lisbon were brought before the Federal Constitutional Court. In consequence, on 30 June 2008, President Horst Köhler suspended the signing of the instruments of ratification pending a decision from the said Court.

On 30 June 2009, the Federal Constitutional Court delivered a judgement in which it declared the Treaty of Lisbon compatible with the Basic Law of the Federal Republic of Germany of 23 May 1949, demanding at the same time that the powers of the Bundestag and the Bundesrat be strengthened within the European Union. With reference to its judgement of 12 October 1993 on the Treaty of Maastricht, the Federal Constitutional Court held that having received a legal personality, the European Union remains an "association of states" (*Staatenverbund*), and not a federation. The term "association of states" stands for a "close and permanent group of sovereign states" that exercises public authority under treaties and whose system is subject to the Member States only. The "nations" resident in the territory of the Member States remain entities of democratic legitimacy of the European Union (sentence 1) (BVerfG 30.06.2009: 1).[4] According to the Federal Constitutional Court, the Treaty of Lisbon did in fact begin a new phase of the

4 In the judgement of 12 October 1993, the Federal Constitutional Court stated that the Treaty of Maastricht established an "association of states" (*Staatenverbund*) that was an implementation of an increasingly more concise Union – of people of Europe – organised as states […], and not a state based on a European nation (*europäisches Staatsvolk*)" (BVerfG 12.10.1993: 155).

European integration, yet Germany would nevertheless remain a sovereign country governed by international law after it enters into force (paragraph 298). Whereas the possible transformation of the European Union into a federation would require the Union to be directly legitimised by the German people and to adopt a new constitution with accordance to Article 146 of the Basic Law (paragraph 113).

Moreover, the Federal Constitutional Court redefined its own role as a guardian of "constitutional identity", stating that constitutional courts of the EU Member States cannot be "deprived of responsibility to ensure constitutional boundaries for the integrative authority and the non-transferable constitutional identity" (paragraph 336). In consequence, it declared that the principle of the primacy of EU law refers solely to the primacy of application of the said law over German law and shall not imply an obligation to revoke the latter if it would put at risk the effectiveness of EU law. It also stated that the constitutional court of a Member State can identify a given EU legislative act as non-compliant with its own constitution, saving itself "the right to the last word" but hence agrees to "the necessity to bear international consequences" (paragraph 340). This is due to the fact that German law gives rise to the primacy of EU law, whereas the competence of the Federal Constitutional Court arises from Germany's sovereignty as a EU Member State (paragraph 339).

Furthermore, the Federal Constitutional Court held that the EU institutions cannot change the treaty base of the EU independently neither based on two simplified treaty revision procedures (Article 48(6–7) TEU) nor under specific *passerelle* clauses nor under the flexibility clause (Article 352 TFEU), nor based on appeal procedures allowing for suspending the ordinary legislative procedure and to submit a given proposal for a legislative act to the EC at the request of a Member State that could be outvoted where vital national interests of the said state could be affected. Therefore, it pointed to the need to significantly strengthen the powers of the Bundestag and the Bundesrat in these areas. It stated that a failure to satisfy requirements provided for by German law on cross-participation of parliamentary chambers in the shaping of Germany's position in the EC and the CEU in the conferral of 'sovereign powers' would constitute a violation of the 'constitutional identity' of the state, since the responsibility of German constitutional authorities for compatibility of the integration process with constitutional requirements (*Integrationsverantwortung*) is not exhausted in a single treaty ratification agreement but also pertains to its implementation. Hence, this also concerns constitutional conditions for the conferral of sovereign rights of Germany on the European Union or possible amendments to the Basic Law, which requires statutory authority compliant with provisions of Article 23(1) of the Basic Law (paragraph 236).

After the judgement was delivered by the Federal Constitutional Court, the CDU/CSU/SPD government coalition parties agreed on a package of the so-called accompanying legislation (*Begleitungsgesetze*), which comprised four acts of law, namely, the Act extending and Strengthening the Rights of the Bundestag and the Bundesrat in European Union Matters; the Act amending the Basic Law for the Ratification of the Treaty of Lisbon; the Act amending the Act on Cooperation between the Federal Government and the German Bundestag in Matters concerning the European Union, as well as the Act amending the Act on Cooperation between the Federation and Federal States in Matters concerning the European Union. The said acts were adopted by the Bundestag and the Bundesrat on 8 and 18 September 2009, respectively. As a result, on 23 September 2009, President Köhler signed the instruments of ratification. Hence, the treaty ratification process in Germany was concluded.

It is stressed in the German doctrine that the judgement of the Constitutional Court of 30 June 2009 is one of the most controversial court verdicts in the history of European constitutional law. Some representatives of the doctrine note that as a result of this judgement, the definitions and acceptable limits of action of the EU institutions, particularly the Court of Justice of the European Union, were redefined. Others even speak of a "sensational" redefinition of the own role of the Federal Constitutional Court in Germany as a guardian of "constitutional identity" and expect its case-law to collide with the case-law of the Court of Justice of the European Union as a possible implication in the future, though it would force the latter to observe the principles of conferral and subsidiarity more effectively than before. Others again even claim that the Federal Constitutional Court opposed in its judgement the idea of establishing a European federal state as the target model for the European integration, as it imposed restriction on Germany as regards the conferral of sovereign rights on the European Union (Scholz 2009: 7–8; Tomuschat 2009: 1259–1262; Niedobitek 2009: 1267–1275; Müller-Graff 2009: 331–360; Ruffert 2009: 1197–1208).

Both in the final phase of the Presidency and during the meeting of the intergovernmental conference in the second half of 2007, the German government succeeded in implementing all of its major postulates on the system reform of the EU specified in the Bundestag resolution of 14 June 2007, later confirmed in the Treaty of Lisbon signed on 13 December 2007. There were at least three reasons for the interest of the German government in the system reform of the EU. First, the reform actually allowed for an internal and external consolidation of the European Union, thus providing grounds for strengthening the EU on the international arena and to enhance the very integration process. Second, the Treaty of Lisbon also consolidated the position of Germany in the European Union,

particularly in the decision-making in the CEU and the EC, which, together with the scope of qualified majority voting radically extended to as many as 49 articles, provided for a change in the balance of powers within this international organisation. The last reason pertained to the fact that due to its economic and demographic potential, and thus its political significance (particularly the capacity to establish coalitions with other Member States), Germany was (and still is) much more likely to reconcile its national interest with the need for surrendering certain attributes of sovereignty. This is because the benefits arising from Germany's presence and action in transnational institutions at times overweigh the benefits of traditional diplomatic activities. Hence, the system reform of the EU carried out under the Treaty of Lisbon has formed a potential that serves to not only consolidate the role of the EU both internally and externally but also to further strengthen Germany's position within this international organisation. Instead of making the relationship between Germany and the Union closer, veto restrictions in the Member States and the radical enhancement of the community method in the EU provided by the treaty formed possible grounds for their domination in the EU.

Chapter IV. Germany's Position on the EU System Reform and the Economic and Monetary Union (2011–2016)

The global financial crisis not only had a substantial impact on the outbreak of the debt crisis in some Member States of the euro area at the turn of 2011 but also exposed both institutional and systemic weaknesses of the entire eurozone (Commission 15.04.2014, MEMO 14/295: 1).[1] The initial attempts to reform the system taken in 2011–2012 concerned in principle the strengthening of economic and budgetary management in the Economic and Monetary Union. These involved, i.a. introduction of surveillance mechanisms and procedures, adopting several new legislative acts and signing international agreements. The new regulations were: the Euro-Plus Pact (2011); the European Semester (2011); the Six-pack, that is, a set of six legislative acts improving fiscal discipline and macroeconomic surveillance in the EMU with the aim to strengthen the Stability and Growth Pact (SGP) and to establish new mechanisms eliminating disturbances in the macroeconomic balance (2011); the Two-pack, that is, a set of two legislative acts providing for the establishment of a common budgetary timeframe for euro area Member States (2011); the Fiscal Stability Treaty as an intergovernmental agreement specifying provisions for enhancing the budgetary discipline, economic policy coordination and management in euro area Member States (2012), as well as a treaty establishing the European Stability Mechanism (ESM) as an institution providing financial support to euro area Member States experiencing or threatened with severe economic difficulties (2012). Furthermore, on 1 January 2011, the European System of Financial Supervisors (ESFS) was established.[2] Nevertheless, all the above listed initiatives failed to bring the expected results. In 2012, the debt crisis was still present and the risk that it might spread from one Member State in

1 For more information on the causes, the course and the implications of the eurozone debt crisis, see: Frankel 2015: 109–120; Beck, Peydró 2015: 63–71; De Grauwe 2015: 99–108; Kunstein, Wessels 2011: 308–322.

2 ESM became fully operational on 8 October 2012 as a permanent crisis mechanism of the euro area Member States. In 2013, it replaced two other entities providing temporary (in the first phase of the crisis) financial assistance to countries affected by the debt crisis, i.e. the European Financial Stabilisation Mechanism (EFSM) and the European Financial Stability Facility (EFSF) (Węc 2012a: 132–151).

the euro area to others remained current. In these circumstances, an idea of conducting a comprehensive system reform of the euro area was born, which was launched in late 2012.

1 First Phase of the Reform (2012–2015)

1.1 Proposed Amendments to Secondary Legislation

A framework for the first phase of the system reform of the euro area was specified in documents of the EU institutions, particularly those of the EC, the European Commission and the ECB. In June, October and December of that year, President of the EC Herman Van Rompuy submitted three reports on the reform elaborated in cooperation with President of the European Commission José Manuel Barroso, President of the Eurogroup Jean-Claude Juncker and President of the ECB Mario Draghi (EC. Report 26.06.2012: 3; EC. Interim Report 12.10.2012: 1–8; EC. Final Report 5.12.2012: 1–18). The ECB and the European Commission also issued their own agendas in this regard on 6 September 2012 and 28 November 2012, respectively. The ECB envisaged, i.a a possibility for the said institution to make unlimited purchases of treasury bonds of the euro area Member States (without any limited timeframe or scale of operation) (Węc 2014c: 23). Whereas the agenda of the European Commission involved a three-stage timeframe for systemic changes in the EMU and the euro area that could be partially implemented under the treaties in force and partially after the treaties were revised, resulting in new competences being granted to the European Union (Commission. Press release, IP/12/1272: 1–3).

On 13–14 December 2012, the EC adopted the third Van Rompuy report as the basis for further proceedings aiming to conclude the EMU formation process. The conclusions adopted at the time specified the key objectives and the scope of proposed systemic changes in the euro area. The said changes were intended as a means for overcoming the debt crisis and involved a three-stage timetable for concluding the EMU formation process by establishing three new structures in the said Union: a Financial Union, a Fiscal Union and an Economic Union (EC. Conclusions, 13–14.12.2012: 1–5). Since such a change would substantially restrict sovereignty of the euro area Member States, the EC President proposed to establish an unspecified legitimation and clearance mechanism instead. This enigmatic concept concealed an intention of extending the competences of the EP and national parliaments in the eurozone with accordance to Article 13 of the Fiscal Stability Treaty and Protocol No. 1 on the role of national parliaments and the European Union annexed to TEU and TFEU, and the TEAEC.

The choice of Van Rompuy`s report and the agenda of the European Commission that was based upon it as the method to be employed in the struggle against the eurozone debt crisis implied that the more radical solution presented below would be abandoned. The said solution was proposed by the German government and involved a transformation of the European Union into a Political Union. Though the proposals made by the federal government led to a debate held in 2011–2012 in Germany and some Member States on the system reform of the entire EU, they gave rise to much controversy at the time and thus were eventually abandoned (Węc 2014c: 7–18).

The system reform of the EMU proposed by Van Rompuy was to be carried out in three stages. The first one was planned for the years 2012–2013, the second for 2013–2014, while the third stage was to begin after 2014 and serve as a culmination of the transformation process. The first step towards the establishment of the Financial Union was to form the Banking Union (BU), which would be based on three pillars, namely, a Single Supervisory Mechanism (SSM), a Single Resolution Mechanism (SRM) and a Deposit Guarantee Scheme (DGS).[3] The Fiscal Union was intended to be established in several stages. First, it required the implementation of the Six-pack, the Fiscal Stability Treaty and the Two-pack to come to an end, which aimed to coordinate *ex ante* annual budgets of the euro area Member States. This was to be followed by an agreement on the ceiling of annual budgetary balance and public debt for the euro area Member States, which would create the right conditions for the issuance of common debt without resorting to communitarisation of a sovereign debt. The issuance of public debt beyond the jointly set ceiling would require justification and former approval of the EU institutions. Whereas in the long term, a tax authority with "clearly defined responsibilities" and a separate eurozone budget would have to be established, the latter enigmatically referred to by Van Rompuy as "fiscal capacity". The separate eurozone budget was intended to safeguard the Member States against the implications of the so-called asymmetric shocks. The Economic Union was to complement the Financial Union and the Fiscal Union. The process of establishing the single market had to be completed in the short term. Structural reforms in the Member States, understood as an instrument for

3 The harmonisation of national deposit guarantee schemes aimed to "ensure that sufficiently robust national deposit insurance systems are set up in each Member State, thereby limiting the spill-over effects associated with deposit flight between institutions and across countries, and ensuring an appropriate degree of depositor protection in the European Union" (EC. Final Report, 5.12.2012: 8).

improving the competitiveness of their economies, would have to be coordinated more effectively by means of the European Semester and the Euro-Plus Pact. In this regard, a mechanism for *ex ante* coordination and implementation of structural policies should be established in accordance with Article 11 of the Fiscal Stability Treaty. Within the said mechanism, the interested euro area Member States would conclude reform contracts with the EU institutions under which they would undertake to enhance the competitiveness of their economies, to advance economic growth and to reduce unemployment. In return, they would receive financial support from the EU budget (EC. Final Report, 5.12.2012: 8–16).

1.2 Implementation of Amendments to Secondary Legislation and outside EU Law

First of all, the implementation of the provisions specified in the Van Rompuy report covered efforts to introduce the BU as a constituent part of the future Financial Union. At the EC meeting held in March and June 2013 it was agreed that conclusion of the legislative process regarding the BU should be the priority in further work, as it was essential for ensuring the financial stability of the euro area Member States (EC. Conclusions, 14–15.03.2013: 9 and 27–28.06.2013: 9–10).

Nevertheless, the said process suffered from a delay. The SSM, i.e. the first pillar of the BU, was created on 4 November 2014, and not on 1 January of that year, as originally planned. The SRM was founded on 1 January 2015, whereas the Single Resolution Fund (SRF) became operational on 1 January 2016. Hence, the second pillar of the BU was formed. As for the third pillar of the BU, namely, DGS it was not established within the agreed period. Instead, provisions that legitimised the mentioned systemic changes in the form of extended competences of the ECB, the EP, the European Commission, the Court of Auditors, the CEU and national parliaments in the euro area were adopted (Węc 2014b: 37–42; Koleśnik 2013: 101–103; Jurkowska-Zeidler 2015: 189–192).

The BU is expected to oversee credit institutions of the eurozone, including banks, yet it should also guarantee that the said institutions can be dissolved in a controlled fashion with no curtailment of the financial system of individual states and without costs that used to be incurred by taxpayers.[4] The SSM comprises the ECB and competent national supervisory authorities. The ECB has direct oversight of 125 largest euro area banks, which accounts for about

4 The legal grounds of the Banking Union are laid in the provisions of primary and secondary law of the European Union. As regards secondary law, the said provisions involve Article 114(1–10), Article 127(6) and Article 53(1) TFEU.

82% of the euro area banking assets (ECB. JMN: 1). In practice, though, the said oversight is executed by Joint Supervisory Teams (JST) of the ECB employees and national supervisory authorities. The remaining 3,500 banks are subject to national supervisory authorities, although the ECB is still ultimately responsible for them. Its powers in this regard involve the granting and the withdrawal of the authorisation to conduct business, and assessment of acquisition and disposal of qualifying holdings of the said banks (CEU. Regulation, OJ L, 2013, 287: 63–89).

The aim of the SRM, also called the insolvency mechanism, is to ensure that the future outcome of potential bankruptcy of euro area credit institutions, including banks, is limited to minimum costs incurred by taxpayers. The implementation of uniform insolvency rules and proceedings is ensured by the Single Resolution Board (SRB) together with the CEU, the European Commission and national resolution authorities. The SRM can be applied only in countries participating in the SSM, whereas in the other EU Member States actions are to be taken based on national resolution authorities (EP/CEU. Regulation 806/2014 OJ L, 2014, 225: 1–90). The SRF is to be built gradually over an eight-year period, starting from 1 January 2016. During the transition period of eight years from the entry into force of the resolution, a dual system composed of national sub-funds and the common part of the SRF will be binding. In accordance with the intergovernmental agreement of 21 May 2014, contributions to the SRF are collected from banks by national resolution authorities and then transferred to the said fund. Initially, funds will be collected in envelopes (the so-called pools) assigned to individual states to be used solely for bailing out banks seated in a given state. However, during the eight-year period, the said funds will be communitarised and then allowed to be allocated for the restructuring of any bank in the eurozone. Individual banks' contributions to the SRF will be raised proportionately to their liabilities and risk profiles (Agreement, 21.05.2014: 22–27). Upon the end of the transition period, the SFR ought to have at its disposal 1% (as a minimum) of the covered deposits of all the credit institutions seated in states that are component members of the BU. The primary responsibility for error caused by banks would lie with their shareholders and creditors, whereas the secondary responsibility would rest with holders of deposits of over 100,000 euros, and lastly with the SRF (in the case of insufficient funds) (EP/CEU. Regulation, OJ L, 2014, 225: 39–40, 77).[5]

5 The major issue to be addressed by the Banking Union in the event of an outbreak of a new financial crisis is an insufficiently small pool of available financial resources. According to some estimates, the eurozone debt crisis of 2010–2013 consumed about 1.6 trillion euros, while financial institutions of states affected by the crisis might have

The essence of the third pillar of the BU *in statu nascendi* should be to harmonise national deposit guarantee schemes meeting conditions specified under Article 4(1) of the Deposit Guarantee Scheme Directive (DGSD) of the EP and the CEU of 16 April 2014. Consequently, the responsibility for deposit guarantee in the euro area would remain within the competences of national authorities, though the supervision over and the decision regarding a bank failure ought to remain with the ECB. The key task of the third pillar should be to protect depositors against the consequences of the insolvency of credit institutions. The component states of the BU should guarantee deposits of up to 100,000 euros for the said depositors. Though banks facing the risk of bankruptcy would be forced to protect their depositaries, they would also have the right to use part of the resources covered by the mentioned guarantees to finance activities allowing them to avoid bankruptcy (cf. Chart I) (EP/CEU. Directive OJ L, 2014, 173: 150–163). Therefore, it is rightly noted in the doctrine that this part of the DGSD provisions constitutes "a strong impulse encouraging banks to undertake greater investment risks" (Zielińska 2013: 35).

In the course of the implementation of the BU carried out so far, attempts at forming a Common Backstop (CB) proved unsuccessful, as it would require each Member State of the BU to sign a loan facility agreement for the SRF. By 11 May 2016, the said agreement was signed by only 8 of the 19 states that were compulsory participants of the SSM and the SRM (PSE 2016, 5: 13). Moreover, several of the EU Member States still had not implemented at the time in their national law two legislative acts significant for the BU, namely, the DGSD and the Bank Recovery and Resolution Directive (BRRD) of 15 May 2014 (EP/CEU. Directive OJ L, 2014, 173, 190–348).[6] By 11 May 2016, three of the 28 EU Member States were still refraining from doing so (PSE 2016, 5: 13). The absence of the third

even up to about 1 trillion euros of difficult to recover debts recorded in the books. For that very reason, 500 billion euros at the disposal of the ESM and 55 billion euros at the disposal of the SRF is not much. Some view the amount of 55 billion euros as sufficient only for saving two medium-sized banks. Nevertheless, these arguments are weakened by the fact that the SRF would be the last source of bank restructuring expenses. Importantly, decisions taken by the SRM might impinge on countries outside the euro area. This pertains, among others, to a situation where a bank's home state and a country outside the euro area where a branch of a given bank is located cannot come to an agreement on a group bank restructuring and resolution, whereby the dispute would be settled by the EBA (Węc 2014b: 42–43).

6 Both directives ought to be implemented in each EU Member State by 31 December 2014 and by 3 July 2015, respectively, whereas the bail-in provisions under the BRRD were to be implemented by 31 December 2015 (PSE, 2016, 2: 10–11).

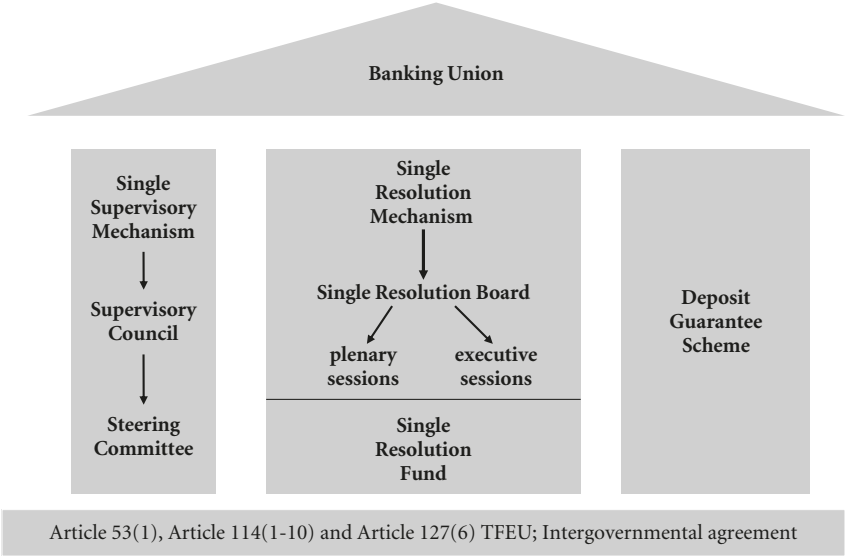


Chart I: Organisational structure of the Banking Union. Source: own study.

pillar of the BU prevents the Member States from attaining the predetermined benefits of the BU (Schoenmaker 2012: 97–103; Waliszewski 2015, 2: 100–101). Moreover, work on other systemic changes was also behind the schedule adopted by the EC in December 2012, since the creation of the Fiscal Union was still a work in progress. The Six-pack, the Two-pack and the Fiscal Stability Treaty entered into force on December 2011, May 2013 and January 2013, respectively. However, due to the opposition of some Member States, no efforts towards establishing the common eurozone budget were made and no decision was even taken in this regard, which was the most controversial objective of the entire reform. The efforts to create a coordination and convergence mechanism, and the implementation of structural policies of the euro area Member States based on reform agreements proved unsuccessful, likewise.

2 Second Phase of the Reform (from 1 July 2015)

2.1 Proposed Amendments to Secondary Legislation

Despite substantial progress in the actual establishment of the EMU, particularly with regard to the implementation of the BU, three of the four objectives of the

system reform of the euro area were still not attained by mid-2015. Therefore, newly appointed President of the European Commission Jean-Claude Juncker presented two highly significant documents the execution of which was intended to fast-track the implementation of the system reform of the euro area. On 12 February 2015, he submitted an analytical note *Preparing for Next Steps on Better Economic Governance in the Euro Area*, whereas on 22 June of that year he presented a report titled *Completing Europe's Economic and Monetary Union*. Both documents were devised in cooperation with newly appointed Euro summit President Donald Tusk, newly appointed President of the Eurogroup Jeroen Dijsselbloem, President of the ECB Mario Draghi and EP President Martin Schulz.

Though the priority in the timeframe for the system reform of the eurozone so far was to establish the BU, in the Five Presidents' Report the main focus was put on the mechanism for *ex ante* coordination of structural policies of the euro area Member States. Consequently, the authors of the report recommended that four objectives are pursued. First, to establish a genuine Economic Union through, i.a. creating a system of national competition authorities in the euro area, strengthening the procedure for preventing macroeconomic imbalances, improving the European Semester and increasing the focus on employment and social issues within the said Semester, as well as adopting new legislation that would render the convergence process legally binding. Second, to create the Financial Union through concluding the implementation of the BU and accelerating work on the Capital Markets Union. Third, to form the Fiscal Union involving, i.a. the European Fiscal Board and the fiscal stabilisation function, i.e. a separate budget of the euro area allowing for a better resilience to large macroeconomic shocks. Fourthly, to initiate progress towards a Political Union aiming to improve competences of the EP and national parliaments in the euro area; to strengthen the representation of the euro area in international financial institutions; to include intergovernmental agreements on the euro area to EU primary law; to create a body modelled on a treasury responsible for common decision-making in fiscal policy; to consolidate the position of Eurogroup in the institutional system of the EMU by establishing the permanent President of the Eurogroup. The signatories of the report unanimously stressed, "All four Unions depend on each other. Therefore, they must develop in parallel and all euro area Member States must participate in all Unions" (Commission. Five Presidents' Report, 22.06.2015, IP/15/5240: 2–5).

The Five Presidents' Report involved an agenda for concluding the EMU implementation process in three phases. The first phase was to cover the period from 1 July 2015 to 30 June 2017. Over those two years, the Financial Union was to be ultimately founded, the employed existing instruments and treaties

were to be entailed "boosting competitiveness and structural convergence" (the Economic Union), a responsible budget policy at both national and eurozone level was to be pursued (the Fiscal Union) and the democratic legitimacy of the implemented reforms was to be strengthened (the Political Union). The second and the third phases involved more substantial reforms to be carried out by 2025. The specified timeframe was to involve, i.a. conferring a binding legal force on the convergence process (the Economic Union), establishing a separate euro area budget (the Fiscal Union), including intergovernmental agreements to primary law, founding a body modelled on a euro area treasury, extending the competences of the EP and national parliaments, and consolidating the position of the Eurogroup (the Political Union). The authors of the report did not specify the exact date when the second phase of the system reform was to end and the third phase was to begin,[7] they did declare though that in the spring of 2017, the European Commission would present a White Paper assessing the progress made so far, a detailed timeframe for the transition from the first to the second phase and guidelines for further legal actions to be essentially implemented in the second phase (Commission. Five Presidents' Report, 22.06.2015, IP/15/5240: 5).

Importantly, as much as the Van Rompuy's report provided a clear direction to the system reform of the euro area and the entire EMU, the report of 22 June 2015 presented highly specific objectives, instruments, methods and a detailed timeframe for the implementation of the reform. Furthermore, the Van Rompuy's report thoroughly disregarded the Germany's proposal to solve the eurozone debt crisis by means of transforming the European Union into a Political Union, considering it ineffective. Whereas the Five Presidents' Report explicitly mentioned not only the possibility but also the necessity to lay the foundations of the Political Union as part of the actual EMU implementation process, which at least to some extent coincided with the German postulates of 2011–2012 (cf. Chart II).

2.2 Implementation of Amendments to Secondary Legislation

On 25–26 June 2015, the EC analysed the Five Presidents' Report and requested the CEU to "rapidly examine" its provisions (EC. Conclusions,

7 Apparently, as a result of a precautionary approach adopted by officials due to the non-observance of previous timeframe for the reform of the euro area, the analysed document provides only a rough picture of the second phase in the medium term and in the long term, while the third phase is depicted as the concluding phase that ought to end in 2025 at the latest (Commission 22.06.2015, IP/15/5240: 5–23).

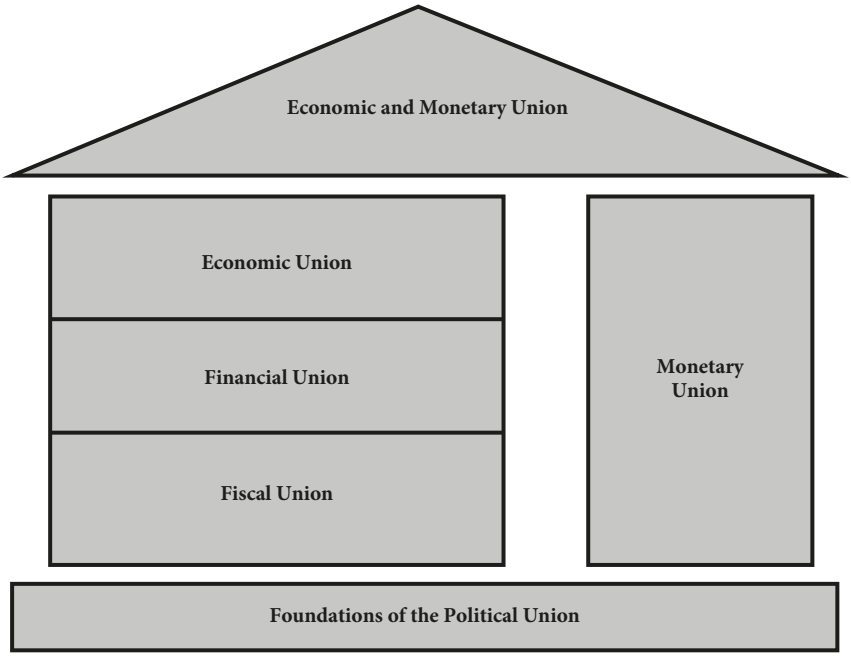


Chart II: The structure of the Economic and Monetary Union as set out in the Five Presidents' Report of 22 June 2015. Source: own study.

25–26.06.2015: 9). On 15 October of that year, the EC ultimately approved the said report. Two months later, in conclusions adopted on 17–18 December 2015 it called on the CEU to consider in short time the proposals of the European Commission issued with account to the submitted report. It also noticed that three matters required to be swiftly addressed: the improvement of the effectiveness of economic and budget governance with the aim to increase competitiveness, convergence and stability; the strengthening of the external representation of the euro area, which would provide a better reflection of its significance in the global economy; and the conclusion of the BU implementation process to improve the financial stability of the eurozone. Moreover, the EC asked the CEU to develop and submit a reform development report by June 2016. Moreover, it declared that it would revert to the issue of the reform "by the end of 2017" (at the latest) (EC. Conclusions, 15.10.2015: 6; 17–18.12.2015: 5). In line with its declaration, on 28 June 2016 the EC familiarised itself with the state of the system reform of the euro area implemented so far, as presented by the CEU.

It welcomed the progress in the conclusion of the EMU implementation process, which included the BU, and also called for these efforts to be continued. It also approved recommendations of the CEU regarding the establishment of national competitiveness councils in the euro area, which are discussed below (EC. Conclusions, 28.06.2016: 6).

