Studies in European Integration, State and Society

Edited by Zdzisław Mach and Bożena Gierat-Bieroń

Janusz Józef Węc

The Intergovernmental Conference as an Institutional Model of the Multilateral Diplomacy of the European Union (1950-2024)

PETER LANG

The Intergovernmental Conference is a legal instrument for negotiating founding and amending treaties in the European Union. The monograph has four research objectives. The first is to reconstruct the dynamics of the Treaty changes in 1950–2024 and to present the prospects for EU Treaty reform after Russia's aggression against Ukraine. The second is to identify which Member States had the greatest influence on the Treaty reforms. Thirdly, it defines a new typology of intergovernmental conferences. The fourth is to evaluate the system reforms in the European Communities and in the EU in 1950–2024. Three theses were formulated for the book: (1) The IGC has become an institutional model of multilateral diplomacy of the EU; (2) The treaty law reforms have been the scene of numerous controversies between supporters of supranational and intergovernmental solutions; (3) The IGCs, as a forum for the participating States to play their national interests, were very often doomed to make difficult compromises.

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I dedicate this book to Aleksandra and Paweł

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List of important abbreviations

ACE	–	Allied Command Europe
AdG	–	Archiv der Gegenwart
ALDE	–	Alliance of Liberals and Democrats for Europe
ASEAN	–	Association of South-East Asian Nations
BVerG	–	Bundesverfassungsgericht
CA	–	Court of Auditors
CAP	–	Centrum für angewandte Politikforschung
CEU	–	Council of the European Union
CFR	–	Charter of Fundamental Rights
CFSP	–	Common Foreign and Security Policy
CIG	–	Conférence intergouvernementale
CJEU	–	Court of Justice of the European Union
Coreper I	–	Comité des Représentants Permanents I
Coreper II	–	Comité des Représentants Permanents II
COSAC	–	Conférence des Organes Spécialisés dans les Affaires
CR	–	Committee of the Regions
CSDP	–	Common Security and Defence Policy
CSU	–	Christlich Soziale Union
DCT	–	Draft Constitutional Treaty
EAEC	–	European Atomic Energy Community
EC	–	European Commission
EC	–	European Community
ECB	–	European Central Bank
ECOFIN	–	Économie et Finance

ECSC	–	European Coal and Steel Community
EDA	–	European Defence Agency
EDC	–	European Defence Community
EEC	–	European Economic Community
EESC	–	European Economic and Social Committee
EIB	–	European Investment Bank
EK	–	Europäischer Konvent
EMI	–	European Monetary Institute
EMS	–	European Monetary System
EMU	–	Economic and Monetary Union
EP	–	European Parliament
EPC	–	European Political Community
EPP	–	European People's Party
ESC	–	Economic and Social Committee
ESCB	–	European System of Central Banks
ESM	–	European Stability Mechanism
EU	–	European Union
EU GNI	–	European Union Gross National Income
EUROPOL	–	European Police Office
G/EFA	–	Greens/European Free Alliance
GDP	–	Gross Domestic Product
IGC	–	Intergovernmental Conference
MEP	–	Member of the European Parliament
MERCOSUR	–	Mercado Común del Sur
NAFTA	–	North American Free Trade Agreement
NATO	–	North Atlantic Treaty Organization
NPD	–	Note from Presidency to Delegations
OPEC	–	Organization of the Petroleum Exporting Countries
PES	–	Party of European Socialists
PSOE	–	Partido Socialista Obrero Español
QMV	–	Gualified Majority Voting
RE	–	Renew Europe
S&D	–	Socialist and Democrats
SACEUR	–	Supreme Allied Commander Europe
SEA	–	Single European Act

TAEC	–	Treaty establishing the European Atomic Energy Community
TCSC	–	Treaty establishing the European Coal and Steel Community
TEC	–	Treaty establishing the European Community
TEEC	–	Treaty establishing the European Economic Community
TEU	–	Treaty on European Union
TFEU	–	Treaty on the Functioning of the European Union
UK	–	United Kingdom
UNASUR	–	Unión de Naciones Suramericanas
UNHCR	–	United Nations High Commissioner for Refugees
US	–	United States of America
USSR	–	Union of Soviet Socialist Republics
VV	–	Vermerk des Vorsitzes
VVD	–	Vermerk des Vorsitzes für die Delegationen
WEU	–	Western European Union

Introductory remarks

Since the beginning of the European integration process, one of the main axes of the problem has been the relationship between the national sovereignty of the Member States and the idea of supranationality. As far back as the 1950s, it led to a public debate on intergovernmentalism and supranationalism. The intergovernmentals argued that the Member States pursuing national and/or domestic interests were in charge of 'driving integration', while the supranationals maintained that the EU's supranational actors 'drove integration via institutional dynamics'. Whereas the divide between intergovernmentals and supranationals continues to this day, the main protagonists of the recent debates are the so-called 'new' intergovernmentalists, insisting 'that the more actively engaged, consensus-seeking member-state governments in the (European) Council have retaken control' of the process of European integration. In contrast, the so-called 'new' supranationals still view the EU's supranational institutions, such as the European Parliament, the European Commission, the Court of Justice of the European Union, the Court of Auditors and the European Central Bank (ECB), as bodies 'driving integration through their greater role in policy design and enforcement'.[1]

[1] V. A. Schmidt, The 'new' EU governance: 'new' intergovernmentalism versus 'new' supranationalism plus 'new' parliamentarism, 'Les Cahiers du Cevipol' 2016, N° 5, pp. 5–8, https://www.cairn.info/revue-les-cahiers-du-cevipol-2016-5-page-5.htm [accessed: 20 June 2024].

According to Sandrino Smeets and Derek Beach, the concept of intergovernmentalism can refer to three dimensions: (1) the legal shape of an international agreement as established outside the EU framework, (2) the position of intergovernmental institutions (the European Council and the Council of the European Union) in the EU decision-making process, and (3) the dominance of Member States vis-à-vis supranational institutions in the EU institutional system.[2] This work will rely on all the three dimensions of intergovernmentalism. The term *supranationality* has been used in the languages of philosophers, political scientists, lawyers and historians for centuries, but to this day it has not been possible to develop a clear definition of it. From a political science perspective the process of emergence of the supranational system in international relations consists of four phases. These are: first, the creation of supranational international institutions; second, the delegation of national powers by member states to the supranational level; third, the control of member states over supranational institutions; and fourth, the creep of supranational institutions from the control of member states[3]. From a legal point of view, supranationality can be understood in two ways: as the phenomenon of the conferral by nation-states of their sovereign powers on international organisations or bodies, or as the competence of international organisations or bodies.[4] The latter also inevitably leads us to the definition of a supranational organisation. Although there is considerable divergence of opinion in doctrine on this issue as well, most scholars, including Koen Lenaerts, Piet Van Nuffel, Robert Bray, Thomas Oppermann, Eckart Klein, Stefani Schmahl and Vernon Bogdanor, agree that a supranational organisation stands out from other international organisations owing to several important attributes: firstly, the possibility

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[2] S. Smeets, D. Beach, Intergovernmentalism and its implications. New Institutional Leadership in major EU reforms, 'Journal of European Public Policy' December 2019, Vol. 27, No. 8, pp. 1–2, https://www.researchgate.net/publication/337705674_Intergovernmentalism_and_its_implications_New_Institutional_Leadership_in_major_EU_reforms#fullTextFileContent [accessed: 20 June 2024].

[3] J. Ruszkowski, Ponadnarodowość w systemie politycznym Unii Europejskiej [A supranationalism in the EU political system], Szczecin 2010, pp. 96–158.

[4] J. Barcz, Organizacja ponadnarodowa [A supranational organisation], 'Sprawy Międzynarodowe' 1991, No. 7–8, p. 91.

of establishing binding laws on its member states as well as on natural and legal persons – including legal rules directly applicable, effective and taking precedence over national legislation; secondly, decision-making in principle by a majority vote, with such decisions also binding on states opposing them; thirdly, having judicial autonomy, i.e. a special judicial institution empowered to settle disputes on the application and interpretation of laws established by the relevant supranational organisation and whose jurisdiction is mandatory and cannot be excluded; fourthly, having financial autonomy, reflected in the fact that the budgetary revenue of a supranational organisation is derived from its own resources rather than from the contributions of the member states.[5] Norman Weiß and Klemens H. Fischer, in agreement with the above-mentioned attributes, state that the most important limitation of a supranational organisation is the principle of conferral, which makes it incapable of establishing its own competences (competence-competence). According to Weiß, it is precisely the lack of competence to establish its own competences that sets the supranational principle its limits.[6]

The terms *intergovernmentalism* and *supranationality* correspond with the concepts of the intergovernmental method and the Community method. The intergovernmental method is characterised by the following division of roles between EU supranational and intergovernmental institutions: (1) the European Commission's right of legislative initiative, shared with EU Member State Governments or limited to specific areas of action; (2) the European Council's dominant role in the EU institutional system; (3) the European Parliament's limited role in the legislative process; (4) the adoption of legal acts by the Council of the EU in principle by acting unanimously. The Community method, on the other hand, consists in the use of the ordinary

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[5] K. Lenaerts, P. Van Nuffel, R. Bray, Constitutional Law of the European Union, London 2009, pp. 11–18. T. Oppermann, Europarecht. Ein Studienbuch, München 2009, pp. 274–276. E. Klein, S. Schmahl, Die Internationalen und die Supranationalen Organisationen, [in:] Völkerrecht, hrsg. von W. Vitzthum A. Proelß, Berlin 2013, p. 258. V. Bogdanor, The Blackwell Encyclopaedia of Political Science, Oxford 1993, pp. 597–598.

[6] N. Weiß, Kompetenzlehre internationaler Organisationen, Berlin 2009, p. 292. K.H. Fischer, Die Legitimation von supranationalen Organisationen, 'Zeitschrift für öffentliches Recht' 2007, Vol. 62, Issue 3, pp. 324–325.

legislative procedure in accordance with Article 294 TFEU. The Community method is characterised by the following division of roles between EU supranational and intergovernmental institutions: (1) the European Commission's right of legislative initiative, with certain exceptions laid down in Article 289(4) TFEU; (2) the adoption of legislative and budgetary acts by the European Parliament and by the Council of the European Union on equal terms; (3) decision-making in the Council of the EU in principle with the use of qualified majority voting.[7] Whereas the intergovernmental method serves to reinforce the intergovernmental architecture, the Community method should strengthen the supranational architecture in the European Union. Since the entry into force of the Treaties of Rome on 1 January 1958, the European Community and then the European Union have relied on an approximate balance between the intergovernmental architecture and the supranational architecture, additionally intermingling with each other.[8]

The monograph has four research objectives. The first objective is to reconstruct the dynamics of the Treaty changes in 1950–2024 and to present the prospects for EU Treaty reform after Russia's aggression against Ukraine. The second objective is to identify which Member States had the greatest influence on the Treaty reforms. The third objective is to define a new typology of intergovernmental conferences. Finally, the fourth objective is to evaluate of the system reforms in the European Communities and in the European Union in 1950–2024. In this context, the monograph puts forward four research hypotheses. The first hypothesis is that over the years and decades the IGC has become an institutional model of multilateral diplomacy of the European Union. This was due to the fact that the European Communities and then the European Union were essentially in

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[7] On 22 May 2002, in a special explanatory note, the European Commission further clarified the concept of the Community method, cf. European Commission. European Governance – A White Paper, COM(2001) 428 final, Brussels, 25 July 2001, p. 6.

[8] For more on the subject, cf. J.J. Węc, Spór o kształt ustrojowy Wspólnot Europejskich i Unii Europejskiej 1950–2010. Między ideą ponadnarodowości a współpracą międzyrządową [The dispute over the constitutional status of the European Communities and the European Union in 1950–2010. Between the idea of supranationality and intergovernmental cooperation], Kraków 2012, pp. 547–568.

the process of continuous systemic changes, especially since the necessity of such changes was sometimes determined by issues that had not been solved at previous conferences or by new challenges faced by these international organisations. The second hypothesis is based on the assumption that Treaty law reforms have been the scene of numerous controversies between supporters of supranational and intergovernmental solutions. According to the third hypothesis, the stock of most Treaty reforms has generally been ambivalent since the IGCs, as a forum for the participating States to play their national interests were very often doomed to make difficult compromises. The fourth hypothesis is that the changes made by the Treaty of Lisbon of 13 December 2007 in the procedures for the revision of the Treaties have made it possible to introduce a new typology of intergovernmental conferences. In this connection, the monograph asks the following five research questions. Firstly, what were the reasons for the systemic changes in the European Union, leading to the frequent convening of Intergovernmental Conferences, and what were the determinants of the *ad hoc* organisation of such IGCs? Secondly, which Member States were most likely to advocate supranational solutions, and which were equally as often in favour of intergovernmental solutions, and why? Thirdly, which Member States initiated the Treaty reforms and which had the greatest impact on those reforms, and how did they push through their proposals? Fourthly, what were the most important successes and failures of subsequent system reforms of the European Communities and then of the European Union? Fifthly and lastly, according to what criteria has the new typology of intergovernmental conferences been defined?

The time span of the study is defined by two turning points: on the one hand, the year 1950, when the first Intergovernmental Conference was convened; on the other hand, the year 2024, witnessing the debate on the draft of a new revision treaty for the European Union, almost ready and adopted by the European Parliament (22 November 2023), and on the report on the institutional reform of the EU published by the Franco-German working group (18 September 2023), whereby one of the views in this debate was a Communication from the European Commission to the European Parliament, the European Council and the Council of the European Union dated 20 March 2024.

The above-mentioned research objectives determine the structure of the monograph. It is composed of nine chapters. Chapter I presents the legal and institutional framework of the Intergovernmental Conference as a model of the multilateral diplomacy of the European Union and an instrument of Treaty reform. Chapter II discusses the first IGCs that took place in 1950–1985 and led to the adoption of the Treaties establishing the European Coal and Steel Community, the European Defence Community, the European Economic Community, the European Atomic Energy Community, and to the signing of the Merger Treaty, the budgetary treaties and the Single European Act. Chapter III analyses the comprehensive system reform of the European Communities, taking place during two Intergovernmental Conferences in 1990–1991, one of which concerned the establishment of a Political Union, whereas the other – that of an Economic and Monetary Union. Chapters IV and V address the Intergovernmental Conferences which led to the signing of two amending treaties: the Treaty of Amsterdam (1996–1997), and the Treaty of Nice (2000). Chapter VI examines the Intergovernmental Conference which concluded with the signing of the Treaty establishing a Constitution for Europe as a document providing for a comprehensive system reform of the European Union. Chapter VII presents the proceedings and outcomes of the Intergovernmental Conference which led to the conclusion of the Treaty of Lisbon (2007). Chapter VIII is devoted to two *ad hoc* Intergovernmental Conferences of 25 March 2011 and of 16 May 2012, the first of which enabled the signing of the Treaty establishing the European Stability Mechanism (ESM), whereas the second resulted in concluding the so-called Irish Protocol, or the Protocol exempting Ireland from certain provisions of the Lisbon Treaty. Chapter IX presents the prospects for a new Treaty reform in the European Union, with reference to the debate that has taken place in the EU since the Conference on the Future of Europe (9 May 2021 to 9 May 2022), the adoption by the European Parliament of a new draft revision Treaty on 22 November 2023, and the publication by the Franco-German working group of a report on the institutional reform of the EU on 18 September of the same year.

The presented monograph relies on a methodological triangulation, i.e. a combination of various research methods, based on the following qualitative research methods used in the humanities and social sciences: the historical method, the institutional and legal method and the method of the critical

analysis of sources and the literature.[9] Whereas the historical method was chosen for the possibility of showing the dynamics of the proceedings of individual IGCs through chains of cause and effect, the institutional and legal method was used to analyse the subsequent founding (constituting) and revision treaties concluded by the Member States of the European Communities and then the European Union. Finally, the method of the critical analysis of sources and the literature allowed the examination of the most important archival and printed sources relating to particular Intergovernmental Conferences as well as of the relevant literature.

The source materials for the monograph include the archives of the European Union, in particular the archives of the 1996–1997 Intergovernmental Conference, the 2000 Intergovernmental Conference, the Convention on the Future of Europe (2002–2003), the 2003–2004 Intergovernmental Conference and the 2007 Intergovernmental Conference. These are supplemented by the Treaties constituting and revising the European Communities and the European Union as well as by acts of secondary legislation adopted by the European Parliament and the Council of the European Union on a proposal from the European Commission or other initiators. In addition, the monograph relies on political documents of the European Council (decisions, conclusions, reports and communications), the Council of the European Union (political conclusions and communications) and the European Commission (communications).

The most significant publications in the existing Polish and foreign studies on the institution of the Intergovernmental Conference include the following monographs: by Brendan Smith, *Constitution Building in the European Union. The Process of Treaty Reforms*, The Hague–London–New York 2001; by Maria Plenzler, *Konferencja międzyrządowa Unii Europejskiej i jej efekty dla rozwoju europejskich procesów integracyjnych*, Poznań 1998; as well as two monographs, referred to for the sake of completeness, by Janusz Józef Węc: *Spór o kształt ustrojowy Wspólnot Europejskich i Unii Europejskiej 1950–2010. Między ideą ponadnarodowości a współpracą międzyrządową*, Kraków 2012 and *Traktat*

[9] Badania jakościowe. Metody i narzędzia [Qualitative research. Methods and tools,], Dariusz Jemielniak (ed.), Warszawa 2012, pp. 1–22, 41–55, 57–88. T. Pawłuszko, Wstęp do metodologii badań politologicznych [An introduction to the methodology of political science research], Częstochowa 2013, p. 8.

Lizboński. Polityczne aspekty reformy ustrojowej Unii Europejskiej w latach 2007–2015, Kraków 2016.[10] In addition to the above-mentioned monographs, there are also contributory works by the following authors: by Daniela Kietz and Andreas Maurer, *The European Parliament in Treaty Reform: Predefining IGCs Through Interinstitutional Agreements*, 'European Law Journal', 2007, No. 1; by Thomas Christiansen, *The role of supranational actors in EU treaty reform*, 'Journal of European Public Policy', 2002, Vol. 9, Issue 1; by Gerda Falkner, *EU treaty reform as a three-level process*, 'Journal of European Public Policy' 2002, Vol. 9, Issue 1; by Ulf Sverdrup, *An institutional perspective on treaty reform: contextualizing the Amsterdam and Nice Treaties*, 'Journal of European Public Policy', 2002, Vol. 9, Issue 1; by Wolfgang Wessels, *Nice Results: The Millennium IGC in the EU's Evolution*, 'Journal of Common Market Studies' 2001, No. 2; by Thomas Christiansen and Knud Eric Jørgensen, *Negotiating Treaty Reform in the European Union. The Role of the European Commission*, 'International Negotiation. A Journal of Theory and Practice' 1998, No. 3; by Thomas Christiansen, *Intra-institutional politics and inter-institutional relations in the EU: towards coherent governance?*, 'Journal of European Public Policy' 2001, Vol. 8, Issue 5; by Andrzej Podraza, *Konferencja międzyrządowa jako metoda reformowania Unii Europejskiej*, 'Rocznik Integracji Europejskiej' 2007, No. 1; by L. Pech, *The Institutional Development of the EU post-Lisbon: A case of plus ça change…?*, DEI Working Paper 11–5, Dublin 2011; and by Patrycja Kozub, *Parlament Europejski wobec reformy systemu instytucjonalnego w trakcie*

[10] B. Smith, Constitution Building in the European Union. The Process of Treaty Reforms, The Hague–London–New York 2001. M. Plenzler, Konferencja międzyrządowa Unii Europejskiej i jej efekty dla rozwoju europejskich procesów integracyjnych [The Intergovernmental Conference of the European Union and its effects on the development of European integration processes], Poznań 1998. J.J. Węc, Spór o kształt ustrojowy Wspólnot Europejskich i Unii Europejskiej 1950–2010. Między ideą ponadnarodowości a współpracą międzyrządową [The dispute over the constitutional status of the European Communities and the European Union in 1950–2010. Between the idea of supranationality and intergovernmental cooperation], Kraków 2012. J.J. Węc, Traktat Lizboński. Polityczne aspekty reformy ustrojowej Unii Europejskiej w latach 2007–2015. Orzecznictwo sądów konstytucyjnych wybranych państw członkowskich UE oraz proces implementacji traktatu lizbońskiego [The Treaty of Lisbon. The political aspects of the system reform of the European Union in 2007–2015. The case-law of the constitutional courts of selected Member States of the EU and the implementation of the Lisbon Treaty], Kraków 2016.

obrad Konwentu w sprawie przyszłości Europy, 'Rocznik Integracji Europejskiej' 2011, No. 5.[11]

The existing studies of the European Union's system conducted in Poland have been significantly enhanced by the following collaborative publications and textbooks edited by Jan Barcz: *Zasady ustrojowe Unii Europejskiej*, Warszawa 2010; *Ustrój Unii Europejskiej*, Volumes 1 and 2, Warszawa 2009; *Prawo Unii Europejskiej. Zagadnienia systemowe*, Warszawa 2006; *Prawo Unii Europejskiej. Prawo materialne i polityki*, Warszawa 2006; as well as by a book published in the *Skrypty Becka* series, edited by Waltraud Hakenberg and Igor B. Nestoruk, *Prawo europejskie*, Warszawa 2012.[12] As regards foreign literature,

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[11] D. Kietz, A. Maurer, The European Parliament in Treaty Reform: Predefining IGCs Through Interinstitutional Agreements, 'European Law Journal' 2007, No. 1, pp. 20–46. Th. Christiansen, The role of supranational actors in EU treaty reform, 'Journal of European Public Policy' 2002, Vol. 9, Issue 1, pp. 33–53. G. Falkner, EU treaty reform as a three-level process, 'Journal of European Public Policy' 2002, Vol. 9. Issue 1, pp. 1–11. U. Sverdrup, An institutional perspective on treaty reform: contextualizing the Amsterdam and Nice Treaties, 'Journal of European Public Policy' 2002, Vol. 9, Issue 1, pp. 120–140. W. Wessels, Nice Results: The Millennium IGC in the EU's Evolution, 'Journal of Common Market Studies' 2001, No. 2, pp. 197–219. A. Podraza, Konferencja międzyrządowa, op. cit., pp. 25–31. T. Christiansen, K. E. Jørgensen, Negotiating Treaty Reform in the European Union. The Role of the European Commission, 'International Negotiation. A Journal of Theory and Practice' 1998, No. 3, pp. 435–452. T. Christiansen, Intra-institutional politics and inter-institutional relations in the EU: towards coherent governance?, 'Journal of European Public Policy' 2001, Vol. 8, Issue 5, pp. 747–769. A. Podraza, Konferencja międzyrządowa jako metoda reformowania Unii Europejskiej [Inter-Governmental Conference as a Method to Reform the European Union], 'Rocznik Integracji Europejskiej' 2007, No. 1. L. Pech, The Institutional Development of the EU post-Lisbon: A case of plus ça change…?, DEI Working Paper 11–5, Dublin 2011, pp. 1–37. P. Kozub, Parlament Europejski wobec reformy systemu instytucjonalnego w trakcie obrad Konwentu w sprawie przyszłości Europy [The European Parliament in the face of institutional reform during the proceedings of the Convention on the Future of Europe], 'Rocznik Integracji Europejskiej' 2011, No. 5, pp. 180–181.

[12] Zasady ustrojowe Unii Europejskiej [The constitutional principles of the European Union], J. Barcz (ed.), Warszawa 2010. Ustrój Unii Europejskiej [The system of the European Union], J. Barcz (ed.), Vol. 1–2, Warszawa 2009. Prawo Unii Europejskiej. Zagadnienia systemowe [European Union law. Systemic issues], J. Barcz (ed.), Warszawa 2006. Prawo Unii Europejskiej. Prawo materialne i polityki [European Union law. Substantive law and policies], J. Barcz (ed.), Warszawa 2006. W. Hakenberg, I.B. Nestoruk, Prawo europejskie [European law], Warszawa 2012.

the contributions worth highlighting include the fundamental works by Walter Frenz, *Handbuch Europarecht*, Bd. 1–6, Berlin – Heidelberg 2012, and by Thomas Oppermann, *Europarecht. Ein Studienbuch*, München 2009.[13] Noteworthy collaborative studies by foreign authors comprise those edited by Armin von Bogdandy and Jürgen Bast, *Principles of European Constitutional Law*, Oxford 2010; by Andreas Marchetti and Claire Demesmay, *Der Vertrag von Lissabon. Analyse und Bewertung*, Baden-Baden 2010; by Koen Lenaerts, Piet Van Nuffel and Robert Bray, *Constitutional Law of the European Union*, London 2009; by Damian Chalmers and Adam Tomkins, *European Union Public Law*, Cambridge 2007; by Andreas Haratsch, Christian Koenig and Matthias Pechstein, *Europarecht*, Tübingen 2006; by Roland Bieber, Astrid Epiney and Marcel Haag, *Die Europäische Union. Europarecht und Politik*, Baden-Baden 2005.[14] The most important studies specifically addressing the system reform of the European Union include, again, monographs by Jan Barcz, for example: *Główne kierunki reformy ustrojowej post-lizbońskiej Unii Europejskiej*, Piaseczno 2015; *Unia Europejska na rozstajach. Traktat z Lizbony. Dynamika i główne kierunki reformy ustrojowej*, Warszawa 2010; and *Traktat z Lizbony. Wybrane aspekty prawne działań implementacyjnych*, Warszawa 2012. Other noteworthy foreign studies include the monographs by Vanessa Hellmann, *Der Vertrag von Lissabon 2009. Vom Verfassungsvertrag zur Änderung der bestehenden Verträge – Einführung mit Synopse und Übersichten*, Berlin 2009; as well as the collaborative works edited by Thomas Christiansen and

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[13] W. Frenz, Handbuch Europarecht, Bd. 1–6, Berlin–Heidelberg 2012. T. Oppermann, Europarecht. Ein Studienbuch, München 2009.

[14] Principles of European Constitutional Law, A. von Bogdandy, J. Bast (eds.), Oxford 2010. A. Marchetti, C. Demesmay, Der Vertrag von Lissabon. Analyse und Bewertung, Baden-Baden 2010. K. Lenaerts, P. Van Nuffel, R. Bray, Constitutional Law of the European Union, London 2009. D. Chalmers, A. Tomkins, European Union Public Law, Cambridge 2007. A. Haratsch, Ch. Koenig, M. Pechstein, Europarecht, Tübingen 2006. R. Bieber, A. Epiney, M. Haag, Die Europäische Union. Europarecht und Politik, Baden-Baden 2005. It is also worth mentioning the following works: System ochrony prawnej w Unii Europejskiej [The legal protection system in the European Union], A. Wyrozumska (ed.), Warszawa 2010. 50 years of the European treaties: looking back and thinking forward, M. Dougan, S. Currie (eds.), Oxford 2009. The European Union: Origins–Structure – Acquis, W. Góralski, Sz. Kardaś (eds.), Warszawa 2008. Unia Europejska od Traktatów Rzymskich do Traktatu Lizbońskiego [The European Union from the Treaties of Rome to the Treaty of Lisbon], T. Wasilewski (ed.), Toruń 2008.

Christine Reh, *Constitutionalizing the European Union*, Basingstoke 2009; by Jan Wouters, Luc Verhey and Philippe Kiiver, *European Constitutionalism beyond Lisbon*, Antwerp 2009; and by Thomas Eilmansberger, Stefan Griller and Walter Obwexer (Hrsg.), *Rechtsfragen der Implementierung des Vertrages von Lissabon*, Wien – New York 2011.[15]

The originality of this monograph and its contribution to scientific research result from the following: firstly, this is the first book to comprehensively show the dynamics of the proceedings of individual Intergovernmental Conferences through chains of cause and effect, allowing the reconstruction of the decision-making process of the Governments of the Member States on the drafting of the founding and amending treaties; secondly, it is the first publication discussing all the 15 IGCs held in the history of the European Communities and the European Union to date; thirdly, it is the first monograph to view the IGC as an institutional model of the multilateral diplomacy of the European Union; Fourthly and lastly, this is the first dissertation based on all currently available archival sources from the European Union Archives.

[15] J. Barcz, Główne kierunki reformy ustrojowej post-lizbońskiej Unii Europejskiej [The main directions of the system reform of the post-Lisbon European Union], Piaseczno 2015. Idem, Unia Europejska na rozstajach. Traktat z Lizbony. Dynamika i główne kierunki reformy ustrojowej [The European Union at a crossroads. The Treaty of Lisbon. The dynamics and main directions of the system reform], Warszawa 2010. T. Christiansen, Constitutionalizing the European Union, Basingstoke 2009. J. Wouters, L. Verhey, P. Kiiver, European Constitutionalism beyond Lisbon, Antwerp 2009. Traktat z Lizbony. Główne reformy ustrojowe Unii Europejskiej [The Treaty of Lisbon. The main system reforms of the European Union], J. Barcz (ed.), Warszawa 2008. T. Eilmansberger, S. Griller, W. Obwexer (Hrsg.), Rechtsfragen der Implementierung des Vertrages von Lissabon, Wien – New York 2011.

The legal-institutional framework and the typology of the Intergovernmental Conferences

1. The legal basis for the Treaty revision procedures, the specific *passerelle* clauses and the flexibility clause

1.1. The revision procedures of the Treaties

The general Treaty revision framework in the European Union is codified in Article 48(2) to (7) TEU. Since the entry into force of the Treaty of Lisbon of 13 December 2007, there have been three main procedures for amending the Treaties: one ordinary revision procedure, and two simplified revision procedures. An ordinary revision procedure can be carried out in two ways: either in an intergovernmental conference preceded by a Convention, or in a conference without convening a Convention. Each of these procedures consists of seven phases. In the case of an intergovernmental conference preceded by a Convention, the Government of any Member State, the European Parliament or the European Commission may submit to the Council of the European Union proposals for amending the Treaties, which may aim, *inter alia*, 'to increase or to reduce the competences conferred on the Union in the Treaties' (phase I). Next, the Council of the European Union submits these proposals to the European Council and the national parliaments are notified (Article 48(2) TEU) (phase II). After consulting the European Parliament, the European Commission and the European Central Bank (in the case of changes in monetary policy), the European Council adopts by a simple majority a decision in favour of examining the proposed amendments (phase III), and then its President convenes a Convention, that is, an assembly composed of representatives of the Heads of State or Government of the Member States, of the national parliaments,

of the European Parliament and of the European Commission (Article 48(3) TEU) (phase IV). The Convention examines the proposed amendments and adopts, by consensus, recommendations to an Intergovernmental Conference (phase V). Following the adoption of the recommendations, the President of the Council of the European Union, or the Presidency, convenes an intergovernmental conference (phase VI). The amendments adopted by consensus at the conference 'shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements' (Article 48(3) TEU) (phase VII).[1]

In the second option of the IGC, the different phases are identical with those of the first option, with the exception of phases IV and V. Thus, in phase IV, the European Council, acting by a simple majority, after obtaining the consent of the European Parliament, decides not to convene a Convention 'should this not be justified by the extent of the proposed amendments'.[2] In phase V, the European Council, rather than a Convention, defines the terms of reference for an IGC (Article 48(3) TEU). Further, the Treaty of Lisbon introduced another new provision to the ordinary revision procedure of the Treaties, addressing both options of the IGC. If, two years after the signature of such an amending treaty, 'four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council' (Article 48(5) TEU).[3] Examples of the application of the ordinary revision procedure preceded by a Convention – even before these provisions came into force under the Treaty of Lisbon of 13 December 2007 – were the Intergovernmental Conferences of 2000 and 2003–2004. The former developed the Treaty of Nice of 26 February 2001, whereas the latter worked on

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1 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (consolidated versions) (hereafter: the Treaty of Lisbon or the Lisbon Treaty), Official Journal of the European Union C, 83, 30.3.2010, pp. 41–42.

2 However, if the Parliament refuses to give its consent, a Convention must be convened, cf. ibidem, p. 42.

3 Ibidem.

the Treaty establishing a Constitution for Europe of 29 October 2004. The two options for the ordinary revision procedure of the Treaties are presented in Charts I and II.

As regards the two simplified procedures for amending the Treaties, one refers to Part Three of the TFEU (Union policies and internal actions) and the other to the entire TFEU or to Title V of the TEU (the common foreign and security policy). The common feature of both procedures is the extension of the possibility for the European Union's institutions to amend certain provisions of the Treaties by unanimity. This may result in a stronger position of the EU at the expense of the Member States. On the other hand, however, both simplified revision procedures of the Treaties also contain certain safeguards as described below.

The first procedure allows the European Council to revise all or part of the provisions on EU policies and internal actions. Proposals for amendments, addressed directly to the European Council rather than to the Council of the European Union – as is the case in the ordinary revision procedure of the Treaties – may be submitted by the Government of any Member State concerned, the European Parliament or the European Commission. The European Council examines these proposals and, after consulting the European Parliament, the European Commission and the European Central Bank (in the case of changes in monetary policy), decides by unanimity to revise the provisions of Part Three of the TFEU as indicated by the applicants. But the decision of the European Council does not enter into force until it has been approved by all the Member States in accordance with their respective constitutional requirements. However, it must not 'increase the competences conferred on the Union in the Treaties' (Article 48(6) TEU).[4] The possibility of using option 1 of the simplified revision procedure is therefore limited by the requirement for all the Member States to ratify the Treaty amendments (cf. Chart III).

[4] Ibidem.

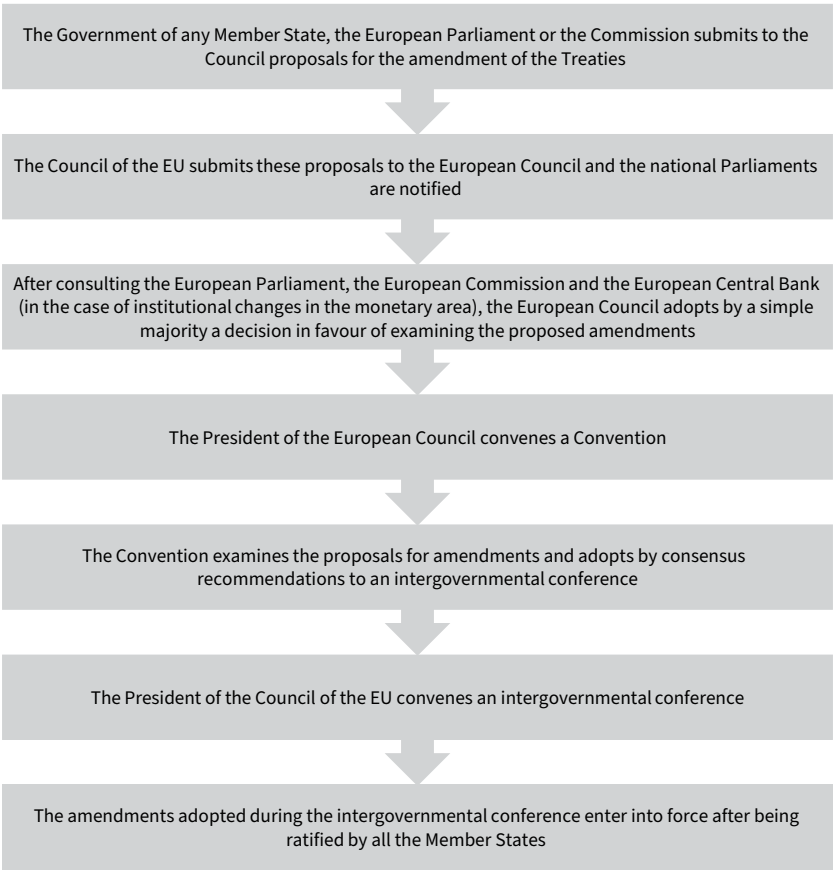


Chart I: Option 1 of the ordinary revision procedure of the Treaties – an intergovernmental conference preceded by a Convention.

Source: prepared by the author on the basis of Article 48(2) to (5) TEU.

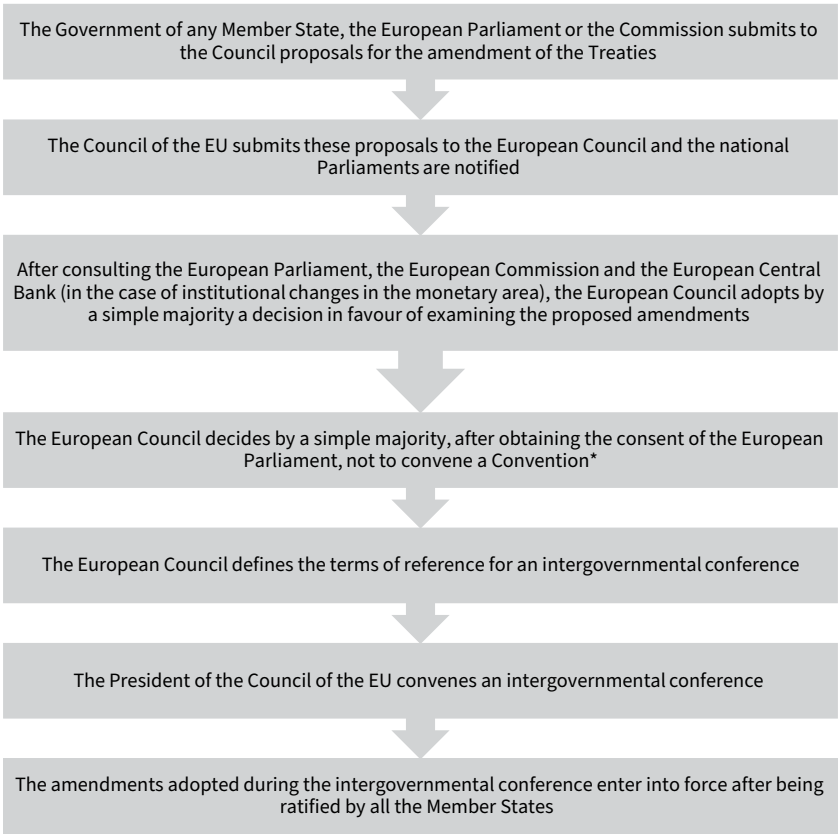


Chart II: Option 2 of the ordinary revision procedure of the Treaties – an intergovernmental conference without convening a Convention.

* If the Parliament refuses to give its consent, a Convention must be convened.

Source: prepared by the author on the basis of Article 48(2) to (5) TEU.

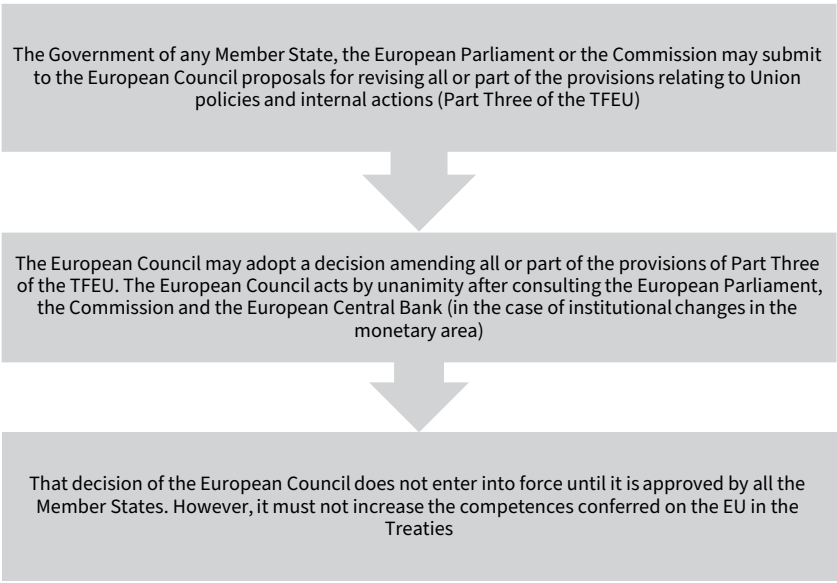


Chart III: The simplified revision procedure of the Treaties (Article 48(6) TEU).

Source: prepared by the author on the basis of Article 48(6) TEU.

The second simplified revision procedure, or the *passerelle* procedure, allows the European Council to amend decision-making by the Council of the European Union and the EU's applicable legislative procedures. As regards the former option, the European Council may adopt a decision authorising the Council of the EU to act by a qualified majority in the area or in the case where Title V of the TEU or the whole TFEU provides for the Council to act by unanimity. However, these provisions do not apply to decisions with military or defence implications (the first subparagraph of Article 48(7) TEU). As mentioned before, the latter option to use the *passerelle* procedure concerns legislative procedures. Where the TFEU provides for legislative acts to be adopted by the Council of the European Union in accordance with a special legislative procedure, the European Council may adopt a decision allowing for the adoption of such acts in accordance with the ordinary legislative procedure (the second subparagraph of Article 48(7) TEU). Any initiative taken by the European Council on the basis of the first or the

second subparagraph is then notified to all the national parliaments. If a national parliament makes known its opposition within six months of the date of such a notification, the decision referred to in the first or the second subparagraph is not adopted. In the absence of opposition, the European Council may adopt the decision referred to in the first or the second subparagraph, in both cases acting by unanimity after obtaining the consent of the European Parliament, to be given by a majority of its component members, i.e. by an absolute majority (Article 48(7) TEU).[5] The applicability of the *passerelle* procedure is therefore limited by the requirement to obtain the consent of the European Parliament and of all the national parliaments. On the other hand, however, this procedure includes no reservation on the ratification of Treaty amendments by all the Member States (cf. Chart IV). Furthermore, in accordance with Article 353 TFEU, the procedure does not apply to the provisions on own resources (the third and fourth paragraphs of Article 311 TFEU), the multiannual financial framework (the first subparagraph of Article 312(2) TFEU), the flexibility clause (Article 352 TFEU) and the suspension of certain rights resulting from Union membership as set out in Article 7(1) to (5) TEU (Article 354 TFEU).[6] The degree of restraint and caution exercised by the Governments of the Member States in the application of the *passerelle* procedure is reflected in the fact that, despite repeated attempts, no consensus has been reached to date on the replacement of unanimous voting with qualified majority voting in the common security and defence policy with regard to the decision of the Council of the European Union to impose sanctions on a third country or to deploy civilian missions in post-crisis territories.

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5 Treaty of Lisbon, op.cit., p. 43.

6 Ibidem, p. 197.

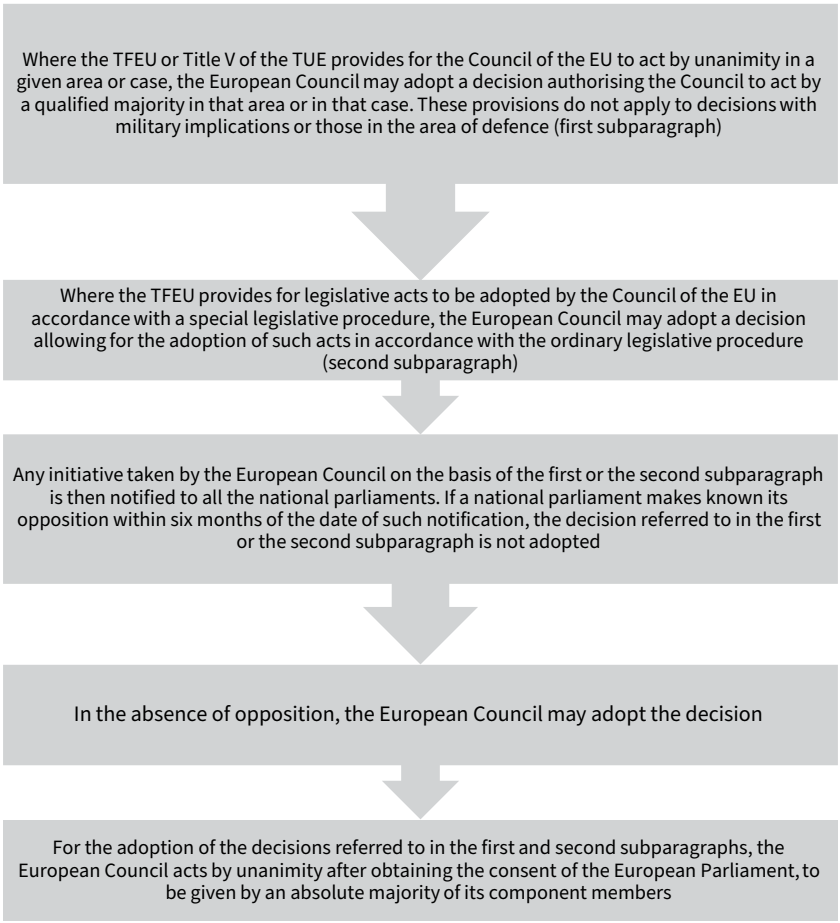


Chart IV: The *passerelle* procedure (Article 48(7) TUE).

Source: prepared by the author on the basis of Article 48(7) TEU.

The provisions of the two simplified procedures for revising the Treaties have been assessed differently by the constitutional courts of some Member States. The best examples justifying this thesis include the ruling of Germany's Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG) of 30 June 2009 and the judgment of the Constitutional Court of the Republic of Poland of 24 November 2010. Thus, the BVerfG ruled that the European

Union institutions could not independently amend the Treaty bases of the European Union or the rules on the division of competences between the Union and the Member States, whether in the ordinary revision procedure, in the two simplified revision procedures, or under the specific *passerelle* clauses. The responsibility of the German constitutional authorities for the compliance of the integration process with the constitutional requirements (*Integrationsverantwortung*) is not limited to a one-off act of consent to the ratification of the Treaty, but it also concerns its subsequent implementation. Therefore, in the opinion of the BVerfG, the constitutional conditions for the transfer of Germany's sovereign powers to the European Union or for possible amendments to the German Basic Law must be observed, which requires a statutory authorisation in accordance with the provisions of Article 23(1) of the Basic Law.[7]

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[7] BVerfG, Vertrag von Lissabon, pp. 86, 88, 91, https://www.bundesverfassungsgericht.de/SharedDocs/ Entscheidungen/DE/2009/06/es20090630_2bve000208.html. The basis for the position taken by the BVerfG, Article 23(1) of the German Basic Law, states that, with a view to establishing a united Europe, the Federal Republic of Germany participates in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law and to the principle of subsidiarity and that guarantees a level of protection of basic rights essentially comparable to that afforded by the Basic Law (first sentence). To this end, the federal authorities may transfer certain sovereign powers by a law requiring the consent of the Bundesrat (second sentence). With regard to the justification of referring to the European Union or amendments to its Treaty principles or comparable legal regulations that should amend or add provisions to the Basic Law or make such amendments or additions possible, the provisions of Article 79(2) and (3) apply (third sentence). This means that all changes in the scope of EU treaty law and comparable legal regulations as a result of which the provisions of the Basic Law should be amended or added, or such amendments or additions should become possible, are limited by the provisions of Article 79(2) of the Basic Law (a qualified majority of two thirds of the votes of the Bundestag and of the Bundesrat necessary to amend the constitution) and of Article 79(3) of the Basic Law (the observance of the principles governing respect for human dignity, democracy, the rule of law, the social state and the federation) – cf. Ustawa Zasadnicza dla Republiki Federalnej Niemiec z dnia 23 maja 1949 r. [Basic Law of the Federal Republic of Germany of 23 May 1949], Bundestag, Berlin 2006, pp. 21, 44.

The BVerfG pointed to the need to strengthen the powers of the *Bundestag* and of the *Bundesrat* in the process of Treaty changes in the European Union.[8] With regard to the first simplified revision procedure (Article 48(6) TEU), the BVerfG stated that it provided the European Council with a wide margin of manoeuvre to amend primary law. The provision refers to as many as one hundred and seventy-two articles defining the policies and internal actions of the European Union, including the common market and the Economic and Monetary Union. The substantive scope of such amendments is only limited by the reservation that decisions of the European Council must not increase the competences conferred on the European Union in the Treaties. Following its ruling on the Maastricht Treaty of 12 October 1993, the BVerfG ruled that changes to primary law could be made under simplified procedures, but only with the consent of all the Member States and in accordance with their respective constitutional requirements. Consequently, the BVerfG made the entry into force of any Treaty amendments adopted under this procedure subject to the consent of the Bundestag and of the Bundesrat, to be given in a ratification law, adopted by each chamber by a qualified majority of two thirds of the votes (pursuant to Article 23(1), third sentence of the Basic Law in conjunction with Article 79(2) of the Basic Law), i.e. by analogy with any Treaty changes made under the ordinary revision procedure of the Treaties. In its opinion, such Treaty amendments should generally be regarded as a transfer of sovereign powers to the European Union within the meaning of Article 23(1), second sentence of the Basic Law.[9]

With regard to the second simplified revision procedure, or the *passerelle* procedure (Article 48(7) TEU), allowing for a special legislative procedure to be replaced with the ordinary legislative procedure for decisions concerning aspects of family law with cross-border implications (Article 81(3) TFEU), the BVerfG stated that the right of the national parliaments to oppose the adoption of such a decision by the European Council or by the Council of

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[8] BVerfG, Vertrag von Lissabon, p. 88.

[9] Ibidem. Cf. also: P.-Ch. Müller-Graff, Das Karlsruhe Lissabon-Urteil: Bedingungen, Grenzen, Orakel und integrative Optionen, 'Integration' 2009, H. 4, p. 353. R. Scholz, Analyse des Urteils des Bundesverfassungsgerichts vom 30.06.2009 zum Lissabon-Vertrag, [in:] Das Urteil des Bundesverfassungsgerichts zum Vertrag von Lissabon und seine Folgen für den europäischen Einigungsprozess. Expertengespräch am 7. September 2009 in Paris, Paris 2009, p. 9.

the European Union was not a sufficient equivalent to the requirement of ratification. It therefore held that in both cases the representative of the German Government in the European Council or, where appropriate, in the Council of the European Union, should have the relevant statutory authorisation granted by the Bundestag and by the Bundesrat in accordance with Article 23(1), second sentence and, where appropriate, third sentence of the Basic Law. Such Treaty amendments also imply a transfer of sovereign powers to the European Union within the meaning of Article 23(1), second sentence, of the Basic Law.[10]

The Constitutional Court in Poland issued a different opinion on both simplified revision procedures of the Treaties. With regard to amendments to the Treaty provisions made in a way different from the ordinary revision procedure, it stated that in their case the Treaty of Lisbon maintained the principle of unanimity as a guarantee of respect for the sovereignty of the EU Member States, to a certain extent reflected in the possibility for the national parliaments of the Member States to make known their opposition within a specified time limit. The Polish Constitutional Court also considered these provisions to be an expression of a compromise between the aim of ensuring the Union's capacity to respond to development challenges requiring a modification of the primary law and the preservation of the constitutional identities of the Member States. The provisions should also 'strike a balance between the subjectivity of the Member States and the subjectivity of the Union'. In the Constitution of the Republic of Poland, this balance is guaranteed by specific 'normative anchors' for the protection of sovereignty, in the form of Article 8(1), Article 90 and Article 91 of the Polish Basic Law. In the view of the Constitutional Court, those 'anchors' are not affected by the provisions of the Treaty of Lisbon in question.[11]

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[10] BVerfG, Vertrag von Lissabon, op.cit., pp. 88–91. Cf. also: P.-Ch. Müller-Graff, Das Karlsruhe Lissabon-Urteil, p. 353. R. Scholz, op. cit., pp. 9–10.

[11] Wyrok z dnia 24 listopada 2010 r. w sprawie zgodności z Konstytucją RP traktatu z Lizbony [Judgment of 24 November 2010 on the constitutionality of the Treaty of Lisbon in the Republic of Poland], file ref. K 32/09, pp. 20–21, https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20102291506/T/D20101506TK.pdf [accessed: 19 May 2024].

Further, the Constitutional Court of the Republic of Poland stated that any change in the procedure of law-making within the European Union, provided for in Article 48(6) and (7) TEU, was accompanied by guarantees allowing the Member States to effectively defend their national interests.[12] Decisions of the European Council in both procedures in question must be taken by unanimity by the Heads of State or Government of the Member States. The entry into force of a European Council decision made pursuant to Article 48(6) TEU requires its ratification by all the Member States, whereas any decision taken by the European Council under Article 48(7) TEU is subject to the absence of opposition by any national parliament within a period of six months.[13] The Constitutional Court also noted that the new Act on cooperation between the Council of Ministers with the Sejm and the Senate in matters related to the European Union membership of the Republic of Poland of 8 October 2010 significantly strengthened the role of both chambers of the Polish parliament, granting them not only the existing opinion-making (advisory) powers, but also, to some extent, the law-making powers.[14] The adoption of the new Act on cooperation between the Council of Ministers and the Sejm and the Senate is a consequence of the significant reinforcement of the role of the national parliaments and representative democracy under the Treaty of Lisbon. The decisions of the European Council referred to in Article 48(6) TEU enter into force after their approval by all the Member States in accordance with their respective constitutional requirements. In the opinion of the Constitutional Court, the Act of 8 October 2010 addresses this sufficiently by amending the Act on international agreements of 14 April 2000 in respect of the requirement to ratify legislative acts of the European Union adopted, *inter alia*, in accordance with the simplified revision procedure of the Treaties under Article 48(6) TEU

[12] Ibidem, p. 42.

[13] Ibidem.

[14] Although the Act of 8 October 2010 was not yet in force on the date of the ruling given by the Constitutional Court, the Court nevertheless considered that the new legal situation created by it should be taken into account in the judgment, especially since it was to come into force a few weeks after its publication and to benefit from the presumption of constitutionality – cf. ibidem, p. 32.

(Article 23(1) of the Act).[15] On the other hand, the Act of 8 October 2010 also regulates the issue of consent to draft legislative acts of the European Union adopted under the *passerelle* procedure referred to in Article 48(7) TEU. It gives the Polish parliament the power to act in this matter. The Act stipulates that the decision on the position of the Republic of Poland towards any draft legislative act of the European Union adopted pursuant to Article 48(7) TEU must be taken by the President of the Republic of Poland, on a proposal from the Council of Ministers, with the consent expressed in the Act (Article 14(1) of the Act).[16]

1.2. The specific *passerelle* clauses

In addition to the *passerelle* procedure, specific *passerelle* clauses also apply in the European Union. The term comes from the fact that they allow for the amendment of individual articles of the TEU or of the TFEU. Specific *passerelle*

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[15] This also applies to Treaty amendments made under the specific *passerelle* clauses, subject to a reservation of ratification and codified in the second subparagraph of Article 25 TFEU (strengthening or adding to the rights of Union citizens), the second subparagraph of Article 218(8) TFEU (accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms), the second subparagraph of Article 223(1) TFEU (direct universal suffrage for elections to the European Parliament), Article 262 TFEU (jurisdiction of the Court of Justice in disputes relating to the application of acts adopted on the basis of the Treaties which create European intellectual property rights) and the third subparagraph of Article 311 TFEU (own resources) – cf. Ustawa z dnia 8 października 2010 r. o współpracy Rady Ministrów z Sejmem i Senatem w sprawach związanych z członkostwem Rzeczypospolitej Polskiej w Unii Europejskiej [Act of 8 October 2010 on the cooperation between the Council of Ministers with the Sejm and the Senate in matters related to the European Union membership of the Republic of Poland], Journal of Laws 2010, No. 213, Item 1395. For the view taken by the Constitutional Court on this matter, cf. Wyrok z dnia 24 listopada 2010 r. w sprawie zgodności z Konstytucją RP traktatu z Lizbony, op. cit., pp. 40–44.

[16] This provision also applies to draft legislative acts of the European Union adopted under specific *passerelle* clauses: Article 31(3) TEU (extending the scope of qualified majority voting in the common foreign and security policy), the first subparagraph of Article 42(2) TEU (establishing a common defence), the second subparagraph of Article 312(2) TFEU (multiannual financial framework), as well as decisions adopted by the Council of the European Union under Article 238(2) TFEU (the so-called reinforced majority of the votes) or by the European Council under Protocol No. 9 (the Ioannina Compromise) – cf. Ustawa z dnia 8 października 2010 r. o współpracy Rady Ministrów z Sejmem i Senatem, op. cit., Item 1395. For the view taken by the Constitutional Court on this matter, cf. Wyrok z dnia 24 listopada 2010 r. w sprawie zgodności z Konstytucją RP traktatu z Lizbony, op. cit., pp. 40–44.

clauses can be divided into clauses containing a reservation of ratification by all the Member States and clauses without a reservation of ratification. The former include specific *passerelle* clauses set out in the first subparagraph of Article 42(2) TEU (establishing a common defence), the second subparagraph of Article 25 TFEU (strengthening or adding to the rights of Union citizens), the second subparagraph of Article 218(8) TFEU (accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms), the second subparagraph of Article 223(1) TFEU (direct universal suffrage for elections to the European Parliament), Article 262 TFEU (jurisdiction of the Court of Justice in disputes relating to the application of acts adopted on the basis of the Treaties which create European intellectual property rights) and the third subparagraph of Article 311 TFEU (own resources).

The latter comprise *passerelle* clauses without reservation of ratification by all the Member States. They are contained in Article 31(3) TEU (extending the scope of qualified majority voting in the common foreign and security policy), Article 81(3) TFEU (aspects of family law with cross-border implications), the fourth subparagraph of Article 153(2) TFEU (social policy), the second subparagraph of Article 192(2) TFEU (environmental protection), the second subparagraph of Article 312(2)TFEU (multiannual financial framework) and Article 333(1) and (2) TFEU (enhanced cooperation). It must be emphasised, however, that the *passerelle* clause codified in Article 81(3) TFEU is subject to the consent of all the national parliaments. Furthermore, the *passerelle* clauses included in Article 31(3) TEU, the second subparagraph of Article 312(2) TFEU and Article 333(1) TFEU refer to the revision of the decision-making procedure, whereas those codified in Article 81(3) TFEU, the fourth subparagraph of Article 153(2) TFEU, the second subparagraph of Article 192(2) TFEU and Article 333(2) TFEU refer to the amendment of the legislative procedure.[17] All the *passerelle* clauses, i.e. clauses with or without reservation of ratification, are presented in Tables I and II.

[17] In the pre-Lisbon legal order, the specific *passerelle* clauses applied in Article 17(1) TEU (establishing a common defence), Article 42 TEU (communitarisation of judicial cooperation in criminal matters and police cooperation), the second subparagraph of Article 22 TEC (strengthening or adding to the rights of Union citizens), the second subparagraph of Article 137(2) TEC (social policy), the third subparagraph of Article 175(2) TEC (environmental protection), Article 190(4) TEC (direct universal suffrage for elections to the European Parliament) and the second subparagraph of Article 269 TEC (own resources). Of these, only the social policy and environmental protection clauses contained no reservation of ratification by all the Member States.

Table I: *Passerelle* clauses with reservation of ratification by all the Member States

1. First subparagraph of Article 42(2) TEU (establishing a common defence)
2. Second subparagraph of Article 25 TFEU (strengthening or adding to the rights of Union citizens)
3. Second subparagraph of Article 218(8) TFEU (accession of the Union to the ECHR)
4. Second subparagraph of Article 223(1) TFEU (direct universal suffrage for elections to the European Parliament)
5. Article 262 TFEU (jurisdiction of the Court of Justice in disputes relating to the application of acts adopted on the basis of the Treaties which create European intellectual property rights)
6. Third subparagraph of Article 311 TFEU (own resources)

Source: prepared by the author on the basis of the above-mentioned provisions of the TEU and of the TFEU.

Table II: *Passerelle* clauses without reservation of ratification by all the Member States

1. Article 31(3) TEU (extending the scope of qualified majority voting in the common foreign and security policy)
2. Article 81(3) TFEU (aspects of family law with cross-border implications)*
3. Fourth subparagraph of Article 153(2) TFEU (social policy)
4. Second subparagraph of Article 192(2) TFEU (environmental protection)
5. Second subparagraph of Article 312(2) TFEU (multiannual financial framework)
6. Article 333(1) and (2) TFEU (enhanced cooperation)

* The clause codified in Article 81(3) TFEU is subject to the consent of all the national parliaments.

Source: prepared by the author on the basis of the above-mentioned provisions of the TEU and of the TFEU.

The specific *passerelle* clauses raised objections from the BVerfG. With regard to the specific *passerelle* procedure allowing for a special legislative procedure to be replaced with the ordinary legislative procedure for decisions concerning aspects of family law with cross-border implications (Article 81(3) TFEU), in its ruling of 30 June 2009, the BVerfG stated that the right of the national parliaments to oppose the adoption of such a decision by the European Council or by the Council of the European Union was not a sufficient equivalent to the requirement of ratification. It therefore held that in both cases the representative of the German Government in the European Council or, where appropriate, in the Council of the European Union should

have the relevant statutory authorisation granted by the Bundestag and by the Bundesrat in accordance with Article 23(1), second sentence, and, where appropriate, third sentence of the Basic Law. Such Treaty amendments also imply a transfer of sovereign powers to the European Union within the meaning of Article 23(1), second sentence of the Basic Law.[18] For the other specific *passerelle* clauses, the BVerfG found that no statutory authorisation was necessary for their application as they were limited to matters sufficiently defined by the Lisbon Treaty. In such a situation, the representative of the German Government in the European Council or in the Council of the European Union may approve an amendment of primary law if the Bundestag agrees and, where it should refer to the legislative powers of the federal states, the Bundesrat also gives its consent.[19]

1.3. The flexibility clause

The flexibility clause codified in Article 352(1) to (4) TFEU allows the Council of the European Union to take decisions in the absence of an explicit legal basis where this should prove necessary for the attainment of certain objectives of the European Union. However, the clause does not provide for any amendment of the Treaties, but only for clarifying the competences of the Union on the basis of the existing Treaty provisions.[20] It also explicitly rules out measures leading to the harmonisation of the laws and regulations of the Member States where the Treaties exclude such harmonisation. In making a decision under the flexibility clause, the Council of the European Union must act unanimously, on a proposal from the European Commission and after obtaining the consent of the European Parliament. Although the Treaty of Lisbon of 13 December 2007 extended the applicability of the flexibility clause, it introduced four procedural restrictions as well. Whereas previously exclusively related to the internal market, after the entry into force

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[18] BVerfG, Vertrag von Lissabon, op.cit., pp. 88–91. Cf. also: P.-Ch. Müller-Graff, Das Karlsruhe Lissabon-Urteil, op.cit., p. 353. R. Scholz, op. cit., pp. 9–10.

[19] BVerfG, Vertrag von Lissabon, op.cit., pp 91–92. Cf. also: P.-Ch. Müller-Graff, Das Karlsruhe Lissabon-Urteil, op.cit., p. 353. R. Scholz, op. cit., p. 10.