Already on 28 January 2015, the European Commission commenced work on the Capital Markets Union as the second constituent element (apart from the BU) of the Financial Union. This new structure could cover all the EU Member States. Its activities were to contribute to, i.a. reduced finance costs, particularly for small and medium-sized companies, and improved attractiveness of the European Union as an investment area. Over ten weeks after the issuance of the Five Presidents' Report, the European Commission issued three communications. The first one concerned priority actions for the establishment of the Capital Markets Union by 2019 (Commission. Communication COM (2015) 468: 1–36). The second communication pertained to the establishment of a unified representation of the euro area Member States in international fora. For the time being, it was nevertheless concerned with creating such a representation mainly in the International Monetary Fund (IMF) as the key international organisation for global economic governance (Commission. Communication COM (2015) 602: 1–12). The third communication specified the scope of actions in the first phase of the reform and the scope of preparatory work for the second period. The European Commission specified five tasks to be implemented in the first period of the reform (by 30 June 2017): first, to reorganise the European Semester by means of, i.a. dividing the Semester into two phases and strengthening the competences of the EP and national parliaments (the Economic Union) within the Semester; second, to establish national competitiveness councils (the Economic Union); third, to create the European Fiscal Board (the Fiscal Union); fourth, to strengthen the external representation of the eurozone (legitimation); fifth, to take further efforts to establish the Financial Union, particularly to found the European Deposit Guarantee Scheme within the BU (the Financial Union). When referring to the latter, the European Commission stressed that it intended to use all powers under the treaties to ensure that the BRRD and DGSD are fully implemented as soon as possible by the EU Member States. It called on the component members of the BU to ratify the intergovernmental agreement on the transfer and the communitarisation of contributions for the SRF by 30 November 2015, and also encouraged them to agree on the content of two significant agreements, one of which pertained to the set-up of a bridge financing mechanism for the SRF, and the other to the founding of the Common Backstop related to the SRF. As part of the preparatory efforts for the second phase of the reform, the European Commission ordered

proceedings aiming to ensure that the system of national competition authorities and the European Fiscal Board are fully operational by mid-2016 (Commission. Communication COM (2015) 600: 2–18).

On 21 October 2015, the European Commission adopted a decision establishing the European Fiscal Board as an independent advisory body of the European Commission pursuing its role under the procedure of multilateral surveillance in the euro area and enhanced cooperation with national fiscal councils (Commission. Decision, OJ L, 2015, 282: 37–40). On the very same day, the Commission also issued two new legislative proposals. The first one pertained to the adoption by the CEU of a recommendation to establish national competitiveness councils by the euro area Member States, which were to cooperate with the European Commission in the framework of the European Semester to coordinate positions (Commission. Proposal COM (2015) 601: 1–6). The second proposal concerned the decision of CEU to establish a unified representation of the euro area in the IMF by the end of 2025 (at the latest) under Article 138 TFEU. It was to comprise the Eurogroup President and the Executive Director of the euro area constituency.[8] The Eurogroup President would present views of the euro area within the Board of Governors and represent the eurozone in the International Monetary and Financial Committee (IMFC). Whereas the Executive Director of the euro area constituency ought to represent the area in the Executive Board and were to be elected by the Eurogroup President with accordance to the procedure specified under Article 2 protocol No. 14 on Eurogroup annexed to TEU and TFEU (Commission. Proposal COM (2015) 603: 7–10).

Over a month later, on 24 November 2015, the European Commission submitted yet a new legislative proposal. The said proposal envisaged the establishment of the European Deposit Insurance Scheme (EDIS) (Commission. Proposal COM (2015) 586: 6–7). The EDIS was to comprise only those states that participated in the BU. It was to be based on the already existing deposit guarantee schemes governed under the DGSD, yet ultimately, it was also intended to lead to their unification. It was to be gradually transformed from a reinsurance system to a fully communitarised coinsurance system. The process of founding the EDIS would cover three phases: first, a reinsurance phase (2017–2020), in which the EDIS would provide the national deposit guarantee scheme with extra funding if they found themselves in a situation requiring disbursement of guaranteed sums

8 The group of IMF states comprises the Member States represented by the Director of the Executive Board. Previously, the nineteen euro area Member States were divided into six groups of states and two individual positions, thus making the euro area rather insignificant in the IMF (Commission. Communication COM (2015) 602: 4–6).

or financing compulsory restructuring; second, a coinsurance phase (2020–2024), during which the level of communitarisation of risk between national deposit guarantee schemes would be gradually improved owing to the EDIS; third, comprehensive insurance of deposits by the EDIS (from 2024).[9] Decision-making powers, supervisory powers and executive powers in the EDIS would be entrusted to a Single Resolution and Deposit Insurance Board formed as a result of transformation of the existing Single Resolution Board under the second pillar of the BU. To ensure that the tasks of the EDIS are implemented, the proposal involved a Deposit Insurance Fund (DIF) funded by *ex ante* contributions paid to the Single Board directly by banks, calculated and invoiced by "participating DGSs" (Commission. Proposal COM (2015) 586: 9–24). According to preliminary estimates, the DIF would have a sum of 43 billion euros at its disposal from 2024, which accounts for 0.8% of the total sum of all funds deposited in banks in the euro area Member States (Kröger 25.11.2015:1).

The first phase of the implementation of the euro area system reform does not come through as unimpressive. On 21 October 2015, the European Commission adopted the above-mentioned decision establishing an independent European Fiscal Board, whereas on 26 September 2016, the CEU adopted recommendation on the establishment of national productivity (competitiveness) councils in the eurozone.[10] The euro area Member States were called to implement provisions specified under the said recommendation by 20 March 2018 (CEU. Recommendation, OJ C, 2016, 349: 1–4). It meant that of all the three legislative proposals of the Commission, two were still undergoing legislative proceedings. These were: the draft regulation of the EP and the CEU amending the regulation (EU) No. 806/2014 establishing the EDIS, and the draft decision of the CEU specifying measures for gradual establishment of unified representation of the

9 In the reinsurance period, a reinsurance system was to be introduced with the aim to ensure funding to some extent and to cover part of losses incurred by national deposit guarantee schemes. In the coinsurance phase, a coinsurance system was to be created to ensure funding and cover losses of national schemes to a greater degree. In 2024, a comprehensive insurance system would be made, which would ensure funding and cover 100% of the losses incurred by national schemes. In contrast to the reinsurance period, in the coinsurance phase national deposit guarantee schemes would not be obliged to exhaust own resources prior to obtaining financial aid from the EDIS. In both cases, it would require national schemes to cover payments for depositaries or financing obligatory restructuring (Commission. Proposal COM(2015) 586: 9, 32–33).

10 The name proposed by the European Commission was changed at the stage of legislative work in the CEU.

euro area within the IMF.[11] Moreover, by November 2016, only 15 of the 19 states that were obligatory participants of the SSM and the SRM signed an agreement on the establishment of a credit line for the SRF. However, progress was noted in the implementation of the BRRD and the DGSD. By December 2016, the former was implemented in all Member States, whereas the latter was not transposed only by Belgium (PSE 2016, 12: 8).

3 Public Debate in Germany

3.1 First Phase of the Debate (2011–2012)

3.1.1 Federal Government's Stance

Already in October 2011, that is, fourteen months before the adoption of the third Van Rompuy's report, the representatives of the federal government had already put forward their own proposals for overcoming the eurozone debt crisis by means of a radical system changes to be implemented throughout the European Union. In this context, given the exceptionally wide scope of the said changes, it is fair to speak of Germany's initiative to conduct the second system reform in the EU.[12]

On 3 October 2011, Finance Minister Wolfgang Schäuble (CDU) in an article titled *Die Antwort auf die Krise ist ein Mehr an Europa* (*The response to the crisis is more Europe*) published in *Die Welt* supported radical systemic changes in the EU. The first change was to involve communitarisation of fiscal policies of the euro area Member States. Another issue was the consolidation of the EU institutions, while this process was to be concluded with the founding of the Political Union. In his view, that would be the best way to overcome the crisis. Whereas without the implementation of a system reform, the EU was at risk of losing its capacity to act. However, the establishment of the Political Union would not equal to founding of a super-state (*Superstaat*), but would only serve as a new form of cooperation

11 Procedure 2015/0270/COD, http://eur-lex.europa.eu, 1–2, (access 25 May 2017). Procedure 2015/0250/NLE, http://eur-lex.europa.eu, 1 (access 25 May 2017).

12 The debate on the first system reform was held in the European Union from 1996. Subsequent phases of this reform were marked by four intergovernmental conferences (1996–1997, 2000, 2003–2004, 2007) and two European Conventions (1999–2000, 2002–2003), which resulted in the Treaty of Amsterdam of 2 October 1997, the Charter of Fundamental Rights of 7 December 2000, the Treaty of Nice of 26 February 2001, the Treaty establishing a Constitution for Europe of 29 October 2004 (which did not enter into force), as well as the Treaty of Lisbon of 13 December 2007 (Węc 2012b: 251–384).

between the Member States in the area of governance. National states would continue to exist as essential subjects that strengthen national identity of their citizens in the age of globalisation, though their powers would become much restricted for the benefit of the Political Union (Węc 2014a: 201–202). Schäuble's initiative was not the first attempt in the European Union to implement systemic changes within this international organisation, though it was undoubtedly the most radical proposal for overcoming the eurozone debt crisis.[13]

Chancellor Angela Merkel's initial reaction to Schäuble's speech was very cautious. She did not engage in the discussion until the CDU Federal Congress in Leipzig (14–15 November 2011) adopted the new resolution of Christian Democrats on changes in European policy discussed below. A debate held in the Bundestag on 23 November 2011 on the draft budget for 2012 offered her the first occasion to do so. At that time, the Chancellor spoke in favour of including provisions of the Stability and Growth Pact to the EU primary law. However, in her view, it was to be just "the first step towards the establishment of the Fiscal Union" as "a political structure (*eines politischen Gebäudes*), that would harmonise some policies formerly subject to the scope of competences of the Member States" (DB Plenarprotokoll 17/142: 16916).

Nevertheless, on 7 February 2012 during her address to students in the BELA Foundation, Merkel supported the idea of creating the Political Union. Referring to the mentioned resolution of the CDU Federal Congress, the Chancellor proposed that the Political Union be formed as a single international organisation with very strong institutions. The European Commission would be then transformed into a genuine "European government" equipped with new competences previously held by governments of the Member States. Moreover, the competences of the EP would be substantially extended, whereas the CEU comprising heads of state or government would become the second parliamentary chamber. Merkel openly admitted that the idea of constituting the Political Union, abandoned at the intergovernmental conferences of 1990–1991, would continue to provoke much controversy in individual Member States; still, she argued that the establishment of the said institution is vital for consolidating the global position of the European Union (Merkel 7.02.2012: 5).

13 The discussion in the EU Member States on amendments to the binding treaties started already in mid-2011. One of the first voices in this case was Giscard d'Estaing's proposal of 1 July 2011. The said proposal concerned the establishment of a National Congress in the EU as a body comprising Members of the EP and national parliaments, which would address the key challenges facing the EU (Węc 2013: 431–452).

Merkel presented her arguments regarding the Political Union yet again in her speech of 3 April 2012 delivered at the University of Prague (Merkel 3.04.2012: 1–6). Whereas on 7 June 2012, in an interview for ARD television, she expressed her support for developing a 'work plan' (*Arbeitsplanes*) on the founding of such an international organisation. The new aspect that appeared in the said interview was Merkel's suggestion compliant with the resolution of the CDU Federal Congress that the proposed changes be carried out in line with the principles of enhanced cooperation. The Chancellor argued that a "two-speed Union", of which some are very afraid, had long been a reality, as exemplified by the Schengen area and the eurozone (Węc 2014a: 203–204).

The speech delivered by Schäuble was received in a thoroughly different manner by politicians of the sister party CSU. Its Chairman Horst Seehofer, who took stance on the Minister of Finance's proposal already in October 2011, not only "categorically opposed further conferral of competences (of the Member States) on Brussels" but also declared that Bavaria would never enter "a path towards the United States of Europe." However, Georg Nüßlein, CSU deputy of the Bundestag, argued that the growing Euroscepticism in the European Union cannot be overcome by depriving parliaments and governments of the Member States of their existing competences. In turn, Federal Minister of the Interior Hans-Peter Friedrich (CSU) claimed that the idea of establishing a Political Union is nothing more than another attempt to strengthen the "European centralism" within the existing EU under the pretext of fighting the eurozone debt crisis (Węc 2014a: 203).

Nevertheless, on 4 June 2012 former German Foreign Minister Joschka Fischer (Alliance 90/The Greens) published an article in *Süddeutsche Zeitung* where he harshly criticised methods for overcoming the eurozone debt crisis applied so far by the CDU/CSU/FDP coalition. He blamed the federal government of "attempting to put out a fire with gasoline instead of water, feeding the flame with austerity policy forced by Merkel." It was due to this policy that the eurozone debt crisis "turned into a genuine existential crisis in three years." However, a dissolution of the eurozone could also put at risk the existence of the European Union and its common market, thus leading to an outbreak of a new global economic crisis of unprecedented dimensions. In order to prevent the euro area from dissolving, Germany and France should convince the Eurogroup to "take a courageous step and build a Fiscal Union and a Political Union." Germany must agree to the establishment of the Fiscal Union "to ensure the viability of the euro area by means of its economic power and assets," whereas France should accept the proposal to establish a Political Union with common governance and common parliamentary oversight in the euro area. Preventing depression in the eurozone and creating conditions for economic growth would require the following steps: to provide

the ECB with the right to buy unlimited bonds from indebted eurozone Member States, to 'Europeanise' debts using Eurobonds and to introduce programmes supporting economic growth (Fischer 4.06.2012: 1–2).

3.1.2 Stance of German Political Parties

Schäuble's postulates brought out many emotions among German politicians, resulting in a general debate in Germany in the years 2011–2012. The effect of the said debate was a reorientation of the European policy agenda implemented both by the CDU/FDP government coalition parties and the parliamentary opposition parties (the SPD and Alliance 90/The Greens). The said parties adopted new programme documents, in which they expressed their support for introducing comprehensive systemic changes in the EU. Individual political parties differed in the scope of the proposed systemic changes. While the postulates made by the CDU and the SPD were fundamentally similar, and the initiatives presented by the Greens were far more restraint, the position of the FDP in this matter was the most radical. In turn, the two other political parties represented in the Bundestag either opposed the proposal to introduce systemic changes in the EU (CSU) or simply ignored it (the Left).

3.1.2.1 Christian Democratic Union

The first German political party to have reoriented its programme regarding European policy was the co-ruling CDU. The said change was initiated by the party's Federal Executive Board. At the above-mentioned CDU Federal Congress in Leipzig, it proposed its own draft resolution on European policy. The Federal Congress adopted the proposal of the Federal Executive Board with nine votes against and ten abstentions. The resolution provided a highly significant support for Chancellor Merkel in her attempt to solve the eurozone debt crisis. In the said document, the CDU advocated the new system reform of the EU as the answer to the mentioned crisis. The first phase of the reform was to radically strengthen the EMU. The second phase would be to 'finish' the EMU implementation process. Whereas the third phase of the reform, the implementation of which was to be postponed to a distant future, consisted in transforming the European Union into a Political Union. This was to take place through a revision of treaties developed by a new European Convention. The European integration and the systemic changes of the EU were to be still driven by the German and the French governments. Here, a significant role would be also played by cooperation in this matter with other EU Member States, particularly cooperation with Poland within the Weimar Triangle.

The authors of the resolution welcomed the first already implemented or planned undertakings aiming to strengthen the EMU in economic and budget governance, i.e. the adoption of the Euro-Plus package; the introduction of the European Semester; the establishment of the European Financial Stability Facility (EFSF); the establishment of the Six-pack and the foreseen establishment of the ESM. Further initiatives proposed by the CDU involved: to strengthen the independence of the ECB, which nevertheless should not be purchasing bonds of indebted euro area Member States (the so-called Eurobonds); to make monetary policy and fiscal policy thoroughly separate, and to introduce a financial transaction tax in the European Union or, at least, in the eurozone. Moreover, the CDU expressed its support for the introduction of the so-called 'debt brake' to prevent over-indebtedness of states first in the euro area and then in other EU Member States (which was modelled on Germany). From then on, accession of a given EU Member State to the euro area was to depend on provisions specifying principles of the functioning of such a brake being introduced to a given state's constitution (CDU-BPT 14–15.11.2011: 9–14).

The 'conclusion' of the implementation of the EMU was intended to not only constitute the second phase of the system reform of the EU, but also act as a milestone towards the establishment of a Political Union. Strengthening of the economic pillar of the EMU would require introduction of further mechanisms for automated application of sanctions against the Member States that infringe the Stability and Growth Pact, inclusion of the provisions of the said pact to the Treaty law of the European Union and subjecting it to the competences of the Court of Justice of the European Union, as well as adoption of a new three-phase procedure to prevent them from being violated by the euro area Member States. In the first phase, the European Commission would be required to provide advice to an indebted state. In the event that the aid proves insufficient, in the second phase, the Commission would take over supervision over the use of financial resources from the general budget of the EU and EU funds by the said state. In the event that even the above measures prove ineffective, financial aid would be offered by the EMS, providing its resources for the interested state on the condition that the latter undertakes strict financial and economic corrective actions. However, if the said state becomes unable to service its debt despite the listed efforts, a controlled debt reduction process should be launched. A state subject to this procedure would be supervised by a commissioner for savings with regard to the use of state resources and undertaken essential restructuring efforts. The Commissioner for Savings would have "the right to interfere" with operations of the said state in a situation where the latter fails to "fulfil its obligations."

Ultimately, the EMS would have to be transformed into a "European Monetary Fund" (CDU-BPT 14–15.11.2011: 18–20).

The third phase of the system reform of the European Union was to involve a transformation of the EU into a Political Union. To this end, a European Convention with a "clearly specified mandate" would have to be convened and the treaties in force would have to be amended. The planned reform would cover above all the European Commission, the EP and the CEU. The CDU proposed that the President of the European Commission be elected directly by all citizens of the European Union, while other commissioners would be appointed in accordance with provisions binding at the time. The party was in favour of establishing the second parliamentary chamber, which should take the form of the CEU. Both chambers would receive the right of initiative, which would translate into lesser powers of the European Commission and, consequently, the community method. Furthermore, the distribution of mandates in the EP would have to be rearranged in a way allowing it to reflect the demographic potential of the EU Member States "stronger (*stärker*) than before." This solution would be beneficial primarily for Germany as the country with the highest demographic potential in the EU. In the forthcoming direct elections to the EP of 2014, the European People's Party should have a common candidate running for the President of the European Commission. Moreover, the CDU called on the European Commission to establish "a new culture of legal regulations" to reduce the number of provisions issued by the latter and to avoid their multiplication. Thus, commissioners should obtain the right to interfere with the activities of the European Commission's Directorates General. To the very same end, a Council for Conformity Assessment would have to be formed. The CDU also supported the establishment of the so-called Defence Union (*Verteidigungsunion*) as part of the Political Union in the future with "European armed forces" at its disposal. Moreover, it confirmed its former stance on the EU enlargement strategy. The accession of new Member States would be subject not only to the condition of meeting accession criteria by the candidate countries but also to "the Union's capacity to absorb new members." The CDU also excluded the possibility to admit Turkey to the European Union, offering to the said country a "privileged partnership" instead. What is more, despite the declared political willingness to retain both legal and systemic cohesion of the EU, the CDU did not rule out the possibility to further deepen the integration process under the principles of enhanced cooperation, which was to be followed by the founding of a 'two-speed' Union. However, this could not result in the European Union being divided into two parts (CDU-BPT 14–15.11.2011: 16, 20–23). The resolution of the CDU Federal Congress in Leipzig indicated very clearly that the primary method for

overcoming the eurozone debt crisis should be to strengthen mechanisms for monitoring and imposing sanctions on the Member States that fail to conform to the provisions of the Stability and Growth Pact. Changes in the economic and budget governance of the EMU were to consist in, primarily, conforming to the rules specified by economically healthy states, particularly Germany. This was accompanied by a belief that the German economy was an outright reference model. Still, the resolution lacked specific proposals for actions furthering growth as a remedy for the crisis.[14]

The presented resolution was largely referred to in a programme proposal of the CDU Federal Executive Board developed in mid-2012, which was to be adopted as a resolution by the Federal Congress of the said party in December 2012 in Hanover. In the said proposal, Christian Democrats spoke yet again in favour of a "step-by-step implementation of a strong, democratic Political Union close to its citizens, which would take place in the coming years." They also announced that they would soon further specify the above-mentioned proposals regarding the founding of a Political Union. The new element in the said proposal was a postulate for the strengthening of actions furthering growth as one of the methods for combating the debt crisis. To a large extent, this resulted from a change in France's position on this issue after the presidential seat was taken there by François Hollande. In his election manifesto, he preferred development of new investments furthering growth as one of the methods for combating the debt crisis, at the same time giving a somewhat less priority to the strengthening of control mechanisms and the use of sanctions formerly promoted by Chancellor Merkel and President Sarkozy. Nonetheless, the CDU continued to oppose the introduction of Eurobonds in the EU and the purchase of Eurobonds by the ECB. In the party's opinion, it would turn the European Union into "a Debt Union" (*Schuldenunion*), where budget discipline is punished and a laid-back policy leading to debt is honoured (CDU-Bvo 4–5.12.2012: 30).[15] In the end, the proposal of the CDU Federal Executive Board was adopted by the Federal Congress in Hanover only in an abridged version. It did not contain

14 Setting aside the highly vague statement, in which the CDU expressed its willingness to strengthen the EU capacity for global competitiveness to ensure permanent economic growth within the Union (CDU-BPT 14–15.11.2011: 12–13).

15 The mentioned programme proposal involved, among others, the following statement: "Permanent stabilisation and long-term growth require a synchronisation of three elements (*Dreiklang*), namely, sound financial policy, actions furthering growth in the form of structural reforms and investments in the future, as well as more resilient mechanisms for preventing crises" (CDU-Bvo 4–5.12.2012: 28).

most of the postulates concerning the transformation of the European Union into a Political Union. This resulted from a changed stance of the federal government on the method for solving the eurozone debt crisis, which was officially implemented by Chancellor Merkel in November 2012 during her appearance before the EP described below.

3.1.2.2 Free Democratic Party

The Free Democratic Party did not react to the public debate in Germany and in the European Union until the spring of 2012. Though it adopted a resolution on European policy already at the FDP Federal Congress in Rostock (13–15 May 2011), in which it supported the future transformation of the European Union into a "federalised Europe deprived of any centralism", it saw the remedy for the eurozone debt crisis not in transforming the European Union into a Political Union but in strengthening financial discipline in the euro area Member States, introducing mechanisms for automated application of sanctions against countries that infringe the Stability and Growth Pact, as well as providing financial assistance to indebted states on the sole condition that the said countries undertake strict corrective actions. As was the case with the CDU, the FDP thought the admission of new Member States to the European Union should be dependent not solely on the accession criteria being met by the said states "expressly and without (…) any politically motivated allowances (*ohne politische Rabatte*)", but also on the Union's capacity to absorb new Member States (FDP-BPT 13–14.05.2011: 1–4).

It was only after the eurozone debt crisis further aggravated and the CDU, Alliance 90/The Greens and the SPD reoriented their agendas regarding European policy in November and December 2011, that the FDP decided to adopt the new resolution containing more far-reaching postulates. The new resolution was adopted by the FDP Federal Congress of 22 April 2012 in Karlsruhe. The Liberals called in this document to deepen the European integration to transform the European Union into a Political Union, to strengthen common security and defence policy of the EU, and to form European armed forces (non-threatening to the position of NATO in Europe), as well as to make the decision on further enlargement of the Union subject to two preliminary conditions already specified in the Rostock resolution (FDP-BPT 22.04.2012: 96–98).

The future Political Union should have sound federal grounds (*festen föderalen Grundsätzen*), strong democratic structures and safeguard the principle of subsidiarity. Ultimately, the Political Union would be transformed into a single "European federal state" (*europäischer Bundesstaat*). This would however require agreement

of all the Member States of the Political Union by referenda. The legal grounds of the Political Union were to be specified in the new European Constitution. It was to contain provisions allowing for, i.a. strengthening the coordination of financial policies, economic policies and environmental policies, "finishing" the building of the single market, adjusting common agricultural policy to the rules of social market economy, and consolidating the Political Union's position in the area of research and development, technology and services. The Constitution would also introduce significant changes to the institutional system of the EU existing at the time. Namely, a reform of the European Commission would consist in strengthening its role as the protector of treaties, appointing the President of the European Commission in direct elections, and reducing the number of commissioners. Changes in the functioning of the EP would boil down to providing it with the right of initiative, extending the scope of its competences in the procedure for adopting the annual budget, appointing some of the MEPs from general European electoral rolls and introducing new election laws under which each voter would have two votes (*Zweistimmen-Wahlrecht*). Moreover, the possibility to establish a second parliamentary chamber should also be given consideration, the role of which should nevertheless be played not by the CEU, as envisaged by the CDU, but by the EC equipped with new checks and balances. In order to enhance the subsidiarity principle in the future Political Union, the FDP also advocated the establishment of a European Subsidiary Court (FDP-BPT 22.04.2012: 96–100). Importantly, the FDP was the first German political party since 1991 to propose in the analysed document a reawakening of the idea of establishing a European Federation.

3.1.2.3 Alliance 90/The Greens

Paradoxically, the first political party after the CDU to support the system reform of the EU was the opposition party Alliance 90/The Greens. Less than a fortnight after the new political platform resolution was adopted at the CDU Federal Congress in Leipzig, the Federal Delegate Conference of the Alliance 90/The Greens in Kiel (25–27 November 2011) adopted two own resolutions on European policy. In the first resolution, the Greens supported further deepening of the European integration as the best answer to the eurozone debt crisis, as a result of which (in their opinion) the EU even lost its controllability. They also pointed to the fact that the debt crisis exposed weak points of the Treaty of Lisbon of 13 December 2007, particularly provisions or the lack of provisions on the financial market regulation, common economic, tax and social policy, as well as common foreign and security policy. This was because under this treaty, the European Union did not receive any new powers in the area of

the said policies or the Member States retained the veto power in these areas. This unfavourable situation could be changed only by a new system reform of the EU that should be developed by the European Convention. The authors of the resolution committed themselves to swiftly draw up a 'roadmap' leading to the Convention. The said convention was to address changes in the treaty law of the European Union that would harmonise the economic, financial, tax and social policies of the Member States, and also introduce the system reform of the EU. Consequently, the EMU implementation process would be completed with the said institution comprising the Monetary Union, the Economic Union and the Fiscal Union. At the occasion, competences of supranational institutions would also need to be significantly extended. The European Commission should be granted the right to coordinate economic and financial policies of the Member States wherever possible, while the EP ought to be given new supervisory and decision-making powers in the area of the said policies. Moreover, it should also have the right of initiative. Another issue that should be solved at the Convention is the direct appointment of the 'executive staff' of the European Union. In any case, at least part of the Members of the EP ought to be elected from supranational lists. Candidates to stand such elections would be nominated by the supreme bodies of European parties. Whereas in the direct election of the EP of 2014, all European parties, including the European Green Party, should have one single candidate running for the President of the European Commission. This was to be followed by the EP choosing the candidate representing one or several European parties who would gain the highest number of votes in a direct election (Bündnis'90/Die Grünen-BDK 25–27.11.2011. Beschluss 1: 3–10).

Alliance 90/The Greens also proposed to introduce significant modifications to the structure of general budget of the European Union. Members' contributions, as the major source of income at the time, ought to be replaced with own resources (e.g. financial transaction tax, corporate tax, energy tax, proceeds from intra-Union emissions trading, etc.). The existing procedure for approving EU revision treaties should also be changed. The institution of the referendum would have to be introduced in all the EU Member States. Ratification would be conditional on gaining approval of a number of countries and population representing the said countries that would correspond to the double majority principle. Thus, the existing requirement of unanimous ratification of revision treaties by all the Member States would be surrendered. Apart from the new system reform of the EU, a new German Constitution would also have to be adopted in accordance with the provisions of Article 146 of the Basic Law of Germany. This new constitution should guarantee that "Germany would be anchored in the integration structures of the European Union" to an even greater

extent than in the Basic Law in force at the time (Bündnis'90/Die Grünen-BDK 25–27.11.2011, Beschluss 1: 9).

The second resolution adopted in Kiel by Alliance 90/The Greens concerned primarily methods for overcoming the eurozone debt crisis. It involved a proposal for a detailed draft *Der Green New Deal für Europa*, which was to be implemented by means of actions aiming to regulate financial markets, develop green modernisation investments and improve social security. However, the implementation of this draft required also further specification of some proposals concerning the system reform of the EU included in the first resolution. The authors of the draft thus demanded that coordination mechanisms between the euro area Member States and other EU Member States be strengthened or created in order to prevent fragmentation of the Union. To this end, the scope of competences of the EP and the European Commission in the euro area would have to be extended in the first place. The Parliament should gain new powers in the eurozone by means of extending the scope of application of the ordinary legislative procedure to the policies of the Monetary Union, the Economic Union and the Fiscal Union. The new Commissioner for Monetary and Financial Policy should be created in the European Commission with the appointment procedure different to the procedure employed for the appointment of the European Commission. The difference would lie in the candidate for the said position being nominated by the EC, while the EP would appoint and remove him or her. The Commissioner ought to chair meetings of the Eurogroup and the Economic and Financial Affairs Council, have the right of initiative and retain control over monetary and fiscal policy of the EU. In the future, provisions for appointing the entire European Commission by the EP should also be adopted. In contrast to the CDU, Alliance 90/The Greens postulated to introduce Eurobonds as an effective instrument for overcoming the eurozone debt crisis (Bündnis'90/Die Grünen-BDK 25–27.11.2011, Beschluss 2: 1–8).

On 24 June 2012, at the extraordinary meeting of Alliance 90/The Greens State Council in Berlin, the party adopted its own resolution on European policy. It drew to a considerable extent from two Kiel political platform resolutions of the Federal Delegate Conference. In the said document, the State Council also supported the system reform of the EU at a European Convention, reiterated the major system proposals contained in the Kiel resolutions, and called on the federal government to take all the necessary action (including the approval of Eurobonds) to overcome the eurozone debt crisis. This was because "unlike any other country, Germany continues to obtain economic benefits from its membership in the eurozone" (Bündnis'90/Die Grünen-SLR 24.06.2012: 1–18).

3.1.2.4 Social Democratic Party of Germany

The third political party in West Germany that changed its European policy as a result of the deepening eurozone debt crisis was the Social Democratic Party of Germany. At the SPD Federal Congress in Berlin (4–6 December 2011), on the proposal of the Federal Executive Board a resolution was adopted, recommending programme reorientation with regard to European policy. In the said resolution, the SPD stated that as a result of the debt crisis, the European Union was at a crossroads. It could continue on the path pursued so far, undertaking an effective fight against the crisis and implementing necessary systemic changes or sacrifice all its former integration success on the altar of populism and isolationism. Thus, as the Union's largest Member State and its strongest economy, Germany had to make a choice between opting out of responsibility for Europe and re-engaging in the process of stabilising the common currency and enhancing political integration of the European Union (SPD-BPT 4–6.12.2011: 109).