[20] A. Maurer, Neue Entscheidungsverfahren. Die neuen Verfahren zur Änderung und Anpassung der Verträge, [in:] Der Vertrag von Lissabon, hrsg. von J. Lieb, A. Maurer und N. von Ondarza, Diskussionspapier der FG 1, 2008/07, April 2008, SWP Berlin, pp. 34–35.

of the Treaty of Lisbon it applies to 'the policies defined in the Treaties', with the exception of the common foreign and security policy (Article 352(1) to (4) TFEU). Declaration 41, annexed to the Final Act of the 2007 IGC, further elaborates on this provision by stating that the flexibility clause extends to the internal market, the so-called area of freedom, security and justice, and the external action of the European Union, with the exception of the common foreign and security policy. Excluding the latter policy from the scope of the flexibility clause served as the first procedural restriction. That exclusion was primarily demanded by the United Kingdom, supported by several other Member States. The second restriction was that, as mentioned above, the provisions of the *passerelle* procedure could not be applied to the flexibility clause. The third limitation, derived directly from the case-law of the Court of Justice of the European Union, was that the flexibility clause 'cannot serve as a basis for widening the scope of Union powers beyond the general framework created by the provisions of the Treaties as a whole' or 'be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaties without following the procedure which they provide for that purpose' (Declaration No 42). Finally, the fourth procedural restriction was reflected in the fact that, for the first time, the national parliaments were given the power to scrutinise the above-mentioned European Commission proposals in that area, under the procedure for monitoring the subsidiarity principle (Article 352(1) to (4) TFEU).[21]

With regard to the flexibility clause, in its ruling of 30 June 2009, the BVerfG took a position similar to that on both the simplified revision procedures of the Treaties and the specific *passerelle* clauses. It stated that the EU institutions could not independently revise the Treaty bases of the European Union and the rules on the division of competences between the Union and the Member States. Any amendments made under the flexibility clause (Article 352 TFEU) are adopted by the institutions of the European Union and, in principle, are not subject to ratification by all the Member States. Furthermore, the widening of the substantive scope of the flexibility clause under the Lisbon Treaty may serve to make amendments to almost all areas of primary law, despite the procedural constraints imposed by the

[21] Treaty of Lisbon, p. 196. Declaration on Article 352 of the Treaty on the Functioning of the European Union, [in:] Treaty of Lisbon, op.cit., pp. 350–351.

Lisbon Treaty. Finally, the flexibility clause also significantly 'relaxes' the principle of the conferral of powers since it enables the European Union to operate in a given field even where it falls outside the Union's competences but such action proves necessary to attain the objectives set out in the Treaties. As a result, the flexibility clause, as amended by the Lisbon Treaty, raises legitimate constitutional doubts from the point of view of the prohibition on granting 'blank' authorisations to or on the conferral of competence-competence on the European Union since such a process would not sufficiently involve the legislative authorities of the Member States. Therefore, in this case as well, the BVerfG opted for the extension of the powers of the Bundestag and of the Bundesrat, ruling that the representative of the German Government in the Council of the European Union should have the relevant authorisation granted under a law of the Bundestag and of the Bundesrat in accordance with Article 23(1), second and third sentences, of the Basic Law.[22]

As in the case of the simplified revision procedure of the Treaties (Article 48(6) TEU), with regard to the flexibility clause (Article 352 TFEU), the Constitutional Court in Poland took a position different from that of the BVerfG in Germany. Referring to the case-law of the Court of Justice, the Polish Constitutional Court pointed out that Article 352 TFEU was subsidiary to other provisions of the Treaty conferring competences on the Union. Its use as the legal basis for a measure (legislative act) is only justified if no other provision of the Treaty provides the Union's institutions with the necessary powers to adopt the measure in question, whereby such an action must prove necessary to attain one of the objectives set out in the Treaties.[23] Referring to the above-mentioned Declaration No 42 annexed to the Final Act of the 2007 Intergovernmental Conference, the Polish Constitutional Court stated that Article 352 TFEU:

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[22] BVerfG, Vertrag von Lissabon, op.cit., pp 92–94. Cf. also: P.-Ch. Müller-Graff, Das Karlsruhe Lissabon-Urteil, op.cit., p. 354. R. Scholz, op. cit., p. 10.

[23] Wyrok z dnia 24 listopada 2010 r. w sprawie zgodności z Konstytucją RP traktatu z Lizbony, op. cit., p. 45.

> which is part of an institutional order based on the principle of conferred (conferral) powers, cannot serve as a basis for extending the Union's competences beyond the general framework created by the provisions of the Treaties as a whole, in particular those which define the tasks and the activities of the Union. That provision cannot serve as a basis for the adoption of provisions the effect of which would be to amend the Treaties without following the procedure laid down for that purpose.[24]

Further, the Constitutional Court pointed out that detailed guarantees of the participation of both chambers of the Polish Parliament in the procedure for the adoption of legislative acts based on the flexibility clause are contained in the Act of 8 October 2010. Those provisions stipulate that the Council of Ministers submits to the Sejm and the Senate, immediately after the receipt thereof, draft legislative acts of the European Union adopted on the basis of Article 352 TFEU, as well as draft Government positions on the subject in question, taking into account the time limits laid down in European Union law but no later than fourteen days after receiving such drafts. Before the Council of the European Union examines such a draft legislative act adopted pursuant to Article 352 TFEU, Poland's Council of Ministers must consult the bodies competent for these matters under the Rules of Procedure of the Sejm and of the Senate, namely the European Union Affairs Committee of the Sejm and the European Union Affairs Committee of the Senate, by providing written information on the position that the Government intends to take during the examination of the draft by the Council of the European Union. Such information must be accompanied by a statement of reasons for the position of the Council of Ministers and by an assessment of the expected effects of the European Union's legislative act on the Polish legal system and of the social, economic and financial implications for Poland. Both Committees may express their views within forty-nine days of the date of the submission of the draft act to the Sejm or to the Senate, as appropriate. Of these, however, so far, only the opinion of the European Union Affairs Committee of the Sejm should serve as the basis of the Government's position, although it is

[24] Ibidem.

not binding on the Government also.[25] If the Government decides to reject the opinion of the competent body of the Sejm, a member of the Council of Ministers must immediately explain to the body concerned the reasons for the discrepancy (Article 7(2) and (4) of the Act, Article 11(1) to (3) of the Act, Article 13(1) and (2) of the Act).[26] On the other hand, the Constitutional Court expressed its conviction that, in its view, 'the requirement that the Council act unanimously and that its action be subject to a proposal from the Commission and the need to obtain the consent of the European Parliament constitute a guarantee for the protection of the subjectivity of the Member States'. This guarantee is also reinforced by the fact that Article 352 TFEU 'cannot be understood as a basis for conferring any unallocated competence on the Union', and this means that it cannot 'create any unallocated competence'.[27]

1.4. Other procedures for amending primary law

Limited revisions of the Treaties, mainly in the institutional system of the European Union, are also made under accession treaties. These require

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[25] For more on the powers of the Sejm and of the Senate and on their competent bodies under the Act on the cooperation of the Council of Ministers with the Sejm and the Senate in matters related to the European Union membership of the Republic of Poland of 11 March 2004, cf. J.J. Węc, Współpraca rządu z Sejmem i Senatem w kształtowaniu polityki europejskiej Polski (problemy i wyzwania wynikające z reformy ustrojowej Unii Europejskiej w latach 2004–2007) [The cooperation of the government with the Sejm and the Senate in shaping Poland's European policy (problems and challenges resulting from the system reform of the European Union in 2004–2007)], [in:] Bilans pierwszych lat członkostwa Polski w Unii Europejskiej [Taking stock of Poland's first years of membership of the European Union], J. Fiszer (ed.), Warszawa 2011, pp. 48–90. J.J. Węc, Nowa pozycja Sejmu i Senatu w polityce europejskiej po wejściu w życie traktatu lizbońskiego [The new position of the Sejm and the Senate in making Poland's European policy after the entry into force of the Treaty of Lisbon], 'Krakowskie Studia Międzynarodowe' 2008, No. 4, pp. 123–141. J.J. Węc, Udział Parlamentu RP w tworzeniu krajowej polityki europejskiej [The participation of the Polish parliament in the making of Poland's European policy], [in:] Usprawnienie kształtowania się polskiego stanowiska w UE – skuteczniejsza polityka europejska [Improving the formation of Poland's position in the EU – a more effective European policy], Kraków 2007, pp. 28–45.

[26] Ustawa z dnia 8 października 2010 r. o współpracy Rady Ministrów z Sejmem i Senatem, op. cit., Item 1395.

[27] Wyrok z dnia 24 listopada 2010 r. w sprawie zgodności z Konstytucją RP traktatu z Lizbony, op. cit., p. 46.

ratification by all the Member States of the European Union in accordance with their respective constitutional requirements (Article 49 TEU).[28] Changes in the functioning of the EU can also be made outside the Treaties, i.e. through intergovernmental agreements. Early examples of such amendments were the Luxembourg Compromise of 29 January 1966 and the Ioannina Compromise, i.e. the *sui generis* Council Decision of 29 March 1994 concerning the taking of a Decision by qualified majority by the Council, made in Ioannina (Greece).[29] More recent instruments of introducing similar changes included the Fiscal Compact signed on 2 March 2012 by the Heads of State or Government of the 25 EU Member States, with the exception of the United Kingdom and the Czech Republic, on tightening fiscal discipline and sanctions for non-compliance in the signatory Member States,[30] and the intergovernmental agreement concluded on 21 May 2014 governing the transfer and mutualisation of contributions to the Single Resolution Fund in the Banking Union.[31]

Whereas the Ioannina Compromise as a *sui generis* Council decision, adopted by the Heads of State or Government, was not challenged in the literature, the legal status of the Luxembourg Compromise was called into question. However, most authors agree that the Luxembourg Compromise was not a revision of the Treaty since any amendment of the Treaty was still possible only under the provisions of Article 236 of the EEC Treaty (now Article 48(2) to (5)

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[28] Cf. S. Biernat, Tworzenie prawa Unii Europejskiej [European Union law-making], [in:] Prawo Unii Europejskiej. Zagadnienia systemowe [European Union law. Systemic issues], J. Barcz (ed.), Warszawa 2006, p. 228.

[29] For more on the subject, cf. J.J. Węc, Spór o kształt ustrojowy, op. cit., pp. 138–145. A. Podraza, Konferencja międzyrządowa, op. cit., pp. 8–9.

[30] For more on the subject, cf. J.J. Węc, The System Reform of the Monetary and Economic Union (2010–2022). Dynamics–Successes–Failures, Lausanne-Berlin-Bruxelles-Chennai-New York-Oxford 2023, pp. 101–108.

[31] Agreement on the transfer and mutualisation of contributions to the Single Resolution Fund between the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Republic of Croatia, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic and the Republic of Finland, Brussels, 21 May 2014, EU/SRF, pp. 1–45. For an analysis of the Agreement, cf. ibidem, pp. 120–123.

TEU). In 1969, the Commission of the European Communities also refused to recognise the agreement as one revising the Treaties.[32] On the other hand, there was a view expressed in the doctrine that, at the latest, with the new definition of the qualified majority established by the Treaty of Nice of 26 February 2001, both the provisions of the Luxembourg Protocol of 29 January 1966, and the Joannina Compromise of 29 March 1994, became irrelevant, since the previous definition of the qualified majority was changed.[33] However, this argument has raised doubts as the Luxembourg Compromise did indeed cease to apply much earlier, namely with the entry into force of the Single European Act of 17/28 February 1986, whereas the Ioannina Compromise is still in force, albeit modified by the Treaty of Lisbon.[34]

2. The typology, structure, decision-making process and actors of the Intergovernmental Conference

2.1. The typology of the Intergovernmental Conferences

The Intergovernmental Conference (IGC) is a legal instrument for negotiating founding and amending treaties in the European Union. The first typology of the intergovernmental conferences was proposed by Brendan Smith, who, in his 2001 monograph entitled *Constitution Building in the European Union. The Process of Treaty Reforms* divided intergovernmental conferences into three categories: legal, special (accession), and constitutional. This division, however, raises serious doubts in my mind for three reasons: firstly, all intergovernmental conferences are, after all, legal in nature; secondly, special conferences understood as negotiations dedicated to the conclusion of an accession treaty with a candidate state have a completely different legal basis than intergovernmental conferences *sensu stricte*. While the legal basis for intergovernmental conferences devoted to the signing of founding treaties or the conclusion of revision treaties is Article 48(1) to (7) TEU, the legal basis for accession negotiations is Article 49 TEU; thirdly, Smith included in the category of constitutional conferences both those

[32] Cf. for example M. Schweitzer, W. Hummer, Europarecht. Das Recht der Europäischen Union – Das Recht der Europäischen Gemeinschaften (EGKS, EG, EAG) – mit Schwerpunkt EG, Neuwied 1996, pp. 56–57.

[33] Cf. T. Oppermann, op. cit., p. 94. R. Bieber, A. Epiney, M. Haag, op. cit., pp. 136–137.

[34] Cf. J.J. Węc, Traktat Lizboński, op. cit., pp. 169–170.

which led to the signing and ratification of the treaties establishing the new international organisations, i.e. the European Coal and Steel Community (1950–1952), the European Economic Community and the European Atomic Energy Community (1956–1957) and the European Union (1990–1991), or which resulted in the revision of existing treaties, such as the conferences on the signing and ratification of the Single European Act (1985), the Treaty of Amsterdam (1996–1997) and the Treaty of Nice (2000), as well as conferences that led to the signing of a treaty, but whose ratification failed, as in the case of the European Defence Community (1951–1952), or conferences that began but failed, as in the case of the project to establish a European Political Community/European Community (1953) and plans for a European Union of Nations (1962)[35].

As mentioned above, the Lisbon Treaty of 13 December 2007 introduced three important changes to the European Union's revision procedures. Indeed, in addition to modifying the ordinary revision procedure (Article 48(2)-(5) TEU), it established two new simplified revision procedures that facilitate the *ad hoc* implementation of treaty changes in the European Union by the EU institutions (Article 48(6)-(7) TEU). Considering these changes, the author proposes a new typology of intergovernmental conferences, i.e., a division into constitutional conferences and *ad hoc* conferences. All intergovernmental conferences had directly impacted on the constitutional shape of the European Communities and, subsequently, the European Union. Looking at intergovernmental conferences from the perspective of the entire process of European integration, it should be noted that in the history of the European Communities and the European Union to date, there have been a total of 15 intergovernmental conferences, 10 of which were constitutional and five of which were *ad hoc* conferences. There were, however, two fundamental differences between them: (1) whereas constitutional conferences were generally devoted to the creation of new international organisations or the profound constitutional reform of existing organisations, *ad hoc* conferences were limited to a restricted number of constitutional changes in the latter organisations; (2) whereas constitutional conferences lasted from several months to a year or even a little longer, *ad hoc* conferences lasted for a short period, sometimes even only a day.

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[35] Cf. B. Smith, op.cit., pp. 6–12.

The constitutional Intergovernmental Conferences either concluded with the signing of the relevant founding treaties, such as: the Treaty establishing the European Coal and Steel Community (ECSC Treaty) of 18 April 1951, the Treaty establishing the European Defence Community (EDC Treaty) of 27 May 1952, the Treaties establishing the European Economic Community and the European Atomic Energy Community (EEC Treaty, Euratom Treaty) of 25 March 1957, the Treaty of Maastricht of 7 February 1992,[36] and the Treaty establishing a Constitution for Europe of 29 October 2004; or their result thereof was the conclusion of the relevant revision treaties, such as: the Single European Act (SEA) of 17/28 February 1986, the Treaty of Amsterdam of 2 October 1997, the Treaty of Nice of 26 February 2001, and the Treaty of Lisbon of 13 December 2007. It must be stressed, however, that the only IGCs that comprehensively dealt with reforming the system of the European Union, that is to say, introduced changes to all (described below) horizontal and to most sectoral components of the EU system, were the 2003–2004 Intergovernmental Conference, preceded by the Convention of 2002–2003 which prepared the Treaty establishing a Constitution for Europe, and the 2007 Intergovernmental Conference on the elaboration of the Treaty of Lisbon, codifying about 90% of the provisions of the Treaty establishing a Constitution for Europe. As regards the *ad hoc* Intergovernmental Conferences, these were devoted to negotiating the Merger Treaty of 8 April 1965, the Budget Treaties of 22 April 1970 and 22 July 1975, amending Article 136(3) TFEU by unanimous decision of the European Council of 25 March 2011 on the basis of a simplified revision procedure (Article 48(6) TEU)), and the concluding on 13 June 2012 of the so-called Irish Protocol under an ordinary revision procedure (Article 48(2) to (5) TEU).

All intergovernmental conferences had a directly impacted on the constitutional shape of the European Communities and subsequently the European Union. Each Intergovernmental Conference reaffirmed the role of Member States as 'masters of the Treaties'. The concept derives from the principle

[36] The Maastricht Treaty was the result of two Intergovernmental Conferences held in parallel: one devoted to the creation of a Political Union and the other – to the establishment of an Economic and Monetary Union. It was both a founding treaty, since it established the European Union, and an amending treaty, as it amended the ECSC Treaty, the EEC Treaty, and the Euratom Treaty.

of conferred powers, also known as the principle of conferral,[37] according to which Governments of Member States could confer new powers on the European Communities and on the European Union through a unanimous revision of the Treaties. At the same time, none of the aforementioned international organisations has the capacity to establish their own powers (competence-competence). The high frequency of systemic changes in the European Communities and in the European Union also implied the gradual institutionalisation of IGCs as a model of EU multilateral diplomacy.[38]

The basic research criterion for this analysis will be the system of the European Communities and then the European Union, which consists of horizontal and sectoral elements. It should be noted, however, that the systemic structure of the European Communities was not identical to the systemic structure of the European Union, and in particular to the current EU operating under the Lisbon legal regime. The differences related primarily to the horizontal components of the system. While the horizontal constituent elements of the system of the current European Union are the international legal status, the integration status and integration objectives, the axiology, the division of competences, the catalogue of legislative acts and procedures, the institutional system, the budget, the role of national parliaments in the legislative process, the 'differentiated integration', and the procedures for treaty revision. In contrast to this however, neither the European Union prior to the entry into force of the Lisbon Treaty (1 December 2009) nor the European Communities prior to the entry into force of the Maastricht

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[37] It was codified in Article 5(1) and (2) TEU (ex Article 5 TEC), stating that the 'limits of Union competences are governed by the principle of conferral' and that the 'use of Union competences is governed by the principles of subsidiarity and proportionality'. 'Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties', whereas any 'competences not conferred upon the Union in the Treaties remain with the Member States'. For more on the subject, cf. J.J. Węc, Spór o kształt ustrojowy, op.cit., p. 517.

[38] A similar position is expressed by Bela Plechanovova, who, comparing the three intergovernmental conferences of 1965, 1985 and 1996–1997 suggested they took 'clear steps in shaping the perceptions of the IGC's role as an institution in the political process within the European Communities and the EU', cf. B. Plechanovová, Intergovernmental Conference. Three Case Studies of EC/EU Institution Building, [in:] Oxford Research Encyclopaedia of Politics, Oxford 2021, pp. 1–10, Cf. also B. Smith, op.cit, pp. 6–12.

Treaty (1 November 1993) had all the above-mentioned constitutional components. For example, the European Union did not have any legal personality at that time, nor an axiology as developed as today, nor a rigid division of competences in its relations with the Member States, nor did it guarantee the participation of national parliaments in its own legislative process. The European Communities, on the other hand, prior to the Maastricht Treaty, essentially had no axiology of their own, no rigid division of competences, no method of integration known as 'differentiated integration', and no guarantee of national parliaments having any say in their own legislative process. On the other hand, both the European Communities and the European Union had their own sectoral components of the system, i.e. internal and external actions and policies, with the Communities having far fewer of these than the current European Union.[39]

Thanks to the changes introduced under the Lisbon Treaty, the current European Union is the only *par excellence* international supranational type organisation in the world. Peter L. Lindseth also expresses a similar view, arguing that it is a 'leading' example of an international supranational type organisation. He states that it 'can exercise a whole range of rulemaking, adjudication, and enforcement powers with a comparatively high degree of independence from intergovernmental or national control, at least within the scope of authority delegated to the supranational level'. Then again, as the Eurozone crisis 2010–2018 has demonstrated, the European Union 'still depends on the strongly legitimated institutions (…) at the national level', because 'institutions of supranational "governance", exercising delegated power in a delegated, administrative sense, are simply not yet equal to that task'.[40] Unlike the European Union, the other international organisations are intergovernmental (inter-state) in nature. Of the international organisations that, like the European Union, are concerned with economic

[39] J.J. Węc, Spór o kształt ustrojowy, op.cit., pp. 39–52, 91–113, 209–249, 273–291, 314–332.

[40] Cf. P.L. Lindseth, Supranational Organizations, [in:] The Oxford Handbook of International Organizations, Jacob Katz Cogan (ed.), Oxford 2017, p. 152. A slightly different opinion is expressed by Martin Koch, who also includes the International Monetary Fund in the catalogue of international organisations of the supranational type, next to the European Union, cf. M. Koch, Supranationale Organisationen, [in:] S. Lütz, A. Mentzel (Hrsg.), Internationale Organisationen. Konzepte, Theorien und Fallbeispiele, Hagen 2022, pp. 129–192.

integration, some have a legal personality (e.g. MERCOSUR and ASEAN), but most are *sui generis* organisations without legal personality (e.g. NAFTA, the Andean Community, UNASUR or the African Union). Moreover, unlike the European Union, none of the international economic organisations also have such constitutive elements of a system as a rigid division of competences or an autonomous budget, none of them use the principles of 'differentiated integration', and only ASEAN has its own axiology[41].

2.2. The structure of the Intergovernmental Conference

In principle, each IGC consists of two phases, the first of which includes preparatory work and the second comprises actual diplomatic negotiations, the latter being divided into three stages. The first phase includes preparing the negotiations and defining the terms of reference for, or a recommendation to, the conference of representatives of the Governments of the Member States. The Presidency, the Governments of the Member States, the European Commission and the European Parliament are involved. Experience to date from the proceedings of 10 constitutional Intergovernmental Conferences has shown that there are at least five models for the implementation of the preparatory phase, depending on the participants. In theory, these could be as follows: (1) the expert committees which prepared the deliberations of the three Intergovernmental Conferences dealing with the drafting of the Treaties of Rome (1956–1957) and of the Maastricht Treaty (1990–1991); (2) the Reflection Group which worked for the IGC on the Treaty of Amsterdam in 1996–1997; (3) the Group of Wise Men whose objective was to prepare the IGC on the Treaty of Nice in 2000; (4) the Convention which performed the preparatory work for the deliberations of the Intergovernmental Conference on the Treaty establishing a Constitution for Europe in 2002–2003; and (5) the Sherpas' Group whose objective was to prepare the IGC

[41] On the system of international economic organisations, cf. J.J. Węc, Ustrój wybranych międzynarodowych organizacji gospodarczych. Analiza porównawcza [The system of selected international economic organisations. A comparative analysis], Kraków 2025 (in print). On the system of the EU as an international organisation of a supranational type, cf. J. Węc, Spór o kształt ustrojowy, op.cit., pp. 13–15. On other economic integration organisations as international organisations of the intergovernmental type, cf. P. Czubik, B. Kuźniak, Organizacje międzynarodowe [International Organisations], Warszawa 2004, pp. 3–11, 115–153.

on the signing of the Treaty of Lisbon in 2007. Among the five models listed above, the most democratic mandate was that of the Conventions, i.e. assemblies composed of representatives of the Heads of State or Government of the Member States, of the national parliaments, of the European Parliament and of the European Commission.[42] They have been convened twice so far. The first Convention was held in 1999–2000 and drafted the Charter of Fundamental Rights, subsequently proclaimed by the European Parliament, the European Commission and the Council of the European Union on 7 December 2000. The second Convention, referred to as the Convention on the Future of Europe, met in 2002–2003 and prepared the draft Constitutional Treaty. The work of the Convention on the Future of Europe was particularly intensive. It comprised debates in working groups and then in plenary sessions. It should be stressed, however, that the development of the draft of the Treaty establishing a Constitution for Europe by the second Convention gave rise to criticism in some Member States of the European Union as the assembly had exceeded the terms of reference defined for it by the European Council, namely to only serve as the framework for drawing up a recommendation for the Intergovernmental Conference. Both Conventions were based solely on 'political legitimacy' since they had neither a legal basis in secondary legislation nor treaty status at that time. That status of the institution of a Convention was not obtained until the Lisbon Treaty of 13 December 2007 (Article 48(3) TEU). In contrast to the Convention, the work of expert

[42] It should be added that the work of the Convention on the Future of Europe also involved representatives of the Governments and of the national parliaments of candidate countries for accession to the European Union, including Poland's delegates. In addition, observers, including the European Ombudsman and members of the Committee of the Regions, of the Economic and Social Committee and of social partners, were invited to participate in the activities of both Conventions, whereas representatives of the Court of Justice, of the Council of Europe and of the European Court of Human Rights also attended the first Convention. Cf. S. Hambura, Karta Praw Podstawowych Unii Europejskiej [The Charter of Fundamental Rights of the European Union], 'Przegląd Sejmowy' 2004, No. 2, pp. 98–99. T. Astramowicz-Leyk, Geneza Karty Praw Podstawowych i jej znaczenie dla wspólnotowego porządku prawnego [The origins of the Charter of Fundamental Rights and its relevance to the Community's legal order], [in:] W. Wacławczyk (ed.), Karta Praw Podstawowych UE. Nowa szansa dla praw człowieka? [The Charter of Fundamental Rights of the EU. A new chance for human rights?], Warszawa 2010, pp. 13–14.

groups, the Reflection Group, the Group of Wise Men and the Sherpas' Group was limited to identifying the problems to be discussed by individual Intergovernmental Conferences.

As mentioned above, proper diplomatic negotiations involve three stages: Community-intergovernmental, intergovernmental and national. In the Community-intergovernmental step, the European Parliament, the European Commission or the Governments of the Member States submit proposals for the amendment of the Treaties (Article 48(2) TEU). The European Council then consults the Community institutions: the Parliament and the Commission as well as the European Central Bank (if the proposed changes concern monetary policy) on the need for an intergovernmental conference. As mentioned before, the European Council, after obtaining these opinions, decides by a simple majority to examine the proposed amendments. If the European Council adopts such a decision, the President of the European Council convenes a Convention. The assembly then examines the proposals for amendments and adopts by consensus a recommendation to an intergovernmental conference. In the case of few amendments being proposed, the European Council may decide not to convene/to forgo convening a Convention, subject to obtaining the consent of the European Parliament. In such an event, the European Council itself defines the terms of reference for an IGC (Article 48(3) TEU).

The intergovernmental step includes actual diplomatic negotiations at the level of the Heads of State or Government within the European Council, Foreign Ministers or European Affairs Ministers within the General Affairs Council and representatives of Foreign Ministers or European Affairs Ministers within the Council of the European Union, or ambassadors and deputy ambassadors of the Member States to the EU within the Committee of Permanent Representatives (Coreper II or Coreper I), or other committees of the Council of the European Union. An intergovernmental conference is convened by the Presidency or, more specifically, by the President of the Council of the European Union, for the purpose of determining by common accord the amendments to be made to the Treaties (Article 48(4) TEU). However, the relevant negotiations take place outside the EU's institutional framework; therefore, the EU decision-making procedures and rules do not apply to them. The objective of the negotiations is for the representatives of the Governments of the Member States to agree, by consensus, on the text of

the founding treaty or the amending treaty, with all the Governments participating in the IGC on an equal footing. Representatives of the Parliament and of the Commission attend the meetings of the conference, but they cannot prevent the adoption of proposals which have received the support of the Governments of all the Member States. In legal terms, an intergovernmental conference is a diplomatic conference during which representatives of the Governments of the EU Member States negotiate with a view to drafting a founding or amending Treaty. Any exemptions from the general obligations of the parties take the form of protocols in the European Union and require the consent of all Member States. The possibility of varying relations between the parties to a treaty, which could result from the Convention on the Law of Treaties of 23 May 1969, which allows the possibility of lodging reservations to treaties, accepting and objecting to reservations to treaties, has therefore been ruled out (articles 19 to 23 of the Convention).[43]

The national step involves the ratification of a new founding or amending Treaty as agreed, by consensus, at the relevant Intergovernmental Conference. The Treaty is ratified by the Member States in three ways: ratification is carried out by the national parliament (e.g. in Romania, Finland and Bulgaria), by the Head of State after obtaining the consent of the parliament (e.g. in Poland and in most EU Member States), or by referendum (e.g. in Ireland). The Treaty amendments only enter into force after the ratification process has been completed by all the Member States (Article 48(4) TEU). In

[43] In accordance with article 21(1) to (3) of the Vienna Convention, a 'reservation established with regard to another party in accordance with articles 19, 20 and 23: (a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and (b) modifies those provisions to the same extent for that other party in its relations with the reserving State (article 21(1))'. 'The reservation does not modify the provisions of the treaty for the other parties to the treaty inter se' (article 21(2)). 'When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.' (article 21(3). Cf. Vienna Convention on the Law of Treaties. Completed at Vienna on 23 May 1969, pp. 8–9, https://legal.un.org/ilc/texts/instruments/english/ conventions/1_1_1969.pdf [accessed: 19 May 2024].

contrast to the accession or association treaties, the consent of the European Parliament is not required for the entry into force of a new treaty. Its resolutions on this matter are of political significance only. However, if, two years after the signature of a treaty, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter is referred to the European Council (Article 48(5) TEU).

2.3. The decision-making process at the Intergovernmental Conference

Basically, there are four levels of decision-making at each IGC: firstly, the level of the Heads of State or Government within the European Council (political level); secondly, the level of Foreign Ministers or European Affairs Ministers within the General Affairs Council (political level); thirdly, the level of representatives of Foreign Ministers or European Affairs Ministers within the Council of the European Union or of the ambassadors and deputy ambassadors of the Member States to the EU within Coreper II or Coreper I, or other committees of the Council of the European Union (technical level); fourthly, the level of legal experts within the relevant working groups (technical level). Whereas actual decisions are taken by the Heads of State or Government, the Foreign Ministers or the European Affairs Ministers, ministerial representatives and experts only perform advisory functions. As regards the first political level of decision-making, the European Council defines the terms of reference for the Intergovernmental Conference (the inaugural meeting) and then adopts a comprehensive package of arrangements resolving all the fundamental issues between the participants in the negotiations (the final meeting). Additional meetings of the European Council are convened during the IGC as necessary. The principle of any intergovernmental conference is that all issues unresolved at lower levels of the negotiations are referred to higher levels and the final decision on such matters must be taken by the Heads of State or Government. Meetings of Foreign Ministers or of European Affairs Ministers, the second political level of the decision-making process, are usually held once a month within the General Affairs Council, the Foreign Affairs Council or the European Council. Some meetings of Foreign Ministers are closed, of a little longer duration, and referred to as 'Conclaves'. These

tend to serve to identify differences of opinion and to reach agreements on specific issues.[44]

As for the third and fourth technical levels of decision-making, the meetings of representatives of Foreign Ministers or of European Affairs Ministers are held several times a month. These include Permanent Representatives (ambassadors) (Coreper II) or Deputy Permanent Representatives (Coreper I), Political Directors or senior officials in the Foreign Ministries, and sometimes members of the European Parliament. The purpose of such meetings is making technical rather than political arrangements. However, their contribution is not entirely small. In fact, during the 1996–1997 Intergovernmental Conference, as many as 60 to 70% of the provisions of the subsequently adopted Treaty of Amsterdam were developed at this level. During the 2003–2004 Intergovernmental Conference, representatives of Foreign Ministers directly participated in the second phase of the discussions held under the auspices of the Irish Presidency, constituting the so-called Focal Points.[45] The principle of strict compliance with the provisions of the negotiation mandate applies during deliberations of any working group of legal experts. This does not mean, however, that its activities are limited only to introducing editorial corrections to a draft Treaty. As a matter of fact, such a working group often deals with issues not covered by the mandate but still indispensable for the development of a new founding or amending Treaty. One of the best examples to support this opinion was the work of a group of legal experts at the 2007 Intergovernmental Conference.[46]

2.4. Participants in the Intergovernmental Conference

As regards the role of the various actors in the decision-making process at the IGC, the Presidency and the Governments of the Member States perform the most significant functions. The Presidency plays the most important role in the sense that, in exercising its formal and informal powers, it has a fundamental influence on the proceedings of the IGC. The formal competences

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[44] A. Podraza, Konferencja międzyrządowa, op. cit., pp. 15–17.