According to the SPD, the ideology of market deregulation proved a complete failure. As a result of the unilateral deregulation, entities operating on financial markets world-wide, including in the European Union, took too much risk that taxpayers were to pay for ultimately. One of the reasons behind the eurozone debt crisis was the absence of common economy and financial policy in the EMU that would be governed by the 'political leadership'. Without a new "institutional opening," the eurozone would hence remain passively affected by financial markets instead of "shaping them itself". Undoubtedly, the crisis was also caused by excessive incurrence of debt by some of the euro area Member States, the weaknesses and flaws of their tax systems, clientelism policy and corruption. Therefore, for such states there should be no alternative other than the urgent need for a drastic public debt reduction. In a situation where the indebted euro area Member States are covered by "common guarantees" as part of the EFSF or the ESM, a relevant measure of "common control" should also be established. Consequently, the SPD expressed its willingness to support changes in the EU treaty law vital in this regard (SPD-BPT 4–6.12.2011: 110–114). Furthermore, the authors of the resolution supported the establishment of the Fiscal Union by the euro area Member States and the future transformation of the European Union into a Political Union. In order to attain the first goal, it would be necessary to adopt a 'roadmap' leading to the creation of a "European economic government (*Europäische Wirtschaftsregierung*)" in the eurozone, which would be supervised by the EP. Following the establishment of the Fiscal Union, a Social Union should also be founded in the future to ensure minimum social standards for all the EU citizens. The Political Union should be established by means of

substantially consolidating the roles of supranational institutions, particularly the European Commission and the EP. It was all the more necessary as over the last years, their positions in the EU institutional system were compromised for the benefit of the EC, which undoubtedly was "a step backwards for the development of democracy and democratic political culture." Therefore, the competences of the EP would have to be extended by providing it with the right of initiative or even by creating a mechanism that would automatically extend the scope of its competences in line with the deepening integration and transposing more sovereign competences of the Member States on the European platform. Moreover, from 2014 the European Socialist Party should jointly propose a single candidate for the President of the European Commission in the direct elections to the EP. In the long run, the European Union should be transformed into a Political Union based on a new European Constitution. The Political Union would be led by an unspecified new European government accountable to the EP. In contrast to the CDU and the FDP, social democrats advocated the establishment of the Political Union in a highly general manner, without even presenting necessary details in this matter. Further strengthening of democracy in the EU was to be also subject to enhanced cooperation between national parliaments. The SPD also called for a more dynamic development of the EU common foreign and security policy, which was to be facilitated chiefly by close cooperation between Germany and France but also by cooperation with Poland within the framework of the Weimar Triangle. What is more, the SPD maintained its former view on the enlargement strategy of the European Union. In contrast to the CDU and the FDP, it continued to support the admission of the Western Balkan countries and Turkey to the EU once they meet the accession criteria. It also proposed to "deepen cooperation with Turkey in the area of regional security" (SPD-BPT 4–6.12.2011: 113–118).

3.1.2.5 Christian Social Union

As noted above, the CSU categorically opposed the proposals to implement radical systemic changes in the EU as a method for solving the eurozone debt crisis. At the National Congress of 7–8 October 2011 in Nuremberg, the CSU called on the federal government to execute all formerly taken political decisions of the EC and the heads of state or government of the euro area Member States, and to implement already adopted legal acts in this regard as a remedy for the crisis. It also resisted deliberations on transforming the European Union into "the United States of Europe." Still, its vision of solving the crisis was similar to that of the CDU in that they both opposed the purchase of Eurobonds by the ECB (CSU-PT 7–8.10.2011: 3–10).

3.1.2.6 The Left

A similar stance on the system reform of the EU to that of the CSU, though for different reasons, was expressed by the Left. Due to its anti-system nature, this party opposed both the European integration process, and the internal and external consolidation of the EU. For that very reason, in a resolution adopted by the Federal Congress of 21–23 October 2011, the Left favoured "a thorough change in the EU structure," which was to involve, i.a. replacement of the treaties binding at the time by a European Constitution approved by all the Member States by referenda. This Constitution should radically limit the competences of the EU in the common foreign and security policy, as well as in policies in the area of freedom, security and justice (Linke-BPT 21–23.10.2011: 66–68) (cf. Tab. II).

3.2 Second Phase of the Debate (2012–2015)

3.2.1 Evolution of the Federal Government's Stance

The debate in Germany on the system reform of the European Union resulted in 2011–2012 in revived discussions on this issue in other EU Member States. The stances of local politicians were highly divergent. Some of them agreed with the opinions in Germany that changes in the system of the entire EU, involving its transformation into a Political Union, would serve as a remedy for the crisis. According to others, the sole condition for overcoming the debt crisis should take the form of systemic changes in the eurozone itself.

The idea of establishing a Political Union was supported primarily by the governments of Poland, Belgium and (conditionally) Austria, and by the European Commission. The first man to advocate this concept was Foreign Minister of Poland Radosław Sikorski. In his famous speech delivered in the seat of the German Council on Foreign Relations in Berlin on 28 November 2011, Sikorski formulated a thesis that the best way to overcome the eurozone debt crisis at the time would be to further enhance European integration. Otherwise, there would be a danger that the euro area might collapse, which could also shake the foundations of the common market. He stated that the EU was facing at the time the problem of choosing whether to become "a proper federation, or not." Therefore, the best solution for the ongoing eurozone debt crisis understood as a long-term objective would be to transform the European Union into a Political Union. This should be preceded by an introduction of further instruments strengthening financial discipline in the EMU, a radical tightening up of the rules binding in fiscal policies so far, and enhancing

Tab. II: Key programme proposals of the CDU, the CSU, the FDP, the SPD, the Greens and the Left regarding the system reform of the EU in 2011–2012. Source: own study.

Political party	Target integration model	Changes in the EU system
CDU	Three-stage Political Union	1. CEU – as the second chamber; 2. EP and CEU – initiative right; 3. EC – direct election of the President.
CSU	Internal and external consolidation of the EU under the Treaty of Lisbon	1. EP and CEU – initiative right; 2. EP – enhanced control over the EC and agencies; 3. ECB – reinforced voice of Germany within the Governing Council.
FDP	1. Political Union 2. European federal State	1. EC – as the second chamber; 2. EP – initiative right; 3. EC – direct election of the President; 4. Establishment of a European Subsidiary Court.
SPD	Three-stage Political Union	1. EP – initiative right; 2. Mechanism for extending the competences of the EP under decisions issued by the EU institutions.
The Greens	1. European Union 2. Complemented establishment process EMU (Fiscal Union and Economic Union)	1. EC – coordination of economic and financial policies of the Member States; 2. EP – initiative right and the right to appoint the entire College of the EC; 3. Treaty revision by qualified majority of votes.
The Left	Change in the organisational structure of the EU	Limited competences of the EU in the CFSP and the AFSJ.

the coordination of economy policies of the Member States. The fundamental condition of all the listed corrective measures in the euro area should be to maintain the existing cohesion between the eurozone and the entire European Union. One of the means for ensuring the above cohesion would be to grant the right to participate in meetings of heads of state or government and meetings of Ministers of Finance of the euro area Member States (though without the right to vote) to countries outside the euro area. Whereas another such means would be to maintain the 'central' position of 'community' institutions in the EU existing at the time. Therefore, Sikorski spoke in favour of reforming the institutional system of the European Union, which was to involve, primarily, a

substantial consolidation of positions of supranational institutions (particularly the European Commission, the EP and the ECB) and of the Member States by ensuring a set of lasting prerogatives regarding national identity, religion, public morals and some aspects of tax policy (Węc 2012a: 122–128).

The federal government of Austria formally supported the German initiative on the new system reform of the EU, yet it was against excessively far-reaching changes in this regard. In April 2012, at a meeting of the Reflection Group on the Future of Europe, Foreign Minister of Austria Michael Spindelegger rejected an idea presented in this forum to establish a super-president of the European Union by combining the European Commission and the EC presidencies. In his view, this would stand for combining decision-making competences of these two institutions. Such a change would undoubtedly and significantly compromise the community method in the European Union (EuObserver 23.04.2012: 1). In little more than eight months after the mentioned Sikorski's speech, the German government's proposal gained support of Foreign Minister of Belgium Didier Reynders. On 9 August 2012, in article titled *Slowly but surely on the path towards a federal European Union* he supported the transformation of the European Union into a federation with a larger budget than the one existing at the time, the European Commission as "a real government in charge of European governance" and a Ministry of Finance that would issue common Eurobonds. In order to improve the effectiveness of the European Commission, the 'one commissioner per country' principle would have to be abandoned and the number of commissioners would have to be reduced. Moreover, it would be necessary to create the second parliamentary chamber, the role of which should be played by the CEU operating as a Chamber of States. According to Reynders, the federalisation of the European Union would not stand for its centralisation, since the position of national states and regions would be safeguarded by the principle of subsidiarity (Węc 2014c: 17).

The last voice of support for the German government's initiative regarding the new system reform of the EU was the address of President of the European Commission Barroso delivered on 12 September 2012 in the EP. He called for the said reform to be discussed in a public debate, thus linking it with the timing of the direct elections to the EP of 2014. The said debate should lead to a European Convention, which would develop a new revision treaty aiming to transform the European Union into a "federation of national states." Barroso also called on all European political parties to nominate their candidates for the office of the President of the European Commission in the forthcoming elections to the EP (Węc 2014c: 24).

Nonetheless, the debate in Germany gradually lost its dynamism with the growing criticism of the German proposals among most governments of the Member States and EU institutions. In this regard, the position adopted by France proved decisive, since it was largely French politicians who were very hesitant to approve the initiatives of the West German government. This was especially vivid after the office of the French President was taken by Hollande in May 2012. On 22 June 2012, the French President stated at a press conference in Rome, which was organised following his meeting with Merkel, Mario Monti (Italy) and Mariano Rajoy (Spain), that France did not agree on the establishment of a Political Union "lacking solidarity". A few days later, French Minister for Europe Bernard Cazeneuve further specified Hollande's statement, claiming that a Political Union "cannot serve as a prerequisite for urgent anti-crisis measures," since such an attitude involved the risk that "neither a Political Union nor such measures would take place" (Węc 2014c: 17).

Nevertheless, on 25 August 2012, weekly news magazine *Der Spiegel* unexpectedly informed that Chancellor Merkel demanded that a date of the new European Convention be determined at the EC meeting of December 2012, and that her adviser for European politics Nikolaus Meyer-Landrut was conducting unofficial negotiations in this regard in Brussels (Spiegel 25.08.2012: 1–2). This concept was also supported by Foreign Minister Westerwelle. Already in March 2012, he proposed that a new Constitutional Treaty for the European Union should be developed, which was to be ratified by referenda held in all Member States (Zeit 10.03.2012: 1). However, having presented within the Reflection Group on the European Union his postulate to convene a Convention in this matter, he met resistance from ministers of most of the Member States (Spiegel 25.08.2012: 1). Though Chancellor Merkel rejected on 26 August the information provided in *Der Spiegel* magazine, the majority of the EU Member States were unquestionably hesitant about German proposals on the second system reform of the EU (PAP 27.08.2012: 1). On 27 August 2012, two days after *Der Spiegel* was published, Polish Foreign Minister Sikorski, who was a guest of honour at a meeting of ambassadors held in the Ministry of Foreign Affairs of Germany in Berlin, declared that the European Union should first solve its current problems caused by the debt crisis in the euro area. Referring to his famous speech delivered on 28 November 2011 in Berlin, he claimed that only after an open social attitude is created as a result of the end of the crisis in the euro area should the Union proceed to amend the treaties (PAP 27.08.2012: 1; EurActiv 28.08.2012: 1).

A ground-breaking impact on the course of the debate in Germany was exerted mainly by the above-mentioned documents of the EU institutions, namely, the so-called agenda of the European Commission of 28 November 2012 and the third Van Rompuy's report adopted by the EC on 12 December 2012 as the basic political

platform allowing for overcoming the eurozone debt crisis. Both these documents were focused on the system reform of the euro area and completely disregarded a comprehensive reform of the European Union. Soon after, this pragmatic approach was supported also by governments of most of the EU Member States. Consequently, the German government changed its stance in this matter as well. On 7 November 2012, in her speech delivered in the EP, Chancellor Merkel admitted for the first time that actions aiming to overcome the eurozone debt crisis should be an absolute priority overriding changes in the EU system, whereas the comprehensive reform of the EU system ought to be postponed indefinitely (EP. Press release 8.11.2012: 1). In the years 2013–2015, the federal government actively participated in the implementation of the system reform of the euro area in line with the package of Van Rompuy and the European Commission. This activity was largely due to its willingness to have a significant influence on the shape of the system reform of the euro area.

3.2.2 Evolution of the Stance of German Political Parties

The change in the federal government's position was followed by modifications in views on the direction of the proposed system reforms of those German political parties that considered the transformation of the European Union into a Political Union to be the best way to avert the crisis in the euro area. On 3–5 December 2012, delegates to the Federal Congress of the CDU convened in Hanover (in line with the proposals included in the third Van Rompuy's report) spoke in favour of radically strengthening the EMU by means of establishing a fully integrated financial framework (the Financial Union), budget framework (the Fiscal Union), and economic framework (the Economic Union) within the EMU, as well as favoured the extension of the scope of powers of the EP and national parliaments in the euro area. Due to the above-mentioned important decision of the ECB, which concerned the possibility to buy unlimited volumes of bonds of the euro area Member States, the regular postulate of the CDU, i.e. its categorical opposition to Eurobonds, became impaired. The party admitted in the presented resolution that "in principle", the ECB has the right to do so, yet it should exercise this right "only temporarily." Consequently, the Federal Congress of the CDU adopted the above-mentioned programme proposal of the Federal Executive Board issued several months earlier as its own resolution, yet it removed the postulate to conduct a system reform of the EU from the said proposal (CDU-BPT 3–5.12.2012: 21–23). Just as the Christian Democratic Union, the FDP abandoned the idea of a radical system reform of the EU. At the Federal Congress in Berlin of 9–10 March 2013, a resolution was adopted in which the liberals expressed their support for a "consistent, quick and permanent elimination of construction faults" of

the EMU in accordance with the third Van Rompuy report and the agenda of the European Commission of 2012 (FDP-BPT 9–10.03.2013: 1–2). At the end of 2012, the Social Democratic Party of Germany did not consider the comprehensive system reform of the EU a priority either. In a resolution adopted on 9 December 2012 at the Extraordinary Federal Congress of the SPD in Hanover, a harsh criticism of former steps taken by the federal government with the aim to combat the eurozone debt crisis, which consisted in forcing countries affected by the crisis to apply radical financial cuts, corresponded with the postulates for the urgent development and implementation of economic recovery projects and for addressing unemployment. Yet again, the SPD declared its support for the founding of a Social Union once the implementation of the EMU is concluded and the Fiscal Union is established within the EMU(SPD-BPT 9.12.2012: 1–2).

In contrast to the CDU, the FDP and the SPD, the political party Alliance 90/The Greens confirmed at the end of 2012 nearly all of its former postulates on European policy. At the Federal Delegate Conference of Alliance 90/The Greens of 16–18 November 2012 in Hanover, the implementation of the abovementioned proposals of Van Rompuy and the European Commission was considered the best way to address the crisis. The said changes should be accompanied by an extension of the powers of the EP, the European Commission and national parliaments in this area, while the cooperation between the EP and national parliaments ought to be given a more solid institutional underpinning (Bündnis'90/Die Grünen-BDK 16–18.11.2012: 1–13). In turn, the CSU proposed in the resolution adopted by the National Congress of 19–20 October 2012 in Munich to consolidate the EU both internally and externally based on the Treaty of Lisbon of 13 December 2007. However, the CSU approached the proposal of systemic changes in the euro area provided for in the third Van Rompuy's report and the agenda of the European Commission of 2012 with restraint, though not with a disapproval (CSU-PT 19–20.10.2012: 1–8).

The establishment of the new CDU/CSU/SPD coalition government on 17 December 2013 had no substantial effect on the form of the public debate in Germany regarding the system reform in the euro area. In the coalition agreement of 14 December 2013, all political parties forming the government spoke in favour of implementing the reform package proposed in the third Van Rompuy's report and the agenda of the European Commission. In their opinion, one of the key objectives of the reform should be to eliminate the pathological relationship between "bank indebtedness and public debt" of the euro area Member States and to introduce regulations ensuring that banks bear the responsibility for their debts themselves, avoiding costs for taxpayers, and that financial markets do not pose a threat to the economic stability of the

Member States. However, the CDU, the CSU and the SPD stipulated that the system reform of the euro area ought not to infringe any "proven" "rules of social market economy", while the EU institutions should actively participate in the functioning of the new structures established as a result of the reform (CDU/CSU/SPD-Koalitionsvertrag 14.12.2013: 110).

3.3 Third Phase of the Debate (from 1 July 2015)

The first political party in Germany to respond to the issuance of the Five Presidents' Report was the SPD. On 25 June 2015, the SPD parliamentary faction in the Bundestag already issued a statement wherein it called the report "a progressive strategy that defines new framework changes in the architecture of the Economic and Monetary Union." The said changes, which were based on convergence and conferral of certain competences of the Member States to the European Union level, were considered by the social democrats to be essential conditions for overcoming the debt crisis and providing the eurozone with a more solid institutional underpinning. As in the case of the third Van Rompuy report, the SPD politicians paid particular attention to the fact that a notable strengthening of social dimension of the proposed reform should be an essential precondition to its social approval (SPD-DB-Fraktion 25.06.2015: 1–2).

A similar vein characterised a resolution of the Federal Congress of the SPD convened on 10–12 December 2015 in Berlin. In the said resolution, the social democrats considered the agenda to establish the Fiscal Union and the Economic Union fully justified. In their opinion, the Fiscal Union should constitute the first step towards the creation of a separate budget of the euro area Member States in the future, which would be endowed with, i.a. a common financial transaction tax. Since the high level of public sector indebtedness in many Member States posed the risk that they could become "extremely reliant on international financial markets", the SPD demanded that the "issue of old debts" in the euro area be solved in the nearest future (SPD-BPT 10–12.12.2015: 7).

In turn, reactions of the Christian democratic parties were thoroughly different. In December 2015, CSU MEP of the European People's Party (EPP) Markus Ferber expressed his view that though the Five Presidents' Report does set out new objectives, it is deprived of any reliable diagnosis on the grounds of failures experienced in the euro area so far. In his opinion, the main reason for the said failures was the fact that individual euro area Member States, particularly France, were avoiding responsibility for the functioning of the eurozone (Mussler 15.12.2015: 2). A few weeks earlier, at the CSU National Congress held

on 20–21 November 2015 in Munich, a resolution was adopted, recommending that provisions on the insolvency of the euro area Member States be included to EU primary law. In a situation where a given state faces insolvency, the said provisions were to provide for, among others, immediate deferral of payment of all foreign debts, capital control, recovery plan and necessary automated withdrawal from the euro area within a strictly specified timeframe in the event that the cure proves ineffective. Referring to the situation of Greece in mid-2015, which was facing insolvency at the time, the CSU resolution stated that if any euro area Member State is "unable to fulfil its obligations and fails to implement bold structural reforms or cannot do so, must have the possibility to leave the eurozone as the *ultima ratio*" (CSU-PT 20–21.11.2015: 318–319).

Even more critical opinions on the Five Presidents' Report were expressed by the CDU/CSU group in the European People's Party faction in the EP. In a statement presented by the group Chair Herbert Reul at the CDU Federal Congress of 14–15 December 2015 in Karlsruhe, critical comments pertained above all to the part of the report that recommended communitarisation of national deposit guarantee schemes and, consequently, to the European Commission's proposal for a European Deposit Insurance Scheme (EDIS) of 24 November 2015. The reasoning applied by the CDU/CSU group overlapped to a considerable extent with the views of Minister of Finance Schäuble, and opinions of representatives of German banks, which had been known for several weeks at the time, discussed below. According to the CDU/CSU group, the founding of the EDIS would pose a threat to clients of stable banks, since they would have to guarantee deposits of clients of banks at risk of insolvency. Hence, the "risk of insolvency" would be transferred from banks in a given Member State to the entire euro area, while the BU would become *de facto* a "transfer union". The CDU/CSU group also called on the European Commission to dedicate more attention to the implementation of the DGSD of 16 April 2014 (whose deadline for entry into force was 3 July 2015) instead of solving the issue of amendment of the regulation of the EP and the CEU of 15 July 2014, which aimed to establish the EDIS. Moreover, the said directive was considered by the CDU/CSU group a sufficient guarantee of the proper functioning of the BU. In addition, it also demanded that the cohesion of the EU not be undermined as a result of the system reform of the euro area, which aimed primarily to strengthen the economic, fiscal and financial governance system of the eurozone (CDU-BPT. Bericht von Reul, 14–15.12.2015: 7–9). The said Federal Congress was finalised by the adoption of a resolution submitted by 30 delegates, whereby the CDU rejected the European Commission's proposal for a European Deposit Insurance Scheme (EDIS) of 24 November 2015. The arguments used by the applicants

were similar to those applied in the statement of the CDU/CSU group within the EPP group. However, this time the delegates of the CDU Federal Congress indicated very clearly that if the EDIS is founded in 2024, it will largely take place "at the expense" of clients of German banks. In the wake of the above, the CDU Federal Congress called on the federal government and the Bundestag to undertake further effective actions aiming to block (*verhindern*) the European Commission's proposal (CDU-BPT 14–15.12.2015: 14–15).

The FDP, which as a result of the parliamentary election of 22 September 2013 for the first time in the history of West Germany failed to remain in the Bundestag, was also very critical of the idea of establishing EDIS. At the FDP Federal Congress of 23–24 April 2016 in Berlin, two programme proposals were submitted, yet not adopted as Congress resolutions but forwarded to the Federal Executive Board for processing instead. Attention was drawn particularly to the proposal of the Federal Committee on the Economic Affairs and Energy (*Bundesfachausschuss Wirtschaft und Energie*), which recommended that the European Commission's proposal of 24 November 2015 be rejected. In the justification, the proposers argued that centralisation of national deposit guarantee schemes would undermine trust in banks that were highly stable, and initiate competition in line with the 'race to the bottom' rule, while any instability in the banking sector, economy and financial policy in a given Member State would affect the financial condition of the entire eurozone. They also noted that the national deposit guarantee schemes existing in the EU are "in most cases sufficiently effective" in safeguarding the financial interests of their clients. This pertains in particular to the German system, which was considered the best example by FDP politicians. Moreover, the federal government was addressed to respect the criteria provided by the Treaty of Maastricht of 7 February 1992, which recommended strict financial discipline and observance of the rule that no euro area Member State can be forced to assume debts of another (the no-bail-out clause) (FDP-BPT 23–24.04.2015: 221–225).

4 Influence of the Federal Government on the Dynamics of the Eurozone Debt Crisis and the System Reform

4.1 Influence of the German Government on the Dynamics of the Eurozone Debt Crisis

The German government exerted significant impact on the dynamics of the eurozone debt crisis. Above all, the financial contribution it made to tackle the crisis

cannot be overestimated. According to the data of the Federal Ministry of Finance, as of 31 March 2017, Germany's share in individual rescue packages for countries affected by the eurozone crisis was estimated at 91.5 billion euros, while unused credit guarantees accounted for 119.6 billion euros in total (BMF 31.03.2017: 1). Therefore, of all the euro area Member States, Germany has become the highest-ranking net contributor for indebted Member States. However, although it might seem a paradox, the German and French governments contributed either directly or indirectly to the deepening of the said crisis themselves, as the root cause of the crisis was the high-risk crediting conditions applied by German and French banks towards acquirers of real estate in Ireland and Spain, consumers in Portugal, and the Greek government. Nevertheless, instead of cancelling debts as recommended by some economics experts (Legrain 21.04.2014: 1–3), Germany and France decided to grant loans to indebted countries, thus passing the buck for the consequences of the crisis to taxpayers residing there. Hence, governments of both countries directly contributed to the further aggravation of the debt crisis.

The primary method for combating the crisis forced through by the German government even against the concerns of the French government was the policy of financial cuts. Since it was not based on pro-growth programmes, it could not lead to economic growth or increase the competitiveness of indebted economies, but it directly contributed to the deepening of the crisis instead. This method for combating the crisis was harshly criticised not only in countries it affected but also in Germany itself (Węc 2014a: 204–205). In the spring of 2010, Chancellor Merkel forced through against the stance adopted by most of the EU Member States a proposal to include both the EFSF and the IMF in the rescue measures for Greece, Italy, Spain, Portugal and Ireland, and to force governments of the listed states to undertake radical steps towards reducing public debt (Müller-Brandeck-Bocquet 2012, B 10: 18–19). The German government conditioned its participation in the rescue packages on the above conditions being met. On 8–9 December 2011, pressured by Germany and France, the EC made a political decision to sign the Fiscal Stability Treaty, whose aims included, i.a. to increase fiscal discipline and sanctions for non-compliance. At the same time, Germany and France opposed proposals specified in a *non paper* of the Polish Presidency of 2 December 2011 to establish a cohesive and inclusive structure ensuring cohesion between the EU and the eurozone following the introduction of changes regarding the economic and budget governance in the latter (Węc 2012a: 128–129, 144–145). From the very beginning of the debt crisis, the German government also strictly opposed postulates made by governments of the most indebted euro area

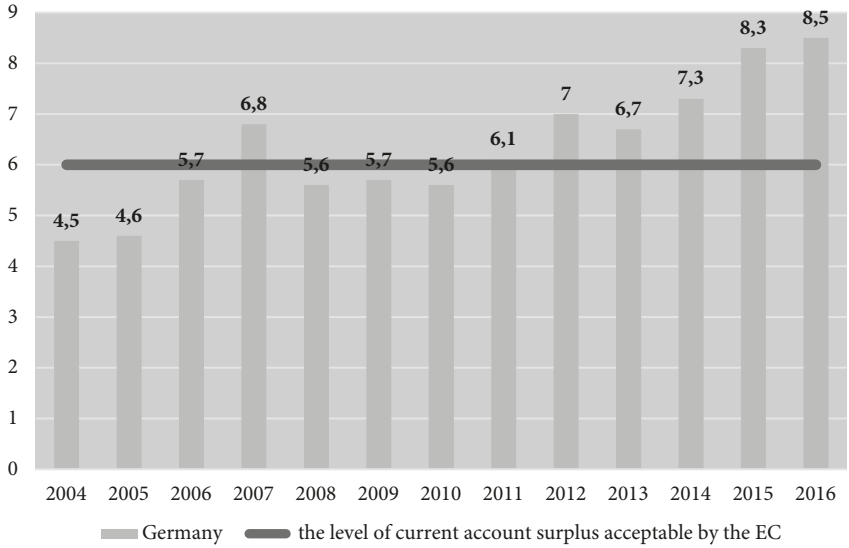


Diagram I: Current account surplus of Germany in the years 2004–2016 (as percentage of GDP). Source: Own study based on Saldo der Leistungsbilanz von Deutschland in Prozent des BIP in den Jahren 1991–2016, IW Köln: 1–2.

Member States supported in this matter by the European Commission and the EP, which pertained to the granting of the right to purchase Eurobonds to the ECB, a nearly unlimited access to the EFSF and later also providing the ESM with the right to the financial resources of the ECB.

Moreover, the period of the eurozone debt crisis involved a phase of a dynamically growing competitiveness of the German economy observed from 2005 compared to the international environment, including economies of other euro area Member States. This was due to relatively low (compared to other euro area Member States) wages and excessively low euro exchange rate as for Germany (Flassbeck 10–16.07.2013: 28–29). The result was a very high current account surplus. Though since 2010, the said current account surplus in relations with euro area Member States started to fall (Hollenbeck 22.11.2013: 1; Berger 28.01.2014 B11), in relations with countries affected by the debt crisis it was still significantly high (Leistungsbilanz 2017: 1–2; Destatis 2014: 424) (cf. Diagrams I and II). Combined with a very low domestic demand and a low investment

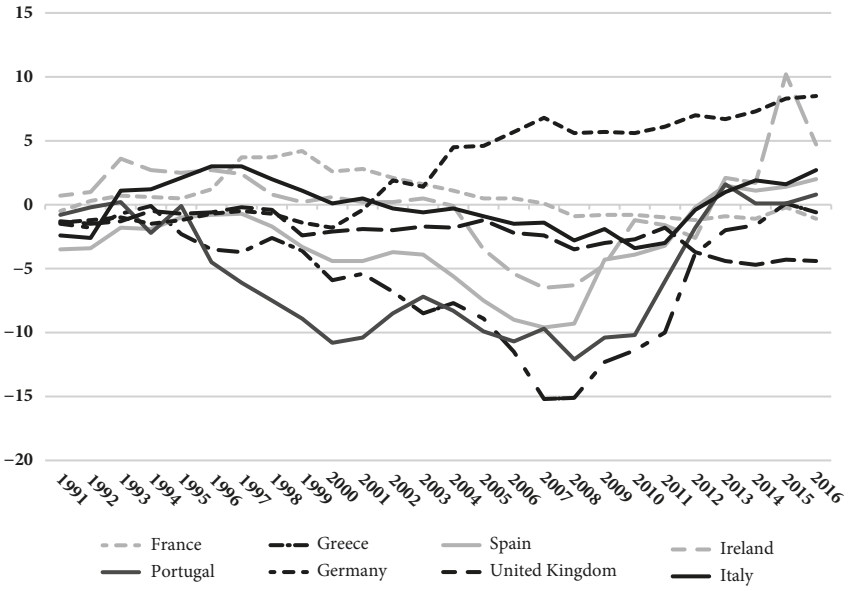


Diagram II: Current account balance of France, Greece, Germany, Ireland, Italy, Potugal, Spain and the United Kingdom in the years 1991–2015 (as percentage of GDP). Source: Own study based on Saldo der Leistungsbilanz von Deutschland, Frankreich, Großbritannien, Griechenland, Italien, Spanien, Portugal und Irland in Prozent des BIP in den Jahren 1991–2016, IW Köln: 1–2.

rate in Germany,[16] this situation led to an economic imbalance throughout the eurozone and, thus, indirectly contributed to further aggravation of the crisis (Zürcher 27.03.2012: 1–2).

16 The poor domestic demand resulted primarily from a specific 'wage dumping' in Germany caused by flexible labour market principles introduced by Schröder's government. Due to these principles, the competitiveness of German economy was constantly growing, yet wages either dropped (as in 2005–2011) or were at a standstill (from 2012). The low domestic demand resulted in, among others, a weaker investment growth and a higher public debt (Flassbeck 10–16.07.2013: 28–29; Berger 28.01.2014 B11).

The European Commission has for many years considered the current account surplus of more than 6% of GDP as a threat to the financial stability of the euro area Member States (Schulz 5.03.2014: 1–2; Berger 28.01.2014 B11).[17] This view was shared by the United States Department of the Treasury, according to which the said situation was a threat to financial stability at a regional or even at a global level, since a country that had that high current account surplus forced its trade partners to credit their import and to contract a permanent debt (Spiegel 2.02.2015: 1).