[45] Ibidem, p. 17.

[46] For more on the subject, cf. J.J. Węc, Traktat Lizboński, op. cit., pp. 92–99. T. Dörfler, K. Holzinger, J. Biesenbender, Constitutional Dynamics in the European Union: Success, Failure, and Stability of Institutional Treaty Revisions, 'International Journal of Public Administration' 2017, No. 14, pp. 1237–1249.

of the Presidency arise from the powers conferred on it by the Treaties and the Rules of Procedure, constituting the basis for the Presidency to perform the following five functions: mediation (honest broker), planning, coordination, representation, and administration.[47] At the same time, informal opportunities for influence include the capability to form coalitions with other EU Member States, the ability to link the Presidency's own national interests with the European interest, effective information and promotion policy, concern for consensus between the political parties on its domestic political scene as well as good coordination of activities between the various authorities and ministries responsible for European policy.[48]

The most important formal competence is the mediation function, reflected in seeking consensus among the Member States on all issues in dispute. It boils down to activities such as sounding out positions and conducting bilateral consultations with the Governments of the Member States, the European Parliament, the European Commission and, sometimes, third countries as well; seeking a positive climate for consultations; identifying, formulating and proposing compromise solutions; attempting to win allies for the Presidency's own proposals; acting as a mediator (honest broker) between the various actors in the decision-making process. The exercise of the Presidency's mediation function is facilitated by its privileged position in access to information and by its procedural control over negotiations and deliberations. The success of any intergovernmental conference largely depends on the capacity and skills of the Presidency Member State. On the other hand, in performing this function, each Presidency faces formal and informal constraints. Whereas formal restrictions stem from the rules on

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[47] This division was also introduced in the author's monograph on the first Polish EU presidency. Cf. J.J. Węc, Pierwsza polska prezydencja w Unii Europejskiej. Uwarunkowania – Procesy decyzyjne – Osiągnięcia i niepowodzenia [Poland's first Presidency in the European Union. Conditions – Decision-making – Successes and failures], Kraków 2012, pp. 17–30.

[48] For more on the subject, cf. J.J. Węc, Formalne i nieformalne możliwości oddziaływania prezydencji na funkcjonowanie Unii Europejskiej po zmianach przewidywanych w traktacie lizbońskim [The Presidency's formal and informal possibilities to influence the functioning of the European Union after the amendments provided for in the Treaty of Lisbon], [in:] Prezydencja w Unii Europejskiej. Analizy i doświadczenia [The Presidency in the European Union. Analyses and experiences], K. Szczerski (ed.), Kraków 2009, pp. 45–46.

decision-making, informal limitations include the principles of neutrality and efficiency.[49] Respect for the principle of neutrality gives the greatest credibility to the mediation activities of the Presidency. To perform this function well, the Presidency Member State's Government must be able to neutralise the concerns of the other Member States that it intends to represent, or where it represents mainly its own national interests. This does not imply that the Governments of the Member States pursue no such interests. However, large Member States have greater capacity to do so, especially in the areas covered by the qualified majority decision-making procedure. At the same time, medium-sized and small Member States must rely more on searching for allies. On the other hand, the experience of all the previous presidencies has shown that medium-sized and small Member States can also succeed in the pursuit of their national interests. Even 'routine' documents prepared and drafted by such Presidency Member States can be highly political in nature and oriented towards pushing their national interests. This is largely facilitated by the prominent position of the Presidency as the spokesperson, representative and President of the Council of the European Union, often allowing decisions to be taken in the Council in accordance with the will of the Presidency. The effective linking of national interests to the European interest on the Presidency agenda is easiest in two cases. One is the appearance of a new diplomatic initiative on the agenda. It is then all the easier for the presidency to push its own national interest the more ambiguous are the positions and opinions of the governments of the other member states towards the new initiative of the presidency. The other case could be a proposal to include in the Presidency agenda, and then to give new political impetus to, an initiative that failed to be implemented during the previous presidency or presidencies.[50]

The remaining functions of the Presidency are not as important as the mediation function, but they have a real impact on the proceedings of the IGC. Thus, the planning function consists in the development of a 6-month programme by the Member State holding the Presidency during the period concerned (the national Presidency programme) and of an 18-month common programme by all the three Member States holding the Group Presidency,

[49] Ibidem, pp. 45–46.
[50] Ibidem, pp. 51–52.

called the Trio (the Group Presidency programme). The coordination function is mainly expressed in ensuring the consistency and continuity of work within the Council of the European Union itself, as well as in synchronising the cooperation of the Council of the European Union with the European Council, the European Commission and the European Parliament. The administrative function consists, *inter alia*, in drawing up the calendar of meetings of the Council of the European Union, in proposing the provisional agenda of the Council in cooperation with the General Secretariat of the Council, in preparing and implementing the agenda of the Council, Coreper I, Coreper II, and of some two hundred and seventy committees and working groups on the basis of the 18-month and 6-month programmes of the Presidency (of the Trio), and in chairing the proceedings within a period of six months. Finally, the representation function is divided into internal and external representation. Internal representation consists in the following: participation in plenary sessions of the European Parliament, during which the Presidency submits the programme and a review of its activities, issues declarations on behalf of the Council of the European Union and answers questions from MEPs (Article 26 of the Council's Rules of Procedure); participation in European Parliament committee meetings (Article 26 of the Council's Rules of Procedure) and in trilogue meetings on legislative and budgetary matters.[51] In addition, the function of internal representation is also reflected in communicating and promoting the activities of the Presidency to public opinion in the Member States. As regards external representation tasks, these consist primarily in representing the European Union towards third countries and international organisations during negotiations on the conclusion of international agreements. The Council of the European Union then acts on a recommendation from the Commission or from the High Representative of the Union (if the agreement concerns the common foreign and security policy). The Council takes a decision authorising the opening of negotiations, adopts negotiating directives, nominates the head of the negotiating team (with the exception of agreements on the common commercial policy, negotiated by the European Commission) and concludes international agreements after they have been negotiated (Article 218(1) to (5) TFEU). As another form of external representation, the Presidency represents the

[51] J.J. Węc, Pierwsza polska prezydencja, op. cit., pp. 28–30.

European Union at international conferences held by international organisations or various forums for political and economic dialogue.[52]

In addition to the Presidency, the Governments of the other Member States play a central role in the proceedings of the IGC as they are the only entities with the authority to make decisions. All decisions are taken unanimously, which further strengthens the role of the Member States. Formally, each Member State has the same right to make decisions. In practice, however, much also depends on the economic, military, political and demographic potential of a given country, its international activity, integration traditions and ability to form alliances. The greater influence of the strongest Member States, in particular Germany and France, on the proceedings of the Intergovernmental Conferences, so far mainly resulted from the so-called Monnet method used since the 1950s as a method of deepening the integration process. This consisted in preparing and developing key integration projects based on confidential contacts and informal agreements between the Governments of the two Member States, involving representatives of the European Commission, of the European Parliament and even of the Court of Justice. Such projects were subsequently discussed by Intergovernmental Conferences. This is why the Monnet method is treated by some researchers, alongside the Intergovernmental Conference and the Convention (starting from the first Convention held in 1999–2000), as one of the three integration methods.[53] Very often arguing that the process of European integration should be deepened because of real or perceived geopolitical, economic, financial or institutional challenges, Germany and France have used this method, frequently presenting their own agreements as accomplished facts to the medium-sized and smaller Member States and then, sometimes with great success, seeking to push them through during the meetings of Intergovernmental Conferences.

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[52] Ibidem, pp. 24–28. Cf. also: J.J. Węc, Nowe zasady sprawowania prezydencji w Radzie Unii Europejskiej. Bilans prezydencji belgijskiej [New rules for presiding over the Council of the European Union. Taking stock of the Belgian Presidency], 'Przegląd Zachodni' 2011, No. 3.

[53] Cf. W. Wessels, A. Faber, Vom Verfassungskonvent zurück zur 'Methode Monnet'? Die Entstehung der 'Road map' zum EU-Reformvertrag unter deutscher Ratpräsidentschaft, 'Integration' 2007, H. 4, pp. 370–371, 376–377.

The IGC is also attended by representatives of the European Commission, of the European Parliament and of the General Secretariat of the Council of the European Union. The influence of supranational institutions, i.e. the Commission and the Parliament, or of the supranational body of the Council of the European Union, i.e. the General Secretariat, on the proceedings and outcome of the IGC is limited. On the other hand, they are not entirely devoid of influence. Among the supranational institutions, the European Commission and the European Parliament have the greatest impact on the proceedings and outcome of the Intergovernmental Conference as they submit proposals for Treaty changes to the Council of the European Union and issue opinions on the need for a conference (Article 48(2) to (3) TEU). The President of the Commission is a member of the European Council and the President of the European Parliament is invited to attend meetings of that institution; thus, they influence the proceedings of the IGC. The Commission's positions are shaped by the EU interests rather than by national interests. However, much also depends on the personality of the President of the Commission. If he or she enjoys high prestige, the Commission greatly influences the course of the deliberations, as in the case of the IGCs drafting of the Single European Act or the Maastricht Treaty, much to the credit of the President, Jacques Delors (France). If the European Commission is experiencing a leadership crisis, its impact on the course of the IGC is much smaller. Further, the more the Commission's proposals for reform resonate with the proposals from Member State Governments, the greater its influence.[54] Until the 2003–2004 Intergovernmental Conference, the Parliament had observer status; since the 2007 Intergovernmental Conference, the EP has enjoyed a status similar to that of the European Commission. The impact of the European Parliament on the proceedings of the IGC is even more limited

[54] For more on the role of the European Commission, of the European Parliament and of the General Secretariat of the Council of the European Union in the deliberations of Intergovernmental Conferences, cf. D. Kietz, A. Maurer, op. cit., pp. 20–46. Th. Christiansen, The role of supranational actors in EU treaty reform, op. cit., pp. 33–53. G. Falkner, op. cit., pp. 1–11. U. Sverdrup, op. cit., pp. 120–140. W. Wessels, Nice Results, op. cit., p. 198. A. Podraza, Konferencja międzyrządowa, op. cit., pp. 25–31. T. Christiansen, K. E. Jørgensen, op. cit., pp. 435–452. P. Kozub, op. cit., pp. 180–181. T. Christiansen, Intra-institutional politics and inter-institutional relations in the EU, op. cit., pp. 747–769. A. Ott, The European Parliament's Role in EU Treaty-making, 'Maastricht Journal of European and Comparative Law' 2016, No. 6, pp. 1009–1039.

than the influence of the European Commission, as the largest Member States, mainly France and the United Kingdom (until 2020), often opposed strengthening its role.

The General Secretariat of the Council of the European Union cooperates closely with the Presidency and serves as the non-treaty secretariat of the Intergovernmental Conference, thus having considerable influence on the preparation, conduct and outcome of the IGC. It provides information to the Presidency and prepares expert opinions on the preferences and negotiating positions of the Governments of particular Member States. It advises the Presidency on negotiation tactics, which is extremely important because of its extensive knowledge of the 'kitchen' of diplomatic negotiations, acquired during previous Intergovernmental Conferences. One can say that it acts as an 'invisible hand' and an 'institutional memory' of the Intergovernmental Conference. If the General Secretariat of the Council cooperates closely with the Presidency, the impact of the former is greater, and *vice versa*. In any case, it plays a more prominent role than its status would imply. The General Secretariat of the Council exerted the most significant influence on the proceedings of the 1996–1997 and 2007 Intergovernmental Conferences. It had the least impact during the 2000 IGC as both the Portuguese and French Presidencies limited its scope for influence. During the 2003–2004 Intergovernmental Conference, the role of the General Secretariat was also small because the Italian Presidency made no use of its assistance at all, whilst the Irish Presidency did so only to a minor extent.[55]

[55] Th. Christiansen, The role of supranational actors in EU treaty reform, op. cit., pp. 33–53. A. Podraza, Konferencja międzyrządowa, op. cit., pp. 31–33.

The first Intergovernmental Conferences in 1950–1985

1. The Intergovernmental Conferences in 1950–1953[1]

International events had a fundamental influence on the convening of the Intergovernmental Conference on the establishment of the European Coal and Steel Community. The conflict between East and West, growing from 1947, inspired the Governments of France, the Federal Republic of Germany and Italy to initiate the process of economic integration as an instrument for the long-term fight against communism. The implementation of the European Recovery Programme between 1948 and 1952, based on the Marshall Plan, triggered further initiatives for economic integration. However, the most important integrative element was the Agreement for Intra-European Payments and Compensations signed on 16 October 1948. It required each of the beneficiary countries of the Marshall Plan which enjoyed a balance-of-payments surplus with another beneficiary country to grant the latter economic aid in the amount of its own active balance. As a result, no country with a trade deficit had to resort to imposing restrictions in order to compensate for it. In the event of non-compliance with the terms of the agreement by the countries which usually provided economic assistance, such as the United Kingdom, Italy, the Federal Republic of Germany, Belgium

[1] For the sake of simplification and greater transparency, the term Intergovernmental Conferences will be hereafter used to define constitutional IGCs. However, as I mentioned above, only those conferences which have significantly contributed to the systematic construction of the constitutional architecture of the European Communities and the European Union will be included in the constitutional intergovernmental conferences in this work, while the others will be treated as *ad hoc* conferences.

and Luxembourg, they had to take into account the possibility for the US to intervene by reducing US financial and economic aid.

On 9 May 1950, French Foreign Minister Robert Schuman announced a plan to establish the European Coal and Steel Community as a new international organisation for the integration of the coal and steel industries of Western Europe. In systemic terms, the organisation was to be the first step towards a European federation as an indispensable condition for the preservation of peace.[2] That objective was to be facilitated by the High Authority, as an ECSC institution of a supranational nature, making decisions binding on all the Member States. At that time, the Schuman Plan was the most important diplomatic initiative for the economic integration of Western European countries. Therefore, it attracted a lot of interest in the capital cities. However, while the Federal Republic of Germany and Italy supported the French project, the United Kingdom and the Benelux countries had reservations.[3] The Government of the Federal Republic of Germany, set up on 20 September 1949, hoped that the establishment of the ECSC would be the first step for Germany to regain sovereignty. Italy expected that joining the process of economic integration would not only facilitate its recovery from the country's political isolation after the end of World War II, but also allow Italy to recoup its losses resulting from the loss of existing markets and colonial possessions (Libya and Eritrea). The British Government, completely surprised by the French initiative, at first made its support for the ECSC project conditional on France's consent to giving the new organisation a status similar to that of the Council of Europe. However, having met with a firm refusal by the French Government, the UK withdrew from participation in the negotiations on the Schuman Plan.[4]

On 20 June 1950, the Intergovernmental Conference on the Schuman Plan began in Paris under the chairmanship of Jean Monnet, the coordinator of the recovery of the French economy. From the very beginning, it was a matter of institutional dispute between the representatives of France, Germany and Italy and the Benelux delegates. Whereas the Dutch, Belgian

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[2] Europa-Archiv 1950, hrsg. vom Wilhelm Cornides, Bonn, p. 3091 et seq.

[3] Adenauer: „Es mußte alles neu gemacht werden". Die Protokolle des CDU-Bundesvorstandes 1950–1953, bearb. von G. Buchstab, Stuttgart 1986, pp. 36–37.

[4] W. Loth, Der Weg nach Europa. Geschichte der europäischen Integration 1939–1957, Göttingen 1991, pp. 83–84.

and Luxembourg delegations welcomed the idea of sectoral integration itself, they had serious doubts about the institutional system proposed by France for the ECSC, to be based only on two bodies: the High Authority and the Common Assembly. During the deliberations of the IGC, Monnet himself made a proposal for the establishment of a Common Assembly to evaluate the work of the High Authority on an annual basis and, if necessary, to express a vote of no confidence in it. However, it did not dispel the doubts of the Benelux countries. In July 1950, they demanded a significant reduction in the supranational powers of the High Authority and the setting up of a new institution – a Special Council of Ministers – as a body of intergovernmental cooperation with broad competences. Finally, the negotiations ended in a compromise, providing that, in addition to the High Authority, the institutional system of the ECSC would include three new institutions: the Special Council of Ministers, the Common Assembly, and the Court of Justice[5]. When the Treaty establishing the European Coal and Steel Community was signed in Paris on 18 April 1951, it marked the beginning by France, Germany, Italy and the Benelux countries of the process of the economic integration of Western Europe. The ECSC Treaty was concluded for 50 years. It introduced provisions defining the ordinary procedure for amending the ECSC Treaty. It provided that the Government of each Member State or the High Authority could submit proposals for amendments to the Treaty to the Special Council of Ministers. If the Council, acting by a qualified majority of two-thirds of the votes, voted in favour of convening an Intergovernmental Conference, the President of the Council would convene it without delay in order to adopt amendments to the Treaty by common agreement. These amendments came into force after ratification by all the Member States, in accordance with their respective constitutional requirements (Article 94 of the ECSC Treaty).[6]

Even before the signing of the ECSC Treaty, on 24 October 1950, in a Government statement submitted to France's National Assembly, French

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[5] T. C. Salmon, W. Nicoll, Building European Union. A Documentary History and Analysis, Manchester 1996, p. 23. J. M. Gabriel, Funktionalismus – ein Überblick, ETH-Zentrum, Forschungsstelle für Internationale Beziehungen, B 8, Dezember 1996, pp. 22, 36.

[6] For an analysis of the provisions of the ECSC Treaty, cf. J.J. Węc, Spór o kształt ustrojowy, op. cit., pp. 39–53.

Prime Minister René Pleven announced another plan for the military integration of France, Germany, Italy and the Benelux countries into a new international organisation, i.e. the European Defence Community (EDC). International events were also the main reasons for the decision on military integration and strengthening of the Western European security system, in particular the breaking by the USSR of the US monopoly on nuclear weapons (1949), the takeover of power in China by the communists (1949) and the outbreak of the Korean War (1950). In support of the project, Pleven argued that the issue of common European defence should be regulated through integration mechanisms. That opinion was based on the belief that any (defence) system leading, whether immediately or eventually, indirectly or directly, with or without conditions, to the creation of a German army, would give rise to distrust and suspicion. Pleven's plan envisaged the integration of part of the armed forces of Western European countries into the European Defence Community, which would also include future German military units. The Western European Army would be integrated at the lowest possible organisational level (battalion or regiment). It would be subordinate to a European Minister for Defence who would be politically accountable to a European Assembly, composed of delegates from the national parliaments. The European Minister for Defence could, with the consent of the Council of Ministers, temporarily place back at the disposal of member Governments parts of their national armed forces incorporated into the Community force and, if necessary, authorise their use to meet requirements other than those of common defence. The powers of the European Minister for Defence would include implementing existing international undertakings, directing diplomatic negotiations with third countries or international organisations on the basis of directives from the Council of Ministers as well as supervising and conducting the European armaments and equipment programme. However, preparations for the creation of a European Defence Community were not in any way to disrupt NATO's activities. The French Prime Minister proposed to invite the 'free countries' of continental Europe and the United Kingdom to negotiate the establishment of the EDC.[7]

[7] Europa. Dokumente zur Frage der europäischen Einigung, Bd. 2, München 1962, pp. 813–815.

The Pleven plan generally met with criticism and raised great consternation in the US and Western European countries. US Secretary of State Dean Acheson even treated the initiative of the French Government as an attempt to torpedo the United States project on the rearmament of Germany. Military experts from the US and the United Kingdom evaluated military integration reaching as low as the battalion level as completely ineffective and unrealistic. The French general staff, which had not even been consulted on the Pleven plan, suggested that its assumptions were absurd. Only the Governments of Belgium and Luxembourg considered the plan to be noteworthy.[8] However, such critical opinions on the new initiative of the French Government only encouraged the US administration to continue pushing for its own project. As a result, the issue of the establishment of a Western European security system was soon discussed by as many as two international bodies. From 9 January 1951, negotiations on the Pentagon plan were conducted on the Petersberg mountain near Bonn, Germany, whereas negotiations on the Pleven plan began in Paris on 15 February of the same year. During the Petersberg negotiations, the US insisted on the parallel membership of the Federal Republic of Germany of NATO and the EDC, but soon abandoned the idea due to opposition from the United Kingdom and France. The US stance was also significantly affected by the fact that in June 1951 Monnet managed to convince General Dwight D. Eisenhower, NATO's Supreme Allied Commander Europe, that the best way to reconcile French concerns and West Germany's desire for German rearmament would be to create a European army. However, the breakthrough in the Franco-American dispute over the shape of the security system in Western Europe occurred during the conference of the Ministers for Foreign Affairs of the US, the United Kingdom and France, held in Washington on 10–14 September 1951. Dean Acheson, Robert Schuman and Herbert Morrison agreed that the Pleven plan was an important step on the road towards a united Europe, but the creation of a European Defence Community could in no way lead to a change in the defensive character of the North Atlantic Treaty. Moreover, the ministers made a preliminary decision on the inclusion of the Federal Republic of Germany in the European Defence Community, announced the abolition of the Occupation Statute and its replacement by a general agreement regulating

[8] W. Loth, Der Weg nach Europa, op. cit., pp. 94–96.

mutual relations between Germany and the Western powers until the signing of the final peace treaty regulation. Thus, the abolition of the Occupation Statute of Germany was made conditional on the German accession to the EDC. At the same time, in return for France's consent to the integration of the European army at the division level, Acheson abandoned his idea of setting up the first West German troop units before the creation of such a European army.[9]

The settlement of the Franco–American dispute was not yet a harbinger of the final success of the Intergovernmental Conference in Paris. During the second phase of the negotiations, which began in October 1951, fundamental differences of views emerged between the participants. The French delegates, supported by the representatives of Italy and Germany, spoke in favour of the creation of a European army, integrated at the division level, in order to avoid a return to national armed forces in the future. Such an army would have a common staff, an independent budget, and should be subordinated to a supranational political authority.[10] The Governments of Belgium, the Netherlands and Luxembourg, on the other hand, called for the integration of European armed forces to be limited to a common command system, as well as for a significant weakening of the supranational element in the European Defence Community. They also advocated that the Member States' contributions, rather than own resources, should be a source of the EDC's budgetary revenue. Finally, a compromise was agreed, signifying the actual revision of the Pleven plan. Under the proposed agreement, the integration of the European armed forces would begin at the army corps level. A Commissariat would be set up instead of the European Defence Minister

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[9] For more on the subject, cf. N. Wiggershaus, Überlegungen und Pläne für eine militärische Integration Westdeutschlands 1948–1952, [in:] Kalter Krieg und Deutsche Frage. Deutschland im Widerstreit der Mächte 1945–1952, hrsg. von J. Foschepoth, Göttingen-Zürich 1985, pp. 323–328. Zwischenbericht der Delegationen für die an der Pariser Konferenz für die Organisation einer Europäischen Verteidigungsgemeinschaft beteiligten Regierungen vom 24. Juli 1951, [in:] Akten zur Auswärtigen Politik der Bundesrepublik Deutschland. Adenauer und die Hohen Kommissare 1949–1951, Bd.I, hrsg. von H.-P. Schwarz in Verbindung mit R. Pommerin, München 1989, pp. 529–530, 538–539. O. Lenz, Im Zentrum der Macht. Das Tagebuch von Staatssekretär Lenz 1951–1953, Düsseldorf 1989, p. 156. Dokumentation zur Deutschlandfrage, 1945–1969, Hbd. I, hrsg. von H. von Siegler, Bonn-Wien-Zürich 1961, p. 104.

[10] Archiv der Gegenewart (AdG), 1951, p. 3091; 1952, p. 3332.

proposed by Pleven, but with much less competence. Almost all major decisions of the Council of Ministers would require unanimity. The European Defence Community would have a common budget, supported by its own resources and contributions from the Member States. In operational terms, the EDC military command was to be subordinated to NATO's Allied Command Europe (ACE). The Supreme Allied Commander Europe (SACEUR) would be granted the right to inspect the EDC's armed forces and, in the event of a crisis, could be authorised by the EDC's Council of Ministers to take over the command of the European army. According to an agreement concluded a few months earlier with the North Atlantic Council, meeting in Lisbon on 20–25 February 1952, the European armed forces would consist of forty-three divisions, including fourteen French, twelve Italian, twelve West German and five Benelux divisions.[11] Despite the abandonment of the many supranational solutions proposed in the Pleven plan, the Treaty establishing the European Defence Community, signed in Paris on 27 May 1952, was an undoubted success for the federalists.[12]

The decisive factor to determine the fate of the EDC Treaty – which is almost completely overlooked in the literature – was the fact that as early as the first half of 1954 some members of the cabinet became aware that the research of French scientists on the construction of France's own atomic weapons was so advanced that they hoped for a final success. The fear of the future putting of French nuclear weapons under the control of a planned international organisation was stronger than the idea of establishing a European army.[13] When the new French Prime Minister and Minister of Foreign Affairs Pierre Mendès-France proposed, on 14 August 1954, to the Governments of the Federal Republic of Germany, Italy and the Benelux countries to sign an implementation protocol to the EDC Treaty, providing for major changes to

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[11] W. Loth, Der Weg nach Europa, op. cit., pp. 99–101. AdG, 1952, pp. 3332, 3345, 3361, 3446.

[12] For an analysis of the provisions of the EDC Treaty, cf. J.J. Węc, Spór o kształt ustrojowy, op. cit., pp. 57–72.

[13] Cf. Neue Quellen und Forschungen zu den deutsch-französischen Beziehungen zwischen 'Erbfeindschaft' und 'Entente élémentaire' (1944–1963) und ihren internationalen Rahmenbedingungen, [in:] Francia. Forschungen zur Westeuropäischen Geschichte, hrsg. vom Deutschen Historischen Institut (Institut Historique Allemand), Bd. 24/3 (1997), 19./20. Jahrhundert, Histoire Contemporaine, Sigmaringen 1998, p. 142. Documents on International Affairs 1952, London–New York–Toronto 1955, pp. 123–137.

the Treaty already signed, e.g. limiting the planned European army to West German and Allied troops stationed on the territory of West Germany, his proposals were jointly rejected by all the other Ministers of Foreign Affairs of the ECSC Member States during a meeting held in Brussels on 19–22 August 1954.[14] In those circumstances, on 30 August 1954, with the votes of the Gaullists, the Communists and some socialists and liberals, against the votes of mainly Christian Democrats, the French National Assembly adopted a proposal to exclude from the agenda the matter of ratification thereof. The reaction of the French Prime Minister and Foreign Minister Mendès-France was surprising as well as symptomatic because he did not even make a gesture of protest.[15]

The failure of the project to establish a European Defence Community determined the fate of the draft Treaty establishing the European Community (EC), adopted by the *ad hoc* Assembly of the ECSC on 5 March 1953. It referred to Schuman's initiative of 1 July 1952 on the establishment of the European Political Community (EPC). Subsequently, it was the subject of the Intergovernmental Conference from 12 May to 28 November 1953. However, due to disputes over the structure of that new international organisation between the participants of the IGC, its deliberations had to be postponed in time until after the ratification of the EDC Treaty. As the ratification of the Treaty was not completed, the Intergovernmental Conference on the Treaty establishing the European Community was also discontinued.[16]

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International events, in particular the Marshall Plan and the conflict between East and West, further exacerbated by the Soviet Union's breaking of the US monopoly on nuclear weapons, the Communist takeover of power in China and the outbreak of the Korean War, had a fundamental influence on the convening of the three Intergovernmental Conferences in 1950–1952. The proceedings of the IGCs devoted to the signing of the ECSC Treaty and

[14] D. W. Urwin, The Community of Europe. A History of European Integration since 1945, London-New York 1991, pp. 60–68.

[15] J.J. Węc, Spór o kształt ustrojowy, op. cit., pp. 85–86.

[16] For an analysis of the draft Statute of the European Community and the reasons for abandoning the idea of merging the ECSC, the EDC and the EC, cf. ibidem, pp. 75–83.

the EDC Treaty were dominated by France. The French politicians Robert Schuman and René Pleven, supported by the famous French economist Jean Monnet, initiated the establishment of all the three new international organisations: the European Coal and Steel Community, the European Defence Community, and the European Political Community/European Community. It was also the French Government that set the tone for the proceedings of all the three IGCs; subsequently, when it found the EDC Treaty unfavourable for France, it indirectly contributed to its blocking in the French National Assembly that excluded the matter of ratification thereof from the agenda on 30 August 1954. Therefore, it determined the fate of the legally related project to establish the EPC/EC.

2. The 1956–1957 Intergovernmental Conference

Owing to the failure of the project to establish a European Defence Community, and thus also of the project to create a European Community, the Governments of France, the Federal Republic of Germany and Italy abandoned their efforts to push for undertakings leading to the establishment of a Western European federation. At the initiative of the Benelux and West German Governments, it was decided to focus on the implementation of comprehensive economic integration projects. On 4 April 1955, Dutch Foreign Minister Johan Willem Beyen proposed the creation of a common market. The Netherlands, Belgium and Luxembourg drew up a joint memorandum which, together with the West German Government memorandum, was submitted to the Conference of the Foreign Ministers of the ECSC Member States taking place in Messina from 1 to 3 June 1955. At first, however, the course of the IGC did not inspire optimism. The reason was the ambivalent stance of the French delegation. French Foreign Minister Antoine Pinay did not conceal his reserved position on the idea of creating a common market, at the same time suggesting that France would be much more interested in establishing a nuclear community for the civilian use of nuclear energy. Eventually, however, the participants agreed to continue the negotiations based on the two memoranda mentioned above and decided to set up a special committee of experts headed by Belgian Foreign Minister Paul-Henri Spaak. In 1955–1956, under the chairmanship of Spaak, the committee produced a report which became the basis for the subsequent Intergovernmental Conference on the drafting of the Treaties of

Rome. On 29–30 May 1956 in Venice, the Ministers for Foreign Affairs of the ECSC Member States approved the Spaak Report, including the conditions for the establishment of the European Economic Community (EEC) and of the European Atomic Energy Community (Euratom). At the same meeting, the Ministers for Foreign Affairs set up an intergovernmental committee composed of representatives of the Governments of the ECSC Member States. On 26 June 1956, also chaired by Spaak, the Intergovernmental Committee at the level of the Ministers for Foreign Affairs of the ECSC Member States began its deliberations in Brussels, with the aim of drawing up new founding Treaties, i.e. the EEC Treaty and the Euratom Treaty.[17]

During the session of the Intergovernmental Committee, once again, quite significant differences of positions between the various delegations were revealed. Whereas France, because of its advantage in nuclear technology, and Belgium, due to its access to the Congolese uranium deposits, were primarily interested in the creation of a Western European nuclear community, the Federal Republic of Germany, Italy, the Netherlands and Luxembourg insisted on the establishment of an economic community. The Federal Republic of Germany, but also the Benelux countries, could count on the economic benefits of the opening up of the markets of the other Member States to their industries. France, whose agricultural prices were relatively low, was aware of the economic benefits that would follow after the markets of the other Community countries should open up to its agriculture, but it still insisted on the creation of a nuclear community first. The decision to integrate the nuclear energy sector was dictated by the increasing demand of Western European countries for electricity production in the 1950s. Since traditional energy sources were insufficient (coal) or mainly imported (oil and natural gas), nuclear sources were chosen.[18] Another prerequisite for integration in the sector was the fact that the advancement of particular countries in the field of nuclear technology increasingly determined their economic and military potential after World War II. However, as nuclear research was extremely costly and often exceeded the financial capacity of individual states,

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[17] T. Judt, Postwar. A History of Europe since 1945, New York–London 2005, pp. 302–303.

[18] For more on the course of the negotiations from the point of view of the theory of liberal intergovernmental cooperation, cf. A. Moravcsik, The Choice for Europe. Social Purpose and State Power from Messina to Maastricht, London–New York 2003, pp. 86–158.

it seemed much easier to conduct such studies together. That circumstance was of particular importance to France, which, as mentioned above, had already implemented its own programme of research on nuclear weapons. Whereas in 1954 the French Government contributed directly to the failure of the Treaty establishing the EDC because it was strongly opposed to the future surrender of its own nuclear weapons to the control of the organisation, in 1956 it did not conceal its interest in the co-financing of the French nuclear research programme by the other members of the planned Euratom.[19]

Differences of views between the various delegations also concerned the institutional system of the new Communities, in particular the decision-making procedure in the Council of Ministers of the EEC and the powers and manner of electing Members of the Parliamentary Assembly. Finally, instead of the qualified majority decision-making procedure for the Council of Ministers as proposed by the Netherlands, it was decided that unanimity would be the rule for voting during the transitional period, although in some areas the Council of Ministers would be able to take decisions by a qualified majority in the transitional period as well. After the end of the transitional period, unanimous decisions of the Council of Ministers would only concern matters of principle, e.g. the appointment of members of the Commission and the conferral of new powers on the Commission. In the qualified majority decision-making procedure in the Councils of Ministers of the EEC and Euratom, the so-called blocking minority was to play an extremely important role. The constitution of a blocking minority was to be based on three principles. The first principle was that the voting power of each large Member State (France, Germany and Italy) should be equal to that of the Benelux coalition. According to the second one, any large Member State should be able to block decisions in agreement with one medium-sized Member State, namely the Netherlands or Belgium. Finally – and this was the third principle – no large Member State could constitute a blocking minority with a small country (Luxembourg). In exchange for their agreement to these three principles, the Benelux countries, fearing that the decision-making process would be dominated by large Member States, pushed through one of their key demands that the Commission of the two newly created European Communities should have the exclusive right

[19] J.J. Węc, Spór o kształt ustrojowy, op. cit., pp. 84–86.

to take a legislative initiative. The Parliamentary Assembly had no power to adopt the budget, as provided for in the Spaak report; instead, it was only authorised to propose amendments to the draft budget. The proposal from Italian Foreign Minister Gaetano Martino to establish direct elections to the Parliamentary Assembly was also rejected, although the participants agreed that the decision on the matter would be taken unanimously by the Council of Ministers in the future.[20] On 25 March 1957, the Treaties establishing the European Economic Community and the European Atomic Energy Community as well as the Convention on certain institutions common to the European Communities were signed in Rome. All these international agreements entered into force on 1 January 1958.[21] The EEC Treaty and the Euratom Treaty was concluded for an unlimited period. They introduced provisions laying down the ordinary procedure for revising the EEC Treaty and the Euratom Treaty (Article 236 of the EEC Treaty and Article 204 of the Euratom Treaty). These were identical in both Treaties:

> *The government of any Member State or the Commission may submit to the Council [of Ministers] proposals for the revision of this Treaty. If the Council, after consulting the Assembly and, where appropriate, the Commission, expresses an opinion in favour of the calling of a conference of representatives of the Governments of Member States, such conference shall be convened by the President of the Council for the purpose of determining in common agreement the amendments to be made to this Treaty. Such amendments*

[20] W. Loth, op. cit., pp. 113–133.

[21] For an analysis of the provisions of the EEC Treaty and of the Euratom Treaty, cf. J.J. Węc, Spór o kształt ustrojowy, op. cit., pp. 91–113. For more on the proceedings of the Intergovernmental Conference, cf. W. Loth, Die Europäische Gemeinschaft – Entstehung und Entwicklung, [in:] C. Jakobeit, A. Yenal, Gesamteuropa. Analysen, Probleme und Entwicklungsperspektiven, Bonn 1993, pp. 18–33. H. J., Küsters, Die Gründung der Europäischen Wirtschaftsgemeinschaft, Baden-Baden 1982. P. Weilemann, Die Anfänge der Europäischen Atomgemeinschaft. Zur Gründungsgeschichte von Euratom 1955–1957, Baden-Baden 1983.

shall enter into force after being ratified by all Member States in accordance with their respective constitutional rules.[22]

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Whereas international events had a major impact on the convening of the three IGCs in 1950–1952, the 1956–1957 Intergovernmental Conference was mainly organised for internal (intra-Community) reasons, in particular, the failed projects for the creation of a Western European federation in 1954 and the decision of the Governments of the ECSC Member States to limit integration to economic issues. As a result of France's loss of diplomatic initiative in the process of Western European integration after 1954, the proceedings of the Intergovernmental Conference on the establishment of the EEC and Euratom were dominated, quite unexpectedly, by the Netherlands and Belgium, supported by West Germany. The initiative to create a common market was first put forward by Dutch Foreign Minister Beyen, while the deliberations of the IGC were chaired by Belgian Foreign Minister Spaak. His report, providing for the establishment of the EEC and Euratom, was based on a joint memorandum of the Benelux Governments and a memorandum of the West German Government. However, the objective of the newly created European Communities was not sectoral integration, as in the case of the ECSC; rather, they aimed at a comprehensive economic integration, i.e. the common economic market and the common nuclear market. All four Intergovernmental Conferences convened between 1950 and 1957 attested to the high frequency of treaty amendments in the European Communities,

[22] Treaty establishing the European Economic Community (Rome, 25 March 1957), http://www.cvce.eu/obj/treaty_establishing_the_european_economic_community_rome_25_march_1957-en-cca6ba28-0bf3-4ce6-8a76-6b0b3252696e.html [accessed: 19 May 2024]. Treaty establishing the European Coal and Steel Community (Paris, 18 April 1951), http://www.cvce.eu/obj/treaty_establishing_the_european_coal_and_steel_community_paris_18_april_1951_consolidated_version_1992-en-7d316c78-9e5e-48f2-90e9-d9090e3374e2.html [accessed: 19 May 2024].

with the average frequency of such amendments occurring during this period being every 10.5 months.[23]

3. The *ad hoc* Intergovernmental Conference of 1965. The Merger Treaty

On 8 April 1965 in Brussels, after several hours of negotiations, the Governments of the Member States signed the Treaty establishing a Single Council and a Single Commission of the European Communities (the so-called Merger Treaty).[24] The Treaty was a manifestation of a deepening integration in the institutional and budgetary areas. It dealt with three issues: establishing a single Council of Ministers and a single Commission for the three European Communities; merging the administration of the three Communities; and partly consolidating the budgets of the three European Communities – the administrative budget of the ECSC, the EEC budget and the Euratom operating budget. The Council of the European Communities, established by the merger of the Special Council of Ministers of the ECSC, the Council of the EEC and the Council of Euratom, should/were to exercise the powers and jurisdiction conferred on those institutions in accordance with the provisions of the respective Treaties establishing the European Communities and of the Merger Treaty (article 1). The Council of the European Communities should consist of representatives of the Governments of the Member States, one from each country. The office of President of the Council should be held, for a term of six months, by each Member of the Council in turn, in a predetermined order. The order specified in the Treaty in question was as follows: Belgium, the Federal Republic of Germany, France, Italy, Luxembourg and the Netherlands (article 2). The Committee of Permanent Representatives was

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[23] We get this average when we take into account the time between conferences, calculated from the end of one conference to the start of another. Between 1950 and 1957, four intergovernmental conferences were held, with a real gap of 3.5 years between them, not counting the preparatory phases, meaning the conferences took place on average every 0.875 years (1 2.5=3.5:4=0.875), or 10.5 months.

[24] Vertrag zur Einsetzung eines gemeinsamen Rates und einer gemeinsamen Kommission der Europäischen Gemeinschaften (67/443/EWG) (67/27/Euratom), Amtsblatt der Europäischen Gemeinschaften, 152, 13.7.1967, pp. 2–12. For an analysis of the provisions of the Merger Treaty, cf. J.J. Węc, Spór o kształt ustrojowy, op. cit., pp. 145–148.

responsible for preparing the work of the Council and for carrying out the tasks assigned to it by the Council (article 4).[25] The Merger Treaty introduced, *inter alia*, two important changes to the Treaty establishing the ECSC, in the part concerning/addressing the decision-making procedure in the Council of Ministers. Firstly, the Treaty stipulated that abstention by members present in person or represented should not prevent the adoption by the Council of acts, which required unanimity. Secondly, the Treaty included a provision stating that 'for the purposes of applying' those provisions of articles 78, 78b and 78d of the ECSC Treaty which 'require a qualified majority', the votes of the Members of the Council should be weighted in the same way as those of the Members of the existing EEC and Euratom Councils (Article 8(2)).[26]

The Commission of the European Communities was formed by the merger of the High Authority of the ECSC, the EEC Commission and the Euratom Commission. It should exercise the powers and jurisdiction conferred on those institutions in accordance with the provisions of the respective Treaties establishing the European Communities and of the Merger Treaty (article 9). However, the Treaty in question excluded the procedure for appointing members of the Commission of the European Communities previously applicable in the High Authority of the ECSC. The new Commission should consist of nine members, chosen on the grounds of their general competence. The number of members of the Commission could be altered by the Council of the European Communities, acting unanimously. Their status was to be similar to that of members of the EEC and Euratom Commissions. Similarly to the members of the EEC and Euratom Commissions, but unlike the members of the High Authority, they should refrain from any action incompatible with the nature of their duties. Each Member State undertook to respect that principle and not to seek to influence the members of the Commission in the performance of their tasks (article 10(1) and (2)). Members of the Commission were to be appointed by common accord by the Governments of the Member States, for a renewable term of office of four years (article 11). The President and the three Vice-presidents of the Commission should be appointed from among its members for a term of two years in accordance

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[25] Vertrag zur Einsetzung eines gemeinsamen Rates und einer gemeinsamen Kommission der Europäischen Gemeinschaften, op.cit., p. 4.

[26] Ibidem.

with the same procedure as that laid down for the appointment of members of the Commission. Their appointments could be renewed (article 14).[27]

It should be stressed that the Merger Treaty, by merging the hitherto separate institutions and administrations of the three European Communities, brought together their institutional systems, albeit maintaining some differentiation in the powers of the Council of Ministers and of the Commission, depending on whether those institutions were to pursue the objectives and to perform the tasks of the ECSC, of the EEC or of Euratom. On the other hand, however, the respective status of the Council of Ministers or of the Commission of the European Communities was to be similar to that of the Council of Ministers or of the EEC Commission, as laid down in the Treaty of Rome of 25 March 1957. The President, the Vice-presidents and the members of the Commission were to be appointed on the entry into force of the Merger Treaty. The Treaty under review also envisaged that, three years after its entry into force at the latest, the Member States would sign a new international agreement on the merger of the three European Communities. Until the entry into force of the Treaty establishing a Single European Community, but no longer than three years after the appointment of its new members, the Commission of the European Communities was to consist of fourteen members, and only after the expiry of that period again, of nine Commissioners (article 32(1) to (2), article 33). However, the planned unification of the three European Communities was thwarted by subsequent differences of views between the Governments of the Member States on the form and methods of European integration.[28]

The Merger Treaty also established a single budget of the European Communities, replacing the administrative budget of the ECSC, the EEC budget and the Euratom operating budget (article 20). Consequently, for the adoption of the administrative budget of the ECSC, the Treaty also introduced the budgetary procedure previously applicable in the EEC (article 21).[29] However, that consolidation of the budgets of the three European

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[27] Vertrag zur Einsetzung eines gemeinsamen Rates und einer gemeinsamen Kommission der Europäischen Gemeinschaften, op. cit., pp. 5–6.

[28] M. Schweitzer, W. Hummer, op. cit., p. 36. D. Lasok, Law and Institutions of the European Union, London 1994, pp. 14–15.

[29] Vertrag zur Einsetzung eines gemeinsamen Rates und einer gemeinsamen Kommission der Europäischen Gemeinschaften, op. cit., pp. 5, 7, 11.

Communities was not completed as the newly created budget, also called the general budget of the European Communities, covered neither the operating budget of the ECSC for investment, research and structural financial assistance nor the research and investment budget of Euratom. The Treaty under examination was accompanied by a Protocol on the Privileges and Immunities of the European Communities and an agreement on the provisional location of certain institutions and departments of the European Communities.[30] The seat of the Council of Ministers and of the Commission was to be Brussels, although the Council should continue to meet in Luxembourg in April, June and October. The seats of the other Community institutions remained unchanged. The European Parliament was supposed to deliberate in Strasbourg, but parliamentary committee meetings should be held in Luxembourg. The seat of the Court of Justice was Luxembourg. The Merger Treaty as well as the Protocol on the Privileges and Immunities of the European Communities annexed thereto and the agreement on the provisional location of certain institutions and departments of the European Communities entered into force on 1 July 1967.[31]

4. The *ad hoc* Intergovernmental Conferences of 1970 and 1975. The Budgetary Treaties

The next two *ad hoc* Intergovernmental Conferences were convened because of the need to establish a Community system of own resources, which in turn required further consolidation of the budgets of the European Communities and the extension of the budgetary powers of the European Parliament. This implied a revision of the existing Treaties, including the ECSC Treaty, the EEC Treaty, the Euratom Treaty and the Merger Treaty. Therefore, on 22 April 1970 in Luxembourg, the Ministers for Foreign Affairs of the Member States, having regard to article 96 of the ECSC Treaty, article 236 of the EEC Treaty

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[30] Ibidem, pp. 13–16. 67/446/EEC: 67/30/Euratom: Decision of the representatives of the Governments of the Member States on the provisional location of certain institutions and departments of the Communities, 8 April 1965, Official Journal of the European Communities L, 152, 13.7.1967, pp. 18–20.

[31] For more on the legal analysis of the Merger Treaty of 8 April 1965, cf. M. Schweitzer, W. Hummer, op. cit., pp. 45–46. The Merger Treaty was formally annulled by the Treaty of Amsterdam of 2 October 1997.

and article 204 of the Euratom Treaty, after negotiating for several hours, signed a Treaty amending certain budgetary provisions of those Treaties and of the Merger Treaty.

The revision of the Merger Treaty allowed further consolidation of the budgets. The Euratom research and investment budget was covered in the general budget of the European Communities. However, it did not apply to the revenue and expenditure of the Supply Agency and the Joint Undertakings (article 10)[32] and meant that the only components still excluded from the general budget of the European Communities were the operating budget of the ECSC (financing expenditure on research, investment and structural financial assistance), and the above-mentioned part of the Euratom research and investment budget.[33]

On the other hand, the amendment of certain provisions of the ECSC Treaty, of the EEC Treaty and of the Euratom Treaty resulted in the extension of the budgetary powers of the European Parliament. The Luxembourg Treaty laid down the budgetary powers of the European Parliament during the transitional period (i.e. in the financial years preceding the financial year 1975) and in the period from 1 January 1975. During the transitional period, the European Parliament was granted the right to propose modifications to the draft budget, in the expenditure section of the institutions, which extended its existing powers, although the final decision on the adoption of the budget remained with the Council of Ministers (articles 2, 5, 8).[34] From 1 January 1975, the responsibility for budgetary policy was to be shared by the Council and the European Parliament. As before, the Parliament

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[32] Treaty amending certain budgetary provisions of the Treaties establishing the European Communities and of the Treaty establishing a single Council and a single Commission of the European Communities, Luxembourg, 22 April 1970, p. 1, https://www.cvce.eu/en/recherche/unit-content/-/unit/b9fe3d6d-e79c-495e-856d-9729144d2cbd/43ab040d-b32a-4d30-9f29-93c7e45810be/Resources#93a76f6b-b740-40f0-8b30-2c7c25fa625d_en&overlay [accessed: 19 May 2024].

[33] Following the introduction of the reform of the financial system, effective retrospectively from 1 January 1988, the general budget of the European Communities included customs duties on imported industrial goods intended for the ECSC, previously directly allocated to the budgets of the Member States, cf. 88/376/EEC, Euratom: Council Decision of 24 June 1988 on the system of the Communities' own resources, Official Journal of the European Communities L, 185, 15.7.1988, pp. 24–28.

[34] Treaty amending certain budgetary provisions, op. cit., pp. 6–7, 10–11, 14–15.

could propose modifications to the draft budget, acting by a majority of its members. On the other hand, for the first time, it was conferred the power to propose amendments concerning compulsory expenditure, acting by an absolute majority of the votes cast. If, within forty-five days of the draft administrative budget being placed before it, the European Parliament should give its approval, the budget would be regarded as finally adopted. If, within that period, the European Parliament should not amend the draft administrative budget or propose any modifications thereto, the administrative budget would be deemed to be finally adopted. However, if the Parliament should adopt amendments or propose modifications within that period, the draft administrative budget together with the amendments or proposed modifications would be forwarded to the Council. After discussing the draft administrative budget with the Commission and, where appropriate, with the other institutions concerned, the Council could, acting by a qualified majority, modify any of the amendments adopted by the Parliament and pronounce, also by a qualified majority, on the modifications proposed by the latter. The draft administrative budget should be modified on the basis of the proposed modifications accepted by the Council. If, within fifteen days of the draft administrative budget being placed before it, the Council should not modify any of the amendments adopted by the European Parliament and should accept the modifications proposed by the latter, the administrative budget would be deemed to be finally adopted. However, if within that period the Council should modify one or more of the amendments adopted by the Parliament or should not accept the modifications proposed by the latter, the draft administrative budget would again be forwarded to the European Parliament. In such a situation, the Parliament could, within fifteen days, acting by a qualified majority of three fifths of the votes cast, representing a majority of its members, amend or reject the modifications to its amendments made by the Council and adopt the budget accordingly (articles 1, 4, 7).[35]

The Luxembourg Treaty also introduced a new breakdown of budget expenditure for compulsory and non-compulsory expenditure, to apply from 1 January 1975. On this basis, the Council of Ministers obtained a decisive influence on mandatory expenditure, accounting for a vast share of budget expenditure. At the same time, the European Parliament was to

[35] Ibidem, pp. 4–6, 9–13.

have the deciding vote on non-compulsory expenditure. Whereas compulsory expenditure was intended to cover payments and commitments of the European Communities arising from the Treaties establishing them or from legal acts adopted in accordance therewith (e.g. the common agricultural policy), non-compulsory expenditure concerned payments and commitments other than those necessarily resulting from the Treaties or from legal acts issued on the basis thereof (e.g. regional policy, energy policy, environmental protection, scientific research).[36] For non-compulsory expenditure, a maximum rate of increase in relation to the expenditure of the same type to be incurred during the current financial year was to be fixed annually. It should be established by the Commission, taking into account the trend of GNP in the Community, the average variation in the budgets of the Member States, and the trend of the cost of living during the preceding financial year. If the actual rate of increase in non-compulsory expenditure, as adopted by the Council in the draft budget, should be over half the maximum rate, the Parliament could, in the exercise of its powers to amend the draft budget, further increase the total amount of such non-compulsory expenditure to a limit not exceeding half the maximum rate. If, in exceptional cases, the Parliament, the Council or the Commission should consider that the activities of the European Communities should require exceeding the rate determined according to the above-mentioned procedure, another rate could be fixed by agreement between the Council, acting by a qualified majority, and the Parliament, acting by a majority of its members and three fifths of the votes cast (articles 1, 4, 7).[37] The decisive influence of the European Parliament on the amount of non-compulsory expenditure was also confirmed by the Court of Justice in its judgment of 3 July 1986, stating that if the Council of Ministers and the European Parliament should be unable to agree on a new maximum rate of increase, and the European Commission, the Council of Ministers and the European Parliament should previously agree that the maximum rate of increase in non-compulsory expenditure as set by the Commission was not

[36] T. Oppermann, op. cit., pp. 88–89.
[37] Treaty amending certain budgetary provisions, op. cit., pp. 4–6, 9–13.

sufficient for the proper functioning of the Communities during the financial year in question, the budgetary procedure could not be considered closed.[38]

A further extension of budgetary powers took place at the *ad hoc* Intergovernmental Conference of 1975. Already at the meeting held in Paris on 19–20 October 1972, the Heads of State or Government adopted a declaration announcing the appropriate measures to be taken in this direction, without waiting for direct elections to the European Parliament. Subsequently, on 22 July 1975 in Brussels, the Ministers for Foreign Affairs of the Member States, having regard to article 96 of the ECSC Treaty, article 236 of the EEC Treaty and article 204 of the Euratom Treaty, signed another Treaty amending certain budgetary provisions of those Treaties and of the Merger Treaty. It confirmed the provisions of the Luxembourg Treaty of 22 April 1970 concerning the budgetary powers of the European Parliament and the division of budgetary expenditure into compulsory and non-compulsory items. On the other hand, however, it conferred entirely new powers on the European Parliament in the budgetary procedure, namely the possibility of rejecting, for important reasons, acting by a majority of its members and by a qualified majority of two thirds of the votes cast, the entire draft budget and requesting that a new draft be submitted to it (articles 2, 12, 20).[39] The existing provisions of the Treaty of Luxembourg of 22 April 1970 concerning the right of the European Parliament to exercise control over the implementation of the budget were also changed. That was related to the establishment of the Court of Auditors. Pursuant to the new provisions, the Parliament, acting on a recommendation from the Council of Ministers which should act by a qualified majority, was to give a discharge to the Commission of the European Communities in respect of the implementation of the budget. To this end, the Council and the Parliament in turn should examine the accounts and the

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[38] Judgment of the Court of 3 July 1986, Case 34/86 – Council of the European Communities v. European Parliament. Budgetary procedure: power of the European Parliament to increase non-compulsory expenditure, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61986CJ0034 [accessed: 19 May 2024].

[39] Treaty amending certain financial provisions of the Treaties establishing the European Communities and of the Treaty establishing a Single Council and a Single Commission of the European Communities, Brussels, 22 July 1975, pp. 4–7, 12–14, 18–20, https://www.cvce.eu/obj/treaty_amending_certain_financial_provisions_22_july_1975-en-bd96621d-f5e8-4b9f-9785-c5bd0f0cfed4.html [accessed: 19 May 2024].

financial statement of the Commission, showing the Community's liabilities and assets, and the annual report by the Court of Auditors (articles 9, 17, 25). However, as before, the giving or refusing to give a discharge had no legal effect, only serving as a warning signal for the Commission.[40]

The Brussels Treaty also established the Court of Auditors, whose powers of audit extended to all the three European Communities. The members of the Court of Auditors, one from each country, were to be appointed by the Council of Ministers, acting unanimously after consulting the European Parliament. Their term of office of six years was renewable. They should elect their President for a renewable term of three years. The members of the Court of Auditors should be elected from among persons who belonged or had belonged in their respective countries to external audit bodies or who were especially qualified for the office. Their independence must be beyond doubt. They must be fully independent in the performance of their functions in the general interest of the Community. In the performance of their duties, they must neither seek nor take instructions from any Government or from any other body. They should refrain from any action incompatible with their duties. Their independence was also guaranteed by the provisions of the Protocol on the Privileges and Immunities of the European Communities applicable to the judges of the Court of Justice, also extending to the members of the Court of Auditors. Therefore, the members of the Court of Auditors were European officials. A member could be deprived of their office if the Court of Justice, at the request of the Court of Auditors, should find that they no longer fulfilled the requisite conditions or met the obligations arising from their office (articles 7, 15, 23).[41] The Court of Auditors began its activity on 18 October 1977, by decision of the Council of Ministers of the European Communities. Until the entry into force of the Maastricht Treaty on 1 November 1993, it was treated as an advisory body. Under the Treaty of Maastricht, it became one of the institutions of the European Union.[42]

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[40] Ibidem, pp. 11, 17, 24.

[41] Treaty amending certain financial provisions, op. cit., pp. 8–9, 15–16, 21–23.

[42] For an analysis of the provisions of the Budgetary Treaties, cf. J.J. Węc, Spór o kształt ustrojowy, op. cit., pp. 151–161.

The *ad hoc* Intergovernmental Conferences of 1965, 1970 and 1975 were the first IGCs to revision the Treaties establishing the European Communities because of the deepening process of economic integration and the consequent need for necessary adjustments. These included the consolidation of the Community institutions, of the Community administration and of the budget of the European Communities, and the conferral of budgetary powers on the European Parliament in view of the need to establish a Community system of own resources. In this sense, the main reason for convening these Intergovernmental Conferences was the intra-Community situation.

5. The 1985 Intergovernmental Conference

5.1. The preparatory phase

From 20 October 1972, when the Heads of State or Government of the European Communities adopted in Paris a declaration calling for the transformation of the whole complex of the Member States' relations into a European Union by the end of 1980, there was a debate in both the Community institutions and the Member States on the establishment of a new international organisation. The period 1975–1984 saw the preparation of four political documents whose authors expressed, in a more or less unequivocal way, the necessity of establishing the European Union. Those were as follows: the 1975 Leo Tindemans Report; the 1981 draft European Act by Hans-Dietrich Genscher and Emilio Colombo; the 1983 Stuttgart Declaration of the European Council (or the Solemn Declaration on European Union); and the 1984 draft Treaty on European Union by Altiero Spinelli. However, a milestone towards the creation of the European Union was the Intergovernmental Conference held in 1985, as its new amending Treaty, called the Single European Act, was the first legally binding document.

On 25–26 June 1984, the Fontainebleau European Council decided to set up two separate committees, composed of personal representatives of the Heads of State or Government. One of them, chaired by Pietro Adonnino (Italy), dealt with broadly understood issues of European identity. Due to the substantive scope of its activity, it was commonly referred to as the Committee for a People's Europe. The other committee, headed by James Dooge (Ireland), was entrusted with institutional matters and the revision

of the Treaties establishing the European Communities.[43] The preliminary reports of the two Committees were submitted to the Brussels European Council (29–30 March 1985), whereas the final reports were presented to the Milan European Council (28–29 June 1985).[44] However, the discussion of the participants in the latter summit focused on the issue of a possible revision of the ECSC Treaty, of the EEC Treaty and of the Euratom Treaty. As many as four documents were then presented to the European Council: the Dooge Report recommending the reform of the European Communities under a new international treaty; the draft Treaty establishing the European Union, called the Spinelli draft or the Spinelli plan;[45] the UK draft on the reform of European Political Cooperation;[46] and, submitted at the last minute, the joint Franco–West German draft Treaty on European Union. The last document contained various proposals for reforming European Political Cooperation and its gradual transformation into a 'European foreign policy'.[47]

The discussion on the documents submitted to the Milan European Council revealed significant differences of views between particular Government delegations. Whereas the representatives of the Federal Republic of Germany, France, Italy, Ireland, the Benelux countries and of the Commission of the European Communities were in favour of an intergovernmental conference to draw up a Treaty on European Union, the

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43 AdG, 1984, p. 27813 et seq.

44 Conseil européen des 29/30 mars 1985 à Bruxelles, p. 3 https://www.consilium.europa.eu/media/20650/1985_mars_-_bruxelles__fr_.pdf [accessed: 19 May 2024]. Milan European Council (28–29 June 1985). Presidency conclusions, p. 1, https://www.consilium.europa.eu/ media/20646/1985_june_-_milan__eng_.pdf [accessed: 19 May 2024].

45 For more on the subject, cf. Europäisches Parlament. Entwurf eines Vertrages zur Gründung der Europäischen Union vom 14. Februar 1984, [in:] Werner Weidenfeld (Hrsg.), Wie Europa verfaßt sein soll - Materialien zur Politischen Union, Gütersloh 1991, pp. 354–385. EP 1979–1984. Resolution on the draft treaty establishing the European Union, Official Journal of the European Communities C, 77, 19.3.1984, p. 53. For more on the subject, cf. R. Corbett, The European Parliament's Role in Closer EU Integration, London 1998, pp. 145–153.

46 European Political Cooperation is a non-treaty body of the European Communities, established in 1970, dealing with the coordination of foreign policies and, from 1981, also with the security policies of the Member States.

47 For the text of the Franco-West German draft Treaty on European Union, cf. AdG, 1985, p. 28900 et seq.

delegates of the United Kingdom, Denmark and Greece opposed it, proposing only a slight modification of the Treaties establishing the European Communities, preferably already at the Milan Summit. German Chancellor Helmut Kohl argued that the establishment of the European Union was the most important current challenge facing the European Communities. He stressed, in particular, the need to make changes to the institutional system, consisting in limiting the right of veto in the decision-making procedure in the Council of the European Communities and in extending the powers of the European Parliament and the Commission of the European Communities. He also called for a reform of European Political Cooperation, allowing at least closer coordination of foreign policy and the establishment of a permanent secretariat. Minister for Foreign Affairs Hans-Dietrich Genscher warned that postponing the institutional reforms, especially in the decision-making procedure in the Council, could lead the European Communities to a 'complete paralysis' in view of the prospect of the accession of two new Member States, namely Spain and Portugal. The need for the three aforementioned changes to the institutional system was also fully supported by French President François Mitterrand. Shortly before the European Council meeting, he spoke in favour of deepening European integration in the political, economic and technological areas. Commission President Jacques Delors was also deeply convinced of the need to convene an Intergovernmental Conference. He expressed the opinion that such a conference should deal with a fundamental reform of the European Communities, covering both institutional matters, in particular the decision-making procedure in the Council, and the issue of extending the activities of the European Communities to new areas, e.g. security policy, culture and education. British Prime Minister Margaret Thatcher also advocated significant limitation of the right of veto in the decision-making procedure in the Council, the establishment of a secretariat for European Political Cooperation, the lifting of restrictions on the Community market, and the strengthening of technological cooperation, but she categorically opposed the revision of the Treaties establishing the European Communities and the convening of an Intergovernmental Conference to that end. The British Prime Minister argued that the existing Treaties had not yet been fully used in operating terms. The delegations of Denmark and Greece shared the British Government's position, making it clear that they also

supported its opposition to the intention of convening an Intergovernmental Conference.[48]

5.2. Proceedings of the IGC

Since most Member States opted for the revision of the Treaties establishing the European Communities, the Council of the European Communities decided to convene an Intergovernmental Conference, at the same time entrusting it with the task of preparing and drawing up a new international agreement providing for two types of changes in the existing activities of the European Communities. Firstly, the IGC was supposed to deal with the reform of European Political Cooperation on the basis of the Franco–West German and UK drafts; secondly, it should address the need for changes in the institutional system, in particular the simplification of the decision-making procedure in the Council of Ministers, the strengthening of the powers of the European Parliament and the Commission, and the extension of the integration process to new policies, in line with the proposals contained in the Dooge and Adonnino Reports as well as in the Commission's draft. It was symptomatic, however, that the Spinelli draft, prepared by an Italian Member of the European Parliament and envisaging the most far-reaching reform of the European Communities, had not been accepted by the Italian Presidency. The outcome of the work of the IGC was to be presented to the Luxembourg European Council in December 1985. But the conclusions of the Milan European Council left no doubt that the decisions taken there postponed indefinitely the date of the creation of the European Union.[49]

The IGC was conducted under the general authority of the Heads of State or Government, supported by the Ministers for Foreign Affairs. The meetings of the latter were prepared by lower level representatives of the Governments of the Member States. The IGC meetings were held intermittently from

[48] For more on the subject, cf. R. Corbett, F. Jacobs, M. Shackleton, The European Parliament, London 2000, pp. 296–299.