Although some euro area Member States (particularly France and Italy) and the European Commission pressed Germany to take necessary action with the aim to decrease the said surplus, the federal government remained unpersuaded. Opinions on the necessity for West Germany to reduce the surplus were also expressed by representatives of the IMF and numerous economics experts. It was not until 2013 that the European Commission started working on proposals for systemic changes in the eurozone with the aim to overcome the debt crisis in line with the third Van Rompuy's report, and also addressed the issue of the current account surplus of Germany. On 5 March 2014, it reprimanded the federal government, at the same time demanding that it took necessary steps towards increasing the domestic demand in Germany, arguing that the current account surplus could compromise the balance in the entire eurozone. Nonetheless, the said surplus not only did maintain until the end of the analysed period but also increased – from 7.3% GDP in 2014 to 8.5% GDP in 2016 (Węc 2015: 131–134).

4.2 Meeting and Report of the Reflection Group on the Future of Europe: the German Diplomatic Initiative

In March 2012, on the initiative of Foreign Minister of Germany Guido Westerwelle, a Reflection Group on the Future of Europe was established. It comprised foreign ministers of eleven EU Member States: Germany, France, Belgium, the Netherlands, Luxembourg, Poland, Austria, Denmark, Italy, Spain and Portugal. Characteristically, when submitting his initiative, Westerwelle did not even agree this fact with the Danish government holding the EU Presidency at the time, which rightfully triggered annoyance in Copenhagen and resulted in the Foreign Minister of Denmark being represented by a ministerial official

17 In 2007 and 2011–2016, the said surplus in Germany exceeded the level of 6% of GDP allowed by the EC (cf. Diagram I).

at the first meeting of the Reflection Group in March 2012 in Berlin (König 21.03.2012: 1–3). The group met five times from March to September 2012, discussing issues such as changes in the institutional system, democratic life, economic governance or common foreign and security policy, as well as the role of the EU in the global politics. During the fifth meeting on 17 September 2012 in Warsaw, the Reflection Group submitted its final report.

The said report was not approved by consensus and thus reflected only views of individual ministers and not the common stance of the entire Reflection Group. Furthermore, it proved unnecessary, since all the proposals made so far by Westerwelle regarding the development of a new Constitutional Treaty for the European Union and the convocation of a Convention in this matter were (as mentioned above) rejected by most of the members of the Reflection Group. Nevertheless, it was the first document to be elaborated at the analysed debate, drawing a clear and apparent dividing line between two issues: changes in the eurozone system vital for overcoming the debt crisis (Part I of the report) and systemic changes in the entire European Union aiming to consolidate the EU in the international arena due to challenges arising from globalisation (Part II of the report). The signatories of the report stressed unanimously that it was significant to "get the sequencing and the balance right, combining what can be realistically achieved in due course with a longer-term perspective and vision for a stronger Europe" (Final Report 17.09.2012: 1). It was considered the greatest priority and, at the same time, a short-term goal to implement a system reform of the EMU in accordance with guidelines specified in the first Van Rompuy's report of June 2012. As was the case with Van Rompuy, members of the Reflection Group demanded (1) that a supervisory mechanism for monitoring banks of the EU Member States be introduced, with the said mechanism made mandatory for the euro area Member States and non-mandatory for other EU Member States (the Financial Union); (2) that a supervisory authority be established to supervise budgets of the Member States (though without specifying the scope of its powers) with full respect of the responsibility held by the latter for the developing national budgets, and communitarisation of the risk of insolvency due to national debt (some ministers) (the Fiscal Union), (3) that economic policies of the euro area Member States be coordinated (the Economic Union), and (4) that all systemic changes in the EMU be legitimised through properly extended competences of the EP and national parliaments (Final Report 17.09.2012: 3–5).

Moreover, the foreign ministers further specified the mentioned Van Rompuy's proposals or advocated other system solutions in the EMU slightly different to his choice. They called for the European Stability Mechanism to

be transformed into the European Monetary System (the Financial Union).[18] They demanded that the role of the Commissioner for Economic and Financial Affairs in the European Commission be strengthened (the Fiscal Union). They also proposed to coordinate economic policies of the Member States using the enhanced cooperation procedure (particularly with regard to labour markets and the stability of pension systems) and to confer the binding legal force on commitments arising from the Euro-Plus Pact, which were voluntary at the time (the Economic Union). Lastly, they also advocated the further specification of the new competences of the EP (i.a. inclusion of the EP into the European Semester procedure, matters related to the Euro-Plus Pact or the issue of indebted countries using resources of the possible euro area budget) and of national parliaments (approving of all actions taken on the EU level that pertain to the competences of the Member States [i.a., a national budget]), as well as the establishment of a permanent common committee comprising representatives of the EP and national parliaments to address economic and fiscal policy within the EMU (Final Report 17.09.2012: 3–5).

Once the system reform of the EMU was completed and the eurozone debt crisis was averted, the European Union would implement a comprehensive second system reform of the EU. Some actions should be taken under the treaties in force, possibly even in the short term, while others in the long term by means of a treaty revision conducted at a Convention meeting and an intergovernmental conference. The second system reform should result in more cohesive external actions of the EU and improved decision-making in this area, enhanced cooperation and increased effectiveness of the EU in relations with its strategic partners, strengthened other EU policies (particularly energy policy and policies in the area of freedom, security and justice), changes in the EU institutional system, strengthened EU axiology and improved long-term governance of the EU.

In order to enhance the cohesion of the Union's external actions, a comprehensive and integrated approach to all the aspects of "the position of the EU in the international arena" should be developed. Particularly, it would be necessary to strengthen the European External Action Service, the High Representative of the Union for specific external actions, to develop clear rules of cooperation between the said High Representative and other commissioners, to improve the work of the Foreign Affairs Council, to increase the frequency of Gymnich-formula meetings of foreign ministers, to enhance the common security and

18 As was the case with the CDU in its programme resolution on European policy of November 2011.

defence policy by means of permanent structural cooperation and to extend the list of its objectives beyond the initiative to pool and share military capabilities. Furthermore, the high representative of the Union together with governments of the Member States should take vital initiatives to enhance cooperation between the Union and its strategic partners, and increase the former's effectiveness in these relations. In the long run, it would be vital to significantly extend the scope of decision-making by qualified majority in the common foreign and security policy, to take new actions in the defence industry (e.g., to create a common market of armament projects), and to pursue the establishment of a common representation of the EU within international organisations in this regard (Final Report 17.09.2012: 6–7). Energy policy could be strengthened by means of an internal energy market established based on the EU infrastructure, improved energy efficiency and defined common external energy relationships with the international environment. The primary objective of the reform of policies in the area of freedom, security and justice should be to create a "European Border Police," whereas the medium-term goal should be to introduce a "European visa" (Final Report 17.09.2012: 6–7).

Changes in the institutional system of the EU would involve, primarily, improving the effectiveness and legitimation of actions performed by individual institutions, particularly the European Commission, the EP and the CEU. The European Commission ought to play the role of "the engine of the Community method," though its internal organisational structure should be improved (by means of creating clusters with commissioners arranged in a two-level hierarchy), whereas "in the medium term the number of commissioners should be addressed." Changes in the EP were to involve the establishment of a European electoral list (apart from national lists in use so far), the elections being held on the very same day in all Member States, the improved procedure for the appointment of the President of the European Commission in the Parliament, as well as the strengthening of European political parties, which "should work towards the building of a truly 'European political space' ". Moreover, national parliaments should be consolidated in their role in the EU by means of, i.a. enhanced cooperation within the Conference of Community and European Affairs Committees of Parliaments of the European Union (*Conference des organismes specialises dans les affaires communautaires*, COSAC), cooperation between the commissions of all national parliaments dealing with the very same European *dossier*, as well as participation of MEPs in strategic EU debates in national parliaments. In turn, the reform of the CEU should boil down to enhancing cooperation between the CEU and the EC, particularly with regard to the sittings of the latter being prepared by the General Affairs

Council in agreement with other formations of the Council. In the medium term, the number of permanent presidents of individual formations of the CEU would have to be increased and "the right balance between permanent and rotational chairs" would have to be stricken. Undoubtedly, this would result in further restriction of the competences of the EU Presidency following changes implemented in this regard under the Treaty of Lisbon. What is more, some members of the Reflection Group claimed that the EC presidency should be combined with the European Commission presidency (Final Report 17.09.2012: 2, 7–8). The improvement of the Union's axiology would take a newly established, simpler mechanism for overseeing the respect of EU values by the Member States. In a situation where EU values specified under Article 2 TEU proved violated, the European Commission would draw up a relevant report and issue recommendations for a given state or bring the case before the CEU (Final Report 17.09.2012: 8). However, the report failed to solve the key issue of the procedure under Article 7 TEU, namely, its ineffectiveness caused by the unanimity requirement in deciding by the EC whether a given Member State caused a serious and persistent violation of the Union's values specified under Article 2 TEU.

In order to improve long-term governance of the European Union, the Reflection Group spoke in favour of amending the treaty revision procedure. Both the adoption and further entry into force of the treaty amendments (except for the accession of new EU Member States) should take place by super-qualified majority of votes of the Member States and the EU population representing them. The treaty amendments would be binding only for those Member States that ratified them. In the long run, improvement of the governance system of the EU by amending its system of separation of powers employed so far would have to be considered. According to some members of the Reflection Group, such amendments could involve, i.a. introducing direct elections for the President of the European Commission "who appoints the members of his 'European Government' himself," providing the EP with the powers to initiate legislation, and establishing a second parliamentary chamber comprising representatives of the Member States (Final Report 17.09.2012: 8).

The report of the Reflection Group on the Future of Europe was the first joint document issued by the Member States, resulting from a public debate held in 2011–2012 and aiming to reconcile the system reform of the euro area and the systemic changes in the entire European Union. Developed by foreign ministers of only eleven Member States with the countries accepted into the EU in 2004 and 2007 represented solely by Poland, the said document was not fully representative for the entire Union. Nonetheless, the report specified

a long-term vision of the system reform of the EU, though many proposals it contained could have provoked or did provoke controversy in the Member States (the combining of the EC and the European Commission presidencies, the establishment of a European government in lieu of the European Commission, the introduction of a European visa, the establishment of super-qualified majority of votes of the Member States and the EU population representing the said states in the ordinary treaty revision procedure). However, the proposals made by the Reflection Group regarding changes in the institutional system of the EU were not a thoroughly new concept. A provision stipulating that the number of staff in the European Commission should be reduced to two-thirds of the number of the Member States in order to make it more effective was even included (and still is) in the Treaty of Lisbon of 13 December 2007. As a result of demands presented later by the Irish government, the EC nevertheless declared in June 2009 that the 'one commissioner per country' principle was to be retained in the European Commission whose term of office began on 1 November 2014, which was followed by a decision issued on 22 May 2013 under Article 17(5) TEU.[19] Moreover, the idea of combining the EC and the European Commission presidencies was first presented on 15 January 2003 by Chancellor Schröder and President Chirac, while on the following day it was referred to the Convention on the Future of Europe, yet failed to obtain the delegates' approval. Likewise, the idea of establishing a single pan-European list of common "European candidates" to be voted for, submitted for the direct elections to the EP was discussed at the Convention, yet it did not obtain sufficient support among its members.

4.3 Influence of the Federal Government on the Course of the Eurozone System Reform so far

Despite the numerous concerns reported both by the euro area Member States and the EU institutions, the German government had a highly significant impact on the implementation of the system reform in the eurozone. This manifested primarily in the course and the outcome of negotiations on the establishment of the BU. The systemic solutions adopted for the BU ensured both Germany and France had a substantial impact on its functioning. Originally, the BU was

19 Nevertheless, the EC stated that it would review this decision following the accession of the thirtieth EU Member State or after expiry of the discussed term of office of the Commission, "whichever is earlier" (Articles 1–2 of the decision) (EC Decision, OJ L, 2013, 165: 100).

to be given a supranational character, yet the federal government together with the French government and governments of several other countries did not agree to the European Commission's proposal, undermining the competences of this new eurozone structure as a result. Eventually, it was agreed that the BU shall be an intergovernmental structure based on three pillars and two different legal orders: EU law and an intergovernmental agreement. At the direction of the German government, the functioning of the SRF was decided to be specified under an intergovernmental agreement and not under secondary legislation. This was due to the German government arguing during the negotiations that EU law would not be a sufficient instrument for the establishment of such a Fund, which could lead to the risk of the SRF being undermined in the future by the Federal Constitutional Court in Germany (Węc 2014b: 43).

The agreement on the detailed regulations concerning the functioning of the BU was also influenced by the German and French governments to a great extent, as both countries managed to use numerous measures to secure the restructuring of banks in the euro area Member States, thus strengthening their position in the decision-making process at the cost of smooth functioning of the BU. This resulted in, among others, a voting system in the SRB that made it easier for Germany or France to form blocking coalitions against restructuring of banks requiring over 5 billion euros of financial assistance or pertaining to institutions with registered seats at least in one Member State of the euro area and at least one country outside the eurozone (the so-called group restructuring). Moreover, as a country with the highest financial contribution to the SRF, Germany will have the final say on all major bank restructuring or resolution processes and, consequently, it will have the capacity to influence the direction of reforms in countries stricken by financial crisis (Węc 2014b: 44).

After the issuance of the Five Presidents' Report, the matter of the establishment of the European Deposit Guarantee Scheme reappeared in a public debate in Germany, evoking much controversy. On 4 November 2015, at the request of the SPD and the CDU/CSU government coalition factions, the Bundestag adopted a resolution in which it referred to the principles of the Five Presidents' Report on the establishment of the EDIS with outright disapproval. It claimed that the communitarisation of national deposit guarantee schemes is a misguided idea that only creates "false incentives"; a concept that not only would have no contribution to bank reliability but also would not create any significant grounds for the stability of the banking sector in the eurozone. According to the Bundestag, instead of pursuing the establishment of a new deposit guarantee scheme, the European Commission should ensure that the DGSD is implemented. The Bundestag followed with a call on the federal government to take action aiming

to block (*unterbleibt werden*) the proposal for EDIS and to effectively implement in all Member States and on the EU level measures adopted so far aiming to establish the BU (DB Drucksache 18/6548: 1–3).

On 24 November 2015, when the European Commission presented its proposal for EDIS, the said legislative proposal was harshly criticised by German Minister of Finance Schäuble. At the debate on the 2016 draft budget held in the Bundestag, he further specified the above-mentioned view of the CDU/CSU and the SPD parliamentary factions that the proposal of the European Commission creates "false incentives" by allowing some of the euro area Member States to get into debt at the expense of others (DB Plenarprotokoll 18/138: 13508). Schäuble's critical attitude towards the idea of forming a common guarantee fund for the entire eurozone had been known since the time of the legislative negotiations on the DGSD of 16 April 2014. However, at the discussed debate it became even more vivid. When presenting the proposal, Commissioner for Financial Stability Jonathan Hill (EC) spoke of the necessity to establish EDIS as "part of a much bigger series of measures" to establish the BU, which shall not in any case involve "free rides" for distressed banks, whereas Schäuble warned that the proposal is premature and poses a threat to clients of German banks who would have to guarantee deposits of clients of banks in other euro area Member States (Commission. Hill 2015: 1; Kröger 2015:1–2; EurActiv 25.11.2015: 1–2; Handelsblatt 24.11.2015: 1). According to Schäuble, the first thing would be to conclude the implementation of the BU based on formerly adopted regulations and to verify the functioning of this new structure in practice, and only then should the strengthening of its third pillar be discussed. Following the opinion of some German banks, Schäuble predicted that the establishment of the EDIS could be the first step towards the transformation of the BU into a "transfer union" (Tageszeitung 25.11.2015:1).

The stance adopted by the German Minister of Finance was shared by Deutsche Bank President Jens Weidmann, who noted that not all of the conditions for the establishment of the EDIS had been met at the time, since national banking systems were still strongly dependent on the financial and economic policies of governments of the Member States (e.g. regulations on insolvency procedures of companies vary across the Member States). Furthermore, the founding of such a system would entail the risk of consequences of faulty political decisions adopted by governments being bore by clients of all banks in the eurozone (EurActiv 25.11.2015: 1). Schäuble was supported also by German Savings Banks (*Deutsche Sparkassen*) and cooperative banks (*Genossenschaftsbanken*), who previously counted on special regulation that would in principle exclude them from the EDIS. However, when the European Commission's proposal of 24 November

2015 proved not to envisage any opt-out regulations, they became highly alarmed. In other euro area Member States (except for Austria), the European Commission's proposal did not generate that much controversy. It was given a particularly enthusiastic reception in France and most countries of the southern euro area. Representatives of the governments of the said countries noted that the maintenance of national deposit guarantee schemes in a single currency area is pointless. The EDIS should promote clients' trust in banks, and hence prevent panic withdrawals of deposited resources in the event of a crisis situation, as in the case of Greece, where depositaries paid in a short term up to 45 billion euros from banks, thus leading to a destabilisation of the entire financial sector in the said state (BdB 25.11.2015: 1–2; Kröger 2015:1–2; Tageszeitung 25.11.2015:1).

As a result of the harsh criticism the European Commission's proposal faced in Germany, the federal government succeeded in deferring the final decision on this issue for some time. This was due to the fact that under German pressure, a paragraph referring to the EDIS was removed from the draft conclusion of the EC in December 2015. Importantly, the issue of the BU was discussed only marginally in the EC at the time, obscured by other matters, such as the European migrant crisis and combating terrorism (EC. Conclusions, 17–18.12.2015: 1–8; Mussler 15.12.2015: 1–2).

However, less than two months later, on 25 February 2016, the Bundestag adopted a categorically formulated resolution addressed primarily to the European Commission. Not only did it contain all the concerns previously specified in Declaration of 4 November 2015 but also new formulated reservations. Above all, it questioned the legal grounds of the European Commission's proposal of 24 November 2015, i.e. Article 114 TFEU, which allows only for harmonisation and not for unification of statutory provisions, regulations and administrative provisions of the Member States with the aim to establish or ensure the proper functioning of the internal market. According to the Bundestag, the said provisions did not allow for a communitarisation of national deposit guarantee schemes. Moreover, the European Commission's proposal provided for the establishment of a Deposit Guarantee Fund with the aim to (as envisaged by the Bundestag) "(re)finance national deposit guarantee schemes." Thus, the said proposal stipulated that a new source of income for the EU would be formed, yet the treaties in force clearly stated that financing new tasks of the EU requires unanimous agreement of all the Member States. Further in the resolution, the Bundestag argued that the European Commission might infringe the subsidiarity and the proportionality principles, as the Commission failed to conduct "broad consultations" required under Protocol No. 2 (Article 2) on the application of the subsidiarity and the proportionality principles annexed to TEU and TFEU,

as well as failed to provide the required justification that would include, i.a. a financial statement of a given proposal (Article 5 of the protocol). The resolution concludes with the Bundestag formulating the very same conditions as presented to the federal government on 4 November 2015 to be met by the European Commission. The Bundestag called on the Commission to abandon the intent to create the EDIS and to ensure that the formerly adopted measures aiming to establish the BU are effectively implemented (DB Drucksache 18/7644: 1–4; CSU-Landesgruppe: 1).

On 8 March 2016, the resolution of the Bundestag was presented at the meeting of the CEU (CEU. Note, 8.03.2016: 1). In June of that year as many as four debates were held in the CEU or its preparatory bodies on the subject of the draft resolution of the European Commission establishing the EDIS (Procedure 2015/0270/COD: 1–2). On 16 June, the Dutch Presidency submitted a progress report on the Commission's legislative proposal and draft political conclusions of the CEU (CEU. Report, 16.06.2016: 1–3; Draft Conclusions, 16.06.2016: 4). In the conclusions adopted four days later, government delegations recognised that "the participating Member States will exploit the opportunity to conclude an intergovernmental agreement, once political negotiations on the EDIS are initiated" (CEU Conclusions, 17.06.2016: 4). This meant that the CEU made another concession to the German delegation.

The assessment of actions taken so far by the federal government during the eurozone debt crisis seems ambivalent. Admittedly, Germany had the greatest financial contribution to the actions of the European Union aiming to stabilise economies of indebted euro area Member States (Greece, Italy, Spain, Portugal and Ireland). However, though it might seem a paradox, Germany had also a direct or indirect contribution to the worsening of the said crisis, yet together with France obtained the greatest influence on the form and outcomes of the system reform of the euro area regardless, and even imposed its own methodology for implementing the said reform on other euro area Member States. This was vivid in the first phase of the reform in 2012–2015, i.a. in the course and the results of the legislative negotiations on the establishment of the BU. The systemic solutions adopted for the BU ensured that Germany had a significant influence on its functioning and the decision-making system, as well as on all major bank restructuring or resolution processes and, consequently, on the direction of the reforms in countries stricken by financial crisis at that time and in the future. In the second phase of the reform, which was executed in accordance with the principles of the Five Presidents' report of 2015, a severe disagreement occurred between the German government and the Bundestag on one side and the European Commission on the other. The dissent concerned a legislative

proposal of the Commission on the establishment of the EDIS, which contributed to further extensions to the deadline for the founding of the Financial Union. Despite legislative work on the mentioned proposal not being finished at the time, there is considerable evidence suggesting that, as before, the German government will succeed in enforcing its position also in this case.

Consequently, the eurozone debt crisis and the attempts to address it taken so far have substantially consolidated Germany's position in the European Union both in economic and political terms. Germany has become the sole leader in the EU, while the previous significance of France decreased, as it was struggling for years with weakening competitiveness of its economy and difficulties in the implementation of economic reforms. The eurozone debt crisis to a great extent undermined the positions of Italy, Spain, Portugal, Ireland and Greece in the EU. It also had an indirect contribution to the consolidation of the role of the EC and the so-called Euro summits, as well as undermined the significance of the European Commission and the EP in the institutional system of the EU. It all contributed to the growing importance of Germany in the European Union; however, this does not mean that the Germany's dominant position in the Union is certain in the future, as it is based mainly on favourable macroeconomic criteria of German economy and implications of the eurozone debt crisis.

Chapter V. Germany's Stance on the European Migrant Crisis in 2015–2016

1 Dynamics of the European Migrant Crisis: from the First Symptoms (2011–2014) to the Peak Period (2015–2016)

In the years 2015–2016, Europe experienced the greatest mass flow of migrants since World War II (Tendera-Waszczuk 2016: 9–25; Koszel 2016: 143–156; Dobrowolska-Polak 2016: 124–135), which was caused by, i.a. implications of the Arab Spring (2010–2013), the proclamation of the so-called Islamic State in 2014 and armed conflicts in African and Asian countries. The exodus of migrants arriving in the European Union has begun already in 2011. In the first half of that year, over 40 thousand people came from North Africa to Italy. In Italy alone, the island of Lampedusa became overpopulated and local authorities proclaimed a state of humanitarian emergency. On 20 February 2011, on the initiative of the Italian government the European Border and Coast Guard Agency (Frontières extérieures, Frontex) initiated the Hermes 2011 operation aiming to provide support in monitoring the EU southern external border (Węc 2012a: 199–200).

Nevertheless, since 2011 there was a growing number of third-country nationals seeking asylum in the European Union. While in 2011 it was estimated at 309,040 people, in 2015 the number of migrants peaked at 1,322,825, whereas in 2016 it fell to 1,259,995 (Eurostat. Asylum applicant, 26.04.2017: 1–2). The main migratory routes were the Eastern Mediterranean route (from Turkey to Greece and Bulgaria), the central Mediterranean route (from Libya and Egypt to Italy) and the Western Mediterranean route (from Morocco to Spain). According to the data of the UNHCR, a vast majority of migrants reached the European Union in 2015 via the Eastern Mediterranean route (about 860 thousand people), a significantly smaller group used the central Mediterranean route (over 153 thousand people), while few groups reached the EU via the Western Mediterranean route (about 16 thousand people) (UNHCR. Bureau for Europe, February 2017: 1–9).[1] According to Eurostat data, of 1,322,825 migrants who managed to apply for asylum in 2015 as many as 90% chose 9 of the EU

1 In 2015, Frontex recorded in total as many as 1,822,337 illegal attempts to cross the EU external borders. However, these data do not reflect the exact number of migrants who entered the EU illegally, since the provided number also includes illegal border-crossings at external borders attempted several times by the same individual (FRONTEX. Risk Analysis 2016: 16–17).

Member States, namely, Germany (476,510 people),[2] Hungary (177,135 people), Sweden (162,450 people), Austria (88,160 people), Italy (83,540 people), France (76,165 people), the Netherlands (44,970 people), Belgium (44,660 people) and the United Kingdom (40,160 people). In the other Member States, asylum applications were lodged by 129,075 people with 13,205 applications lodged in Greece (Eurostat. Asylum applicant, 26.04.2017: 1–2) (cf. Tab. III).

The intensification of the inflow of migrants into the EU was substantially impacted by an erroneous (yet probably understandable due to humanitarian reasons) decision of Chancellor Merkel and Austrian Chancellor Werner Faymann, declared on the night of 4 to 5 September 2015 on temporary suspension of the Dublin III Regulation for Syrian refugees, particularly the requirement to seek asylum in the EU Member State a given migrant enters first. As a result of this decision, the mass inflow of migrants to the EU, especially to Germany further intensified. According to data of BAMF, by the end of 2015, about 890 thousand people arrived in Germany, 476,649 of whom applied for asylum and about 413,350 got there from other EU Member States, leading to a cumulation of these two groups of refugees (arriving from third countries and EU Member States). Later, the issue of these so-called secondary movements of refugees between the Member States became a major problem addressed by the reform of the Common European Asylum System (CEAS).[3] Of

2 According to BAMF data, the total number of asylum applications lodged in Germany in 2015 was estimated at 476,649 (BAMF. Migrationsbericht 2015, 14.12.2016: 1).

3 EASY, a registration system for asylum seekers, recorded as many as 1,091,894 migrants by the end of 2015. However, when verified by BAMF in 2016, the data proved that this number was substantially overestimated and was ultimately set at about 890,000 people. This difference stemmed from the fact that EASY did not require applicants to provide their personal details. For that very reason, records in the system oftentimes proved erroneous or even double. Moreover, some individuals registered with EASY later moved to other EU Member States. Of the above-mentioned group of about 890 thousand people, 441,899 individuals were first-time applicants for asylum, while 34,750 were second-time asylum applicants. BAMF differentiates between a first-time application for asylum, a subsequent application for asylum and a second-time application for asylum. The first-time application (*Erstantrag*) is an application lodged for the first time by an interested individual in BAMF. However, if the said person withdraws the application before it is considered, or the said application is rejected in an unchallengeable manner, the applicant has the right to appeal. This subsequent application (*Folgeantrag*) is considered only in cases where new essential circumstances emerged in individual cases (e.g. altered conditions in the country of origin or new evidence of a threat to the asylum seeker in the case of his or her return). Whereas a secondary application for asylum (*Zweitantrag*) can be lodged if the asylum procedure concerns a country considered 'safe' under the

Tab. III: Number of asylum applications lodged in the EU Member States in 2015. Source: Eurostat. Asylum applicant, 26.04.2017: 1–2.

Time	**2015**
Geo	
European Union (28)	1322825
Austria	88160
Belgium	44660
Bulgaria	20365
Croatia	210
Cyprus	2265
Czech Republic	1515
Denmark	20935
Estonia	230
Finland	32345
France	76165
Germany	476510
Greece	13205
Hungary	177135
Ireland	3275
Italy	83540
Latvia	330
Lithuania	315
Luxembourg	2505
Malta	1845
Netherlands	44970
Poland	12190
Portugal	895
Romania	1260
Slovakia	330
Slovenia	275
Spain	14780
Sweden	162450
United Kingdom	40160

Asylum Procedure Act (*Asylgesetz*) of 26 June 1992 (the EU Member States, Norway and Switzerland) and proves unsuccessful, Germany is authorised to consider the application and the above-mentioned circumstances in a given migrant's situation occur. In such case, the application is processed by BAMF as the first-time application for asylum (BAMF. Erst-, Folge-, Zweitanträge, 1.08.2016: 1; Migrationsbericht 2015, 14.12.2016: 1).

the above-mentioned 476,649 applicants, only 140,915 were granted asylum in Germany in 2015, which was nevertheless the highest quote of positive decisions in the entire European Union (BAMF. Aktuelle Zahlen zu Asyl, 2017: 10).

According to the data of Eurostat, the influx of migrants into the EU in 2016 was lower than in the preceding year, yet it still was estimated at as many as 1,259,955 people. However, at that time, as many as 59% (approximately) of migrants lodged asylum applications in Germany, while about 41% in the other EU Member States. In absolute figures, the highest number of applications was registered in Germany (745,545) and Italy (122,960). According to the data of BAMF, in 2016 Germany admitted 433,920 asylum seekers, which constituted, as in 2015, the highest number of positive decisions in the entire EU (BAMF. Aktuelle Zahlen zu Asyl, 2017: 10).

According to Eurostat data, the total number of asylum applications lodged in the years 2015–2016 in the EU Member States was highest in the following countries: Germany (1,221,665), Italy (206,500), Hungary (206,565) and the United Kingdom (78,945)[4], meaning that of the total number of 2,333,710 applicants (first-time and subsequent applications) in the entire European Union in the analysed period, as many as 52.35% applications were lodged in Germany, 8.85% in Italy, 8.85% in Hungary and 3.38% in the United Kingdom. Whereas in the other 24 Member States, the total number of lodged applications was estimated at 21.68% (cf. Tab. IV) (Eurostat. Asylum applicant, 26.04.2017: 1–2). However, according to the data obtained from BAMF, the total number of asylum seekers admitted to Germany in the years 2015–2016 was estimated at 574,835. What is more, from January to April 2017, further 132,218 individuals were granted the right to asylum in Germany (BAMF. Aktuelle Zahlen zu Asyl, 2017: 10) (cf. Tab. V).

2 Amendments to the Immigration Policy, External Borders Control and Asylum Policy of the European Union

2.1 Legal Grounds for Immigration Policy and External Borders Control

The legal grounds for immigration policy and external borders control were codified in primary and secondary EU legislation. Since the entry into force of the Treaty of Lisbon on 13 December 2007, the principles of this policy are specified under Article

4 One should add to the presented numbers (particularly in the case of Germany and the United Kingdom) migrants from other EU Member States. For the time being, the said numbers should only be treated as estimates.

Tab. IV: Number of asylum applications lodged in the EU Member States in 2015–2016. Source: Eurostat. Asylum applicant, 26.04.2017: 1–2.

Time	**2015**	**2016**
Geo		
European Union (28)	1322825	1259955
Austria	88160	42255
Belgium	44660	18280
Bulgaria	20365	19420
Croatia	210	2225
Cyprus	2265	2940
Czech Republic	1515	1475
Denmark	20935	6180
Estonia	230	175
Finland	32345	5605
France	76165	84270
Germany	476510	745155
Greece	13205	51110
Hungary	177135	29430
Ireland	3275	2245
Italy	83540	122960
Latvia	330	350
Lithuania	315	430
Luxembourg	2505	2160
Malta	1845	1930
Netherlands	44970	20945
Poland	12190	12305
Portugal	895	1460
Romania	1260	1880
Slovakia	330	145
Slovenia	275	1310
Spain	14780	15755
Sweden	162450	28790
United Kingdom	40160	38785

67(2), Article 79(1–5) and Article 80 TFEU. According to General Provisions specified in Article 67(2) TFEU, policy on asylum, immigration and external border control should be based on "solidarity between Member States, which is fair towards third-country nationals", while "stateless persons shall be treated as third-country

Tab. V: Total number of asylum seekers admitted by Germany in 2015–2016. Source: BAMF. Aktuelle Zahlen zu Asyl, 2017: 10.

	Total	Granted legal status as a refugee	Granted subsidiary protection	Determination of a deportation ban
2015	140915	137136	1707	2072
2016	433920	256136	153700	24084
2017 (January – April)	132218	61373	51978	18867

nationals." Specific provisions on the three above-mentioned policies, provided under Article 80 TFEU, impose an additional obligation on the Member States to ensure that "their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States." In turn, specific provisions regarding immigration policy authorise the European Union to ensure "the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of (…) illegal immigration and trafficking in human beings" (Article 79(1) TFEU). The EU immigration policy specifies the conditions of entry and residence of legal migrants (including standards on procedures for the issue by the Member States of long-term visas and residence permits) arriving in a given Member State and legally residing in the said Member State, including for the purpose of family reunion (Article 79(2)(a) TFEU). However, the Member States retain the right to determine volumes of admission of migrants coming to their territories to seek work (Article 79(5) TFEU). The EU may also support the Member States in promoting integration of legal migrants with their societies by providing relevant incentives and stimuli, yet there are not any provisions harmonising national legislation in this regard (Article 79(2)(b)) and Article 79(4) TFEU). The EU is also obliged to prevent and limit illegal immigration, particularly by means of effective repatriation policy but also to combat trafficking in persons with a particular focus on women and children (Article 79(2)(c-d) TFEU). Moreover, "the Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States" (Article 79(3) TFEU).

The Treaty of Lisbon extends the competences of the European Union in immigration policy. It sets up new legal grounds for adopting migrant integration

measures by the EP and the CEU, thus engaging these two institutions in the procedure for establishing the said measures. However, these measures cannot harmonise laws and regulations of the Member States as a consequence. Moreover, it expressly accounts the fight against trafficking in human beings, particularly women and children, and the procedure for concluding readmission agreements to the instruments of the EU immigration policy.

Secondary legislative acts that specify the principles of immigration policy and external border control can be classified into acts on legal migration, integration of foreigners and illegal immigration. The most important of the former are: firstly, the directive of the CEU of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, which provided for a fast-track procedure for the issuance of a special residence permit on more attractive terms (the so-called Blue Card) (CEU. Directive, OJ L, 2009, 155: 17–29); secondly, the directive of the EP and the CEU of 13 December 2011, which introduced a single application procedure for issuing a residence and work permit for third-country nationals contained in one single administrative decision, as well as a common set of rights conferred on legal migrants (EP/CEU. Directive, OJ L, 2011, 343: 1–9); thirdly, the directive of the EP and the CEU of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, with the maximum duration of stay limited to a period of 5 to 9 months as fixed by a given Member State, specifying the set of their rights (EP/CEU. Directive, OJ L, 2014, 94: 375–390); fourthly, the directive of the EP and the CEU of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, which facilitates temporary relocations of managers, specialists and trainee employees to branches or subsidiaries within the EU (EP/CEU. Directive, OJ L, 2014, 157: 1–22).[5]

Until the outbreak of the migrant crisis, the acquis of the secondary EU legislation regarding the integration of legal migrants, and prevention, control and monitoring of illegal immigration was very modest, in contrast to legal migration. The competences of the EU in the area of the integration of migrants are very limited, since it is a matter of national sovereignty. Hence, one of the few legislative acts to regulate this issue on the EU level is the directive of the CEU

5 The said provisions are complemented by the directive of the EP and the CEU of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (EP/CEU. Directive, OJ L, 2016, 132: 21–57). The directive should be transposed in the Member States by 23 May 2018.

of 22 September 2003 on the right of family reunification (CEU. Directive, OJ L, 2003, 251: 12–19). Whereas the most important acts of secondary law on prevention, control and monitoring of illegal immigration are: the directive of the CEU of 28 November 2002, which involves, i.a. a common definition of unauthorised entry, transit and residence (CEU. Directive, OJ L, 2002, 328: 17–65); the directive of the CEU of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings, cooperating with competent authorities (CEU. Directive, OJ L, 2004, 261: 69–73); the directive of the EP and the CEU of 16 December 2008, which sets out common standards and procedures to be applied in Member States for returning third-country nationals who stay illegally in the territory of the Union (EP/CEU. Directive, OJ L, 2008, 348: 98–107); the directive of the EP and the CEU of 18 June 2009, providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals (EP/CEU. Directive, OJ L, 2009, 168: 24–32).

2.2 Implemented and Proposed Amendments to Secondary Law on Immigration Policy and External Borders Control following the Outbreak of the Migrant Crisis

The European Union's response to the migrant crisis involved changes in immigration policy and external borders control policy. On 24 April 2015, the EC called on the European Commission at an extraordinary meeting in Brussels to develop a new agenda for immigration policy that would address the ongoing increase in the volumes of migrants arriving in the EU (EC. Statement, 24.04.2015: 3).[6] On 13 May 2015 the European Commission issued a communication titled *European Agenda on Migration*. In the first part of the agenda, the Commission proposed to introduce immediate action to tackle the crisis, whereas in the second part, it presented four pillars for managing migrations in the future. The listed measures to be taken with immediate effect involved, i.a. search and rescue operations, including increased spending on Triton and Poseidon operations executed by Frontex in 2015–2016; targeting criminal smuggling networks, including sending special Petersberg missions for fight against migrant smuggling to countries of origin; putting forward the Commission's legislative proposal to introduce a temporary relocation scheme for refugees seeking asylum in the Member States (by the end of May 2015), followed by a legislative proposal providing for a common EU relocation scheme

6 The agenda referred to the decision of the Foreign Affairs Council and the Justice and Home Affairs Council adopted at their joint session on 20 April 2015 (Adamczyk 2016: 48–49).

(by the end of 2015); developing a resettlement scheme allowing for safe and legal transfer of people from countries of origin to the EU, and contributing 50 million euros to this end in 2015–2016; establishing partnership between the EU and the countries of origin to limit migrations and provide economic and financial aid to prospective migrants in these countries; supporting the Member States under particular pressure by setting up the so-called 'hotspots' allowing for swift registration of migrants as means for European Asylum Support Office (EASO),[7] Frontex and Europol to assist these countries in identifying and fingerprinting migrants, as well as forming an emergency fund of 60 million euros to the very same end (Commission. Communication COM (2015) 240: 4–8).

The European Commission attempted to base the management of migration in the future on the following four pillars: first, to reduce incentives for inflow of underaged migrants by addressing the root causes of migration, smuggling and human trafficking, and also to set up return systems meant to send illegal migrants back to their countries of origin; second, to improve the EU external border management by extending the competences of Frontex and adopting new provisions in this regard (i.a. the so-called 'smart borders'), and also to enhance third countries' capabilities to effectively control their own borders; thirdly, to implement changes to the EU immigration policy by means of linking it closely to development policy, to modernise the so-called Blue Card system and to determine new principles for funding European integration policy; fourthly, to strengthen the CEAS, particularly the so-called Dublin system,[8] asylum procedures and the Eurodac system (Commission. Communication COM (2015) 240: 8–20).

On 27 May 2015, the European Commission submitted the first package of measures for the "European migration programme." These were, among others, a legislative proposal to employ a temporary resettlement mechanism for the benefit of Greece and Italy, a recommendation on the voluntary resettlement scheme and a plan of action to combat trafficking of human beings for the years

7 Operating since 2011, the EASO is responsible for collecting and exchanging information, and assessing the needs of the Member States coping with increased asylum pressure.

8 The Dublin system was formed gradually. The initially binding document was the Dublin Convention signed on 15 June 1990 by governments of the Member States in the capital of Ireland (which entered into force on 1 September 1997). As part of the Amsterdam Treaty implementation process and the related communitarisation of asylum policy, on 18 February 2003 the Convention was replaced with the resolution of the CEU establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application of a third-country national (Dublin

2015–2020. The legislative proposal provided for temporary 24–month international protection measures for redistributing refugees from Italy and Greece to other EU Member States (Commission. Proposal COM (2015) 286: 1–21). The Recommendation of the European Commission on voluntary resettlements adopted on 8 June 2015 stated that in agreement with countries of origin (North Africa, the Horn of Africa, the Middle East), the EU would admit 20 thousand legally displaced persons in 2015–2016 (Commission. Recommendation, OJ L, 2015, 148: 32–37).[9]

Consequently, on 25–26 June 2015, the EC agreed on two-way actions aiming to relocate 60 thousand migrants in total, namely, a decision of the CEU on a temporary and exceptional relocation of 40 thousand people from Greece and Italy, and an agreement between the governments of the Member States on a voluntary resettlement of 20 thousand people from outside the EU.[10] The latter referred to the above-mentioned recommendation of the European Commission. As a result, on 20 July of that year, representatives of the governments of the Member States meeting within the EU adopted two major documents: a resolution on relocating 40,000 people from Greece and Italy, and conclusions on the voluntary resettlement of 22,504 non-EU asylum seekers, with the latter exceeding the number recommended by the European Commission by 2,504 individuals (CEU. Resolution, 22.07.2015: 1–5; Conclusions, 22.07.2015: 1–6).[11]

II). Whereas as part of the implementation of the Treaty of Lisbon, the EP and the CEU adopted a new resolution on 26 June 2013 (Dublin III), which replaced and further specified previous provisions.

9 Moreover, the Commission has also declared to support the scheme in the first phase of its implementation with the amount of 50 million euros from the Asylum, Migration and Integration Fund. The voluntary resettlement scheme should enable asylum seekers a safe and legal entry into the EU territory and associated countries, while its primary objective should be to reduce the inflow of illegal immigrants.

10 What is more, the conclusions of the EC envisaged introduction of 'hotspots' in "the frontline Member States" with the aim "to determine those who need international protection and those who do not"; the development of a scheme for readmitting illegal immigrants to their countries of origin and transit based on the proposal put forward by the European Commission on 16 June 2015; the enhancement of cooperation with countries of origin and transit, particularly with African countries, Turkey, Iraq, Jordan and Lebanon, with the aim to reduce the inflow of illegal immigrants and to fight against migrant smuggling (EC. Conclusions, 25–26.06.2015: 1–5).

11 The tile of the conclusions referred to 20 thousand people, though an annexed document containing the redistribution key for distributing refugees to the EU Member States and EFTA member states specified as many as 22,504 displaced persons.

Under this resolution, the relocation of 40,000 people from Greece and Italy was to be executed in two phases: in the first phase, as many as 32,256 migrants were decided to be relocated, whereas the second phase was to cover another 7,744 people (CEU. Resolution, 22.07.2015: 3). In accordance with the "European migration programme", the allocation of migrants to individual Member States was to be subject to a redistribution key based on four criteria: size of population (40% weight), GDP (40% weight), mean number of spontaneous asylum applications and past numbers of asylum seekers and of resettled refugees per 1 million of citizens over the last four years (10% weight), and unemployment rate (10% weight) (Commission. Communication, COM (2015) 240: 22–23). In the first phase, the highest number of migrants was to be admitted by Germany (10,500), followed by France (6,752) and the Netherlands (2,047). As for Poland, 1,100 displaced persons were to be admitted. Whereas the redistribution key for displacement of persons in the second phase ought to be developed by governments of the Member States by the end of 2015. In turn, the representatives of the governments of the Member States foresaw in the conclusions that the highest number of displaced persons, in line with the above described key, would be admitted to France (2,375), followed by the United Kingdom (2,200) and Italy (1,989). Poland had as many as 900 people assigned, while of all the European Free Trade Association (EFTA) members that joined the programme as the so-called associated countries with the Schengen acquis and the Dublin system, the biggest group of migrants was to be relocated to Norway (3,500) (CEU. Resolution, 22.07.2015: 4–5; Conclusions, 22.07.2015: 5–6). In total, under the resolution and the conclusions of the representatives of the governments of the Member States of 20 July 2015, the European Union was to admit 62,504 migrants (cf. Tab. VI).

Pursuant to the resolution of the representatives of the governments of the Member States of 20 July 2015, the CEU adopted on 14 September 2015 a decision establishing measures for a temporary relocation of 40,000 migrants. The said decision found its legal basis in Article 78(3) and Article 80 TFEU. According to Article 78(3), "in the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt [by qualified majority] provisional measures for the benefit of the Member State(s) concerned." Whereas Article 80 TFEU, as mentioned above, states that the policies on border checks, asylum and immigration "shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications." The relocation scheme applied to immigrants who applied for asylum in Italy or in Greece, thus expecting to be admitted by a given host country. Hence, the responsibility for examining asylum

Tab. VI: Number of migrants relocated from Italy and Greece or voluntary displaced outside the EU under the resolution and the conclusions of representatives of the governments of the Member States of 20 July 2015. Source: CEU. Resolution, 22.07.2015: 4–5. CEU. Conclusions, 22.07.2015: 5–6.

Country	Relocation of 40 000 migrants from Italy and Greece under the resolution of 20 July 2015	Displacement of 22 504 asylum seekers outside the EU under the conclusions of 20 July 2015
Austria	0	1900
Belgium	1364	1100
Bulgaria	450	50
Croatia	400	150
Cyprus	173	69
Czech Republic	1100	400
Denmark	-	1000
Estonia	130	20
Finland	792	293
France	6752	2375
Germany	10500	1600
Greece	-	354
Hungary	0	0
Ireland*	600	520
Italy	-	1989
Latvia	200	50
Lithuania	255	70
Luxembourg	320	30
Malta	60	14
Netherlands	2047	1000
Poland	1100	900
Portugal	1309	191
Romania	1705	80
Slovakia	100	100
Slovenia	230	20
Spain	1300	1449
Sweden	1369	491
United Kingdom	-	2200
Iceland	-	50
Liechtenstein	-	20
Norway	-	3500
Switzerland	-	519

* Ireland's participation in this Resolution is subject to opting to the Council Decision establishing provisional measures in the area of international protection for the benefit of Italy and Greece under Protocol No. 21 to the Treaties.

applications was to be assumed by the last country and not the first one following the crossing of the EU external borders by a given migrant (Articles 1–2 and Article 3(1)). Relocation was to be applied only in respect of migrants from countries for which the proportion of decisions granting asylum in the EU among decisions taken at first instance on asylum applications was, according to the latest available Eurostat data, 75% or higher (Article 3(2)).[12] Of the 40,000 migrants to be relocated, 24,000 persons were to be relocated from Italy, whereas 16,000 from Greece (Article 4). The Member States participating in the relocation mechanism were to receive for each relocated person a lump sum of 6,000 euros (Article 10). The decision on a temporary relocation was to apply "to persons arriving on the territory of Italy and Greece from 16 September 2015 until 17 September 2017, as well as to applicants having arrived on the territory of those Member States from 15 August 2015 onwards" (Article 13) (CEU. Decision, OJ L, 2015, 239: 151–153).[13]

Due to the ongoing mass inflow of migrants, particularly to Italy, Greece and Hungary, on 9 September 2015, the European Commission submitted another package of measures for the "European migration programme."[14] It involved, i.a. the proposal for a decision establishing provisional measures in the area of international protection for the benefit of Italy, Greece and Hungary (Commission. Proposal COM (2015) 451: 1–29); the proposal for a regulation establishing an EU common list of safe countries of origin (Commission. Proposal COM (2015) 452: 1–20), the proposal for a regulation establishing a crisis relocation mechanism for all the Member States (Commission. Proposal COM (2015) 450: 1–24), as well as the EU action plan on return and the common return handbook (Commission. Communication COM (2015) 453: 1–17).[15]

The proposal for a decision establishing provisional measures in the area of international protection for the benefit of Italy, Greece and Hungary

12 According to the most recently analysed quarterly data of Eurostat (April-June 2015), this was to apply to Syrian, Iraqi and Eritrean nationals (Commission 9.09.2015, MEMO 15/5597: 4).

13 In accordance with Articles 1 and 2 of Protocol No. 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice annexed to TEU and TFEU, the United Kingdom and Ireland were not bound by this decision. Denmark was likewise exempted under Articles 1 and 2 of Protocol No. 22 on the position of Denmark, annexed to TEU and TFEU.

14 The second package of measures of the European Commission referred to the above-mentioned conclusions of the EC meeting of 26 June 2015 (EC. Conclusions, 25–26.2015: 1–5).

15 More information on the return handbook can be found in (Commission. Recommendation COM (2015) 6250: 1–5).

complemented the Commission's proposal of 27 May 2015 regarding a similar matter. Whereas the proposal for a regulation establishing an EU common list of safe countries of origin was to facilitate compliance of the Member States with procedures related to the concept of a safe country of origin. The Commission proposed that the list should include, above all, Albania, Kosovo, Macedonia, Serbia, Bosnia-Hercegovina, Montenegro and Turkey (Commission. Proposal COM (2015) 452: 1–20; Commission 9.09.2015, MEMO 15/5597: 2–3). However, most controversy was triggered by the proposal for a regulation establishing a crisis relocation mechanism and the related revision of the Dublin III resolution. In contrast to proposals for a decision on temporary relocation, it was based on Article 78(2)(e) and Article 80 TFEU. Furthermore, in contrast to these proposals, it also introduced a method for determining for a given period the Member State responsible for examining asylum applications lodged in a country in crisis. Therefore, a certain number of asylum applications was to be examined also by the host Member State (Article 33a(2)). The decision to relocate was to be taken by the European Commission by adopting a delegated act. In the said act, the Commission was to state whether in the country whose nationals were subject to relocation a crisis in fact occurred at the time, specify the total number of persons relocated from that country and the quota of migrants resettled to other Member States according to a special redistribution key, as well as to determine the duration of the crisis relocation mechanism (Article 33a(4)). The redistribution key was similar to that provided in the legislative proposals for the establishment of temporary relocation with minor amendments to the third and the fourth criteria. Still, compared to proposals regarding temporary relocation, the analysed proposal of the European Commission also provided for sanctions for the Member States that failed to participate in the permanent crisis relocation mechanism (e.g. due to a natural disaster). In such an event, each of the countries concerned would have to contribute financially to the general budget of the EU at 0.002% of its GDP (Article 33b(2)). As before, relocation was to apply only to migrants from countries for which the proportion of decisions granting asylum in the EU among decisions taken at first instance on asylum applications was 75% or higher (Article 33c(2)). The delegated act entered into fore provided that neither the CEU nor the EP were against it in the first month of the date they received the act from the Commission (Article 32a(3)) (Commission. Proposal COM (2015) 450: 9–24; Commission 9.09.2015, MEMO 15/5597: 2–3).

Of all the mentioned proposals, the shortest legislative procedure pertained to the Commission's proposal establishing temporary relocation measures. On 22 September 2015, the CEU adopted a decision to resettle 120,000 migrants from Italy and Greece to other Member States. The first phase of the relocation

procedure concerned 66 thousand migrants, including 50,400 individuals from Greece and 15,600 from Italy, according to the key adopted in Annexes I and II to this decision. Whereas in the second phase, another 54 thousand migrants from Greece and Italy should be relocated from 26 September 2016, proportionally to the figures from the first phase specified in Annexes I and II, unless on that day the Commission requested that quotas are allocated to a specific Member State experiencing sudden inflow of migrants (Article 4(1–3)) (CEU. Decision, OJ L, 2015, 248: 88). The quota of migrants from Greece and Italy redistributed to specific Member States was based on the above-mentioned criteria adopted in the "European migration programme" (Commission. Communication COM (2015) 240: 22–23). As before, the fairness mechanism should apply only to the migrants from countries for which the proportion of decisions granting asylum in the EU among decisions taken at first instance on asylum applications was 75% or higher (Article 3). The Member States participating in the relocation scheme were to obtain for each person relocated a lump sum of 6 thousand euros, whereas Italy and Greece were to receive a lump sum of 500 euros or higher (Article 10) (CEU. Decision, OJ L, 2015, 248: 80–94).[16] The decision of the CEU was to be applied in cases of people resident in the territories of Italy and Greece from 25 September 2015 to 26 September 2017, and applicants who have been arriving on the territory of these states since 24 March 2015 (Article 13). The highest number of migrants from Italy was to be admitted by Germany (4,027), followed by France (3,064), Spain (1,896) and Poland (1,201). Moreover, the largest groups of migrants from Greece were decided to be relocated in the countries listed above. Hence, the number of people to be granted asylum in Germany was 13,009 persons, in France – 8,898, in Spain – 6,127, while in Poland 3,881 (cf. Tab. VII). The decision of the CEU did not allow for a relocation of 54,000 individuals from Hungary, though it was indeed mentioned in the proposal of the European Commission of 9 September 2015.[17] This was due to the fact that the Hungarian government voted against this decision, apparently deciding to seek solution to the mass migrant inflow problem on its own.

16 As in the case of the decision of 14 September 2015, the United Kingdom, Ireland and Denmark were not bound by the analysed legal act under Articles 1 and 2 of Protocol No. 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice annexed to TEU and TFEU, as well as Articles 1 and 2 of Protocol No. 22 on the position of Denmark annexed to TEU and TFEU (respectively).

17 The proposal of the European Commission concerned relocation of 15,600 persons from Italy, 50,400 from Greece and 54,000 from Hungary (Article 4(1) of the draft decision) (Commission. Proposal COM (2015) 451: 23–24).

Tab. VII: Decision of the EU Council of 22 September 2015 on the relocation of 120,000 migrants from Italy and Greece to other EU Member States. Source: CEU. Decision, OJ L, 2015, 248: 93–94.

Country	Allocations from Italy	Allocations from Greece
Austria	462	1491
Belgium	579	1869
Bulgaria	201	651
Croatia	134	434
Cyprus	35	112
Czech Republic	376	1215
Denmark	-	-
Estonia	47	152
Finland	304	982
France	3064	9898
Germany	4027	13009
Greece	-	-
Hungary	306	988
Ireland	-	-
Italy	-	-
Latvia	66	215
Lithuania	98	318
Luxembourg	56	181
Malta	17	54
Netherlands	922	2978
Poland	1201	3881
Portugal	388	1254
Romania	585	1890
Slovakia	190	612
Slovenia	80	257
Spain	1896	6127
Sweden	567	1830
United Kingdom	-	-

The implementation of the Council decisions of 14 and 22 September 2015 was to allow for a relocation of as many as 160,000 people. The first group to be relocated comprised 98,256 migrants, including 32,256 persons provided for in the decision of 14 September and 66,000 as laid down by the decision of 22 September 2015. The remaining 61,744 individuals were to be relocated in the

second phase with 7,744 migrants under the first mentioned Council decision and 54,000 under the other. While the decision of 14 September 2015 was based on a voluntary agreement of the governments of the Member States under the resolution of 20 July 2015, the decision of 22 September of that year placed the Member States under a legal obligation to execute relocations. Both decisions meant that some provisions of the Dublin III Resolution, particularly Article 13(1), under which the responsibility for examining asylum applications was to fall upon Italy and Greece instead of host countries, were to be temporarily discontinued.

In practice, both decisions of the CEU were implemented at a very slow pace, possibly indicating that this method proved unsuccessful for overcoming the European migrant crisis. According to the twelfth report of the European Commission on relocation and resettlement, as many as 18,418 people had been successfully relocated in total by 12 May 2017, including 5,711 from Italy and 12,707 from Greece. It was only 18.75% of the 98,256 persons that the mentioned two decisions of the CEU provided for. However, the total number of individuals eligible for relocation who resided in Greece or Italy proved far smaller than the quotas set out in the Council decisions. In early May 2017, the number of relocation candidates registered in Greece was 12,400 persons, while in Italy the number was estimated at about 2,500. This could be due to, among others, errors in migrant registration, secondary flows of refugees or asylum tourism. However, taking due account of the latter, the European Commission considered relocation of all persons eligible "possible and feasible by September 2017." Nevertheless, it alleged that Poland, Hungary and Austria were the only states that had relocated "anyone", and so were urged to fulfil their legal obligations in respect of Greece and Italy with immediate effect (Commission. Report COM (2017) 260: 2–5). In contrast, the voluntary resettlement scheme for non-EU asylum seekers proceeded as planned. By 12 May 2017, 16,163 persons were resettled in the above described manner, representing 71.8% of the total number of 22,505 migrants agreed under the scheme (Commission. Report COM (2017) 260: 2–5).[18]

18 In the eleventh report of 12 April 2017, the Commission viewed the current pace of relocation as unsatisfactory and contested the lack of commitment of some of the Member States in the implementation of the scheme. It noted that only Malta and Finland were "so far on track to meet their obligations", whereas other states, such as the Czech Republic, Slovakia, Bulgaria and Croatia meet their obligations only to some extent, while others, such as Poland and Hungary, stubbornly refuse to take part in the scheme (Commission. Report COM (2017) 212: 2–4).

The implementation of the second package of measures of the European Commission yielded only partial results. The proposal regarding the temporary relocation of 120 thousand migrants from Greece, Hungary and Italy was protested by governments of some of the Member States (as further discussed below). Ultimately, it was adopted by the CEU in a limited version. Moreover, its practical implementation proved unsatisfactory. Furthermore, the even more controversial legislative proposal establishing a permanent crisis relocation mechanism for all the Member States and the proposal for a Union list of safe countries of origin remain under an ongoing legislative process (Procedure 2015/0208/COD: 1–2; Procedure 2015/0211/COD: 1–2).

Since the implementation of the second package of measures of the European Commission encountered obstacles and the mass inflow of migrants not only did not stop but continued to grow instead, the EU Member States decided to undertake new solutions. First, at an informal meeting on 23 September 2015 in Brussels, heads of state or government adopted recommendations that largely provided for new anti-crisis measures within the EU, such as strengthening the dialogue with Turkey to enhance cooperation in preventing and managing migration flows; supporting Turkey, Jordan, Lebanon and other countries admitting Syrian refugees in their territories by means of, i.a. increasing resources to the Madad Fund; assisting the Western Balkan countries struggling with the inflow of refugees by means of, i.a. pre-accession funds; increasing resources to the emergency trust fund for stability and eliminating causes of displacement in Africa and the phenomenon itself, as well as reinforcing control on the external borders of the European Union using additional resources, staff and equipment ensured by the Member States for Frontex, the EASO and Europol.[19] This was followed by further actions determined at the EC meeting of 15 October 2015, which involved, i.a. concluding an agreement with Turkey on fighting illegal immigration under the scheme negotiated by the European Commission and extending the scope of competences of Frontex to deploy the Integrated External

19 In relation to former decisions of the EC , the heads of state or government also recommended that additional support of 1 billion euros (as a minimum) be provided to the United Nations High Commissioner for Refugees, the World Food Programme and other agencies. Other recommendations involved establishing hotspots in Greece and Italy, providing aid in ensuring relocation and return by November 2015, and increasing financial resources to the Emergency Fund for Asylum, Integration and Migration and the Internal Security Fund – Borders (EC. Statement, 23.09.2015, 673/15:1).

Borders Surveillance System (EC. Conclusions, 15.10.2015: 1–5; EurActiv 19.10.2015: 1–3).

Consequently, the agreement on fighting illegal immigration signed with Turkey in early October 2015 and the efforts to secure the external borders of the EU became a priority in the fight against the crisis. This fact was reflected in agreements adopted during negotiations held between EC President Donald Tusk, President Recep Tayyip Erdoğan and Prime Minister Ahmet Davutoğlu on 9–10 September 2015 in Ankara, and also during negotiations with President Erdoğan conducted in Brussels on 5 October of that year.[20] As for securing the borders, on 15 December 2015, the European Commission submitted a legislative proposal regulating the extension of the competences of Frontex to deploy the Integrated External Borders Surveillance System. The proposal was based on Article 77(2)(b) and (d), and Article 79(2)(c) TFEU (Commission. Proposal COM (2015) 671: 1–116).

Following the completion of the legislative procedure on 14 September 2016, the EP and the CEU adopted a resolution establishing the European Border and Coast Guard (EBCG), which was to comprise the EBCG Agency (Frontex) and Member States' authorities responsible for border management, including coast-guard services regarding their scope of border control tasks (Articles 1–2, 6). Frontex ought to be responsible for monitoring migration profiles and preventing crises (Articles 9–13), managing external borders (Articles 14–26) and organising return of illegal immigrants (Articles 27–33). Hence, it was to gain much broader competences than before. At the request of a country or the Member States, Frontex was expected to, i.a. coordinate joint operations of one or more states, organise rapid interventions on the external borders of the EU and support hotspots. In all these cases, it was to be responsible for deploying and placing EBCG teams, which in the event of rapid border interventions were to be seconded from Rapid Reaction Pools (Article 14). The EBCG teams were to comprise personnel of the Member States' border guards and other relevant staff members acting as national experts seconded to the EBCG by the Member States for any period of twelve months or more but not be less than three months. "The contribution by Member States as regards their border guards to specific joint operations for the following year shall be planned on the basis of annual bilateral (…) agreements between the Agency

20 At the meeting of 5 October 2015, Erdoğan declared willingness to cooperate with the European Union on solving the refugee crisis, yet he also presented a list of own demands that involved, i.a. visa liberalisation and fast-tracking of the Turkey's EU accession process (Tusk-Erdoğan 5.10.2015: 1–2).

and Member States." Whereas in the case of rapid border interventions, the decision on this matter was to be taken by the executive board of the EBCG by a qualified majority of three-quarters of the votes. "The deployment of (…) teams from the rapid reaction pool should be immediately complemented by additional European Border and Coast Guard teams where necessary." To this end, the Member States were expected to make a number of their border guards and other relevant staff available within seven working days from the start of the rapid border intervention. The Rapid Reaction Pool could be deployed "within five working days from when the operational plan is agreed upon by the executive director and the host Member State." "The total number of staff made available by the Member States shall amount to a minimum of 1 500 border guards or other relevant staff." The said pool was to serve as a "standing corps placed at the immediate disposal of the Agency" (Article 20(1–12)). The highest number of contributions to the Rapid Reaction Pool ought to be provided by Germany (225), followed by France (170), Italy (125), Spain (111) and Poland (100) (cf. Tab. VIII) (EP/CEU. Regulation, OJ L, 2016, 251: 19, 24–26). The Rapid Reaction Pool should support, yet not replace the border guard of the Member States, estimated at around 100 thousand border guards in total (Commission. Press release, 2.03.2017, IP/17/348: 3). The headquarters of Frontex are located in Warsaw (Articles 56–57).[21] The regulation on the establishment of the EBCG entered into force on 6 October 2016 (Procedure 2015/0310/COD: 1–2).[22] However, the EBCG failed to attain full operational capability due to a shortage of resources concerning the Rapid Reaction Pool, forced return monitors, escorts and return specialists (Commission. Press release, 2.03.2017, IP/17/348: 3).