[49] Milan European Council (28–29 June 1985). Presidency conclusions, p. 1, https://www.consilium.europa.eu/ media/20646/1985_june_-_milan__eng_.pdf [accessed: 19 May 2024]. For the proceedings of the meeting, cf. AdG, 1985, p. 28900 et seq.

9 September to 17 December 1985.[50] The outcome of its work was a package of reforms, adopted by the Luxembourg European Council (2–3 December 1985).[51] At the last formal meeting of the Foreign Ministers held on 16–17 December 1985, proposals for the revision of the ECSC Treaty, the EEC Treaty and the Euratom Treaty were codified in the amending Treaty. On 27 January 1986, following amendments by the legal services of the General Secretariat of the Council of the European Communities, the IGC submitted the final version of that international agreement, referred to as the Single European Act. On 17 February 1986 in Luxembourg, the Ministers for Foreign Affairs of the nine Member States of the European Communities signed a Treaty amending and supplementing the ECSC Treaty, the EEC Treaty and the Euratom Treaty. Initially, this agreement was not signed by Denmark, Italy and Greece. As the Danish Parliament demanded its renegotiation, Denmark's Government decided to hold a national referendum. In this situation, Italy and Greece postponed their signing of the amending Treaty, making it dependent on the outcome of the Danish referendum. On 27 February 1986, 56.2% of the eligible voters of Denmark accepted the agreement in question. The following day, the Ministers for Foreign Affairs of Denmark, Italy and Greece, meeting in The Hague, signed the Single European Act (SEA). Due to the constitutional and legal difficulties that emerged during its ratification in West Germany and Ireland, the Single European Act did not enter into force until 1 July 1987.[52]

Eventually, the drafting of the Treaty establishing the European Union was abandoned, but an agreement was reached to sign a Treaty amending the ECSC Treaty, the EEC Treaty and the Euratom Treaty. The Signatory States to the SEA declared that they intended to follow 'the will to continue the work undertaken on the basis of the Treaties establishing the

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[50] For more on the subject, see: R. Corbett, The European Parliament's Role, op.cit., pp. 218–253. R. Corbett, F. Jacobs, M. Shackleton, op. cit., pp. 298–299. A. Moravcsik, Negotiating the Single European Act, [in:] R. O. Keohane, S. Hoffmann (eds.), The New European Community. Decisionmaking and Institutional Change, San Francisco-Oxford 1991, pp. 41–84. A. Moravcsik, The Choice for Europe, op.cit., pp. 314–378.

[51] Luxembourg European Council (2–3 December 1985). Presidency conclusions, pp. 2–3, https://www.consilium.europa.eu/media/20433/1985_december_-_luxembourg__eng_.pdf [accessed: 19 May 2024].

[52] For an analysis of the provisions of the Single European Act, cf. J.J. Węc, Spór o kształt ustrojowy, op. cit., pp. 186–194.

European Communities and to transform relations as a whole among their States into a European Union'[53] on the basis of the European Communities and European Political Cooperation. The Single European Act introduced new rules for the single European market by adding Articles 8a, 8b and 8c to Article 8 of the EEC Treaty and announced its establishment by the end of 1992. It also made minor changes to the institutional system of the European Communities. The SEA strengthened the powers of the European Parliament (the assent and cooperation procedures) and of the Commission of the European Communities (the comitology procedure), extended the scope of the decision-making procedure in the Council of the European Communities to 17 new cases, authorised the establishment of a Court of First Instance and granted Treaty status to the European Council and to European Political Cooperation. It should be stressed, however, that the changes introduced under the Treaty in question were minor as compared to the expectations of the Governments of the Federal Republic of Germany, France, Italy, Ireland and the Benelux countries.

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In this case, most of the Member States of the European Communities were the initiators of the 1985 Intergovernmental Conference. The United Kingdom, Denmark and Greece, opposing it, eventually took part in the IGC. The delegations of the Federal Republic of Germany, France, Italy, Ireland and the Benelux countries proposed a deep reform of the existing Treaties with a view to establishing the European Union. However, opposition from the three above-mentioned countries prevented the implementation of these proposals. Based on the number of diplomatic initiatives submitted during the IGC used as an assessment criterion, the outcome of the IGC was mostly influenced by the Federal Republic of Germany, France, the United Kingdom, Italy and Ireland. The main premises for convening the 1985 Intergovernmental Conference were both international and intra-Community conditions. The international determinants included the economic crisis caused by the collapse of the Bretton Woods monetary

[53] Single European Act, Luxembourg, 17 February 1986, and The Hague, 28 February 1986, Official Journal of the European Communities L 169, 29.6.1987, p. 2.

system (1971–1973) and the so-called oil shock and oil crisis caused by the decisions of the OPEC countries to drastically raise oil prices (1973–1974). These factors contributed not only to the stagflation crisis in the European Communities, but also to the stagnation in the process of economic integration itself, lasting from the mid-1970s to the mid-1980s and mockingly called Eurosclerosis. The intra-Community conditions were as follows: the political debate on the establishment of the European Union taking place in the European Communities between 1972 and 1984; the need to sanction non-treaty changes introduced to the system of the European Communities in the 1970s and the 1980s and to improve the efficiency of the functioning of supranational institutions such as the European Commission and the European Parliament; and the necessity to amend the rules on the European single market. The above-mentioned debate on the creation of the European Union resulted in the adoption of many political documents. Previously, however, there was no legally binding document to set out a roadmap for the establishment of the European Union. The Single European Act was such a document. This new amending Treaty sanctioned non-treaty changes introduced in the European Communities in previous years, giving Treaty status to the European Council existing from 1975 and to the European Political Cooperation functioning from 1970. The SEA strengthened the position of the Commission of the European Communities by granting Treaty status to the so-called comitology, i.e. the procedure for delegating implementing powers to the Commission of the European Communities by the Council of the European Communities, provided for in the EEC Treaty but not respected by the Governments of the Member States before. The Treaty also reinforced the powers of the European Parliament, for the first time conferring on it legislative powers under two new legislative procedures (the assent and cooperation procedures). The SEA introduced amendments to the EEC Treaty, enabling the completion of the constitution of the single European market by adding Articles 8a, 8b and 8c to Article 8 of that Treaty. On the other hand, the Single European Act was a revising Treaty, going much further than the Merger Treaty of 8 April 1965, which was mainly of an institutional-administrative nature, or than the Budgetary Treaties: the Luxembourg Treaty of 22 April 1970 and the Brussels Treaty of 22 July 1975, which only amended the European Communities' financial provisions and the budgetary powers of the European Parliament.

The Intergovernmental Conferences in 1990–1991

1. The preparatory phase

The idea of establishing a European Union did not take real shape until the early 1990s, in the face of the end of the Cold War, the German reunification, as well as of rising differences in the economic development of individual Member States of the European Communities and the increasing asymmetry in the dynamics of economic growth between them and the United States and Japan. The main initiator of deepening integration in the political, military, monetary and economic spheres was French President François Mitterrand. The strategy of the French President primarily aimed at permanently binding the reuniting Germany with the existing integration organisations, which was supposed to counteract a possible increase in German influence in Europe and to guarantee the maintenance of the existing balance of Franco-German interests in the European Communities. Whereas France's political and military superiority had compensated for Germany's economic dominance in the European Communities until 1989, the spectre of reunification between the two German states caused French politicians to worry about disrupting that balance.

The deepening of integration in the political and military spheres was, for Mitterrand, as for de Gaulle in the past, a lever for the strengthening of France's position in the international system. Simultaneously, deeper integration in the monetary and economic areas should serve as an 'insurance policy' against the risks arising from German reunification. The Economic and Monetary Union would bind Germany even more closely to the European Communities, but the country would also bear the largest share of the

financial costs resulting from its creation. In these circumstances, from the end of 1989, the French Government, previously very reluctant to embrace the idea, gradually became one of the most important advocates of the establishment of the European Union and of the Economic and Monetary Union. The German Government, a major supporter of deepening the integration process, agreed to the creation of the European Union and of the Economic and Monetary Union, hoping to further strengthen its political and economic position within the European Communities.[1]

The signing of the Single European Act of 17/28 February 1986, containing provisions for the completion of the internal market by the end of 1992, including the liberalisation of capital movements, naturally boosted efforts of the Member States of the European Communities towards the establishment of Economic and Monetary Union. The free movement of capital within the European Communities posed a real threat to the stability of exchange rates. The volatility of the rates could, in turn, hinder the free movement of goods and services. From this point of view, the establishment of the Economic and Monetary Union corresponded not only to the interests of France and Germany, but also to the expectations of the other Member States of the European Communities. The idea was supported by the Benelux countries, already forming the Economic Union from 1 November 1960. On the other hand, economically weaker Member States such as Greece, Portugal, Spain and Ireland expected positive effects of deepening integration on their economies. Common to all Member States was the desire to break the dominant position of the German central bank in the European Monetary System, which until now had been expressed, among other things, through the need for the central banks of the other countries to adapt to the restrictive monetary policy of the German central bank. However, whereas Germany could afford to implement such a policy, for reasons such as the strong position of the brand and the low inflation rate that had been enjoyed for many years, it often did not correspond to the economic growth policies pursued by other countries. For most of them, the establishment of the Economic and Monetary Union

[1] For more on the subject, cf. S. Hoffmann, French Dilemmas and Strategies in the New Europe, [in:] R. O. Keohane, J. S. Nye, S. Hoffmann (eds.), After the Cold War. International Institutions and State Strategies in Europe 1989–1991, Cambridge 1994, pp. 127–147. T. Judt, Grosse Illusion Europa. Gefahren und Herausforderungen einer Idee, München-Wien 1996.

and, in particular, the creation of the ECB would therefore be a pathway towards common decision-making in monetary policy. Additionally, in the second half of the 1980s, the Member States of the European Communities observed with concern the increasing distance between them and the US and Japan in terms of economic growth dynamics. In 1982–1985, the growth rate of the European Communities' GDP was two thirds that of the United States and less than half that recorded in Japan. The European Communities accounted for a declining proportion of world high-tech exports, whereas the shares of the USA and Japan had increased. In addition, from the mid-1980s, the competitiveness of Japan, South Korea, Taiwan, Hong Kong, Singapore and Malaysia with regard to cutting-edge technology was on the rise. This had led to a shift in the centre of gravity of trade flows from the US and Western Europe towards the US and South-East Asia. In 1984, the value of the United States' trade with South Asian countries exceeded that recorded in trade with Western Europe for the first time. Most of the Member States of the European Communities, especially France and the Federal Republic of Germany, then believed that economic and monetary unification could lead to the elimination of differences in economic development between the Member States and of the asymmetry in economic growth dynamics between them and the United States and Japan.

When the Hanover European Council of 27–28 June 1988 decided to re-examine the possibility of creating an Economic and Monetary Union, hardly anyone expected that a breakthrough in such a controversial matter could take place quickly. The divergence of views on the subject was still very clear among the Heads of State or Government; for this reason, perhaps, it would be better to avoid an immediate settlement. Whereas German Chancellor Helmut Kohl spoke at the Hanover European Council meeting in favour of a full Economic and Monetary Union, the French Spokesperson of the President in office, Hubert Védrine, did not conceal that France would be interested in creating a Monetary Union first. However, the biggest doubts about the need for establishing the Economic and Monetary Union were expressed by British Prime Minister Margaret Thatcher. The European Council meeting concluded with the setting up of a special committee composed of the presidents or governors of the central banks of the Member States and experts. It was chaired by Jacques Delors, President of the Commission of the European Communities. The Committee aimed to prepare, within one year, a report

on the conditions and possibilities for the establishment of Economic and Monetary Union.[2]

The work on the report was completed within the time limit set and Delors was able to present its assumptions and conclusions to the Heads of State or Government at the Madrid European Council meeting held on 26–27 June 1989.[3] The report contained a three-stage plan for the creation of Economic and Monetary Union. Its realisation was to begin on 1 July 1990, with the entry into force of the provisions of the Single European Act concerning the full liberalisation of capital movements. At the first stage of the implementation of the plan, Delors assumed that all the Member States would join the European Monetary System and that the coordination of their economic and monetary policies would be strengthened within the existing Community institutions and bodies. On the other hand, preparations were also to be made for convening an Intergovernmental Conference on the revision of the EEC Treaty in connection with the planned creation of the Economic and Monetary Union. After the entry into force of the resulting amending Treaty, the second stage of EMU implementation should begin. As envisaged by Delors, the main objective of this stage would be to create the European System of Central Banks (ESCB) as a new supranational institution for the conduct of monetary policy. However, it should initially take over only some of the powers of the Economic and Financial Affairs Council (ECOFIN) and of the Committee of the Governors of the Central Banks. At the third stage, the exchange rates should be fixed irrevocably and full responsibility for monetary policy should be transferred to the European System of Central Banks, which would mean the Member States' giving up their sovereign powers in that area. Preparations for the creation of a single European currency would begin as well.[4]

A prerequisite for the proper functioning of a monetary union was the establishment of an economic union, which Delors understood as a new phase of integration, comprising four components. These were as follows: the

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[2] Hanover European Council (27–28 June 1988). Presidency conclusions, pp. 1–3, http://aei.pitt.edu/1422/1/Hanover_june_1988.pdf [accessed: 19 May 2024].

[3] Madrid European Council (26–27 June 1989). Presidency conclusions, pp. 1–3, https://www.consilium.europa.eu/media/20589/1989_june_-_madrid__eng_.pdf [accessed: 19 May 2024].

[4] AdG, 1989, p. 33465 et seq.

internal market; the communitarisation of competition policy enabling the internal market to function properly; the coordination of macroeconomic policy to link monetary policy with fiscal policy with a view to ensuring internal economic equilibrium and price stability; and a structural policy to compensate for differences in economic and social development in the European Communities.[5] Therefore, the Delors Plan advocated the parallel implementation of monetary and economic unions, treating them almost as two sides of the same coin. It must be emphasised, however, that it did not provide for the communitarisation of fiscal policies pursued by the Member States. Convinced that the differences of opinion between the delegations on Economic and Monetary Union were still too significant, Delors gave no specific deadlines or time limits for the implementation of the second and third stages of his plan.[6]

Although the Delors Plan was approved by the majority of the delegations, it simultaneously quite strongly divided the participants of the Madrid European Council meeting. Whereas the representatives of the German Government spoke enthusiastically about it, the UK delegates did not hide their disappointment. Chancellor Kohl clearly declared that Germany's Federal Government would proceed with the implementation of the Economic and Monetary Union project. He also spoke in favour of convening an Intergovernmental Conference on the revision of the EEC Treaty in connection with the need to transfer to the European System of Central Banks the sovereign rights of the Member States in monetary policy. However, the idea of convening such a conference raised serious doubts and reservations among members of the UK and Dutch delegations. British Prime Minister Thatcher strongly opposed the establishment of the Economic and Monetary Union, fearing that the UK would relinquish its sovereign powers in monetary policy. She also rejected the possibility of revising the EEC Treaty, arguing that the objectives set out in the Delors plan could be achieved without giving up national sovereignty in the monetary policy area. On the other hand, Thatcher

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[5] Ibidem. Council Regulation (EEC) No 2052/88 of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments, Official Journal of the European Communities L, 185, 15.7.1988, pp. 9–20.

[6] For more on the proceedings of the meeting, cf. AdG, 1989, p. 33465 et seq.

agreed to the participation of the United Kingdom in the first stage of the process of establishing Economic and Monetary Union, albeit on condition that the internal market would be created in advance, capital flows would be fully liberalised and the inflation rate in her country would fall to a level comparable to those of other Member States. What the Prime Minister of the United Kingdom perhaps did not want to say, however, was very clearly expressed by British Foreign Secretary Geoffrey Howe. Critical of the supranational demands of the Delors Plan, he proposed that the Member States proceed to the first stage of the process of the constitution of Economic and Monetary Union, but at the same time abandon, for an indefinite period, the implementation of the provisions concerning the other two stages. In his opinion, making 'plans for eternity' should not occupy the attention of the participants in the European Council meeting.[7]

Eventually, the parties agreed to adopt a final statement, but at the price of a compromise with the UK. In that statement, the European Council approved the Delors report and considered it a good basis for further work. At the same time, the European Council stressed that the implementation of its provisions would have to take into account the interrelations and parallelism between economic and monetary policies, respect the principle of subsidiarity and allow for the specific situations of some Member States. The European Council also decided that the first stage of the realisation of Economic and Monetary Union should start on 1 July 1990, as proposed by Delors. Shortly thereafter, although the statement provided no specific deadline or time limit, an Intergovernmental Conference would be convened to determine the next steps in the implementation of the project.[8]

France, holding the Presidency of the Council of Ministers in the second half of 1989, decided to take over the diplomatic initiative. At an informal meeting of the European Council in Paris (18 November 1989), France called on the Governments of the Member States to convene another Intergovernmental Conference as soon as possible.[9] However, the intentions of the French Government then differed from those of the West German authorities. A few days before the Strasbourg European Council (8–9 December 1989), in a letter

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7 Ibidem.

8 Madrid European Council (26–27 June 1989), op. cit., pp. 1–5.

9 AdG, 1989, p. 33976 et seq.

to Mitterrand, Chancellor Kohl warned against the intention to convene an IGC too early and made his Government's consent to the communitarisation of the monetary policies of the Member States conditional on a prior extension of the powers of the European Parliament. Apparently, Kohl was convinced that the most important task of the German Government in foreign policy should be the reunification of Germany. Kohl's rather surprising reaction was seen in Paris as an attempt by the Federal Government to impose preconditions for the planned IGC, and even as a readiness to revise, perhaps together with the UK, the Economic and Monetary Union project. This led to temporary disagreements between the Governments of the two countries.[10]

However, shortly before the start of the Strasbourg European Council meeting, the German Government accepted Mitterrand's proposed deadline for convening an Intergovernmental Conference at the end of 1990, which greatly facilitated the subsequent compromise. Eventually, the meeting agreed that the opening of the IGC would take place 'before the end' of 1990, but formal negotiations would not start until the spring of 1991.The only delegation to oppose the convening of the IGC was again the United Kingdom, although it could be expected that as soon as the discussions began, the UK delegation would nevertheless sit down at the negotiating table.[11] In a declaration adopted by the Strasbourg European Council on developments in Central and Eastern Europe, the Heads of State or Government stated that they sought 'the strengthening of the state of peace in Europe in which the German people will regain its unity through free self-determination. This process should take place peacefully and democratically, in full respect of the relevant agreements and treaties and of all the principles defined in the Helsinki Final Act, in the context of dialogue and East–West cooperation. It also has to be placed in the perspective of European integration'.[12]

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[10] Ibidem, p. 34023 et seq.

[11] A few years earlier, a similar tactic had been adopted by the Margaret Thatcher Government in relation to the Intergovernmental Conference on the preparation of the Single European Act, first opposing the opening of negotiations and then delegating its representatives to participate in them, cf. ibidem.

[12] This last sentence was introduced into the declaration under distinct pressure from French President Mitterrand. Cf. AdG, 1989, p. 34023 et seq. Strasbourg European Council (8–9 December 1989). Declaration on Central and Eastern Europe, p. 15, https://www.consilium.europa.eu/media/20580/1989_december_-_strasbourg__eng_.pdf [accessed: 18 May 2024].

Further developments were determined by the conclusions adopted at two European Council meetings, held in Dublin (25–26 June 1990) and in Rome (14–15 December 1990). At the former meeting, the European Council accepted the joint initiative of French President Mitterrand and German Chancellor Kohl, tabled in April 1990, to convene two separate Intergovernmental Conferences. One of them was to be devoted to the establishment of a Political Union, the other – to the establishment of an Economic and Monetary Union.[13] Six months later, at its meeting in Rome, the European Council adopted guidelines for subsequent negotiations. Thus, the deliberations of the two IGCs would take place in parallel, whereas their results would be codified in a single international agreement, to be ratified 'before the end of 1992'.[14] On 15 December 1990, the second day of the Rome European Council meeting, the two IGCs were officially opened. However, the actual negotiations started in Brussels in early 1991. The work proceeded under the auspices of two presidencies: the Luxembourg Presidency (until June 1991) and the Dutch Presidency (until December 1991).[15] The overall authority over the deliberations of the IGCs was exercised by the Heads of State or Government, assisted by the Foreign Ministers of the Member States. The meetings of the latter were prepared by lower level representatives of the Governments of the Member States. A representative of the Commission of the European Communities and a representative of the European Parliament as an observer also took part in the proceedings.

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[13] Dublin European Concil (25–26 June 1990). Presidency conclusions, pp. 4–6, https://www.consilium.europa.eu/media/20562/1990_june_-_dublin__eng_.pdf [accessed: 19 May 2024]. G. Brandstetter, Chronologisches Lexikon der europäischen Integration 1945–1995, Wien 1996, p. 158.

[14] Rome European Council (14–15 December 1990). Presidency conclusions, pp. 9–10, https://www.europarl.europa.eu/summits/rome2/rd1_en.pdf [accessed: 19 May 2024].

[15] For more on the proceedings of the Intergovernmental Conferences from the point of view of the theory of liberal intergovernmental cooperation, cf. A. Moravcsik, The Choice for Europe, op. cit., pp. 379–471.

2. Proceedings of the Intergovernmental Conference on Political Union

During the Luxembourg Presidency, a total of five meetings of the Intergovernmental Conference on the establishment of a Political Union were held (4 February, 4 March, 15–16 April, 13–15 May, and 17–18 June 1991). A similar number of meetings were organised by the Dutch Presidency, with the last two being closed ones, i.e. the so-called conclaves (30 September, 28 October, 4 November, 12–13 November, and 3–4 December 1991).[16] On 15–16 April 1991, Luxembourg Foreign Minister Jacques F. Poos presented a note containing a draft Treaty on Political Union, which would consist of three pillars. The first pillar would include the European Community and the Economic and Monetary Union, and would be based essentially on supranational cooperation. The second and third pillars would comprise, respectively, the common foreign and security policy and justice and home affairs, subject to intergovernmental cooperation.[17] The Luxembourg draft provoked criticism from the Community institutions and from the Governments of some Member States. The three-pillar structure, the reform of the institutional system as well as the common foreign and security policy of the future Political Union raised the most controversy. On 18 April 1991, the European Parliament adopted a resolution calling on the participants in the IGC to transform the European Communities into a single Political Union, based on a federal system rather than on a three-pillar structure, and demanded for itself the right to co-decide in the legislative process. Less than a month later, during the meeting of the interinstitutional conference in Strasbourg (15 May 1991), the European Parliament's demands were supported by the Commission. Eight of the twelve Foreign Ministers of the Member States gathered at the informal meeting in Dresden (2–3 June 1991) also spoke against the three-pillar structure of the future Political Union. At the same time, they called on the Luxembourg Presidency to prepare a new draft Treaty providing for a unified system structure for the future Political Union.[18]

Very important differences of views between the Governments of the individual Member States also concerned the common foreign and security

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16 G. Brandstetter, op. cit., pp. 173–189.
17 Ibidem, p. 176.
18 Ibidem, pp. 176–177.

policy of the European Union. Whereas the United Kingdom, Denmark, Portugal and Greece agreed to the establishment of the second pillar based solely on intergovernmental cooperation, Germany, France, the Benelux countries and Italy, supported by the European Commission, advocated greater autonomy and, in the long term, considerable independence from the Governments of the Member States. The opinions of individual delegations on possible cooperation in defence policy were also divergent. Germany, France, Belgium, Luxembourg and Spain were in favour of establishing a common defence policy for the European Union in the future. On the other hand, the United Kingdom, Portugal and the Netherlands were very cautious about those proposals, fearing that it could weaken NATO's role in Europe.[19]

Following critical assessments of the proposals contained in the note of 15 April 1991, the Luxembourg Presidency submitted a second draft Treaty on Political Union at its fifth meeting of the IGC in Brussels on 17–18 June of the same year. It maintained the three-pillar system model of the Union.[20] This draft was approved as a basis for further negotiations by the Luxembourg European Council on 28–29 June 1991. In its final statement, the European Council set out four principles on which the future Political Union should be based. These were as follows: (1) full maintenance of the *acquis communautaire* and development thereof; (2) the creation of a single institutional framework; (3) deepening and extending of the process of European integration to new policies; (4) compliance with the principle of subsidiarity and the principle of economic and social cohesion. The European Council also expressed its approval for strengthening the position of the European Parliament in the institutional system by extending its monitoring powers (influence on the appointment of members of the College of the Commission) and legislative powers (the co-decision procedure). A provisional compromise was also reached on the defence policy of the future Political Union. The participants agreed that gradual reinforcement of a European defence identity and of the European Communities' independence in this area should be an important contribution to the strengthening of the NATO Alliance. They also expressed

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[19] For more on the subject, cf. G. Edwards, S. Nuttall, Common Foreign and Security Policy, [in:] A. Duff, J. Pinder, R. Pryce (eds.), Maastricht and Beyond. Building the European Union, London–New York 1995, pp. 84–103.

[20] G. Brandstetter, op. cit., pp. 178–179.

the hope that the IGC would be able to finalise its work before the European Council's December summit in Maastricht.[21]

However, the opinions of individual delegations, formulated immediately after the meeting, left no room for the false comfort that reaching a compromise would be easy. While President Mitterrand made it no secret that the most important issue for France was the establishment of a common foreign and security policy, Chancellor Kohl strongly insisted on the need for a federal system of the future Union, arguing that a Europe without federal structures and the principle of subsidiarity would certainly have no future.[22] British Prime Minister John Major was sceptical about the project of creating a Political Union, although he also hinted that further negotiations of the Intergovernmental Conference would probably create opportunities to steer clear of the existing political reefs.[23] The results of the Luxembourg European Council were also referred to by the European Parliament; in its two resolutions, adopted on 10 July and 10 October 1991, the EP made its consent to the adoption of the new Treaty conditional on its acquiring the right of co-decision in the legislative process, of having influence on appointing members of the College of the Commission, the right to consent to the revision of the Treaties, as well as on extending the scope of the qualified majority decision-making procedure in the Council of Ministers.[24]

In accordance with the conclusions of the European Council, on 24 September 1991 the Dutch Presidency submitted a new draft Treaty entitled 'Towards European Union'. It differed on two points from both the earlier Luxembourg drafts. The Political Union was to be based on a unified structure, including the European Community, external relations

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[21] Luxembourg European Council (28–29 June 1991). Presidency conclusions, pp. 2–6, https://www.consilium.europa.eu/media/20528/1991_june_-_luxembourg__eng_.pdf Luxembourg European Council [accessed: 19 May 2024].

[22] AdG, 1991, p. 35789 et seq.

[23] Ibidem. A similar position had been taken before by the former British Prime Minister Margaret Thatcher, who at the special meeting of the European Council in Dublin (28 April 1990) categorically opposed the idea of creating a Union, arguing that it could lead to the creation of a unitary state, a solution completely unacceptable to the United Kingdom.

[24] The same demands for the IGC, plus the requirement to establish Union citizenship, were formulated in a resolution of the European Parliament adopted on 10 October 1991. G. Brandstetter, op. cit., pp. 180, 184.

and internal security. In addition, the position of the European Parliament in the institutional system should be considerably strengthened, in accordance with the expectations expressed in its resolution of 10 July 1991. However, the Dutch draft met with no enthusiasm, especially among opponents of federal solutions. On 30 September 1991 in Brussels, the Ministers for Foreign Affairs of the 12 Member States of the European Communities rejected the Dutch draft envisaging the establishment of a unified international organisation, called a Political Union, by a majority of seven to five votes. At the same time, they recommended that the other Luxembourg draft remain the basis for further negotiations. This decision was extremely important to the fate of European integration. The reason for the departure from the Dresden guidelines of 3 June 1991 was a turn in the position of the German Government which, under the influence of France, withdrew from supporting the Political Union project.[25] Those voting against the proposal included the delegations of France, Germany, Luxembourg, the United Kingdom, Denmark, Greece and Portugal. The Foreign Ministers of the Netherlands, Belgium, Italy, Spain and Ireland voted in favour of the Political Union project.[26] [CORRECT]Ultimately, it was decided to establish, in place of the planned Political Union, a European Union as a non-uniform international organisation composed of three pillars and two legal orders, whereby the first pillar would be governed by Community law and the second and third pillars would be based on public international law. The European Union was intended as a *sui generis* international organisation, devoid of legal personality, characterised by significant incoherence. The decision made by the above-mentioned seven Member States also implied that the Economic and Monetary Union would have no mechanism to protect it

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[25] G. Brandstetter, op. cit., pp. 180, 183–184.

[26] The Government of the unified Germany gave up the aspiration to establish a Political Union not only because half of the member states were strongly opposed to it, but also because after German reunification on 3 October 1990 one of the basic axioms of European politics, in force since the days of Chancellor Konrad Adenauer (1949–1963), i.e. that the consent of other European states to unification would be much easier if it should take place within the framework of a European federation, became obsolete, cf. J.J. Węc, CDU/CSU wobec polityki niemieckiej Republiki Federalnej Niemiec [CDU/CSU and the policies pursued by the Federal Republic of Germany], Kraków 2000, pp. 89–94.

against tensions between monetary and fiscal policies, with thus no guarantee of stable functioning.

Following the failed attempt in Brussels, on 8 November 1991 the Dutch Presidency submitted its second draft on the creation of the European Union, based essentially on the Luxembourg draft of 17 June 1991. This document was critically received by the representatives of the Commission of the European Communities and of the European Parliament. As argued by the Commission representatives, the adoption of the three-pillar model could even lead to the disintegration of the European Union in the future.[27] The President of the European Parliament, Enrique Crespo, spoke with extremely sharp criticism of the Dutch Presidency's draft at the Conclave of Foreign Ministers in Noordwijk (12–13 November 1991). He described the draft as completely insufficient and devoid of any vision for the future. Crespo argued that the Union's three-pillar model was inconsistent with the Dresden recommendations of Foreign Ministers, left the common foreign policy outside democratic control, and limited the European Parliament's powers of co-decision to too narrow a range of issues. While Crespo's views were shared by German Foreign Minister Hans-Dietrich Genscher, who proposed that the co-decision procedure should apply to all areas where the Council of Ministers would take decisions by a qualified majority, the proposal was firmly rejected by British Foreign Secretary Douglas Hurd, who was willing to grant the European Parliament, at most, only the right of co-decision in matters of the internal market. The majority of the participants in the meeting also disapproved of another proposal by the German delegation, namely the inclusion in the first pillar of the European Union of social policy as well as of at least some issues of justice and home affairs, such as immigration, asylum and the fight against drug crimes. Neither was it possible to reach a compromise during the Conclave of Foreign Ministers in Brussels (3–4 December 1991), especially since some delegations brought new controversial proposals to the IGC agenda. Thus, France proposed the creation of a Congress of members of the national parliaments. Spain, on the other hand, submitted a proposal for the introduction to the Treaty of binding arrangements for progressive

[27] AdG, 1991, p. 36288 et seq.

increases in financial assistance from the European Union to the poorest Member States.[28]

3. Proceedings of the Intergovernmental Conference on Economic and Monetary Union

During the first phase of the Intergovernmental Conference on the establishment of Economic and Monetary Union (EMU), conducted under the auspices of the Luxembourg Presidency, an agreement was reached on the principles of the so-called external monetary policy, i.e. the policy of regulating the exchange rate of the ECU against the currencies of non-EC countries. The participants decided that the most important decisions in this area would be taken by the Council of Ministers in agreement with the European Central Bank. The Council would also decide on the interventions made by the European System of Central Banks in foreign exchange markets. During the second phase of the deliberations, under the auspices of the Dutch Presidency, a draft Treaty establishing Economic and Monetary Union was agreed. Its preliminary version was submitted by Dutch Finance Minister Wim Kok on 29 October 1991. According to the draft, as early as the beginning of the second stage of Economic and Monetary Union (1 January 1994)[29] the Treaty basis for the European Monetary System existing from 13 March 1979[30] would be created and the European Monetary Institute (EMI) would be established. At the start of the third stage of the process

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[28] For more on the positions of individual Member States, of the Commission and of the European Parliament on the idea of creating the European Union, cf. F. Laursen, S. Vanhoonacker, (eds.), The Intergovernmental Conference on Political Union. Institutional Reforms, New Policies and International Identity of the European Community, Dordrecht 1992, pp. 37–225. R. Pryce, The Treaty Negotiations, [in:] A. Duff, J. Pinder, R. Pryce, op. cit., pp. 36–52. R. Corbett, F. Jacobs, M. Shackleton, op. cit., pp. 299–300.