2.3 Agreement between the European Union and Turkey of 18 March 2016 and New Aid Schemes, Humanitarian and Financial Aid Instruments in the Fight against the Crisis

The above-mentioned negotiations held between EC President Tusk, President Erdoğan and Prime Minister Davutoğlu in September and October 2015 resulted in a joint action plan to increase cooperation between the European Union and Turkey in the fight against illegal immigration adopted on 29 November of that

21 On 9 March 2017, an agreement was signed between Poland and Frontex, regulating the issue of its headquarters in Warsaw, the legal status of the Agency and its staff (Gajewska 2017: 1–2).

22 Nevertheless, some provisions in the analysed resolution entered into force on 7 December of that year (forming teams from rapid reaction pools and a pool of technical equipment) or on 7 January 2017 (forming teams for the co-called return interventions (EP/CEU. Regulation, OJ L, 2016, 251: 46, 61–63).

Tab. VIII: Contributions of individual EU Member States to the Rapid Reaction Pool of the European Border and Coast Guard. Source: EP/CEU. Regulation, OJ L, 2016, 251: 19, 24–26.

Country	Contributions
Austria	34
Belgium	30
Bulgaria	40
Croatia	65
Cyprus	8
Czech Republic	20
Denmark	29
Estonia	18
Finland	30
France	170
Germany	225
Greece	50
Italy	125
Latvia	30
Lithuania	39
Luxembourg	8
Malta	6
Netherlands	50
Poland	100
Portugal	47
Romania	75
Slovakia	35
Slovenia	35
Spain	111
Sweden	17
Iceland	16
Liechtenstein	(*)
Norway	20
Switzerland	16
Total	1500

(*) Liechtenstein will contribute through proportional financial support.

year. The said plan provided for essential steps in "cooperation on support of Syrians under temporary protection and migration management", as well as to prevent illegal immigration. In return, Turkey was ensured by the EU that

the accession negotiations would be fast-tracked and that non-repayable financial assistance of 3 billion euros would be offered to Syrian citizens in Turkish hosting communities. The said financial means were to be provided from the EU Facility for Refugees in Turkey established to this very end by the European Commission (Commission. Press release, 24.11.2015, IP/15/6162: 1–2; EC. Statement EU-Turkey, 29.11.2015: 1–2).

The said plan served as the basis for diplomatic negotiations that led to a provisional agreement reached on 7 March 2016 regarding the principles of cooperation with Turkey and cooperation instruments. The Turkish government committed to admit at the Union's expense all new migrants arriving to Greece from Turkey who require no international protection. Furthermore, with each readmission of a Syrian national from Greek islands to Turkey, one Syrian national was to be resettled from Turkey to the EU. To fund this endeavour, the Union committed to provide Turkey with the above-mentioned amount of 3 billion euros with a prospect of an increase. Moreover, it was also agreed that the implementation of the visa liberalisation with all the EU Member States should be accelerated "with a view to lifting the visa requirements for Turkish citizens at the latest by the end of June 2016" (EC. Statement HSG, 7.03.2016: 1–3).

The above stance of 7 March 2016 was further specified in an agreement signed eleven days later by the European Union and Turkey, whereby from 20 March 2016 all illegal immigrants arriving to Greece from Turkey were to be deported to Turkey. At the same time, it was agreed that with each Syrian national sent back from Greece to Turkey as a result of his or her irregular crossing of an external border of the EU, the Union would admit one Syrian national from Turkey who had not attempted to arrive in the EU illegally.[23] Return operations from Greece to Turkey should take place concurrently with relocations of displaced persons from Turkey to the EU Member States by air. The displacement of Syrian nationals was to take place in line with commitments made by the Member States and cover 72,000 persons. As many as 18,000 migrants were to be displaced under the CEU conclusions of 20 July 2015, whereas 54,000 unused places were planned to be allotted to refugees due to the above described opt-out of Hungary on the relocation policy pursuant to the decision of the CEU of 22 September 2015.[24] In return for fulfilling its pledges, Turkey was to receive

23 Turkey has admitted the largest numbers of refugees so far, i.e. about 3 million people in total, 2.5 million of which are Syrian nationals (Commission. EU and refugee crisis, July 2016: 3).

24 On 29 September 2016, the CEU adopted a decision amending the Council decision of 22 September 2015 on temporary relocation for the benefit of Italy and Greece. The

financial assistance for refugees in the years 2016–2018 totalling 6 billion euros. Moreover, the EU committed to lift the visa requirements for Turkish citizens at the latest by the end of June 2016 provided that the reference criteria were met by Turkey (EC. Statement HSG, 7.03.2016: 1–3).[25] As a result of the successful implementation of the agreement of 18 March 2016 concluded with Turkey, the influx of migrants via the Mediterranean route was radically reduced. According to the data of the UN Refugee Agency, as many as 174,500 persons arrived from Turkey to Greece in 2016, while only 23,108 from April to December of that year (UNHCR. Bureau for Europe, February 2017: 2). However, from 12 May 2017, 5,695 Syrian nationals were displaced from Turkey to the EU (Commission. Report COM (2017) 260: 2–5). Hence, the agreement with Turkey had a fundamental meaning for the Union's fight against the migrant crisis.

In response, the European Union also launched in 2015–2016 new humanitarian and financial aid instruments, as well as aid schemes, such as maritime search and rescue operations, humanitarian and development aid, targeting migrant smuggling networks, schemes aiming to prevent uncontrolled influx of migrants, return schemes, as well as voluntary resettlement schemes (EC. Statement EU-Turkey, 18.03.2016: 2). Already in 2013–2014, Italy in cooperation with Frontex conducted in the central part of the Mediterranean the Mare Nostrum operation with the aim to seek boats carrying migrants within 100 nautical miles from the coast of Italy. Almost entirely funded by the Italian government, it allowed for saving about 170 thousand people in a single year. This operation ended in 2014 due to Italian requests for funding left unanswered by the EU. In these circumstances, Frontex launched in 2014 operation Triton, which differed from the former in substantially lower costs and significantly reduced scope of actions carried out within its framework, as its main focus was put on patrolling borders, and not on saving lives. Furthermore, operations were carried out only within 30 nautical miles from the coast of Italy, thus jeopardising the provision of aid to many castaways. Frontex continued the Poseidon operation launched in 2006 regardless in the Aegean and the eastern Mediterranean. Whereas in

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said decision obliged the Member States to admit in their territories Syrian citizens residing in Turkey who evidently required international protection. In accordance with the decision, the number of persons admitted under the above-mentioned conditions by a Member State should be deducted from the number of people to be relocated to this country under Article 4(1)(c) of the Council decision of 22 September 2015 (Article 4(3a) (CEU. Decision, OJ L, 2016, 268: 84).

25 Consequently, the European Commission launched a new aid scheme to fund Turkey's initiative to support refugees.

2015–2016, the European Union further increased its activity regarding search and rescue operations in the Mediterranean. The operations conducted in that period involved two formerly launched search and rescue operations Poseidon and Triton, and one CSDP military operation launched in 2015. The latter, i.e. EUNAVFOR Med code-named operation Sophia, was targeted against human trafficking and covered southern part of the central Mediterranean. According to the data of the European Commission, nearly 90% of migrants paid organised criminal groups and smugglers in order to reach the EU (Commission. EU and refugee crisis, July 2016: 3). Consequently, thousands of people died while travelling across in the Mediterranean to the mainland. According to the data of the UN Refugee Agency, as many as 3,712 persons drowned when attempting to reach Europe from the Mediterranean in 2015 alone, whereas in 2016 the number of deaths was estimated at 5,019 (UNHCR. Mediterranean. Dead and Missing at sea, April 2017: 1). Within the framework of all the three search and rescue operations, over 250 thousand people were rescued in 2015, whereas from 1 January to 31 May 2016 the number of saved individuals was estimated at about 50 thousand (Frontex. EUNAVFOR Med., June 2016: 1). In 2015 alone, the European Union allocated about 430 million euros for humanitarian and development aid to combat the migrant crisis. About 22 million euros of the total amount was allocated to financially support in emergency situations the West Balkan countries (Greece, Slovenia, Croatia, Serbia and Hungary), which launched the EU Civil Protection Mechanism as the main transit countries.[26] Furthermore, the EU contributed 408 million euros to humanitarian and rescue operations in the following countries of origin: Syria (160 million euros), Lebanon (97 million euros), Iraq (79 million euros), Jordan (58 million euros) and Turkey (36 million euros).[27]

In an effort against criminal networks smuggling migrants into Europe, on 27 May 2015, the European Commission issued an action plan for the years 2015–2020. The said plan provided for the following actions to be taken by the EU (among others): to "identify, capture and dispose of vessels used by smugglers"; to deprive smugglers of their source of income; to intensify operational cooperation

26 The EU Civil Protection Mechanism serves for enhancing and coordinating cooperation between the European union and the Member States in the area of civil protection in the event of a natural or man-made disaster (EP/CEU. Decision, OJ L, 2013, 347: 924–947).

27 The amount allocated to Turkey for humanitarian and rescue operations does not include the 6 billion euros allocated to that country for the years 2016–2018 under the agreement of 18 March 2016 (Commission. Report COM (2016) 751: 4, 7–9).

against the smuggling of migrants; to improve the information gathering process by means of strengthening the operational team Mare as the Union's information centre on migrant smuggling; to enhance cooperation within the Africa-Frontex Intelligence Community and to control the EU borders by Eurosur; to prevent the smuggling of illegal migrants by, i.a. increasing the aid offered to those most vulnerable and to improve the effectiveness of the return procedure as a deterrent to smuggling (Commission. Communication COM (2015) 285: 1–13).

The above plan was implemented in practice by means of, i.a. strengthening Europol by establishing two new structures, namely, the European Counter Terrorism Centre (ECTC) and the European Migrant Smuggling Centre (EMSC). The former was founded on 1 January 2016 and tackles with, i.a. analysing suspicious content on the Internet and wire transfers of financial resources owned by terrorists, whereas the latter was created on 22 February 2016 to actively support the EU Member States in dismantling of organised criminal networks dealing with migrant smuggling (Commission. Communication COM (2016) 602: 13–17; Commission. EU and refugee crisis, July 2016: 3–4).

Another means to be employed to overcome the migrant crisis were programmes for preventing uncontrollable influx of illegal immigrants. In order to support the authorities of Greece and Italy in managing migration flows, the European Union formed hotspots that were to aid EU experts in swift registration of individuals and coordination of returns of illegal migrants to their countries of origin (Commission. EU and refugee crisis, July 2016: 3–4). Furthermore, a decision was made to develop EU partnership programmes with migrants' and asylum seekers' countries of origin to allow them to stay closer to their countries. Consequently, on 12 November 2015 at the Summit in Valletta, the capital city of Malta, which was attended by heads of African states or governments and representatives of the EU Member States, an action plan of measures to address the inflow of illegal immigrants from Africa to Europe was adopted and an emergency trust fund for Africa was established (Valletta Summit 11–12.11.2015: 1–17). In the long run, partnership programmes ought to enable the support of economic and social development of countries of origin in order to eliminate the causes of illegal immigration. By 2021, the European Union intends to allocate 8 billion euros in total for the implementation of partnership programmes (Commission. EU and refugee crisis, July 2016: 4).

On 9 September 2015, the European Commission issued the EU Action Plan on return. Based on the Union's experience, for instance, in 2014 only about 40% of illegal immigrants ordered to leave the EU territory actually left its borders. Therefore, the Commission recommended that the efficiency of the EU return system be substantially enhanced by allocating to the Member States financial

support from the Fund for Asylum, Integration and Migration, strengthening the competences of Frontex in co-organising and coordinating returns of illegal immigrants, as well as establishing an integrated return management system in the future, which should combine all the aid networks and schemes dedicated to returns and readmissions financed by the EU (Commission. Communication COM (2015) 453: 1–10). Furthermore, on 1 October 2015 the European Commission issued a recommendation establishing a common "Return Handbook", which involved indications for competent authorities of the Member States regarding the implementation of tasks related to forced returns of illegal migrants, training of employees who would be entrusted with such tasks, as well as further training of experts who take part in Schengen evaluation missions (Commission. Recommendation COM (2015) 6250: 1–5).

2.4 Legal Grounds for Asylum Policy

As in the case of immigration policy and borders control, the legal grounds for asylum policy are specified under primary and secondary legislation of the European Union. After the entry into force of the Treaty of Lisbon of 13 December 2007, the principles of asylum policy were specified under Article 67(2), Article 78(1–3) and Article 80 TFEU. General provisions regarding the policy on asylum, immigration and EU external borders control are specified under Article 67(2) TFEU and Article 80 TFEU, as mentioned above, whereas specific provisions on asylum policy alone are specified under Article 78(1–3) TFEU. "The Union shall develop a common policy on asylum subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*"[28]. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the

28 The *non-refoulement* principle was codified in Article 33 of the Geneva Convention of 28 July 1951 relating to the Status of Refugees. It states that "no Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion" (Handbook 2014: 64). Consequently, no person denied of a refugee status can be deported to a country where he or she would be subject to persecution but ought to be granted other form of international protection instead. However, there are two exceptions to this provision, namely, in cases where a given person regarded as a threat to security or society of a given state where the said person had been convicted by a final judgement of a serious crime.

status of refugees, and other "relevant treaties" (Article 78(1) TFEU).[29] The Treaty of Lisbon provides for the establishment of the CEAS that ensures a uniform status of asylum seekers for third-country nationals throughout the EU; a uniform status of subsidiary protection for individuals who were not offered asylum in the Union, still require international protection; a common system for temporary protection of displaced persons in the event of a mass influx; common procedures for the granting and withdrawing of uniform asylum and subsidiary protection status; criteria and mechanisms for determining the Member State responsible for processing of an asylum application or subsidiary protection; admission criteria for individuals seeking asylum or subsidiary protection, as well as partnership and cooperation with third countries with the aim to manage flows of the above-mentioned three categories of persons (Article 78(2) TFEU). Moreover, as mentioned above, the CEU may adopt provisional measures for the benefit of the country or the Member State that finds itself in an emergency situation due to a sudden influx of third-country nationals (Article 78(3) TFEU).[30]

In contrast to the previously binding provisions, the Treaty of Lisbon extended the competences of the European Union in asylum policy, allowing it to replace minimum norms with harmonised regulations of individual Member States in this regard, thus providing real circumstances for establishing the CEAS. What is more, under the said treaty the EP became for the first time involved in the procedure of establishing provisional measures for the benefit of the Member State(s) in an emergency situation. Furthermore, the Common European Asylum System was first granted a treaty status under the said treaty.

However, the beginning of the CEAS implementation is much earlier. First, in 1999–2005, under the Treaty of Amsterdam and secondary legislation, two regulations and three directives, criteria and mechanisms were adopted for determining the Member State responsible for examining an asylum application, establishing minimum reception standards for asylum applicants, admitting asylum seekers and granting or withdrawing of a refugee status, as well as establishing the Eurodac (European Dactyloscopy) system for collecting the fingerprints of asylum applicants who crossed the external borders of the EU. Next, in 2011–2013, the

29 The other treaties applied are as follows: the ECHR, the UN Convention on the Rights of the Child, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the UN International Convention on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights (Handbook 2014: 65).

30 In contrast to regulations adopted so far, the Treaty of Lisbon did not specify the duration of the adopted provisional measures.

above-mentioned regulations and directives were changed under the Treaty of Lisbon and secondary legislation in order to allow a transition from minimum standards to harmonised provisions of individual Member States regarding asylum policy. From then on, the working methods of the CEAS have been specified by five secondary legislative acts, namely, the regulation of the EP and the CEU of 26 June 2013 determining the Member State responsible for examining an asylum application (EP/CEU. Regulation, OJ L, 2013, 180), the directive of the EP and the CEU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection (EP/CEU. Directive, OJ L, 2011, 343), the procedural directive of the EP and the CEU of 26 June 2013 on common procedures for granting and withdrawing asylum (EP/CEU. Directive, OJ L, 2013, 180), the directive of the EP and the CEU of 26 June 2013 establishing norms and standards for admission of persons seeking protection (EP/CEU. Directive, OJ L, 2013, 18), and the regulation of the EP and the CEU of 26 June 2013 on the establishment of the Eurodac system (EP/CEU. Regulation, OJ L, 2013, 180).

All the above-listed legislation entered into force on 19 July 2013, except for the qualification directive, which came into effect on 10 January 2012. Nevertheless, the regulation on the Eurodac system was to apply from 20 July 2015, while individual articles of the procedural and reception directives were to apply from 21 July of that year. Importantly, the mentioned legislation (except for the regulation on the Eurodac system) contain direct references to and are based on the provisions of the Geneva Convention relating to the Status of Refugees and the complementary New York Protocol. Hence, they implement these provisions in EU law.

The Common European Asylum System was intended to harmonise asylum law and practices in individual EU Member States, and to ensure that they share the responsibility for asylum matters. It determined a Member State responsible for migrants seeking international protection, including dactyloscopy databases. Moreover, it imposed common norms on asylum procedures and conditions for recognising, receiving and protecting the beneficiaries of international protection. The establishment of this system ought to give a third-country national seeking a refugee status equal chances to obtain it in all EU Member States while those who have been seeking such status, e.g. an Iraqi citizen had 82% chance to obtain a refugee status in France, whereas 63% in Germany and 2% in Greece (Węc 2017: 35).

2.5 Proposed Amendments to Secondary Legislation on Asylum Policy after the Outbreak of the Migrant Crisis

The outbreak of the migrant crisis in the European Union in 2015 exposed the weak points of the CEAS but most of all, it further revealed limitations of

the Dublin system. Nonetheless, it should be noted that the CEAS provisions biding at the time did not envisage handling that enormous volume of migrants in such a short time. This new situation forced the EU to yet again revise its asylum policy. Most issues were stemming from Article 13(1) of the Dublin III Regulation, which obliged a frontier EU Member State reached by an immigrant to examine the application for international protection lodged by the said person. At the time of the migrant crisis of 2015–2016, the said provisions proved to disproportionally affect Greece and Italy, since these southern frontier states were crossed by migrants using the eastern Mediterranean route and the central Mediterranean route. Moreover, an issue emerged regarding the co-called secondary flows of refugees between the EU Member States due to varying duration of locally binding procedures, different criteria for refugee acceptance, asylum recognition rates and types of protection granted.

On 4 May 2016, the European Commission submitted the first package of draft legislative acts aiming to reform the CEAS, followed by the second package presented on 13 July of that year. The first package involved three proposals amending the Dublin III Regulation, the regulation on the establishment of Eurodac and the regulation constituting the legal basis of the EASO, respectively (Commission. Proposal COM (2016) 270:1–113; 271: 1–75; 272: 1–107). The aim was to strengthen the Dublin system by means of establishing a permanent emergency relocation mechanism for all the Member States and a solidarity tax for countries that refused to accept migrants, to strengthen and extent the competences of the Eurodac system, which should allow for a better monitoring of secondary flows and tackling illegal immigration, as well as to transform the EASO into the European Asylum Agency.

Of all the listed draft legislative acts, most controversy was evoked by proposals to amend the Dublin III Regulation, particularly the provision establishing a corrective allocation mechanism (the fairness mechanism) that would be automatically launched in an emergency situation, i.e. where a given Member State was "confronted with a disproportionate number of applications for international protection for which it is the Member State responsible under this Regulation" (Article 34(1)). As was the case with the proposal of 9 September 2015 establishing a permanent crisis relocation mechanism, this proposal of the European Commission was based on Article 78(2)(e) and Article 80 TFEU as well. However, the proposal of 9 September 2015 stipulated that the Commission should initiate the relocation mechanism under the delegated act that would also specify the number of persons to be relocated, while the analysed proposal introduced an automated corrective allocation mechanism. Both these proposals had a similar aim. For that very reason, the European Commission declared that based on the outcome of discussions on the

submitted proposal, it would take action to withdraw the proposal of 9 September 2015 (Commission. Proposal COM (2016) 270: 3–5, 23, 33, 74–80).

The analysed proposal envisaged that in a situation of an excessive number of asylum applications lodged in a given EU Member State, i.e. where the number of asylum applications "in addition to the number of persons effectively resettled" was higher than 150% of the formerly determined reference number, all subsequent migrants would be transferred to other Member States (Article 34(2–3)). The reference number of asylum applications to be lodged in a given Member State was to be determined with respect to size of population of a given country and prosperity level (expressed as GDP). These criteria were to have the same weight, i.e. both size of population and GDP were to account for 50% of the reference number each (Article 35(1–3)). The corrective allocation mechanism was to be effective until the number of applications fell again below the specified reference number. Nevertheless, each Member State that would not like to participate in the corrective allocation mechanism can do so under two conditions: first, that it does not take part in the mechanism solely on a temporary basis (a renewable twelve-month period); second, that it makes a 'solidarity contribution' of 250 thousand euros per each applicant "who would have otherwise been allocated to that Member State during the respective twelve-month period." This specific solidarity tax would be then allocated at the end of the said twelve-month absence period directly to the Member State that assumed the responsibility to examine a given application (Article 37(1–3)) (Commission. Proposal COM (2016) 270: 76–78). Importantly, the fundamental principle of the CEAS was to remain unchanged, since the requirement to seek asylum in the first EU Member State reached by a given immigrant was binding unless he or she proved to have family in a different Member State. By contrast to previously binding provisions, in a situation where a given Member State was overburdened, the responsibility for examining applications was to be shared between all the EU Member States.

The second package of the European Commission of 13 July 2016 included four proposals, the first two of which were concerned with the replacement of the asylum and qualification directives with regulations, while the third and the fourth proposals pertained to changes in the reception directive and the regulation on the EU resettlement framework. The aim of these proposals for legislative acts was to further harmonise norms in all Member States. The procedural regulation envisaged the following changes, among others: to simplify and shorten the asylum procedure (with decisions taken within 6 months); to introduce common guarantees for applicants, including the right to a personal interview and free legal assistance, as well as to tighten up regulations on cooperation with institutions and to make repercussions for non-conformity

abuse mandatory (at that time, the repercussions were optional) (Commission. Proposal COM (2016) 467: 1–78). The new provisions were intended to allow for the possibility to establish a common asylum procedure in the future. Whereas the qualification regulation involved, i.a. similar asylum recognition rates (based on the guidelines of the European Asylum Agency), harmonisation of forms of international protection and periods of validity of residence permits, as well as repercussions for migrants practicing the so-called asylum tourism or asylum shopping, i.e., lodged numerous asylum applications in various Member States (Commission. Proposal COM (2016) 466: 1–53).

In turn, the revised reception directive allowed for uniform admission criteria, increased opportunity to integrate migrants with communities in host Member States and limited secondary flows (Commission. Proposal COM (2016) 465: 1–78).[31] Whereas the revised regulation on displacements in the EU was to give the binding legal provisions in this regard a clearer and more logical order, thus contributing to a more structured approach of the EU to international protection, a greater number of legal migration solutions and to eliminate pull factors for illegal immigration (Commission. Proposal COM (2016) 468: 1–33). At present, all the above-mentioned proposals are still subject to a legislative procedure (Procedure 2016/0133/COD: 1–2; 2016/0132/COD: 1–2; 2016/0131/COD: 1–2; 2016/0222/COD: 1–2; 2016/0223/COD: 1–2; 2016/0224/COD: 1–2; 2016/0225/COD: 1–2).

3 Stance of the Federal Government and the Parliamentary Opposition in Germany on the European Migrant Crisis

3.1 First Phase of the Crisis (2011–2014)

The *exodus* of migrants from Africa to Italy in 2011, tragical fate of castaways in the Mediterranean and the related humanitarian crisis in Lampedusa came as a shock not only to the Italian but also to the European public.[32] However, the

31 In order to prevent asylum tourism and secondary movements of refugees, the Member States could, i.a. demand that migrants stay in a strictly specified location while systematically monitoring their accessibility, as well as establish geographical restrictions regarding the payment of social benefits.

32 The first government coalition party to express its stance on the *exodus* of migrants from Africa to Europe was the Liberals. In the FDP policy agenda adopted on 22 April 2012, the party advocated, among others, the establishment of an "asylum law that would safeguard human rights" in the European Union and expressed its support for the idea that as "a state that is not a frontier state" of the EU, Germany made "a significant contribution to the Union's asylum policy" (FDP-BPT 22.04.2012: 95).

initial response of the CDU/CSU/FDP coalition government to these events was restrained. When Italian Minister of the Interior Roberto Maroni (the Northern League) called on the EU in early March 2011 to take "all the necessary measures" to prevent the humanitarian crisis foreseen due to a mass influx of migrants to Italy caused by the civil war in Libya,[33] his German counterpart Thomas de Maizière (CDU) strongly opposed the admission of refugees into Germany. Though at the same time, Federal Government Commissioner for Human Rights Policy and Humanitarian Aid Markus Löning (FDP), who had visited on 8–9 March 2011 the Tunisian-Libyan border, called for a humanitarian gesture and solidarity with Tunisia (Nordafrika. Flüchtlinge, 22.03.2011: 1–2), already on 11 April of that year, at the CEU meeting in Luxembourg, newly appointed Minister of Interior of Germany Hans-Peter Friedrich (CSU) harshly criticised the Italian government's declaration on the possibility to issue visas for North African migrants and threatened it with "stepping up controls on German borders."[34] Since this was tantamount to denying admission to the African migrants, it immediately triggered harsh response of the opposition parties in Germany: Alliance 90/The Greens, the Social Democratic Party of Germany and the Left (Zeit 11.04.2011: 2).

Likewise, the opinion of the said parties on the increasing inflow of migrants into the EU shifted over the next months. At the Federal Delegate Convention of 25–27 November 2011 in Kiel, Alliance 90/The Greens adopted a resolution in which it expressed its critical stance on the "bargaining" (*Geschachere*) of Italy and France about admission of immigrants from Libya or other failing African countries, the Italian-Libyan agreement on the return of migrants despite the ongoing civil war in Libya, as well as the German government's refusal to host refugees. Consequently, Alliance 90/The Greens announced that efforts would be made aiming to accelerate the conclusion of the CEAS implementation process, resulting in the said policy being subject to parliamentary control and the decision-making process being further democratised. In its view, Europe should stop playing the role of a stronghold and become a haven for migrants

33 According to the data obtained from the International Organisation for Migration (IOM), between 20 February to mid-March 2011 alone, about 280 thousand people fled from the civil war in Libya to the neighbouring countries, with 150 thousand persons arriving in Tunisia and 120 thousand to Egypt (Nordafrika. Flüchtlinge, 22.03.2011: 1).

34 This declaration of the Italian government was rooted in the fact that it failed to obtain the necessary support from the EU to provide aid to refugees. The issuance of visas would stand for leaving the way to all Schengen Member States, including Germany, open for migrants (Zeit 11.04.2011: 1–2).

instead, who oftentimes find themselves in a dramatic situation (Bündnis'90/Die Grünen-BDK 25–27.11.2011, Beschluss 1: 5). Alliance 90/The Greens also referred to the EU asylum policy reform in a resolution adopted at the Federal Delegate Conference of 16–18 November 2012, in which it supported a revision of Article 13 of the Dublin II Regulation, in accordance to which the country first reached by an asylum seeker was to take the responsibility for examining a given asylum application. These provisions should be amended to ensure that all the EU Member States are equally responsible for admitting migrants. Moreover, the Greens postulated that the strict policy of Frontex towards migrants be relaxed, accusing it of systematic human rights violations due to refusing asylum (Bündnis'90/Die Grünen-BDK 16–18.11.2012: 7).

The issue of the growing influx of migrants from Africa to the EU via the central Mediterranean route was also addressed at the SPD Federal Congress held on 4–6 December 2011 in Berlin. At that time, delegates of lower organisational bodies submitted programme proposals that called for a profound reform of the EU immigration policy and the German asylum law. Thus, the representatives of Münster District Union demanded, i.a. that the rigid working methods of Frontex be abandoned and that Article 13 of the Dublin II Regulation be amended in a way that would oblige all the Member States to examine asylum applications. A similar position on Frontex was presented by representatives of Würzburg District Union, whereas delegates of Eimsbüttel-Süd District (Hamburg National Union) postulated, i.a. to facilitate the grant of German citizenship or dual citizenship to the migrants, to improve their educational conditions and to introduce numerous conveniences in the asylum procedures. Nevertheless, these bottom-up initiatives of SPD politicians were not adopted as resolutions by the Federal Congress but progressed for consideration to other party bodies: the SPD parliamentary faction in the Bundestag (the proposals of Eimsbüttel-Süd and Münster), the SPD Federal Executive Board (the proposals of Münster and Würzburg) and the faction of the Positive Alliance of Socialists and Democrats in the EP (the proposals of Münster and Würzburg) (SPD-BPT 4–6.12.2011: 166–169).

Changes in the EU asylum policy were also advocated by the Left. In its programme adopted at the Federal Congress of 21–23 October 2011 in Erfurt, it criticised the Union's restrictions regarding the admission of asylum seekers, openly calling them a "policy of exclusion" (*Abschottungspolitik*). In the opinion of the Left, the EU asylum policy ought to be founded on the protection of human rights, humanitarian aspects and aid for migrants instead of political and economic aspects. For that very reason, the first step towards changes in this area should be the dissolution of Frontex, which "constitutes the key exclusion instrument of the EU" (Linke-BPT 21–23.10.2011: 52).

Before the third cabinet of Angela Merkel was sworn in on 17 December 2013, in a coalition agreement concluded several days earlier, the CDU/CSU and SPD stated that in view of the new wave of immigration arising worldwide, the federal government should adopt "a migration and development strategy" aiming to improve the cohesion of actions in foreign policy, immigration policy and development policy of Germany. This strategy should contribute to a more effective management of migrant influx and tackle the root causes of migration in cooperation with countries of origin and transit states. The coalition parties also stressed the necessity to amend the asylum law of Germany with respect to, i.a. reducing the duration of asylum procedures to three months as a maximum for first-time decisions and increasing the number of BAMF members (CDU/CSU-SPD-Koalitionsvertrag 14.12.2013: 76–77). Moreover, they advocated the granting of a safe country status to Bosnia and Herzegovina, Macedonia and Serbia under Article 29a of the Asylum Act of 26 June 1992 (AsylG, BGBl 2008, I, 40) and attempts to encourage governments of these countries and the European Commission to take action aiming to improve their social and economic situation. Concurrently, they called upon the Frontex authorities to "consistently respect humanitarian standards and (…) human rights" in their efforts to safeguard external borders (CDU/CSU-SPD-Koalitionsvertrag 14.12.2013: 76–77). Notwithstanding the coalition agreement, the SPD declared in the adopted government agenda for 2013–2017 that action would be taken to amend the EU asylum policy in a manner more compliant with "human rights protection standards" than before, ensuring a "fair share of responsibility for (…) the integration of refugees" in all the EU Member States (BReg. Regierungsprogramm 2013–2017: 55–58, 112).

The view expressed by the opposition party Alliance 90/The Greens was along the same lines. In the election programme adopted at the Federal Delegate Convention of 26–28 April 2013 in Berlin, it criticised the policy implemented by the EU and the Member States towards refugees, defining it – as was the case with the Left – as a "policy of exclusion". In its view, the Union thus infringed the prohibition of refusal imposed under the Geneva Convention relating to the Status of Refugees of 28 July 1951. Therefore, it demanded yet again that Article 13 of the Dublin II Regulation be amended. It also proposed to establish "high asylum standards" uniform in all EU Member States, to support countries most affected by the influx of migrants, and to open borders to Syrian refugees and provide financial aid to the neighbouring countries that admitted millions of Syrian refugees at the time (Bündnis'90/Die Grünen-BDK 26–28.04.2013: 232–233).

The first official stances of the Christian democratic parties on the growing influx of migrants in the EU were not adopted until 2014. However, though the

CDU reacted to these events was still restrained, opinions of the CSU were far more decisive. On 5 April of that year, at the CDU Federal Congress in Berlin a resolution was adopted, in which the party expressed its contentment with the establishment of the CEAS in 2013 as "one of the most modern systems in the world." It claimed that "in principle", the so-called "Dublin system proved effective", though it is inconvenient when dealing with excessively high numbers of migrants arriving in the EU frontier states. Nevertheless, the CDU declared that Germany would continue to financially support the activity of the United Nations High Commissioner for Refugees and consent to host migrants from third countries provided that "their swift return to countries of origin would be impossible or they would be unable to fully integrate with communities in those countries." The CDU also called on the other EU Member States to admit refugees (CDU-BPT 5.04.2014: 84–86).

In turn, at the CSU National Congress of 12–13 December 2014 in Nuremberg, the CSU adopted a resolution whereby it claimed that the EU "ought to remain the anchor of global stabilisation." However, "the constantly growing influx of refugees into Europe poses a threat" both to the stability of the EU and Germany. In the face of current crises and hazards at the time, the EU was said to "need more Europe in the largest and less Europe in the smallest" (*mehr Europa im Großen und weniger Europa im Kleinen*). This meant that enhanced cooperation between the Member States should apply to the greatest cross-border threats, including the mass influx of migrants, whereas it ought to be limited in those aspects of public life that are better managed by the Member States. The highest priority in the Union's external actions but also in the policies responsible for its internal security, should be given to overcoming the mass inflow of migrants. Consequently, the CSU proposed to include the following tasks in the scope of EU activities: first, to introduce new asylum provisions to ensure a "fair share of the responsibility of hosting refugees between the EU Member States", e.g. according to "a mandatory quota system" (*Verteilungsschlüssel*); second, to develop a special aid scheme for refugees of 1 billion euros; third, to extend the scope and intensity of the search and rescue operation Triton and to strengthen the EU external borders control; fourth to consider the possibility to reintroduce border control at internal borders in emergency situations; fifth, to combat smuggling and human trafficking networks more effectively (CSU-PT 12–13.12.2014: 4–5). Importantly, the CSU was the first German political party to suggest the quota system as a method allowing for a fair distribution of the responsibility for refugees in the European Union. At the time, this method was oriented in Germany in line with the so-called Königstein key

(*Königsteiner Schlüssel*), which served for calculating the number of asylum seekers per Federal State each year based on its tax revenue (two-thirds) and size of population (one-third).[35]

3.2 Second Phase of the Crisis (2015–2016)

The first German political party to respond in a highly incisive manner to the mass influx of migrants to the EU in 2015 was the FDP. Due to the lost 2013 federal elections, the first absence of this party in the Bundestag in the history of the Federal Republic of Germany and the adoption of a role of an extra-parliamentary opposition, the FDP could quite easily distance itself from its cautious approach towards the European migrant crisis it previously presented within the government coalition with the Christian democratic parties in the years 2009–2013. Moreover, it was urgently needed that the FDP pursued to acquire a new profile at the public debate on the European migrant crisis held in Germany.

On 16 May 2015, the FDP Federal Congress adopted a resolution on the migrant and asylum policy of Germany that specified the directions of actions to be taken by the party in the second phase of the European migrant crisis. In the said resolution, the FDP called on Germany to become more open to the current European and global challenges related to migration, and to regard them not as "a threat, but an opportunity" for the demographic and economic development of Germany, since the FDP believed that it should act as "a magnet for high-qualified migrants from around the globe willing to integrate with the German society", given the fact that due to demographic changes, which involved anticipated birth-rate decline and the ageing society, Germany could experience a labour shortage of 15 million people in 2050 (FDP-BPT 16.05.2015: 1–2).[36] Nevertheless, the FDP supported in the resolution profound changes in the EU immigration and asylum policy, including the introduction of the automated fairness mechanism for relocating migrants between all the Member States in

35 The name of the quota system for allocating migrants in Germany derives from the city of Königstein in Hessen, where on 31 March 1949 Federal States signed an agreement on sharing the financial responsibility for the activity of research institutions in Germany. Later, the said system was applied in other areas of public life, including asylum policy (GWK. Königsteiner Schlüssel:1).

36 Furthermore, on 19 January 2015 the FDP Federal Executive Board advocated the development of a modern concept for Germany's immigration policy (FDP-Bvo Beschluss 19.01.2015: 1–4).

line with the Königstein key binding in Germany.[37] Therefore, the EU policy should pursue a greater openness to refugees and fair relocation of migrants based on the following criteria: size of population, GDP, unemployment rate and size of a given state (FDP-BPT 16.05.2015: 7–8, 12).

On 17 June 2015, the FDP Federal Executive Board advocated the replacement of the Dublin III Regulation with new legislation stipulating the establishment of the migrant quota system. At the same time, it demanded that legal migrants be given access to the EU labour market, that the so-called humanitarian visa issued by the embassy of the EU is introduced for refugees from countries where people are subject to most severe persecution, that the root causes of migration are addressed in countries of origin, and that political and economic stabilisation processes are supported in transit countries such as Libya (FDP-Bvo Beschluss 17.06.2015: 2). Over two months later, on 26 August 2015, the FDP Presidium in its ten-item programme called yet again to revise the Dublin III Regulation and to replace it with the migrant quota system in line with the criteria adopted in the regulation of the Federal Congress in May of that year. Moreover, it also suggested, i.a. that the European Union should establish a special fund to support the countries that carried the main burden of the mass influx of migrants and that the EU immigration law should be liberalised by establishing humanitarian visas and temporary worker visas (*Job Visa*) in addition to the so-called Blue Card applied so far (FDP-Präsidium Beschluss 26.08.2015: 4).

The first joint response of the CDU/CSU/SPD government coalition to the mass influx of migrants in 2015 and Chancellor Merkel's decision to suspend the provisions of the Dublin III Regulation temporarily with regard to Syrian nationals (as discussed below) was the recommendations of the coalition committee (*Koalitionsausschuss* – KA), i.e. a body comprising the chairs of the CDU, the CSU and the SPD, and the relevant ministers of the federal government, adopted on 6 September 2015. The package of measures adopted at the meeting involved assisting countries of origin and transit countries aiming to prevent the root causes of migration, supporting measures taken by the EU to address the migrant crisis and coordinating cooperation between the federation, the federal states and municipalities regarding the asylum policy of Germany (KA 6.09.2015: 1).

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37 On 28 April 2016, the Alliance 90/The Greens parliamentary faction also submitted a proposal to establish an automatic mechanism for relocation of migrants within the UE in line with the Königstein key. The proposal was then forwarded to the Committee on Internal Affairs, while on 24 June of that year it was rejected on the Commission's recommendation at a plenary session of the Bundestag (DB Plenarprotokoll 18/167: 16448–16449, 16459–16460, 17859–17860).

The assistance to be provided to countries of origin and transit countries was to consist of, i.a. the provision of financial and institutional aid to refugee camps in regions affected by the crisis and taking action aiming to stabilise and strengthen the statehood of both failing and failed states. The support for actions taken by the European Union to address the crisis involved primarily approving of all proposals of the European Commission that were to be discussed at the CEU meeting of 14 September 2015 on the establishment of 'hotspot' areas in Greece and Italy; a distributing and admitting displaced persons entitled to asylum by the EU Member States in a solidary and fair manner; establishing a common EU list of safe countries of origin; carrying out of a "profound asylum policy reform" and establishing "a uniform asylum law" in the EU; engaging in effective fight against smuggling networks; providing financial and practical aid for the EU Member States most affected by the implications of the crisis at the time and improving the Union's engagement in addressing the causes of migration in the main countries of origin. Moreover, the coalition committee made a few important decisions determining the direction of changes in the asylum policy of Germany. It declared that the federal government would allocate in the draft budget for 2016 an additional amount of 3 billion euros to aid refugees on the federal level and make additional 3 billion euros available to federal states and municipalities to be managed. The police units that handled refugees and the BAMF were to be reinforced with regard to personnel and technical equipment. Furthermore, the act on safe countries of origin was to be amended to provide such status to Albania, Kosovo and Montenegro. It was agreed that it was highly important to fast-track asylum and return procedures; to abandon the erroneous system of financial incentives for migrants applied at the time (i.a. replacement of cash payments with benefits in kind); to improve the principles of integration with regard to migrants in the German society; to improve social-housing construction; to establish 10 thousand additional posts in voluntary services, and to facilitate legal labour migration as an alternative to asylum for citizens of Albania, Kosovo, Montenegro, Bosnia-Herzegovina, Serbia and Macedonia (KA 6.09.2015: 2–7).[38]

38 Most of these postulates were later included in the so-called first asylum package (*Asylpaket I*), which entered into force on 24 October 2015, though some provisions became applicable some time later. The package provided for changes in, i.a., to funding of asylum policy by the federation and federal states, the type of benefits (limited cash payments in favour of benefits in kind), the distribution of migrants between individual federal states, in the integration process of asylum seekers (language courses, facilitated access to the labour market), as well as in the recognition

The coalition committee also declared that Germany would fulfil its commitments with respect to asylum seekers and expressed hope that other EU Member States would act likewise (KA 6.09.2015: 1). This declaration pertained to, i.a. the proposal of the European Commission of 9 September 2015 on the establishment of a permanent crisis relocation mechanism, which was considered controversial in some countries of Central and Eastern Europe. The proposal of the European Commission was supported both by factions of the government coalition and the parliamentary opposition. However, both the SPD and Alliance 90/The Greens blamed the Christian democratic parties for serious mistakes in the asylum policy of the first phase of the migrant crisis in 2011–2014. Chairman of the SPD parliamentary faction Thomas Oppermann argued that four years earlier, when the crisis pertained to the Italian island of Lampedusa and Greece, the CDU and the CSU opposed the "establishment of the refugee quota system", yet changed their mind nevertheless once Germany found itself under the pressure exerted by the influx of migrants (DB Plenarprotokoll 18/145: 14287). Katrin Göring-Eckardt of Alliance 90/The Greens accused the government at the time of applying "Saint Florian's principle in the asylum policy" until 2014, which only aggravated the crisis. The use of this rule consisted in the willingness of the federal government to solve the migrant crisis "as far from the German borders as possible, preferably in countries of origin or neighbouring countries, but (in any case) outside the European Union" (DB Plenarprotokoll 18/120: 11616). Nevertheless, some social democrats, such as Minister of Economic Affairs

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of Albania, Kosovo and Montenegro as safe countries of origin. In principle, these provisions were implemented under the Act on the Acceleration of Asylum Procedures (*Asylverfahrensbeschleunigungsgesetz*, BGBl, 2015, I, 40). Moreover, on 7 July 2016, the Bundestag adopted the integration act that entered into force on 6 August of that year (with some provisions binding since 1 January 2017). The act envisaged to facilitate the integration process of asylum seekers with the German society but more so to apply sanctions for failure to respect it. The said facilitations were to apply in, i.a. the access to integration courses (German language and culture courses) and the labour market. However, the refugees who discontinue the course must expect to face lower social benefits. The right to permanent residence would become exercisable after 5 years instead of 3 and would be subject to the sufficient knowledge of German language and the capability to earn one's own living. Whereas after 3 years, asylum seekers were to receive this right once they learn German language and become employed or self-employed. In order to ensure that the responsibility for asylum seekers is fairly distributed and to prevent them from forming clusters in the largest metropolises (*Ballungsgebiete*), the act provided federal states with the right to designate a place of residence for refugees (Integrationsgesetz, BGBl, 2016, I, 39).

and Energy and Chairman of the SPD Sigmar Gabriel, openly pointed out to Germany's demand for workforce. Gabriel argued that the federal government should be interested in the inflow of migrants, as the German labour market was about to go down by 6 million people by 2030 and thus, migrants arriving to the Federal Republic were those who "can (…) help change that." Otherwise, it could pose a genuine threat not solely to entrepreneurs but also to the welfare of the entire German public (DB Plenarprotokoll 18/121: 11703).

On 5 November 2015, the Chairman of the CDU/CSU/SPD government coalition adopted a special resolution on the migrant crisis. To large extent, particularly in the part regarding the Union's measures against the crisis, it was based on the joint stance of the Christian democratic parties expressed four days earlier (CDU/CSU-Positionspapier, 1.11.2015: 1–6). In the resolution, Merkel, Seehofer and Gabriel reiterated the postulates of the federal government stated so far on the reform of the immigration and asylum policy of the European Union, i.a. the necessity to establish the quota system (*Strukturen der Lastenteilungen*) and 'hotspot' areas in Greece and Italy, and to make the mechanism for returning illegal immigrants to their countries of origin more effective. Still, in order to meet the new priorities of the European Union in the fight against the crisis, they supported the initiative to conclude an agreement with Turkey and actions ensuring that the EU external borders are thoroughly secure (CDU-CSU-SPD. Parteivorsitzendenbeschluss 5.11.2015: 5–7).

In the part pertaining to the German asylum policy, the chairs of the CDU, the CSU and the SPD supported the following changes: introduction of a refugee identity card and a database of information about persons seeking asylum with the so-called regular procedure for the examination of asylum applications; the establishment of 3–5 centres for migrants with low chances for asylum and tightened up residential system under the so-called fast-track procedure for the examination of asylum applications; a two-year suspension of the asylum seekers' right to family reunification; introduction of the mandatory co-financing of the refugees' integration process with the German community by the former; establishment of a federal centre to embassies of countries of origin in order to facilitate the identification of migrants and restricting migrants' right to defer expulsion only to severe cases of disease (CDU-CSU-SPD. Parteivorsitzendenbeschluss 5.11.2015: 1–5).[39]

39 Most of these proposals were reflected in the so-called second asylum package that entered into force on 17 March 2016. The sad package provides for, i.a the asylum seekers' right to family Reunion to be suspended for a two-year period (except for members of families situated in refugee camps in Turkey, Jordan and Lebanon); the introduction of the obligation for the asylum seekers to co-finance the costs of the

While the resolution of the chairs of the CDU, the CSU and the SPD of 5 November 2015 determined the stance adopted by the federal government with regard to the new priorities of the EU in the fight against the migrant crisis, the above-mentioned position adopted by the CDU and the CSU of 1 November of that year was the key document that largely defined actions of the Christian democratic parties (CDU/CSU-Positionspapier 1.11.2015: 1–6). All major programme documents of these parties adopted in the following several months referred to this document, e.g. the declaration of the CDU Federal Congress of 15 December 2015, the resolution of the CDU Federal Congress of 7 December 2016, the resolution of the CSU National Congress of 21 November 2015, the resolution of the CSU National Executive Board of 10 September 2016 and the policy agenda of the CSU adopted at the National Congress of the said party on 5 November of that year.

In the declaration of 15 December 2015, the CDU essentially confirmed all the objectives and tasks undertaken by the party against the crisis so far (CDU-BPT 14–15.12.2015: 8–23), whereas in the resolution of 7 December 2016, it also expressed a positive opinion of the signing and execution of the agreement with Turkey of 18 March of that year, the closure of the eastern Mediterranean route for migrants, the reinforcement and the sealing of the EU external borders, and also the reform of the Dublin III Regulation initiated by the European Commission on 4 May 2016. However, it also supported in the declaration the establishment of transit areas on the borders of the Member States for migrants awaiting decisions on their asylum applications, the harmonisation of social standards for asylum seekers, and also the signing of agreements with African countries by the EU on the cooperation to fight illegal immigration modelled on the agreement concluded with Turkey (CDU-BPT 6–7.12.2016: 13–19). In contrast to the CDU, its sister-party CSU departed in its programme documents from the framework adopted under the resolution of 1 November 2015. Its position on the migrant crisis and asylum seekers was far more ambivalent, yet also more

integration process at the amount of 10 euros per month; the recognition of Morocco, Algeria and Tunisia as safe countries of origin; the restriction of illegal immigrants' right to defer expulsion from Germany only to severe cases of disease; the establishment of 5 centres for migrants with small chances for asylum, which pertained to individuals who did not manifest willingness to cooperate or those who provided false personal data or intentionally destroyed their own documents or those arriving from the so-called safe countries or banned from entering Germany (Asylverfahrensbeschleunigungsgesetz, BGBl, 2016, I, 12; Gesetz zur erleichterten Ausweisung, BGBl, 2016, I, 12).

realistic, since (as in the first phase of the crisis in 2011–2014) it fully recognised threats arising from the mass influx of migrants both for the European Union and for Germany. Therefore, in its programme adopted at the National Congress of 20–21 November 2015 in Munich, the CSU called on all the Member States to respect EU law in asylum and immigration policy, particularly the provisions of the Dublin III Regulation or the Schengen acquis. As before, it also advocated the introduction of the migrant quota system. Furthermore, it warned refugees against any attempts to establish a multicultural society in Germany or against 'ghettoisation' (*Ghettoisierung*) of Germany or promoting religious fundamentalism and fanaticism. It reminded that the Basic Law is the binding law in Germany, and not sharia law. Consequently, it contrasted the concept of a multicultural society with the idea of the 'leading culture' (*Leitkultur*), which was to involve "the western Christian-Jewish culture, our fundamental values, German language, our history and culture." The observance of German law was obvious, yet a "genuine community" requires something more, namely, the "leading culture". While appreciating the key role played by Turkey in limiting the inflow of migrants to the European Union via the eastern Mediterranean route, the CSU still opposed the accession of Turkey into the EU and proposed to provide it with a privileged partner status instead (CSU-PT 20–21.11.2015: 28–31). In the resolution of the National Executive Board of 10 September 2016, the CSU announced that Bavaria would still act as the federal state that sets trends in Germany (*Taktgeber*) in the fights against the migrant crisis and in the integration process of asylum seekers, which should be based on the "leading culture". Consequently, it demanded that this concept be introduced to the Constitution of Bavaria[40] and that the maximum number of refugees admitted in Germany be stipulated by the law at 200 thousand persons per year. The CSU

40 On 30 April 2017 Minister of the Interior de Maizière (CDU) supported in an article published in *Bild am Sonntag* the idea of the "leading culture" understood as the condition for a successful integration of migrants with the German society, and called for a public debate on this issue. This proposal was immediately protested by politicians of the SPD, the FDP and Alliance 90/The Greens. The SPD candidate for Chancellor Martin Schulz considered it an absurd, arguing that "the leading German culture is freedom, justice and peaceful cohabitation, as defined in the Basic Law." Chairman of the FDP Christian Lindner accused de Maizière of practicing electoral campaign. Whereas Co-Chair of Alliance 90/The Greens Simone Peter stated that Germany require not a debate on the "leading culture" but "a new internal policy that would facilitate integration, monitor the right-wing groups (*rechte Netzwerke*) and take due account of the Islamic threat" (De Maizière, Bild 30.04.2017: 1; De Maizière, SZ 30.04.2017: 1: De Maizière, SD 1.05.2017:1).

also opposed the abandonment of borders control on the Austrian frontier until genuine control is reinstated on the external borders of the European Union. In its critical stance on Chancellor Merkel's decision to open the German-Austrian border in September 2015, the CSU stated it "must not happen again on any condition", since "no country can afford to tolerate illegal crossing of its borders" (CSU-Pvo. Beschluss 9–10.09.2016: 1–10). The resolutions adopted by the National Congress in 2015 and by the CSU National Executive Board in 2016 were of fundamental importance to this party in the fight against the migrant crisis, which was evidenced by the fact that the key principles were included in the policy agenda adopted on 5 November 2016 at the National Congress in Munich (CSU-PT. Grundsatzprogramm 4–5.11.2016: 14–15).

3.3 Influence of the Federal Government on the Reform of Immigration and Asylum Policy of the European Union: Crisis Management or an Impulsive Act?

Despite being fully aware of the imminent threat, the critical opinions of the immigration policy pursued so far by the European Union and the calls for a reform in the said policy area, both the CDU/CSU/SPD coalition government and the parliamentary opposition parties were thoroughly surprised by the migrant crisis that broke out in the EU in 2015. Neither side was prepared for the mass influx of migrants in such a short time or the Union's helplessness in the face of the crisis. Though the number of applications for asylum in the EU increased by over 45% in 2014 compared to 2013, and in the first eight months of 2015 continued to grow even faster, the federal government at the time still did not have any effective solution for tackling the migration pressure (cf. Tab. IX).[41]

On 18 June 2015, in her appearance before the Bundestag Chancellor Merkel called on governments of all the EU Member States to jointly participate in the admission of displaced persons in line with the European Commission's proposal of 27 May 2015 for the establishment of a temporary relocation mechanism for the benefit of Italy and Greece, which was mentioned above (DB Plenarprokoll 18/112: 10688). Referring to the current Eurostat data, Merkel also stated that

41 Though in 2013 as many as 431,090 applications were lodged, the number in 2014 reached up to 626,960. The total number of immigrants who lodged their first-time asylum applications and appeals against a decision in 2015 in Germany was 476,649, which is 135% higher compared to 2014 (Eurostat. Asylum and first time asylum applicants 26.04.2017: 1).

Tab. IX: The number of asylum applications lodged in the EU Member States in 2013–2015. Source: Eurostat. Asylum applicant, 26.04.2017: 1–2.

Time	2013	2014	2015
Geo			
European Union	431090	626960	1322825
Austria	17500	28035	88160
Belgium	21030	22710	44660
Bulgaria	7145	11080	20365
Croatia	1075	450	210
Cyprus	1255	1745	2265
Czech Republic	695	1145	1515
Denmark	7170	14680	20935
Estonia	95	155	230
Finland	3210	3620	32345
France	66265	64310	76165
Germany	126705	202645	476510
Greece	8225	9430	13205
Hungary	18895	42775	177135
Ireland	945	1450	3275
Italy	26620	64625	83540
Latvia	195	375	330
Lithuania	400	440	315
Luxembourg	1070	1150	2505
Malta	2245	1350	1845
Netherlands	13060	24495	44970
Poland	15240	8020	12190
Portugal	500	440	895
Romania	1495	1545	1260
Slovakia	440	330	330
Slovenia	270	385	275
Spain	4485	5615	14780
Sweden	54270	81180	162450
United Kingdom	30585	32785	40160

Germany cannot longer agree to the fact that only five of the Member States (Germany, Hungary, Sweden, Austria and Italy) were to admit as many as three-quarters of all asylum seekers (Eurostat. Asylum applicant: 26.04.2017: 1–2).

In the summer of 2015, thousands of migrants began flowing into Budapest, the capital city of Hungary, via the eastern Mediterranean route. The Hungarian

government was facing at the time a very difficult dilemma. Every solution seemed unfavourable. The admission of refugees exceeded the admission capabilities of the local asylum system, whereas a permission to enter Austria or Germany without previously examining a given asylum application would mean not only a violation of the provisions of the Dublin III Regulation but also an incentive for more groups of migrants to come into the EU. Nevertheless, in late August 2015, the government of Prime Minister Victor Orban allowed many thousands of migrants to march along a motorway from Budapest to Austria, and even provided them with coaches. Orban's dicey move forced the governments of Austria and Germany to act.[42] On 31 August 2015, during a press conference Chancellor Merkel claimed famously "we can do it!" (*Wir schaffen das!*), words that have later become the slogan of the 'open doors policy' (*Türöffnungspolitik*) pursued by the German government with respect to displaced persons.[43]

In response to migrants marching towards Austria, on the night of 4 to 5 September 2015, Merkel and Austrian Chancellor Faymann in agreement with Orban declared the above-mentioned controversial decision to temporarily suspend the provisions of the Dublin III Regulation with respect to Syrian nationals (Trauner 2016: 99). Moreover, they agreed that coaches and trains transporting migrants shall be let from Austria to Bavaria. As a result, as many as about 12 thousand migrants crossed the German border on the following day. However, only a few hours after the said decision was taken, the Chancellor of Austria alarmed Merkel that the number of refugees is far greater than expected (PAP 17.03.2017: 1).

The said decision was taken by Merkel spontaneously, without the consent of the government cabinet or a parliamentary debate in the Bundestag and a resolution adopted by the CDU/CSU and the SPD parliamentary factions, as well as without the agreement of the authorities of the government coalition. It was highly criticised both in Germany and in other EU Member States. The main adversary of Chancellor Merkel in Germany was the co-ruling CSU. Prime Minister of Bavaria and Chairman of the CSU Seehofer warned that the uncontrolled inflow of migrants

42 According to German journalist Robin Alexander, Prime Minister Orban set a trap for Merkel and Faymann, thus forcing them to admit migrants he did not want to host himself. For that very reason, the two chancellors acted under pressure (*getriebene*) exerted by the Prime Minister of Hungary (Alexander 2017: 59–70).

43 The Chancellor used this phrase based on estimates of German offices, according to which by the end of 2015 about 800 thousand migrants were to arrive in Germany (Spiegel 19.08.2015: 1: Tagesschau 31.08.2015: 1; Merkel, Banas 31.08.2015: 1–2). The above number was first declared on 19 August 2015 by de Maizière (Spiegel 19.08.2015: 1).

might result, i.a. in a growing support for extreme right-wing groups in Germany. General Secretary of the CSU Andreas Scheuer informed that the Executive Board of the party unanimously deemed Merkel's decision an erroneous signal. The Chancellor's attitude was also criticised by Minister of Interior of Bavaria Joachim Herrmann (PAP 6.09.2015: 1–2). As for foreign criticism, the most critical opinions came mainly from the Central and Eastern European countries, mainly Hungary and Poland (Węc 2017: 9). The said opinions were not only a consequence of the controversial decision to suspend the provisions of the Dublin III Regulation with regard to Syrian nationals but also pertained to the diplomatic efforts undertaken later by federal government to introduce a permanent crisis relocation mechanism for all the EU Member States. The said efforts were considered an attempt to shift responsibility for Germany's mistakes in the asylum and immigration policy onto the Member States. On 13 September 2015, pressed by growing numbers of migrants, the federal government was forced to reinstate borders control on the Austrian frontier, while returning to the observance of the provisions of the Dublin III Regulation in November of that year (De Maizière, BMI 13.09.2015: 1–2: Trauner 2016: 99).

Already in September 2015, the coalition committee determined – as seemed at the time – directions of the federal government's activities for the following several months. A discussion held in the committee has also calmed the previously tense atmosphere between the Christian democratic parties. The meeting participants agreed unanimously that the decision taken on the night of 4 to 5 September 2015 by Chancellor of Germany Merkel and Chancellor of Austria Faymann "should not be allowed to happen again", thus rendering it *de facto* erroneous (KA 6.06.2015: 1). The recommendations of the coalition committee made a considerable impact on further actions taken by the federal government to tackle the migrant crisis. Based on this document, its representatives took part in the procedure of the both above-mentioned decisions to relocate migrants from Italy and Greece adopted by the CEU. Though the adoption of the decision of 14 September 2015 took quite a smooth course, the adoption of the decision of 22 September of that year evoked much controversy among individual delegations. While the first decision was based on voluntary arrangements adopted by the governments of the Member States by consensus, included in the resolution of 20 July 2015 (CEU Protocol 20.07.2015: 3–4; 14.09.2015: 8; CEU Conclusions 14.09.2015: 8), the second decision, which provided for a mandatory quota system, was adopted by qualified majority (also by Poland), though against the position of the Czech Republic, Slovakia, Hungary and Romania, whereas Finland abstained from voting (CEU Protocol 22.09.2015: 3).

The official position of the federal government on the quota system was formed for the first time in a joint statement of Germany and France annexed to the Protocol of the CEU of 20 July 2015. In this document, governments of both these countries

declared they would both admit the refugees residing in Italy and Germany in a two-year period in line with the proposal of the European Commission of 27 May 2015. However, they noted in a highly condescending manner that they shall both watch closely whether all the other criteria specified under the said resolution are met, particularly to make sure that all the Member States subject to relocation scheme take part to attain a balanced share of responsibilities (CEU Protocol 20.07.2015 Annex: 8–9). The German and French governments were one of the Member States that most actively pursued the establishment of a provisional (and from September 2015 also permanent) crisis relocation mechanism for the entire European Union. Based on the joint position of Germany and France, Chancellor Merkel introduced a postulate of a solidary and fair distribution of displaced persons to the recommendations of the coalition committee of 6 September 2015. Three days later, at a parliamentary debate in the Bundestag, the postulate was supported by the parliamentary factions of the CDU/CSU/SPD government coalition and the parliamentary opposition Alliance 90/The Greens and the Left (DB Plenarprotokoll 18/120: 11606, 11613, 11619, 11629, 116643).