[29] At the special meeting in Rome (27–28 October 1990), the European Council adopted a compromise proposal submitted by Spain and the Netherlands to start the second phase of the creation of Economic and Monetary Union on 1 January 1994, cf. Rome European Council (27–28 October 1990). Conclusions of the Presidency, p. 6, https://www.europarl.europa.eu/summits/rome1/ro1_en.pdf [accessed: 19 May 2024].

[30] D. Cobham, G. Zis (eds.), From EMS to EMU: 1979 to 1999 and Beyond, London–New York 1999.

(1 January 1997), the European Central Bank (ECB) should be established. Membership of the Economic and Monetary Union was to be conditional on the fulfilment by individual Member States of the four convergence criteria. The third stage of integration could also be joined at a later date. Less than a month later, on 26 November 1991, against opposition from Greece and with the serious doubts of the United Kingdom, Ireland and Denmark, the Finance Ministers agreed on restrictions to be applied to Member States violating the convergence criteria. These included confidential caution, public criticism, and financial penalties. Transitional rules for the integration of the EMU Member States' central banks within the General Council of the ECB were also laid down. The final version of the draft Treaty on Economic and Monetary Union was agreed by the Finance Ministers at their meeting in Scheveningen on 1 December 1991.[31]

The proceedings of the IGC confirmed the significant differences of views existing between the Member State Governments. The main dividing line continued to be that between France and Germany on the one hand, and the United Kingdom supported by Denmark on the other. Whereas France and Germany showed the liveliest interest in the Economic and Monetary Union project, the UK remained the biggest critic and opponent of the undertaking. Although the German Government agreed to economic and monetary integration, it also expected its extension to the political level. Since the Economic and Monetary Union project did not provide for the communitarisation of fiscal policy, Germany feared that it could lead to a conflict of interests between the monetary policy of the European Central Bank and the fiscal policies of individual Member States in the future. The Political Union was supposed to be the mechanism of protection against tensions between the monetary and fiscal policies, as well as the guarantee of a stable functioning of the Economic and Monetary Union.[32]

The strategy of the French and German authorities was well understood by the British Government, but not only did it not share their enthusiasm for monetary integration, but, above all, it opposed the idea of extending integration to the political sphere. The new British Prime Minister John

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[31] G. Brandstetter, op. cit., pp. 174, 186–188.
[32] R. Pryce, op. cit., pp. 36–52.

Major fully identified with Margaret Thatcher's view that the creation of the Economic and Monetary Union could be a 'springboard to federalism'. At the Rome European Council in December 1990, Major firmly rejected the project of full monetary integration, proposing instead an improvement of the European Monetary System.[33] In the final phase of the IGC in question, he also strongly asserted that his Government would never sign any Treaty providing for a common European currency or the unification of social legislation. Other UK Government officials argued that the administrative restrictions on the size and financing of the budget deficit provided for in the draft Treaty were unnecessary as market rules would be much more effective for disciplining the fiscal policies of the Member States. On 20 November 1991, the House of Commons debated on the United Kingdom's European policy. Speaking during that parliamentary debate and trying hard to appeal to the right addressees, Major argued that most of British society opposed the formation of a new European state with a federal structure and that such a state would never be created. Foreign Secretary Douglas Hurd rejected the federal model of European integration with equal firmness, arguing that the UK authorities would at all costs want to preserve the special character of the British nation. Only the leader of the opposition Labour Group, Neil Kinnock, tried to warn the Government against the isolation of the United Kingdom in the European Communities after rejecting the draft Treaty on Economic and Monetary Union. Ultimately, however, the House of Commons, by a majority of 351 votes, with 250 'against', accepted the position of Prime Minister John Major not to sign the new Treaty in the then present form.[34]

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The conclusions of the two IGCs, with minor amendments, were approved by the Maastricht European Council on 9–10 December 1991, and then

[33] AdG, 1990, p. 35151 et seq. Rome European Council (14–15 December 1990). Presidency conclusions, pp. 9–10, https://www.europarl.europa.eu/summits/rome2/rd1_en.pdf [accessed: 19 May 2024].

[34] AdG, 1991, p. 36288 et seq.

codified in a single Treaty on European Union.[35] On 7 February 1992, the Foreign Ministers and the Finance Ministers of the 12 Member States signed the Treaty on European Union in Maastricht. It was a new Treaty, establishing the European Union, but simultaneously revising the ECSC Treaty, the EEC Treaty and the Euratom Treaty.[36] In view of this extension of the integration process to areas of public life other than the economy, the Treaty changed the name of the European Economic Community to the European Community and, consequently, the name of the Treaty itself was abbreviated as the TEC. The Treaty of Maastricht entered into force on 1 November 1993.[37] The Treaty was concluded for an unlimited period. It established the European Union, but without dissolving the European Communities. The European Union did not have a legal personality or a uniform system structure. Therefore, it was not an international organisation within the meaning of international law, but a *sui generis* international organisation composed of three pillars and two legal orders, with Community law applicable in the first pillar and public international law – in the second and third pillars. Whereas the second pillar of the EU concerned external security (the common foreign and security policy), the third pillar comprised policies safeguarding internal security (immigration policy, visa policy, asylum policy, judicial cooperation in civil

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[35] Maastricht European Council (9–10 December 1991). Presidency conclusions, p. 2, https://www.europarl.europa.eu/summits/maastricht/ma1_en.pdf [accessed: 19 May 2024].

[36] Treaty on European Union, Maastricht, 7 February 1992 (hereafter: the Treaty of Maastricht or the Maastricht Treaty), Official Journal of the European Communities C, 191, 29.7.1992, pp. 1–112, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:11992M/TXT [accessed: 18 May 2024]. For an analysis of the Treaty of Maastricht, cf. J.J. Węc, Spór o kształt ustrojowy, op. cit., pp. 209–249.

[37] The Maastricht Treaty was due to enter into force on 1 January 1993, but difficulties in ratification in some Member States caused considerable delay. In Denmark and Ireland, referendums on the adoption of the Treaty were held under their respective national laws. On 2 June 1992, 50.7% of the Danish population rejected the Treaty. In contrast, on 16 June 1992, 69% of the eligible voters in Ireland accepted the international agreement. In the other Member States, fierce debates on the Treaty started. In this situation, France also decided to hold a referendum, although its national law imposed no such requirement. On 20 September 1992, quite unexpectedly, only 51.05% of the French population entitled to vote accepted the Maastricht Treaty. On 18 May 1993, in a repeated referendum in Denmark, 56.8% of the population voted in favour of the Treaty.

matters, judicial cooperation in criminal matters and police cooperation). The Treaty strengthened the powers of the European Parliament, of the European Commission, of the Court of Justice and of the Court of Auditors, as well as the powers of the Council of the European Union and of the European Council. A matter of special importance was the conferral on the European Parliament of legislative powers almost equivalent to those of the Council of the European Union in the framework of the newly established legislative procedure, known as the co-decision procedure. Another significant amendment was strengthening the position of the European Council; from this moment on, it gradually became the real centre of decision-making in the European Union, and the process of European integration was more oriented than ever before towards intergovernmental cooperation and thus dependent on the particular interests of the Member States.

A similar compromise was reached at the Intergovernmental Conference on Economic and Monetary Union (EMU). The Treaty of Maastricht did stipulate the establishment of an independent European Central Bank, but the supervision of the financial sector was left to the central banks of the Member States of the Monetary Union, whereas the surveillance of fiscal policies – to the Governments of those States. No common resolution mechanisms were agreed for credit institutions, including banks. The signatories to the Treaty focused on the issues of budget deficit and public debt, without establishing any system for monitoring private sector finance (e.g. the stability of the banking sector and debt), or fiscal policy control tools. Although the convergence criteria introduced under the Treaty (ex Article 109j(1) TEC – Article 140(1) TFEU) could be basically effective when used at the stage of qualification for Economic and Monetary Union, they were insufficient for monitoring a Member State's fiscal policy after that Member State's joining the EMU; in particular, there was no system of automatic and effective penalties for failure to comply with the fiscal policy rules. The Treaty provided for no common fiscal or economic policies, but it did establish certain instruments limiting the competences of the Member States in this regard, i.e. a procedure for avoiding excessive deficits (ex Article 104c(1) to (14) TEC – Article 126(1) to (14) TFEU) and a procedure for multilateral surveillance (ex Article 103(1) to (5) TEC – Article 121(1) to (6) TFEU). Whereas the excessive deficit procedure was intended for monitoring fiscal policies, the multilateral surveillance procedure aimed to ensure the coordination and convergence of the

economic policies of the Member States.[38] In the excessive deficit procedure, new powers were conferred on the European Commission, i.e. control of the Member States' general government deficits and public debt levels. The multilateral surveillance procedure engaged more entities and had a broader scope, but the relevant powers of the European Commission were weaker than in the excessive deficit procedure.[39] In contrast, the Treaty conferred significant new powers in the multilateral surveillance procedure on the Council of the European Union. The institution was responsible for ensuring closer coordination of economic policies and sustained convergence of the economic performances of the Member States. Therefore, the Council of the European Union, based on reports submitted by the European Commission, monitored economic developments in each of the Member States and in the European Union as well as the consistency of economic policies with the broad guidelines adopted by the Council, acting on recommendations from the Commission. The Treaty of Maastricht also laid down two other rules, intended to function as incentives for the Member States to pursue responsible fiscal policies.[40] The first rule was introduced under provisions prohibiting the European Central Bank and the central banks of the Member States from granting 'overdraft facilities or any other type of credit facility' to the European Union's institutions or bodies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States, but also from purchasing directly from them by the European Central Bank or national central banks of 'debt instruments' (ex Article 104(1) TEC – Article 123(1) and (2) TFEU). The second rule was adopted as provisions prohibiting the European Union and

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[38] Convergence in the European Union is the process of reducing economic, institutional or structural differences between the Member States. Economic convergence means narrowing development gaps, institutional convergence is measured by the economic freedom index and the regulatory system assessment index, whereas structural convergence is the process of economies becoming more similar in terms of production structure and developing the same sectors in industry and business services. Cf. M. Klucznik, K. Marczewski, An EU of convergence or divisions? The European economy 30 years after the Treaty of Maastricht, Polish Economic Institute, Warsaw 2022, pp. 10–28.

[39] For more on the subject, cf. J.J. Węc, The System Reform of the Economic and Monetary Union, op.cit., pp. 23–24.

[40] Ibidem.

the Member States from being liable for or assuming the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any (or another) Member State (ex Article 104b(1) TEC – Article 125(1) TFEU).

Opinions expressed by individual politicians on the Maastricht Treaty were mixed, but neither party was satisfied with the compromise reached. Chancellor Kohl stressed the historic importance of the Treaty as an international agreement opening a new chapter in the process of European integration. As a matter of fact, he did acknowledge that the Federal Government's goal had been to confer on the European Parliament significantly greater powers and to base the third pillar on supranational rather than intergovernmental cooperation. Nevertheless, he expressed his hope that the inclusion of the principle of subsidiarity in the Treaty would allow the European Union to start a march towards a 'federal Europe'. President Mitterrand considered the provisions of the Treaty concerning the new powers of the European Parliament and the common foreign and security policy as special achievements of the Intergovernmental Conference. Prime Minister Major put great emphasis on reforming the institutional system of the European Communities, in particular strengthening the position of supranational institutions – the European Parliament, the Court of Justice and the Court of Auditors. On the other hand, Major did not hide his sceptical position on the further extension of the competences of the European Communities at the expense of the Member States. He was therefore pleased that, in order to counter the 'creeping expansion of Community competences', the IGC had for the first time been able to clearly define those competences in areas such as health, vocational training and culture.[41]

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The basic premises for convening the two Intergovernmental Conferences in 1990 –1991 included the reunification of Germany in 1990 and the decision to establish a European Union after eighteen years of political debate on the subject. Although France was the initiator of the Intergovernmental

[41] AdG, 1991, p. 36288 et seq. Cf. also: R. Corbett, F. Jacobs, M. Shackleton, op. cit., pp. 299–300.

Conference to draw up the Treaty on European Union in December 1989, the Governments of many Member States also expressed interest in the IGC. Only the Government of the Federal Republic of Germany, then preoccupied with the German reunification, considered it premature. In the end, however, it supported the French initiative. In April 1990, French President Mitterrand and German Chancellor Kohl made a joint proposal to hold two Intergovernmental Conferences, one of which would deal with the creation of a Political Union and the other – with the establishment of an Economic and Monetary Union. The Governments of France, Germany and the United Kingdom had the greatest influence on the proceedings of both IGCs held in 1990 – 1991. Whereas Germany initially supported the Dutch Presidency's plan to establish a unified Political Union based on a federal model, from September 1991, encouraged by France but also under pressure from the British delegation, categorically opposed to the idea, the country began to support the project of establishing a three-pillar European Union, which enabled the successful conclusion of the IGC.

The Maastricht Treaty did not solve all the systemic (constitutional) problems of the newly created European Union and Economic and Monetary Union. Therefore, in Article N(2) TEU, the signatory States announced the convening of another Intergovernmental Conference in 1996 'to examine those provisions of this Treaty for which revision is provided, in accordance with the objectives set out' in Article A TEU (EU definition) and in Article B TEU (the catalogue of EU objectives). That meant, among other things, changes in institutional regulations, the catalogue of legal acts, the provisions on the common foreign and security policy in connection with the expiry of the Brussels Pact, envisaged in 1998, as well as the introduction of new titles to the EC Treaty for energy policy, civil protection and tourism.[42] The Maastricht Treaty was therefore the first EU Treaty in which the signatory States explicitly acknowledged that the need for further systemic (constitutional) changes in the European Union was determined by the issues unresolved during the concluded IGC and that it would be necessary to convene another such conference.

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[42] Treaty of Maastricht, op. cit., pp. 4, 63. Declaration on civil protection, energy and tourism, Declaration on the hierarchy of Community Acts, [in:] Treaty of Maastricht, op. cit., pp. 97, 101.

The 1996–1997 Intergovernmental Conference

1. The preparatory phase. The Westendorp Report

On 24–25 June 1994, the Corfu European Council decided to set up a Reflection Group to prepare the next Intergovernmental Conference. Six months later, during the Essen European Council meeting (9–10 December 1994), the Heads of State or Government agreed that the IGC should take place before the commencement of accession negotiations with the Central and Eastern European countries.[1] They also obliged as many as seven Community institutions and bodies to prepare reports on the planned IGC. The Council of the European Union and the Committee of the Regions submitted their reports in April 1995, the European Parliament, the European Commission, the Court of Justice and the Court of Auditors did so in May, whereas the Economic and Social Committee – in November of that year.[2] Symptomatically, most reports recommended strengthening the supranational architecture in the European Union. The work on convening the Intergovernmental Conference was accelerated by the increasingly real prospect of the biggest enlargement

[1] European Council at Corfu (24–25 June 1994). Presidency conclusions, pp. 1–3, https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00150.EN4.htm [accessed: 19 May 2024].

[2] G. Brandstetter, op. cit., pp. 214–215, 218–219.

of the European Union to new member states in history, namely adding countries of Central and Eastern Europe.[3]

The Reflection Group was composed of representatives of the foreign ministries of the Member States (15), of the European Parliament (2) and of the European Commission (1); it was chaired by Carlos Westendorp, the State Secretary for Relations with the European Communities and later the Minister for Foreign Affairs of Spain. The Group started its work in Messina on 2 June 1995, with the first working meeting held on the following day in Taormina, Sicily. It prepared eight questionnaires which organised and ranked the most important tasks of the IGC. These were as follows: identifying and defining the challenges, tasks and objectives for the European Union; reforming the institutional system; relations between the Union and the citizens (citizenship, area of freedom and security); external action and the common foreign and security policy; the hierarchy and classification of legislative acts. In June 1995, the Spanish Presidency sent these questionnaires to the Governments of the Member States asking them to take their respective positions on the issues mentioned therein. On the basis of the replies received and of the following discussion during the four working meetings (June–July 1995), the Reflection Group produced an interim report on its activities in September 1995. It confirmed the divergence of views existing between the Member States on the scope and direction of the European Union's system reforms to be addressed by the IGC. At the same time, the Reflection Group recommended that the deliberations of the IGC be substantially narrowed down to the most important issues, advising against a comprehensive system reform of the European Union. On 5 December 1995, the Reflection Group completed its work and published a final report, consisting of two parts. The first part, 'A Strategy for Europe', indicated the most important directions for future changes. The second part, entitled 'An Annotated Agenda', defined the agenda of the IGC. In the report in question, the Reflection Group essentially identified three areas on which the future IGC should focus. These were changes in the institutional system, reforming the common foreign and

[3] Cf. G. A. Bermann, The European Intergovernmental Conference: An American Perspective, 'Syracuse Journal of International Law and Commerce' 1998, Vol. 25, No. 1, pp. 61–68. S. Harnisch, A. Lautz, The Intergovernmental Conference in 1997 – Coalition-Building and Institutional Reform in the European Union, Trier 1997, pp. 1–43. M. Plenzler, Konferencja międzyrządowa, op. cit., pp. 35–38.

security policy, as well as strengthening the identity of the European Union by bringing it closer to its citizens.[4]

The institutional transformation was to concern both intergovernmental and supranational institutions. Thus, the Reflection Group advocated a further strengthening of the position of the European Council, 'as the highest expression of the Union's political will…[which] defines its general political guidelines'[5]. It also called for the Council of the European Union to be improved as an institution with legislative and executive powers, but without diminishing the powers of other institutions and within the existing institutional balance. It supported maintaining the principle of unanimity as a rule when the Council of the European Union should decide on matters of primary law (Article N TEU [now Article 48(2) to (5) TEU), Article O TEU [now Article 49 TEU]) as well as the provisions of the system of own resources. All such decisions should be ratified by the national parliaments. In the case of Community legislation, a clear majority of the Group's members expressed their willingness to consider the possibility of using qualified majority as a decision-making rule in the EU, although others called for exceptions guaranteeing the protection of important national interests. On the other hand, some members of the Group, especially the representatives of Germany, pointed to the need to take due account of population in the decision-making process by changing the system of the weighting of votes in the Council of the European Union or by adopting a completely new system of double majority, i.e. a majority of States and citizens. Supporters of the latter solution proposed making decisions by a simple majority of States and

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[4] The Intergovernmental Conference (hereafter: the IGC) 1996. 'A Strategy for Europe'. Final report from the Chairman of the Reflection Group on the 1996 Intergovernmental Conference, Brussels, 5 December 1995, pp. 1–36, https://www.cvce.eu/en/obj/report_by_the_reflection_group_a_strategy_for_europe_brussels_5_december_1995-en-307c412a-9be0-4137-a0e9-1fc8c86c8aa3.html [accessed: 18 May 2024]. For an extensive analysis of the work of the Reflection Group, cf. M. Hennes, Die Reflexionsgruppe der Europäischen Union, 'Aussenpolitik' 1996, H. 1, pp. 33–42.

[5] IGC 1996. Reflection Group's Report, Messina 2nd June 1995, Brussels 5th December 1995, SN 520/95 (REFLEX 21), p. 26, https://aei.pitt.edu/49155/1/B0015.pdf [accessed: 18 May 2024]. Cf. also: Konferencja Międzyrządowa 1996 Unii Europejskiej. Raport końcowy Grupy Refleksyjnej (tzw. Raport Westendorpa) [The 1996 Intergovernmental Conference of the European Union. Final Report from the Reflection Group (the Westendorp Report)], 'Monitor Integracji Europejskiej' 1996, No. 3.

the population behind them, assuming a departure from the differentiated weighting of votes of the Member States. However, some of them felt that taking into account the size of the population should strengthen qualified majority decision-making. In their opinion, the aim of the IGC would be not only to establish a new system of weighting votes, but also to determine the proportion of the population of the Union that should be necessary to take a decision in the presented procedure. Most of the members of the Reflection Group proposed the establishment of a new function within the Council of the European Union, responsible for the implementation of the tasks and objectives of the second pillar, namely a High Representative for the Common Foreign and Security Policy. This person would be appointed by the General Affairs Council and the function would be placed within the General Secretariat of the Council of the European Union. Other members of the Reflection Group spoke in favour of the appointment and dismissal of the High Representative for the CFSP by the European Council. The person would receive instructions directly from it or from the General Affairs Council and the Presidency. Another solution proposed was that the function should, at least in time, be the responsibility of the European Commission because it would then be easier to ensure consistency between the common foreign and security policy and other external actions of the European Union.[6]

Minor changes were to concern the functioning of the European Commission. The Reflection Group argued in favour of maintaining the exclusive right of legislative initiative of the European Commission as one of the conditions for institutional balance, of retaining the Commission's full role as the 'guardian of the Treaties', and of the maintenance of the existing system of responsibilities under which the Commission shared its executive powers with the Council of the European Union. The most important novelties were two proposals put forward by the majority of the members of the Reflection Group with regard to the procedure for constituting the College of the European Commission, which, in their opinion, should be 'a fundamental aspect of the credibility and legitimacy of the Commission as an institution'.[7] One option would be to maintain the existing Treaty arrangements, guaranteeing each Member State at least one Commissioner and thus fostering their citizens' sense of

[6] Reflection Group's Report, op. cit., pp. 26–28, 43.
[7] Ibidem, p. 31.

belonging to the Union. The other proposal was based on the assumption that the number of Commissioners should be smaller than the number of Member States, in order to ensure the smooth and efficient performance of the Commission's duties, to restore its collegiate nature and independence, to give it a higher profile as the institution safeguarding the general interests of the Community, and also to contribute to significant savings in human and financial resources. Although this option would not ensure that representatives of all the Member States would be present in the College, it would not, in the opinion of its supporters, discriminate against absent countries as the Commissioners would be chosen by the President of the Commission on their merits and authority, from a list of three candidates proposed by each Member State. The President of the Commission would gain much greater independence than before as the person would be elected by the European Parliament, acting on a proposal from the European Council, and subsequently then appointed by the Parliament together with the entire College of the Commission. Some members of the Reflection Group put forward, as a middle way, the option that each Member State would have one Commissioner. The reduction in the number of Commissioners would come at the expense of countries which, due to their demographic potential, enjoyed the right to have two Commissioners, namely Germany, France, the United Kingdom, Italy and Spain. In addition, other members of the Group proposed that the College of the Commission should consist of two different categories of Commissioners: senior members with voting rights, and non-voting junior members.

The Reflection Group did not suggest any far-reaching changes to the European Parliament either. It agreed with Parliament's proposal that in an enlarged European Union the maximum number of seats should not exceed 700, advocated reducing the number of legislative procedures to three (co-decision, assent and consultation) and called for strengthening the position of the national parliaments. The majority of the members of the Reflection Group pointed to the need to simplify the co-decision procedure and to extend its scope, in particular to all cases of legislation in which the Council of the European Union should decide by a qualified majority. Some members of the Reflection Group also proposed that the assent procedure be applied where the Council of the European Union should decide unanimously, in particular in the case of the flexibility clause (Article 235 TEC [now Article 352(1) to (4) TFEU]), own resources and international agreements concluded with

third countries. The Reflection Group also recommended that the national parliaments receive full documentation in their official languages on each major draft of a European Commission legislative act. In this way, they would be able to carry out a preliminary examination of such a draft before the Council of the European Union should discuss it and take a final decision.[8]

The Reflection Group expressed its support for increasing the significance of the Court of Justice, stressing its important role 'in watching over a Community based on the rule of law, in ensuring legal uniformity in the interpretation of Community law and in guaranteeing the protection of individual citizens' rights'.[9] A majority of the Group members called for reinforcing the powers of the Court of Justice in the areas of justice and home affairs, in line with the principle of legal certainty, in order to ensure the protection of individual rights that might be infringed in those fields. Some suggested that the Court of Justice should be given the power to enforce the penalties imposed more quickly. Most members of the Reflection Group were in favour of extending the term of office of judges of the Court of Justice to nine years, but without the possibility of reappointment. With regard to the Court of Auditors, some members of the Reflection Group suggested that it should be granted the right to protect its prerogatives before the Court of Justice. The possibility of involving the European Parliament more directly in the procedure for appointing members of the Court of Auditors was also mentioned. However, a majority of the members of the Reflection Group pointed out that more effective fraud prevention was also, and perhaps primarily, a matter for the Member States. Some members of the Group were in favour of giving the Committee of the Regions an active legal capacity before the Court of Justice in order to guarantee its prerogatives, and of making better use of the consultative functions of the Economic and Social Committee in the preparation of legislative acts.[10]

The changes in the institutional system proposed by the Reflection Group did not therefore herald a thorough reform, but only improvements in its functioning in connection with the planned enlargement of the European Union to the east. One of the main objectives of the reform was to maintain

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[8] Ibidem, pp. 24–25.
[9] Ibidem, p. 33.
[10] Ibidem, pp. 33–34.

a comprehensive institutional balance, corresponding to the specific nature of the European Union, as well as the approximate systemic (constitutional) balance between the intergovernmental and supranational architectures in the European Communities and the European Union, applicable from the Treaties of Rome.[11] Some members of the Reflection Group pointed to the need to strengthen the axiology of the European Union by incorporating into the text of Article F TEU (now Article 2 TEU) a clear commitment by the Member States to respect human rights and fundamental freedoms, subject to Union sanctions. The Treaty should also include a provision for penalties and even suspension of the rights inherent in membership if a Member State should seriously and repeatedly breach fundamental human rights or basic democratic principles.[12] Further, the Reflection Group called for inserting into the Treaties provisions allowing the use of a new integration method, called flexible integration or 'differentiated integration'.[13] In the opinion of the

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[11] For more on the approximate balance between the intergovernmental and supranational architectures of the European Communities and, subsequently, of the European Union, cf. J.J.Węc, Traktat Lizboński, op.cit., pp. 207–209, 358–359. J.J.Węc, The European Union Debate on the Second Institutional Reform (2011–2012), 'Przegląd Zachodni' 2014, No. 1, pp. 7–30. J.J.Węc, Die politische Debatte zur zweiten Systemreform der Europäischen Union in Deutschland (2011–2012), 'Zeitschrift des Verbandes Polnischer Germanisten' 2014, H. 2, pp. 201–208.

[12] Reflection Group's Report, op. cit., p. 11.

[13] For the sake of clarity, the term 'differentiated integration' will be used hereinafter. For more on the subject, cf. Überlegungen zu einer europäischen Politik, CDU/CSU-Bundestagsfraktion, 1. September 1994, pp. 1–11, https://www.cvce.eu/documents/ 10181/41685/Piermattei_schauble+lamers+tedesco.pdf/ [accessed: 19 May 2024]. A. Stubb, A Categorization of Differentiated Integration, 'Journal of Common Market Studies' 1996, No. 2, pp. 283–295. A. Stubb, Negotiating Flexible Integration in the Amsterdam Treaty, [in:] K. Neunreither, A. Wiener (eds.), European Integration After Amsterdam, Oxford 2000, pp. 62–65, 153–174. H. Wallace, Fit für Europa? Reform und Erweiterung der Europäischen Union, 'Integration' 1996, H. 2, pp. 84–85, 153–174. H. Wallace, Flexibility: A Tool of Integration or a Restraint on Disintegration?, [in:] K. Neunreither, A. Wiener, op. cit., pp. 175–191. J. Shaw, The Treaty of Amsterdam: Challenges of Flexibility and Legitimacy, 'European Law Journal' 1998, No. 1, pp. 63–86. C. Giering, Vertiefung durch Differenzierung – Flexibilisierungskonzepte in der aktuellen Reformdebatte, 'Integration' 1997, H. 2, pp. 73–75. K. Forgó, Zwischen 'Europa à la carte' und Einheit: Modelle differenzierter Integration, [in:] F. Breuss und S. Griller (Hrsg.), Flexible Integration in Europa. Einheit oder 'Europa à la carte'?, Wien–New York 1998, pp. 41–77. J.J. Węc, Spór o kształt ustrojowy, op. cit., pp. 257–261.

majority of the members of the Reflection Group, 'differentiated integration' should be carried out based on the maintenance and development of the *acquis communautaire* as a whole, and within a single institutional framework of the Union. It should be undertaken by Member States wishing to achieve more quickly the objectives of the Union as defined in the Treaty, whereas participation in 'differentiated integration' should always be available to Member States not participating in such arrangements from the beginning. At the same time, a majority of the members of the Reflection Group were of the opinion that differentiation should only cover the intergovernmental pillars and not the Community pillar as that could undermine the cohesion of the single market.[14]

2. Proceedings of the IGC

2.1. The first phase of the IGC

On 6 December 1995, French President Jacques Chirac and German Chancellor Helmut Kohl sent a joint letter to the Spanish Prime Minister and President-in-Office of the European Council, Felipe Gonzalez, in which they presented their own vision of the reform of the European Union. Like the authors of the report of the Reflection Group, the two politicians regarded as priorities of the IGC changes in the institutional system, the reform of the common foreign and security policy, as well as modifications in the area of justice and home affairs that would make the European Union closer to its citizens. The institutional transformation would consist in extending the scope of the qualified majority decision-making procedure in the Council of the European Union to new cases, while at the same time checking the existing voting system, considering the possibility of introducing changes to the appointment procedure, composition and powers of the European Commission, thus simplifying and introducing greater transparency to the cooperation of the decision-making triangle (the European Commission, the Council of the European Union and the European Parliament). In order to overcome the democratic deficit, the IGC should decide to involve the European Parliament and the national parliaments more widely in the EU legislative process, and create the conditions for a more robust application of the principle of subsidiarity in practice. Moreover, the French President

[14] Reflection Group's Report, op. cit., pp. 6–7.

and the German Chancellor made concrete the concept of 'differentiated integration' put forward by the Reflection Group. They proposed inserting into the Treaty on European Union a general clause setting out the conditions for establishing enhanced cooperation as a new method of integration. Such cooperation would be without prejudice to the single institutional framework of the European Union and would have to be open to all Member States wishing to join it at a later date.[15]

On 15–16 December 1995, the Madrid European Council approved the final report of the Reflection Group as the basis for the IGC and set a date for its commencement to 29 March 1996 in Turin. The IGC was held under the auspices of three Presidencies: those held by Italy, Ireland and the Netherlands. The negotiations were conducted under the general authority of the Heads of State or Government, supported by the Ministers for Foreign Affairs. The latter usually met on a monthly basis. In order to ensure the continuity of the work of the IGC, their representatives met between meetings of the Foreign Ministers. A representative of the European Commission and a representative of the European Parliament as an observer also took part in the proceedings.[16]

On 27 February 1996, the Foreign Ministers of France and Germany, Hervé de Charette and Klaus Kinkel, prepared common guidelines on the reform of the second pillar of the European Union, proposing, *inter alia*, the abandonment of unanimous voting on the common foreign and security policy, the introduction of a solidarity clause to the Maastricht Treaty, the establishment of a policy planning and early warning unit, and the inclusion in the European Union of the so-called Petersberg missions managed by the Western European Union (WEU), as well as the incorporation of the WEU into the EU in the future.[17] Whereas the joint letter of Chirac and Kohl of 6 December 1995 indicated that changes in the institutional system, the

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[15] Gemeinsamer Brief des deutschen Bundeskanzlers und des französischen Staatspräsidenten an den Vorsitzenden des Europäischen Rates vom 6.12.1995, [in:] Die Reform der Europäischen Union. Analysen – Positionen – Dokumente zur Regierungskonferenz 1996/97, hrsg. von M. Jopp und O. Schmuck, Bonn 1996, pp. 115–117.