As noted above, the decision of the CEU of 22 September 2015 on provisional measures for the benefit of Italy and Greece, which provided for the mandatory quota system covering as many as 120,000 migrants, was openly opposed by some of the Central and Eastern European countries. The governments of the Czech Republic, Slovakia, Hungary and Romania considered it a 'dictate'. Prime Minister of Slovakia Robert Fico declared that the decision would be challenged in the Court of Justice of the European Union, whereas Czech Prime Minister Bohuslav Sobotka not only did oppose the migrant quota system but also pointed out to the need for an immediate conclusion of conflicts in Syria and Libya as a means for overcoming the European migrant crisis.[44]

The governments of the mentioned four states involved a special statement to the Protocol of the CEU of 22 September 2015. The Czech government considered it a hasty decision. In its view, "the proposed relocation scheme will never be functional," since "the free will of the relocated persons is not reflected enough, not speaking about the aspect of their secondary movement in the Schengen area." As a result, the scheme would attract "more immigration to the EU." The Czech government also questioned the decision-making procedure adopted by the CEU. In its view, "major policy decisions such as the Council Decision (…) establishing provisional measures in the area of international

44 Ultimately, in December 2015, governments of Slovakia and Hungary challenged the Council's decision in the Court of Justice of the European Union (DPA: 2.12.2015: 1; PAP 12.01.2017: 1–2; Morozowski 2016: 3–4; Potyrała, Wojciechowski 2015: 5).

protection (…) should be, despite the possibility envisaged by the Treaty on the Functioning of the European Union, adopted by consensus." The adoption of such a decision by qualified majority meant that the "EU is moving away from the concept of voluntary participation of its Member States in the proposed relocation scheme," which "could be perceived as an unfortunate step threatening to weaken the spirit of cooperation within the European Union – even should it be taken in the name of solidarity." Hence, according to the Czech government, as "a new systemic aspect to the Common European Asylum System," the relocation scheme ought not to be introduced (CEU Protocol 22.09.2015 Annex: 4–5). Likewise, the governments of Romania, Slovakia and Hungary deemed the relocation scheme improper and ineffective as regards the migrant crisis, since "this approach only targets the immediate symptoms" of the crisis (Romania) (CEU Protocol 22.09.2015 Annex: 7). The relocation scheme failed to solve fundamental issues such as "irregular secondary movements". Moreover, it failed to take due account of preferences expressed by migrants and acted as "a pull factor to the growing influx of third-country nationals into Member States" (Slovakia) (CEU Protocol 22.09.2015 Annex: 7–8). The scheme "could complement but not replace a comprehensive and effective common action to ensure efficient control at the external borders of the European Union" (Hungary) (CEU Protocol 22.09.2015 Annex: 6). Finland abstained from voting, since (as was the case with the Czech Republic) it questioned the procedure applied by the CEU to adopt the analysed decision. This was due to the fact that the Finnish government put much stress on the adoption of the refugee quota by a resolution, and not in a legislative act (CEU Protocol 22.09.2015 Annex: 6).

The recommendations of the coalition committee of 6 September 2015 shaped the position adopted by Germany on the European migrant crisis, yet only for a short while, as it soon turned out. In respect of the ongoing mass influx of migrants, further agreements on the EU level were urgently needed, which resulted in the above-mentioned decision of the heads of state or government of 23 September 2015, followed by the EC conclusions of 15 October of that year, which determined new priorities of the Union in the struggle against the crisis, i.a. the agreement with Turkey and the sealing of the EU external borders. The federal government's reaction was ambivalent. Chancellor Merkel supported these priorities,[45] yet she

45 Merkel called for stepping up negotiations with Turkey for the first time on 9 September 2015 at a parliamentary debate in the Bundestag on the migrant crisis. At the same time, Merkel clearly supported changes in the working methods of Frontex and the establishment of the Integrated External Borders Surveillance System (DB Plenarprotokoll 18/120: 11613, 12558; DB Plenarprotokoll 18/145: 14282–14283).

was not in favour of closing the eastern Mediterranean route completely, which led to an open confrontation with EC President Tusk in March 2016. Nevertheless, the federal government was actively seeking to fast-track legislative proceedings on the proposal of the European Commission of 9 September 2015 establishing a permanent crisis relocation mechanism (DB Plenarprotokoll 18/130: 12558, 12561; DB Plenarprotokoll 18/139: 13612; DB Plenarprotokoll 18/145: 14283).

The above-mentioned resolution of the chairs of the CDU, the CSU and the SPD of 5 November 2015 determined the position of the federal government before the forthcoming meeting of the CEU, at which the political resolution on the European migrant crisis was adopted. With the aim to reduce the migration pressure at that time, the CEU decided to take the following action: first, to step up the work on the establishment of hotspots in Greece and Italy, so that they reach full capacity by the end of November 2015; second, to fast-track relocation procedures with respect to migrants from the above-mentioned two states by means of, i.a. relocation liaison officers seconded by the participating countries to the said countries by mid-November of that year; third, where migrants are unwilling to cooperate, to apply to a greater extent than before asylum procedures stipulated in EU law on borders or transit areas, fast-track procedures, provisions regarding unacceptability of subsequent asylum applications, as well as coercive measures, including detention for the time of implementation of the procedures; fourth, to support the Member States that require aid in managing external borders; fifth, to continue the legislative work on the proposals of the European Commission of 9 September 2015 on the establishment of a permanent crisis relocation mechanism and on the joint list of safe countries of origin; sixth, to support accelerated implementation of the timeframe for the liberalisation of the visa scheme with Turkey (CEU, Conclusions 13880/15, 9.11.2015: 2–5).[46]

By promoting the 'open doors policy', also referred to as the 'welcome policy' (*Willkommenspolitik*), from early September 2015, the federal government implied its willingness to assume responsibility for managing the migrant crisis throughout the European Union. However, according to Robin Alexander, it was in fact merely an "impulsive act".[47] The federal government's activity (particularly

46 In the statement annexed to the minutes of the CEU, Poland, Hungary and Slovakia rejected the postulate for the establishment of the permanent crisis relocation mechanism (CEU Protocol. Annex, 9.11.2015: 4–5).

47 At times, Merkel's government yielded to the pressure, which was particularly visible on 12 September 2015, when during a telephone conference attended by Chancellor Merkel, Foreign Minister Steinmeier, Minister of Interior de Maizière, Head of the Federal Chancellery Peter Altmaier, Prime Minister of Bavaria and Chair of the CSU

from September 2015) was characterised by opportunistic approach, indecisiveness and was basically limited only to responding to current events. Consequently, Germany's relations with the Central and Eastern European Countries deteriorated, resulting in deepened divisions within the EU itself or even a temporary isolation of Germany in the Union. The long-term consequences of Merkel's decision in Germany included a deep divide within the German society between the supporters and the opponents of the admission of migrants, changes in its social and ethnic structure, as well as a strengthened position of a populist party Alternative for Germany (*Alternative für Deutschland*, AfD) formed in 2013.

"Germany's lonely path" (*Alleingang Deutschlands*) in the European Union was criticised over the following months by local journalists, legal practitioners and politicians. *Rheinische Post* even referred to a "Europe of solo players", whereas *Der Tagesspiegel* and *Frankfurter Rundschau* warned the federal government against solitude in fighting the migrant crisis and the possible lack of understanding from other Member States for subsequent German initiatives in this regard (Ziedler 21.09.2015: 1–2; Tagesspiegel 13.10.2015: 1–2; FR 19.10.2015: 1–2). On 13 January 2016, former President of the Constitutional Tribunal in North Rhine-Westphalia Michael Bertrams accused Chancellor Merkel of arrogating her powers in immigration policy and "possibly, violating the constitution." In his view, this policy allowed hundreds of thousands of refugees into Germany, which was "compassionate (*mitfühlend*), yet occurred without any clear plan" and, above all, without the consent of the Bundestag. For that very reason, Merkel's decision ought to be considered a manifestation of an "autocratic chancellor democracy" (*selbstherrliche Kanzler-Demokratie*) (Welt 13.01.2016: 1–2). On 18 February 2016, the FDP Presidium adopted a resolution that placed full responsibility for all the previous failed attempts to overcome the European migrant crisis on the federal government. Due to non-coordinated actions taken by the federal government and erroneous signals made personally by Chancellor Merkel, "there was an impression in many parts of the world that the German asylum law does not essentially provide for any conditions or limitations for migrants." This attitude only encouraged thousands of migrants to come to Germany, though it had "catastrophic consequences." Eventually, the "welcome culture" (*Willkommenskultur*) evoked "a sense of fear, rejection and partially even hysteria" in the German society. Thus,

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Seehofer, and Chair of the SPD Gabriel decided to close the German border on the following day. Paradoxically, only several hours later, de Maizière and Merkel decided nevertheless not to implement this decision to prevent political consequences of possible clashes between migrants and the German police (Alexander 2017: 23–32, 59–60).

the federal government was required to take action aiming to "allow Germany to overcome its political isolation in Europe." This was attainable by means of seeking a common compromise "in the area of asylum law" for the entire European Union together with "European partners" (FDP-Präsidium 18.02.2016: 1–2).

In March 2016, the federal government changed its previous statements on the means and instruments for overcoming the migrant crisis. This was most vivid in the government's declaration presented on 16 March 2016 in the Bundestag by Chancellor Merkel. Until that time, solidarity of all the Member States on the migrant quota was prioritised by the federal government, whereas Merkel put strong emphasis also on other "pan-European solutions" (*gesamteuropäische Lösung*). The interests of the European Union involved not only a fair and solidary distribution of refugees, including the revision of the Dublin III Regulation planned by the European Commission but also reinstate free movement across borders in nine Schengen Member States (including Germany), cooperation with Turkey as the largest migrant transit country, and cooperation with African and Asian countries of origin to eliminate the causes of migration (DB Plenarprotokoll 18/160:15745–15749).

The mass influx of migrants into the European Union via the eastern Mediterranean route was not successfully handled until the signing of the abovementioned agreement with Turkey on 18 March 2016. Negotiations between the EU and Turkey on the limiting or preventing inflows of refugees continued until the autumn of 2015. The federal government actively supported these negotiations, reaffirming its stance during the parliamentary debates in the Bundestag of 15 October and 25 November 2015, Merkel's visit in Turkey on 18 October 2015 or the joint visit of Tusk, Merkel and Frans Timmermans in the said country on 23 April 2016 (Romaniec 18.10.2015: 1–2; Wprost 19.10.2015: 1–2; PAP 15.04.2016: 1; 23.04.2016: 1: 25.04.2016: 1). At both the parliamentary debates, Merkel for the first time spoke about the key role of Turkey in overcoming the crisis and expressed support of the federal government for negotiations held by the EU with Turkey in that regard. On 18 October, the first German-Turkish exploratory discussions on this subject took place. In late November, the federal government actively joined work on the adoption of the agenda of the meeting of the heads of state or government of the EU with Prime Minister of Turkey Ahmet Davutoğlu held on 29 November 2015 in Brussels. Whereas on 16 December 2015, the Chancellor expressed her dissatisfaction with the arrangements concluded between the EU and Turkey so far, and a hope that they would substantially allow to overcome the crisis (DB Plenarprotokoll 18/130: 12557; 18/139: 13612; 18/145: 14283).

At the meeting of the heads of state or government of the EU with Prime Minister Davutoğlu, a joint action plan to enhance cooperation between both

sides in fighting illegal immigration was adopted.[48] However, the decisive point was the meeting of the heads of state or government of the EU with Prime Minister Davutoğlu on 7 March 2016 in Brussels. At that time, the above-mentioned preliminary agreement on principles of cooperation with Turkey and implementation instruments was concluded (EC. Statement HSG 7.03.2016: 1–2). On the eve of this event, a meeting was held between Merkel, Davutoğlu and Dutch Prime Minister Mark Rutte, whose government was holding the EU Presidency at the time. At this very meeting, the outline of the arrangement of 7 March 2016 was agreed, which was further specified on 18 March of that year in an agreement concluded with the Turkish government. Due to the dissent between EC President Tusk and Chancellor Merkel on methods for solving the migrant crisis, not only was Tusk not invited to the meeting, but he was not informed of the meeting either. Merkel's willingness to attain a notable success in overcoming the European migrant crisis not only did obscure former personal sympathy for Tusk from her view but also indicated that she ignored the EU institution. While Tusk spoke in favour of a stricter policy towards displaced persons and called on the Balkan countries to close their borders, which was supported by the actions taken by politicians of Central and eastern European states or even Austrian Foreign Minister Sebastian Kurz (ÖVP) (Kurz 7.03.2016; Kurz/Will 6.03.2016), Merkel opposed the 'locking' of the eastern Mediterranean route. When Tusk pursued that statements of the heads of state or government of the EU from the meeting with Davutoğlu of 7 March 2016 involved a paragraph on the agreement with Turkey being equal to the closing of the said route for displaced persons, Merkel was against it (Stabenow: 26.03.2016: 1–2; PAP 13.03.2016: 1–2). Ultimately, the statement nevertheless contained a consensual formulation that non-regulated migration flows along the mentioned route were over. At the same time, it was agreed that the EC President should be responsible for developing the ultimate agreement with Turkey with respect to both European and international law (EC. Statement HSG 7.03.2016: 1–2). However, Chancellor Merkel's active engagement in the negotiating and the signing of the agreement with Turkey on 18 March 2016 allowed the federal government to definitively leave the temporary political isolation within the UE that persisted from September 2015.

48 On 15 October 2015, the said plan was agreed *ad referendum* between the European Commission and the Turkish government, and adopted on the very same day by the EC (Commission, Fact Sheet 15.10.2015, MEMO 1558/60: 1–2; EC. Conclusions, 15.10.2015: 1).

The reactions of the federal government and the parliamentary opposition to the negotiations and the conclusion of the agreement with Turkey were thoroughly different. While the federal government considered the said agreement a success both for the EU and for Germany, the opinion of the opposition parties was critical. Nearly six months after it entered into force, at a parliamentary debate in the Bundestag on 7 September 2016, Chancellor Merkel described it as a model solution for similar agreements that ought to be concluded in the future, i.a. with the governments of Egypt, Tunisia and Libya, provided that the domestic political situation in the latter becomes more stable. Whereas Foreign Minister Steinmeier stressed the geopolitical significance of Turkey for addressing the international situation in the Middle East and North Africa. In his view, the said country should play the "leading role" in solving conflicts in Syria, Iraq and Libya in the future. In contrast, the opposition parties Alliance 90/The Greens and the Left challenged the agreement with Turkey. Dietmar Bartsch (Alliance 90/The Greens) argued that the European Union has thus become a hostage of President Erdoğan, who after the failed coup of July 2016 led to a dismantling of democracy, the rule of law and human rights in Turkey, while these values should never be subject to a diplomatic haggle. Michael Leutert (the Left) accused the European Union that the analysed agreement was concluded under the pressure of the Turkish government, which expected the EU to make concessions regarding visa liberalisation in return, which should not be approved by the Union due to Turkey's failure to meet visa criteria (DB Plenarprotokoll 18/186: 18409–18410, 18415, 18451, 18453).[49]

The views of the government coalition and the parliamentary opposition in Germany on the controversial proposal of the European Commission of 4 May 2016 amending the Dublin III Regulation were also highly divergent. The said proposal, which envisaged establishment of the fairness mechanism and a very high solidarity tax for the states that refuse to consent to a compulsory admission of asylum seekers, faced much criticism in both South European states and Central and Eastern European countries. The states that carried most of the burden related to the mass influx of migrants, i.e. Italy and

49 Already at the debate in the Bundestag held on 28 April 2016, Göring-Eckardt (Alliance 90/The Greens) accused the European Union of concluding the agreement with Turkey at the expense of the freedom of speech and of press, which are not respected in that country, while its sole positive aspect is the fact that it may "lay the foundations for the European solution" for the migrant crisis in the EU, though it did not solve the issue of mass inflow of refugees but merely allowed 72,000 Syrian citizens to legally resettle in the EU (DB Plenarprotokoll 18/167: 16448).

Greece, questioned regulations that allowed a given country to refuse to participate in the fairness mechanism even for compensation. Whereas the Visegrad countries undermined both the idea that such a mechanism be established and the intention of introducing a solidarity tax (PCh 2.05.2016: 1; PAP 4.05.2016: 1; Newsweek 4.05.2016: 1; RP 26.12.2016: 1; Ostrowski, Wójcik Polityka 2017: 24; Szymańska 2017: 1; AJ 14.07.2016: 1).

At the end of September 2016, the Visegrad countries proposed to solve the issues arising from the weakness of the Dublin system by means of the 'flexible solidarity' concept. In the said concept, the Member States would decide independently (based on their potential and experience) on the form of their participation in the EU asylum policy and the solving of the migrant crisis, whereas taking part in the relocation schemes ought to be voluntary. On 17 November 2016, on the eve of the meeting of the CEU, the Slovakian Presidency presented at an informal dinner attended by ministers of interior detailed proposals, which were this time framed as 'effective solidarity' concept that entailed three operational scenarios depending on the size of the immigrant influx. The first scenario, which concerned the pre-crisis situation, obliged frontier states to register migrants, whereas all the Member States were obliged to prevent secondary movements. The second scenario to be applied in a crisis imposed on all the Member States the obligation to provide collective assistance to countries most affected by the outcomes of the crisis. However, the form of assistance was to be determined by individual states. Apart from relocation, these could involve: financial contribution, support for agencies responsible for fighting the crisis or organising deportations of illegal immigrants. The third scenario, which pertained to the apogee of the crisis, envisaged the possibility to introduce temporary relocations under Article 78(3) TFEU provided that a given state would take part in the mechanism voluntarily and that the political decision to initiate the mechanism would be taken by the EC. The 'effective solidary' concept was nevertheless criticised by Germany, Malta, Greece and Italy (Szymańska 2017: 1–2; PAP 18.11.2016: 1).

Under the Maltese Presidency, the legislative proposal of the European Commission was supported by Germany, Sweden, Malta, Italy and Greece, whereas the Visegrad countries continued to oppose it. On 8 March 2017, Swedish MEP Cecilia Wikström submitted a proposal for amending the legislative proposal of the European Commission, suggesting that the provisions on the solidarity tax should be abandoned and that the reference value should be lowered from 150% to 100% as the threshold for triggering the relocation procedure. Whereas as a consequence of a given state's refusal to participate in the relocation procedure, the funding from structural and investment funds of the EU allocated to the said state would be limited would (PAP 8.03.2017: 1–2). In

this situation, at a meeting held on 9–10 March 2017 in Brussels the EC called on the European Commission, the CEU and the EP to reach a consensus on the asylum policy by the end of June of that year (EC. Conclusions by the President, 9–10.03.2017: 1).[50] The efforts to defer the above term taken by representatives of the Polish government prior to the sitting of the EC proved unsuccessful due to the opposition of i.a. Germany, France and Sweden (PAP 10.03.2017: 1). On 21 April 2017, the Maltese Presidency in a document in a document titled *The Solidarity Aspect in the Dublin Reform System* proposed a consensual solution to the ongoing dispute on the revision of the Dublin III Regulation. It was to entail an amount of 60 thousand euros paid to host states in a situation of a mass influx of immigrants over a five-year period for each migrant admitted under the allocated quota or above the quota. Whereas those states that hosted fewer migrants than under the allocated quota would have to pay the specified price for each migrant who was not allowed in the said state. However, the proposals of the Maltese Presidency envisaged alternative forms of solidarity for countries that would not like to fulfil their obligations arising from the quota system, such as the possibility to deploy additional staff to the EBCG or the EASO. The fairness mechanism could be deactivated only in a situation of a "severe crisis", i.e. where the number of migrants to be relocated exceeds 200 thousand for the entire European Union in a given year. In these circumstances, only minimum standards laid down in the Geneva Convention relating to the Status of Refugees of 28 July 1951 would apply (Müller 27.04.2017: 1–2).[51]

In the years 2011–2014, the federal government's position on the European migrant crisis evolved from a strict opposition to admitting African migrants fleeing the civil war in Libya in 2011 (the CDU/CSU/FDP government) to a belief on the necessity to develop a "migration and development strategy" and the need to introduce changes in the German asylum law in 2013 (the CDU/CSU/SPD government). Since 2014, the federal government increasingly called on the governments of the other EU Member States to introduce a solidary and fair distribution of responsibility for refugees. Likewise, the government coalition parties introduced this postulate to their programme documents: the SPD included it in its government agenda for 2013–2017, the CDU in the resolution

50 The EC discussed formerly prepared conclusions, yet it did not officially approve them as an institution but supported by 27 heads of state or government (except for Poland). This was caused by a dispute between Poland and other Member States on yet another issue, namely, Tusk's appointment as the EC President.

51 The federal government insisted that each Member State meets 50% of the stipulated quota as a minimum.

of the Federal Congress of April 2014, while the CSU in a resolution adopted by the National Congress in December 2014.

In 2015, both the CDU/CSU/SPD coalition government and the parliamentary opposition parties were totally surprised by the European migrant crisis. Neither side was prepared for the size of the mass influx of immigrants in such a short time or for the Union's helplessness in the face of the crisis. Nevertheless, the federal government signalled that it was willing to assume the responsibility for managing the crisis in the entire EU. However, its actual efforts, particularly those taken from September to November 2015, were characterised by opportunistic approach and indecisiveness, and were basically limited only to responding to current events. Though Chancellor Merkel contributed to the deepening of the European migrant crisis herself, the federal government gained an actual impact on the decisions of the EU institutions on the reform of the immigration policy, external borders control and asylum policy. This was reflected in, i.a. forcing through the decision of the CEU of 22 September 2015 establishing a provisional migrant relocation scheme for the benefit of Italy and Greece, consistent support for the European Commission's proposal of 9 September 2015 establishing a permanent crisis relocation mechanism, as well as highly controversial proposal of the Commission of 4 May 2016 establishing the automated corrective allocation mechanism (the fairness mechanism). Moreover, the federal government actively co-participated in the negotiations of the agreement with Turkey of 18 March 2016, which was of a fundamental significance for the further dynamics of the migrant crisis, the implementation of which has radically reduced the inflow of immigrants via the eastern Mediterranean route to the EU.

Conclusions

Germany played a highly significant role in both intergovernmental conferences of 1990–1991 that led to the signing of the Treaty on European Union on 7 February 1992. However, the decision to form the European Union meant that the federal government refrained from the *iunctim* promoted in 1989–1991 that envisaged concurrent establishment of a Political Union and the EMU. Hence, in the years 1991–1992, the first significant change in the European policy of the reunited Germany took place, which consisted in an official abandonment of the pursuit to unite Europe in the form of a federation in the classical sense. From then on, the target model of the European integration was to be an unspecified federation of national states also called a Political Union. Following the signing, ratification and entry into force of the Treaty of Maastricht, Germany's European policy became increasingly pragmatic, which was the second change in this area, yet it was also focused to a much greater extent than before on safeguarding national interests. An even greater impact was exerted by Germany on the course and results of the intergovernmental conference of 1996–1997, which was dedicated to negotiating and signing of the Amsterdam Treaty on 2 October 1997. Together with France, not only did Germany submit the highest number of diplomatic initiatives regarding the EU system reform, but also numerous proposals found reflection in the new revision treaty. Whereas the evaluation of the federal government's actions at the intergovernmental conference of 2000 is ambivalent. Since the SPD/Alliance 90/The Greens coalition came to power in Germany in the autumn of 1998, increasingly more focus was put in the European policy on a geopolitical paradigm intended to safeguard Germany's national interest (which was the third change in this area). At the same time, Schröder's/Fischer's government maintained the stance of former government cabinets on the need to transform the EU into a Political Union understood as a community of decentralised national states. Nevertheless, the cooperation between the governments of Germany and France did not go well at the intergovernmental conference in 2000. Although the federal government succeeded in extending the enhanced cooperation to the second pillar of the EU under the Treaty of Nice signed on 26 February 2001, it was nonetheless unable to force through its major postulate for the introduction of double majority in the CEU, as was the case with the previous intergovernmental conference, leading to misunderstandings with France. Consequently, the settling of this final matter was in the view of Germany postponed until the subsequent intergovernmental conference.

As in the case of the intergovernmental conference of 1996–1997, at the 2002–2003 Convention on the Future of Europe, Germany and France attempted to make the greatest impact on negotiations. Governments of both these states were the only ones in the entire EU to delegate foreign ministers (Fischer and de Villepin, respectively) to the meeting of the Convention. Although it did not take place until November 2002, it faced justified criticism of delegations of the governments of most of the Member States, since none of them were represented at such a high level and, moreover, due to the presence of foreign ministers at the Convention, it seemed to resemble an intergovernmental conference. At the meeting, the German and the French government submitted as many as four joint draft system reforms of the European Union, three of which were officially submitted and subject to a discussion at the Convention. Delegates of Germany were also one of the most active participants of the negotiations. It was under their influence that numerous provisions specifying the scope of the system reform of the EU were introduced to the Draft Constitutional Treaty, although in truth, not all proposals made by the German delegation were successfully forced through.

During the intergovernmental conference of 2003–2004, the representatives of Germany attempted to maintain the provisions included in the Convention's initial working basis at all costs. In this case, the federal government argued that once initiated, a discussion on this issue could lead to the entire package of regulations included in the Draft Constitutional Treaty being "unpacked". These tactics proved effective, since the German delegation managed to retain the key institutional solutions formerly included in the Convention's initial working basis in the Treaty establishing a Constitution for Europe of 29 October 2004. These involved, above all, double majority voting in the Council of Ministers and the EC, which was very beneficial for Germany. The federal government manifested its willingness to negotiate only in matters that were not ultimately solved by the Convention's initial working basis, nonetheless (i.a. structural cooperation and the *casus foederis* in common security and defence policy). In other disputable matters that were solved either in the first or in the second phase of the intergovernmental conference, the representatives of Germany changed their former stance in that they were often unofficially supporting proposals of other delegations or asked for their support themselves, particularly in cases where the postulated amendments were compatible with the expectations of the federal government itself or the opposition parties, specifically, the CDU, the CSU and the FDP.

Following the greatest enlargement in the history of the European Union of 2004 and the failed referenda in France and the Netherlands in 2005, the CDU/CSU/SPD grand coalition government implemented the fourth change in the

European policy of Germany. The said change consisted in replacing the strategy in which the deepening and widening of the European Union was considered two sides of the same coin with a strategy aiming to consolidate the EU both internally and externally. Since the Constitutional Treaty already contained such an agenda for consolidating the Union both internally and externally, and most of its new regulations were seen as acceptable by the federal government, the tactics adopted by the German delegation at the intergovernmental conference of 2007 were similar to its proceedings during the intergovernmental conference of 2003–2004. Consequently, the German government ensured primarily that the mandate adopted in June 2007 by the EC constituted the sole base and framework for the conference. What is more, it aimed to further specify treaty regulations that were not ultimately settled in the mandate or supported (oftentimes unofficially) proposals and postulates of other countries. Instead of bringing Germany even closer to the European Union, enhanced community method and reduced veto right of the Member States under the Treaty of Lisbon of 13 December 2007 provided grounds for its dominant position in the EU. Thus, the foundations were placed for the fifth significant change in the European policy to be implemented by the federal government, which concerned Germany's capacity to not only use its economic and political potential, but also the legal framework of the EU in order to pursue national interests in the integration process.

Germany also gained a massive impact on the course and the dynamics of the eurozone debt crisis. It made the greatest financial contribution to overcome the crisis in the actions taken by the euro area Member States so far. Furthermore, it contributed either directly or indirectly to the deepening of the crisis itself, as it imposed on indebted euro area Member States (Greece, Italy, Spain, Portugal and Ireland) the policy of radical financial cuts without support of pro-growth programmes, and also employed its competitive advantage in economy without any reservations (e.g. the persistently large current account surplus of Germany above 6% of its GDP). From the very beginning of the crisis, the German government also attempted to force through its own concept of the eurozone system reform. First, in the years 2010–2011, supported by France or even on its own, it introduced changes in the economic and budget governance in the euro area (i.a. the working methods of the EFSF and the ESM, provisions of the Fiscal Stability Treaty, the objection to Eurobonds). Then, until the autumn of 2012, it continued to undertake attempts to convince the other Member States to transform the European Union into a Political Union as a means for overcoming the debt crisis, which this time proved futile, nonetheless. Eventually, due to opposition from a vast majority of the Member States, the federal government backed down and agreed on the systemic changes in the euro area proposed by the EU

institutions (the third Van Rompuy's report, the action plan of the European Commission and the ECB agenda of 2012). From then on, it was actively participating in the implementation of the said reform, regaining a significant influence on it as a result, which might seem paradoxical. This has become evident particularly in the course of results of legislative negotiations on the establishment of the BU. Furthermore, in the second phase of the reform initiated in July 2015, a harsh controversy was evoked between the German government and the European Commission due to a dissent on, i.a. the proposal for the establishment of EDIS. The eurozone debt crisis and the attempts to overcome it taken so far significantly consolidated Germany's position within the European Union both economically and politically. Not only did Germany emerge from this crisis unscathed but also gained a significant influence on the results of the system reform of the eurozone, thus ensuring for itself further economic and political gain in the long run.

The European migrant crisis that broke out in 2015 caught the federal government completely by surprise. Chancellor Merkel's erroneous decision to temporary suspend the provisions of the Dublin III Regulation with regard to Syrian nationals largely intensified the large-scale influx of migrants to the EU. This decision was widely criticised by some German political parties (the CSU and the FDP), journalists and legal practitioners, as well as the governments of many Central and eastern European countries. Efforts taken by the federal government with the aim to overcome the migrant crisis, particularly from September to November 2015, consisted rather in responding to current events instead of managing the crisis. Consequently, not only did it compromise Germany's position but also temporarily isolated it within the EU. It was only due to Chancellor Merkel's active participation in negotiations with Turkey held from the autumn of 2015, followed by the signing of a ground-breaking agreement by the European Union and the Turkish government on 18 March 2016, that the federal government's position in overcoming the migrant crisis was consolidated. As in the case of the eurozone debt crisis, the federal government gained an actual impact on the shape of the reform of the immigration policy, external borders control and asylum policy of the European Union. The migrant crisis forced it also to drastically revise German asylum policy, which was reflected in, i.a. the adoption of the first and the second asylum package, and the new integration act. Germany's condescending approach towards other Member States in politics left much to be desired. So was the case with multiple postulates made by the federal government regarding the establishment of the migrant quota system or proposals made by some political parties (the CSU, the FDP and Alliance 90/The Greens) to model their effort in this regard on Germany's experience in asylum

policy (*Königsteiner Schlüssel*). The temporary suspension of the provisions of the Dublin III Regulation as regards Syrian nationals in early September 2015 combined with the diplomatic attempts taken by the federal government later on with the aim to establish the provisional relocation mechanism for the benefit of Greece and Italy, which was then followed by the introduction of the automated fairness mechanism and the solidarity tax for countries that refuse to admit migrants, were viewed (particularly in the Central and Eastern European countries) as an attempt to shift the responsibility for Germany's mistakes in asylum and immigration policy on these countries. Due to the said reasons, governments of these states objected to the decision of the CEU of 22 September 2015 and harshly criticised the European Commission's proposal of 4 May 2016. Though the implementation of both Council's decisions establishing provisional measures in the area of international protection for the benefit of Italy and Greece (of 14 and 22 September 2015) yielded only partial results, the legislative effort to introduce the automatically triggered fairness mechanism and the solidarity tax (at least in the version submitted on 4 May 2016 by the European Commission) had even poorer prospects due to excessive dissent between the governments of the Member States in this regard.

The system reform of the European Union of 2002–2009 consolidated Germany's position in this international organisation by forming possible grounds for its domination in the Union, whereas the course of the debt crisis and the system reform of the euro area allowed Germany to become the sole leader in the EU. However, this role is not assured in the future, since it is largely based on the current prosperity of the German economy and the consequences of the eurozone debt crisis. The said position was undermined already at the time of the 2015–2016 migrant crisis, when it stemmed mostly from faulty decisions of the federal government in tackling the crisis, particularly the failed attempt to manage this said crisis.

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