[16] IGC 1996. Presidency note. Organization of work at the Intergovernmental Conference, Brussels, 29 March 1996, CONF 3835/96, pp. 1–9. Madrid European Council (15–16 December 1995). Presidency conclusions. Annex 15, pp. 37–42, https://www.consilium.europa.eu/media/21179/madrid-european-council.pdf [accessed: 18 May 2024].

[17] Deutsch-Französische Leitlinien zur GASP vom 27. Februar 1996, [in:] Die Reform, op. cit., pp. 118–120.

reform of the second and third pillars and the establishment of enhanced cooperation could constitute a platform for compromise between the two Member States ahead of the forthcoming Intergovernmental Conference, the guidelines from Charette and Kinkel confirmed that one of the top priorities for both countries would be the reform of the common foreign and security policy of the European Union.

When the European Council met in Turin on 29–30 March 1996 to officially open the Intergovernmental Conference, commonly known as Maastricht II, the Italian Presidency submitted to the participants in the meeting preliminary proposals for the reform of the European Union. These indicated four main directions of change. The first one concerned transformations in the institutional system, such as extending the scope of the qualified majority decision-making procedure in the Council of the European Union to new cases and reducing the number of Commissioners in the European Commission from two to one for the largest Member States. The second direction of change announced the reform of the second pillar of the Union, consisting, *inter alia*, in the establishment of a new function for the coordination of the common foreign and security policy. The third direction of proposed changes included the reform of the third pillar, reflected in strengthening the fight against organised international crime, in more effective operation of the European Police Office (Europol), and in the communitarisation of cooperation in the visa, asylum and immigration policies. The fourth direction of change was to bring the Union closer to its citizens by strengthening the protection of fundamental rights and civil liberties as well as through a more effective fight against unemployment. However, the limited scope for a possible compromise was demonstrated by the fact that, before the beginning of the IGC, the majority of the Member States opposed the French proposal to establish an office for the coordination of the common foreign and security policy, whereas the United Kingdom, traditionally critical of any initiatives aimed at strengthening the supranational architecture in the European Union, did not share the opinion on the need to revise the decision-making procedure in the Council of the European Union, to increase judicial and parliamentary scrutiny in the third pillar or to strengthen the effectiveness of Europol's activities.[18]

[18] AdG, 1996, p. 40933.

Finally, the Heads of State or Government adopted for the IGC a work programme covering seven issues. These were as follows: firstly, transformations in the institutional system, which were to consist, *inter alia*, in extending the scope of application and changes in the procedure of qualified majority decision-making in the Council of the European Union (the method of weighting votes, defining the threshold required for qualified majority voting), changes in the composition of the European Commission, strengthening the position of the European Parliament by extending the scope of the co-decision procedure and possibly enhancing the powers of the Court of Justice and of the Court of Auditors; secondly, improving the coherence and effectiveness of Union action in the visa, asylum and immigration policies; thirdly, bringing the Union closer to its citizens, *inter alia*, through a more effective fight against unemployment and organised international crime; fourthly, changes in the common foreign and security policy aimed at increasing the international activity of the European Union and regulating its relations with the Western European Union; fifthly, the simplification and consolidation of the Treaties; sixthly, making better use of the principle of subsidiarity; seventhly and lastly, consideration of the possibility of establishing enhanced cooperation.[19]

However, the IGC held under the auspices of the Italian Presidency did not produce the expected results. Despite five meetings of the Ministers for Foreign Affairs, including one Conclave convened immediately before the Florence European Council (21–22 June 1996), the Italian Government managed to draw up only an interim report on the progress of the IGC which

[19] Intergovernmental Conference. An Agenda for the Intergovernmental Conference, pp. 1–3, https://www.consilium.europa.eu/media/21169/turin-european-council.pdf [accessed: 18 May 2024]. IGC 1996. Commission Opinion 'Reinforcing political union and preparing for enlargement', Brussels, 28 February 1996, COM(96)0090 – C4-0151/96, pp. 1–12. IGC 1996. Resolution on (i) Parliament's opinion on the convening of the Intergovernmental Conference; and (ii) evaluation of the work of the Reflection Group and the definition of the political priorities of the European Parliament with a view to the Intergovernmental Conference, 13 March 1996, A4-0068/96, pp. 1–10. IGC 1996. Opinion of the Economic and Social Committee on the 1996 Intergovernmental Conference – the Role of the Economic and Social Committee, Brussels, 23 November 1995, pp. 1–8. IGC 1996. Opinion of the Committee of the Regions on the Revision of the Treaty on European Union, Brussels, 20 April 1995, pp. 1–7.

provided no solution for any of the key issues.[20] In this situation, the European Council required the Irish Presidency to prepare, by the time of its regular meeting in Dublin in December 1996, a preliminary draft amendment to the Treaties, covering in particular the following: bringing the European Union closer to its citizens, strengthening the common foreign and security policy while improving its effectiveness, as well as ensuring the proper functioning of the Community institutions in the face of the planned enlargement of the European Union to the east while maintaining institutional balance and improving the efficiency of the decision-making process.[21] As the Florence meeting was dominated by a dispute between the United Kingdom and the European Union over a ban on British beef exports due to mad cow disease, the French delegation proposed to convene a special meeting of the European Council in October 1996.[22]

The meeting took place in Dublin on 5 October of the same year and resulted only in the confirmation of the will to conclude the Intergovernmental Conference in June 1997. President Chirac announced that France and Germany would put forward a new diplomatic initiative ahead of the European Council meeting in December, to accelerate the reform of the European Union. Prime Minister Major, who was particularly opposed to proposals for changes to the institutional system as well as to the extension of the European Union's powers in the field of employment and the fight against unemployment as proposed by France, Austria, Ireland and the Scandinavian countries, did not hide his sceptical stance on the planned reform. Although the British Prime Minister supported the intention to enlarge the European Union eastwards, he was also deeply convinced that differences of opinion between the Member States on the reform of the institutional system did not require immediate resolution. That position of the British delegation

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[20] IGC 1996. Draft. Progress report on the Intergovernmental Conference, Brussels, 12 June 1996, CONF 3860/96, pp. 1–47. IGC 1996. Progress report on the Intergovernmental Conference – Draft texts, REV 1 ADD 1, Brussels, 13 June 1996, CONF 3860/1/96, pp. 1–24. IGC 1996. Progress report on the Intergovernmental Conference, REV 1, Brussels, 17 June 1996, CONF 3860/1/96, pp. 1–47.

[21] Florence European Council (21–22 June 1996). Presidency conclusions, pp. 3–4, https://www.consilium.europa.eu/media/21158/florence-european-council.pdf [accessed: 18 May 2024].

[22] AdG, 1996, p. 41462 et seq.

was supported by the representatives of Denmark and Sweden. Whereas Chancellor Kohl shared the opinion of Major that the European Union should have only coordination powers in the employment policy field, he also advocated broad changes in the EU's institutional system, aimed to strengthen the position of the European Commission and its President, introducing as a rule the procedure for qualified majority voting in the Council of the European Union, and to make the Union's common foreign and security policy more effective. On the other hand, he expressed his hope that the negotiations of the Intergovernmental Conference would end with a compromise reconciling the opposing positions of many delegations. But if that should prove impossible, the German Chancellor proposed that all the problems that could not be solved in the following eight months should be submitted to another Intergovernmental Conference, Maastricht III, which should be convened at the turn of the century. The President of the European Commission, Jacques Santer, also believed that the IGC should focus on the most important issues in order not to disturb the rhythm of preparations for the accession of new Member States to the European Union.[23]

Significant differences of views were also revealed during the deliberations of the negotiators of the IGC under the auspices of the Irish Presidency from July to December 1996. Although the Westendorp Report was supposed to be the basis for the discussion, representatives of the Governments of the Member States seldom referred to its content, focusing rather on the presentation and justification of frequently different national positions. With regard to changes in the institutional system, it should be stressed that a very serious obstacle to their implementation was the fact that many countries, in particular Greece, Portugal, Ireland and the United Kingdom, but also, in a sense, Spain, Sweden, Finland and Austria, were simply uninterested in carrying them out. The most attention was paid to the Council of the European Union, the European Commission and the European Parliament. In the first phase of the deliberations, all the delegations, with the exception of the United Kingdom and Sweden, supported the proposal to extend the scope of the qualified majority decision-making procedure in the Council of the European Union to new cases. However, over time, it turned out that many

[23] Ibidem.

of them also raised a lot of objections and made their final positions on the matter subject to their resolution.[24]

France requested that the Member States continue to have recourse to the Luxembourg Compromise of 29 January 1966 on certain matters of national interest. Germany wished to maintain the principle of unanimity in respect of taxes, budget, social welfare and industrial policy, whereas Spain took a similar position in the areas of structural funds, social policy, environmental protection and marine resource management. Ireland made the same request with regard to tax policy, Greece – in matters of industrial policy and culture. Austria called for the principle of unanimity to be maintained on issues relating to energy resources, water management, derogations from the single market rules and access of third-country nationals to the Community labour market. The Netherlands and Portugal were in principle in favour of extending the use of qualified majority voting in the first pillar, but were opposed to extending it to budgetary and fiscal policies and of issues related to the European Union system. Finland was ready to accept the use of the qualified majority only in social policy, environmental policy and the coordination of employment policy. Most of the Member States, with the exception of the United Kingdom and Greece, supported the introduction of qualified majority voting in the second pillar, but only in relation to implementation decisions. The same position was taken by most countries, except for the United Kingdom, Sweden and partly also Spain, with regard to the visa, asylum and immigration policies, which were to be transferred from the third to the first pillar.

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[24] IGC 1996. Note from the Presidency. The Institutions of a more democratic and more effective Union, Brussels, 20 May 1996, CONF 3849/96, pp. 1–12. IGC 1996. Benelux memorandum on the Intergovernmental Conference, Brussels, 5 May 1996, CONF 3844/96, pp. 1–15. IGC 1996. Portugal and the Intergovernmental Conference for the Revision of the Treaty on European Union, Brussels, 5 May 1996, CONF 3846/96, pp. 1–43. IGC 1996. Statement by the Greek Delegation at the Meeting of Ministers' Representatives on 30 May 1996. Institutions – European Parliament, Brussels, 4 June 1996, CONF 3858/96, pp. 1–7. IGC 1996. Basic positions of Austria for the Intergovernmental Conference, Brussels, 4 June 1996, CONF 3857/96, pp. 1–21. IGC 1996. Commission report on the scope of Article 189b on co-decision, Brussels, 24 July 1996, CONF 3882/96, p. 1. IGC 1996. Cover note from Spanish Government. Proposal on the simplification and improvement of the co-decision procedure, Brussels, 25 September 1996, CONF 3926/96, pp. 1–3.

The opinions of the individual delegations were also strongly divided on the German proposal to establish a new definition of qualified majority in the Council of the European Union, referred to as a 'double majority'. It was supposed to be based on two components: the majority of States and the majority of EU citizens, rather than on the so-called weighted votes, i.e. the number of votes allocated administratively to each Member State. Only Italy, the Benelux countries, Denmark and Austria showed interest in such a change. France and the United Kingdom insisted on maintaining the existing balance between Germany and the other large Member States, which meant that they were in fact opposed to the introduction of a double-majority system, although they supported a change in the weighting of votes in the Council of the European Union. Some of the medium-sized and small countries, such as Portugal, Ireland, Greece, Finland and Sweden, opposed any revision in this area. But the other medium-sized and small Member States agreed to amending the method for weighting votes, albeit subject to changes in other areas of interest to them. Most of the delegations supported the proposal to establish a new function of the High Representative for the Common Foreign and Security Policy to the Council of the European Union. The Netherlands was most opposed to this idea. The country proposed conferral on the European Commission of powers in the area in question and establishing the function of Commissioner for the Common Foreign and Security Policy.[25]

Differences of views between the various delegations also concerned the composition of the European Commission. Supporters of limiting the number of Commissioners, led by France, Italy and Germany, argued that such a change should lead to the 'breaking' of the Commissioners' ties with their respective countries of origin, thus further strengthening the supranational nature of the institution and enhancing its efficiency. However, unlike Germany and Italy, the French delegation not only demanded a radical reduction in the number of Commissioners (to ten), but also advocated a simultaneous limitation of the powers of the European Commission, which,

[25] Positionen der EU-Regierungen zur Regierungskonferenz, [in Die Reform, op. cit., pp. 148–149, 152, 159–160, 167–168, 171–172, 180, 182–183, 188. H. Wallace, Fit für Europa, op. cit., pp. 90–91. CIG 1996. Les orientations de la France pour la Conférence Intergouvernementale de 1996, Bruxelles, le 20 février 1996, http://europa.eu.int/en/agenda/igc-home/ms-doc/state-fr/200296.html [accessed: 15 Juni 2024]. C. Masala, Debatte über die institutionelle Reform der EU, 'Aussenpolitik' 1997, H. 3, pp. 228–236.

in its opinion, should act on the basis of a precise mandate given to it by the Council of the European Union. But the vast majority of delegations, especially those of small Member States, spoke in favour of maintaining the principle of one Commissioner per Member State, i.e. the right of each EU Member State to have its representative in the European Commission. The Benelux countries were the closest to giving up their representation in the Commission. However, the failure to reach an agreement on the composition of the Commission was mainly determined by the ambivalent attitude of the large Member States. Whereas Germany, France, the United Kingdom and Spain declared their willingness to limit the total number of Commissioners, they did not hide their position that they themselves would like to retain at least one permanent seat in the Commission. Such an approach meant that a possible rotation in the College of the Commission would only cover small Member States. The German delegation was the firmest in demanding its permanent representative in the Commission, whereas the Italian delegation, as the only one among the delegations of large countries, expressed its willingness to renounce that right. On the other hand, the overwhelming majority of participants in the debate on extending the powers of the President of the European Commission were in favour of the proposal, which, in their opinion, should also lead to the strengthening of the supranational nature of the institution.[26]

A similar convergence of views characterised almost all delegations on increasing the powers of the European Parliament by extending the scope of the co-decision procedure. In principle, only the UK delegation opposed this proposal and, like the French delegation, advocated strengthening the role of the national parliaments. Germany, Italy, Spain, Belgium, Luxembourg, Denmark and Greece expected the most far-reaching changes in this respect, calling for the introduction of co-decision to all areas where the Council of the European Union should act by a qualified majority. Following the proposals contained in the Westendorp Report, these countries, together with the Netherlands, also demanded a reduction in the number of legislative

[26] Positionen der EU-Regierungen zur Regierungskonferenz, op. cit., pp. 152, 159, 167, 172, 178, 180–181. H. Wallace, Fit für Europa, op. cit., pp. 91–92. F. Dehousse, The IGC Process and Results, [in:] D. O'Keeffe, P. Twomey (eds.), The Treaty of Amsterdam – Legal issues, London 1999, pp. 93–98.

procedures to three: consultation, assent, and co-decision. The most ambiguous position on the powers of the European Parliament was taken by France, formally supporting the idea of their extension, but in fact it was mainly interested in the creation of a High Parliamentary Council composed of representatives of the national parliaments (two from each Member State), and thus strengthening the role of those parliaments in the legislative process of the European Union. The main task of such a High Parliamentary Council would be respecting the principle of subsidiarity. As argued by members of the French delegation, that would allow the EU to effectively overcome the democratic deficit and to implement one of the fundamental demands of the Reflection Group, namely making the Union closer to its citizens. If the proposal for establishing a High Parliamentary Council should not be accepted by the participants in the IGC, France proposed to confer those powers on the Conference of Parliamentary Committees for Union Affairs (*Conference des organismes specialises dans les affaires communautaires* – COSAC), as a platform for interparliamentary cooperation between members of the European Parliament and of the national parliaments. In addition, the French delegation called for designing a single procedure for the election of the European Parliament for all the Member States and, like most delegations, demanded imposing a ceiling on the number of its members.[27]

However, the positions of individual delegations on the idea of 'differentiated integration' were strongly divided. As announced by French President Chirac, on 17 October 1996 the Foreign Ministers de Charette and Kinkel submitted to the Intergovernmental Conference a joint Franco-German draft to establish enhanced cooperation as a new integration method based on the concept of 'differentiated integration'. Its immediate purpose was to facilitate reaching a compromise on the reform of the European Union between individual Member States. In the long term, however, it was supposed to contribute to deepening the integration process. The Foreign Ministers of the two countries proposed extending enhanced cooperation to all the three pillars of the Union, specifying the procedures and conditions for its application. The provisions on enhanced cooperation were to be included in a general clause, laying down the conditions for 'differentiation' in all the three

[27] Positionen der EU-Regierungen zur Regierungskonferenz, op. cit., pp. 160, 167, 172–173, 178; 182–183. F. Dehousse, op. cit., pp. 98–103.

pillars, as well as in three specific clauses, one for each pillar of the EU. The position of France and Germany was initially supported only by Italy, Belgium and Luxembourg. The other Member States raised numerous objections. Thus, Portugal and Greece were in principle opposed to the introduction of enhanced cooperation within the European Union. The representatives of the Greek Government even argued that enhanced cooperation would not only not contribute to deepening integration, but it could even lead to its decomposition and the formation of a directorate of the strongest Member States. The United Kingdom agreed to establish enhanced cooperation only in the first pillar, but provided that it would not lead to a breach of the single market rules. However, the Netherlands, Denmark and the European Commission opposed that idea, fearing that 'differentiated integration' in the first pillar could undermine the cohesion of the single market. Neutral Member States or those pursuing policies of neutrality, such as Sweden, Austria, Finland and Ireland, were, like Greece and Portugal, very sceptical about the notion of enhanced cooperation. However, they were particularly opposed to its inclusion in the second pillar. It was only during further negotiations that Finland and Austria relaxed their positions slightly, and the Finnish Government even produced the most comprehensive catalogue of conditions under which that cooperation should be established in the European Union.[28]

Having considered the proposals from de Charette and Kinkel, as well as all those put forward by the other delegations during the four meetings of the Foreign Ministers of the Member States held between July and November 1996, the Irish Presidency prepared a draft revision of the Maastricht Treaty entitled *The European Union today and tomorrow. Adapting the European Union for the benefit of its peoples and preparing it for the future*. On 5 December 1996, the draft was submitted to the IGC and then discussed by the Ministers for Foreign Affairs during the Conclave in Brussels on the following day. The draft contained, *inter alia*, a proposal to create an area of freedom, security and justice under the first pillar of the European Union, including the immigration, visa and asylum policies, to be transferred from the third pillar, to

[28] Positionen der EU-Regierungen zur Regierungskonferenz, op. cit., pp. 148–149, 152, 156–157, 163–164, 170. IGC 1996. Flexibility, Brussels, 22 October 1996, CONF 3957/96, p. 1.

introduce institutional changes in the second pillar, to increase the role of national parliaments in the EU legislative process and to establish enhanced cooperation.[29] As the Irish Presidency's draft caused much controversy, with particularly critical opinions from the French delegation, on 9 December 1996 President Chirac and Chancellor Kohl sent a joint letter to Irish Prime Minister John Bruton, demanding further amendments to the document. These were to concern enhanced cooperation, the establishment of an office for the coordination of the common foreign and security policy, and the limitation on the number of Commissioners in the European Commission, combined with a change of the procedure for the qualified majority decision-making in the Council of the European Union and the new definition of the thresholds required.

Although the Irish Presidency took note of the Franco-German letter, it did not yield to all of its demands. Fearing negative reactions from smaller Member States, it did not agree in particular to include in its draft proposals changes in the composition of the European Commission and in the qualified majority voting procedure for the Council of the European Union, or to redefine the thresholds required. During the Dublin European Council meeting (13–14 December 1996), the draft of the Irish Presidency was accepted as the starting point for negotiations in the final phase of the IGC conducted under the auspices of the Dutch Presidency.[30]

2.2. The second phase of the IGC

After the Netherlands took over the presidency, the deliberations of the IGC accelerated considerably. It organised as many as seven meetings of the Ministers for Foreign Affairs, including two Conclaves: in Noordwijk on 6–7 April 1997, and in The Hague on 20 May of the same year. The starting point for these talks was the draft prepared by the Irish Presidency, supplemented by an annex drawn up by the Dutch Presidency and presented to the

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[29] IGC 1996. Council of the European Union. The European Union Today and Tomorrow. Adapting the European Union for the Benefit of its peoples and preparing it for the future. A general outline for a draft revision of Treaties, Dublin II, Brussels, 5 December 1996, CONF 2500/96, pp. 1–141.

[30] Dublin European Council (13–14 December 1996). Presidency conclusions, pp. 3–4, https://www.consilium.europa.eu/media/21147/dublin-european-council.pdf [accessed: 18 May 2024].

Intergovernmental Conference on 25 March 1997. During the negotiations, significant differences of views between the various delegations were again revealed, mainly with regard to the reform of the institutional system. The most controversial issues concerned changes in the procedure of the qualified majority decision-making in the Council of the European Union. On 24 April 1997, based on the conclusions of the Conclave of Foreign Ministers in Noordwijk, the Dutch Presidency presented two options for amending the voting system and two proposals for establishing a double majority. Both options of changes in the voting system favoured the large and medium-sized Member States, with them gaining more votes than the small States, but on the other hand, these changes corresponded to the existing philosophy of integration, guaranteeing political overrepresentation to the latter. As for the double majority system, one draft envisaged that it would be a simple majority of the votes of the Member States (51%), represented by at least 60% of the population of the Union. The other proposal provided for maintaining the existing number of weighted votes for individual countries, with the proviso that the qualified majority should come from at least 60% of the Union's population. However, during further deliberations of the IGC, the Dutch Presidency clearly advocated a less radical solution, namely a change in the weighting of votes. That implied the rejection of the proposals of the German delegation to establish a double majority. Therefore, in May 1997, the German delegation quite unexpectedly made its consent to the introduction of a qualified majority in areas of high financial importance, in particular taxation, structural funds, social policy and research, conditional on a change in the way of weighting votes in the Council of the European Union or on the introduction of a double majority there. The discussion on the issue of reducing the number of areas subject to unanimous voting in the Council of the European Union started to become more and more widespread. Smaller Member States accepted a change in the weighting of votes, provided that the scope of the application of the qualified majority voting should be significantly extended to new cases. They argued that it would not only simplify the decision-making process, but it would also serve as a long-term basis for deepening integration and strengthening the supranational architecture in the European Union. However, when the Dutch Government proposed a far-reaching extension of the scope of qualified majority voting to new cases in the Council, it only received the support of two delegations: those of

Belgium and Italy. Finally, the proposal of the Dutch Presidency was blocked by the German delegation, which was clearly dissatisfied with the course of discussions on its proposals to amend the definition of qualified majority.[31]

The discussion on changes in the European Commission ended in a half success. Although the participants in the IGC reached an agreement on strengthening the position of its President, attempts to limit the composition of the Commission failed. Following the fruitless debate, in March 1997 the Commission itself proposed to postpone the decision on its composition until the accession of the twentieth Member State to the European Union. However, a compromise was reached on the principles of the functioning of the European Parliament. Its position was to be strengthened by simplifying and extending the scope of the legislative co-decision procedure. The maximum number of members of the Parliament was established at seven hundred. With regard to human rights and fundamental freedoms, the participants agreed, following the proposals already put forward at the previous IGC by Denmark, to include in the definition of European citizenship the statement that citizenship of the Union should be additional to and not replace national citizenship. Further, it was decided to introduce into the Treaty clearly formulated guarantee standards of a repressive nature, obliging Member States to respect human rights and fundamental freedoms, subject to sanctions that the European Union might impose.[32]

The special meeting of the Noordwijk European Council held on 23 May 1997 was of crucial importance to the further course of the proceedings as a compromise was reached on basically all of the most controversial issues to that date, including changes in the institutional system. The participants agreed that even after the enlargement of the European Union to the east, the European Commission should consist of twenty members, whereas the largest Member States would give up one of their two Commissioners. However, it was not agreed how that concession would be compensated for. For the time being, at least formally, that issue was not linked to the changes in the qualified majority decision-making procedure in the Council of the European

[31] IGC 1996. Institutions, Brussels, 7 April 1997, CONF 3863/97, pp. 1–6.

[32] IGC 1996. Composition, organization and operation of the Commission, Brussels, 6 March 1997, CONF 3839/97, pp. 1–4. IGC 1996. Composition and organization of the Commission, Brussels, 21 March 1997, CONF 3852/97, pp. 1–3. IGC 1996. Commission, Brussels, 24 April 1997, CONF 3887/97, pp. 1–6. F. Dehousse, op. cit., pp. 103–105.

Union, mainly supported by the German and French delegations. Further, no arrangements were made to strengthen the position of the European Commission in the institutional system of the European Union, as requested by smaller Member States. However, the position of the President of the European Commission, who would have a direct influence on the election of Commissioners and the scope of their powers, was to be strengthened. At the initiative of France and Germany, a compromise solution was also adopted in the decision-making procedure under the second pillar. It was decided to maintain the unanimous vote as a rule and to introduce the so-called constructive abstention if a given decision should undermine the vital national interests of several Member States. However, constructive abstention could not hinder the adoption of such a decision itself. Finally, it was also agreed to transfer part of the Schengen *acquis* and the immigration, visa and asylum policies to the first pillar of the EU with a view to their communitarisation. The participants also confirmed their willingness to conclude the IGC at the Amsterdam European Council meeting on 16–17 June 1997.[33]

The compromise reached in Noordwijk was largely facilitated by the constructive attitude of the new British Prime Minister Tony Blair, who spoke out in favour of an active role of his Government in European politics, which, as he saw it, was oriented towards dialogue and progress rather than towards confrontation and stagnation. On the other hand, the British Prime Minister did not hide that the negotiations of the Intergovernmental Conference so far had been insufficient and caused legitimate dissatisfaction in the Member States' societies. In his view, employment policy, the fight against unemployment and job creation should be a priority in the European Union. At the same time, Blair said that his Government would not agree to the communitarisation of the visa, asylum and immigration policies. Like the Swedish Government, it would also oppose the integration of the Western European Union into the European Union as that could undermine NATO's position in the European defence system.[34]

At the Amsterdam European Council meeting of 16–18 June 1997, the decisions of the Intergovernmental Conference were approved by the Heads

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[33] AdG, 1997, p. 42041 et seq.

[34] Ibidem. R. Corbett, F. Jacobs, M. Shackleton, op. cit., pp. 300–304. F. Dehousse, op. cit., pp. 104–108. U. Sverdrup, op. cit., pp. 120–140.

of State or Government.[35] The most important of these were the changes introduced in the institutional system of the European Communities, in the rules on citizenship of the Union, as well as new provisions on European identity, the democratic legitimacy of the Union and enhanced cooperation. In the last matter, three additional amendments were agreed by the Heads of State or Government. Thus, as requested by the United Kingdom, Greece and Austria, enhanced cooperation on the common foreign and security policy was abandoned. Following the proposals from the United Kingdom and France, it was agreed that decisions on the establishment of enhanced cooperation would be made by a qualified majority, although any Member State would be able to oppose it on grounds of an important national interest. Finally, at the initiative of Portugal, it was resolved that the European Commission would decide on the implementation of enhanced cooperation. Following amendments by experts, acting under the supervision of the Council of the European Union, all these changes were subsequently codified in a single international agreement. On 2 October 1997, in Amsterdam, the Ministers for Foreign Affairs of the fifteen Member States of the European Union signed a Treaty containing provisions amending the Treaty on European Union as well as the ECSC Treaty, the TEC and the Euratom Treaty.[36] Following the referendums held in Ireland and Denmark in May 1998, in which the societies of the two Member States voted in favour of the Treaty by a majority of 62% and 55% of the votes respectively, and ratifications in the other Member States, the Treaty entered into force on 1 May 1999.

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The premises for convening the 1996–1997 Intergovernmental Conference were the systemic (constitutional) issues of the EU unresolved during the previous IGC on the one hand, but also the planned accession negotiations with the Central and Eastern European countries on the other hand.

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[35] Amsterdam European Council (16–17 June 1997). Presidency conclusions, pp. 1–2, https://www.consilium.europa.eu/media/21136/amsterdam-european-council.pdf [accessed: 18 May 2024].

[36] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (hereinafter: the Treaty of Amsterdam or the Amsterdam Treaty), Official Journal C, 340, 10.11.1997, pp. 1–144.

During the IGC, Germany and France presented as many as three mutually agreed diplomatic initiatives and various additional individual proposals, but failed to push through all of these. Only two Franco-German demands for enhanced cooperation and the reform of the common foreign and security policy were somewhat reflected in the newly signed Treaty of Amsterdam. However, Germany and France did not play a decisive role in the proceedings of that Intergovernmental Conference. The United Kingdom had a much greater impact on its final outcome. Following the proposals from the United Kingdom and France, it was agreed that decisions on the establishment of enhanced cooperation would be made by a qualified majority, although any Member State would be able to oppose it on grounds of an important national interest. However, due to opposition from the United Kingdom, Greece and Austria, enhanced cooperation on the common foreign and security policy was abandoned. When it turned out that not all of the proposals of the German and French Governments in the area of the EU common foreign and security policy were acceptable to the other Member States, compromise solutions were agreed. The most controversial issue was the proposal to abandon unanimous voting in the Council of the European Union in the CFSP area. It was most opposed by the UK and several other Member States. It was therefore decided to maintain the unanimous vote in the Council as a decision-making rule in the common foreign and security policy, but the so-called constructive abstention was also introduced for cases where a decision might well undermine vital national interests of several Member States. On the other hand, in line with Franco-German demands, Petersberg missions were included in the European Union, the Western European Union (WEU) was announced to be incorporated into the EU in the near future, and a policy planning and early warning unit was established in the common foreign and security policy. The Petersberg missions were to remain under the aegis of two international organisations: the EU and the WEU.

On the other hand, a major obstacle to changes in the institutional system of the European Communities had been the general lack of interest in their implementation from many Member States, specifically from the Governments of Greece, Portugal, Ireland, Spain, Sweden, Finland and Austria. This was particularly evident based on the example of two proposals: extending the scope of qualified majority voting in the Council of the European Union to new cases, and limiting the number of Commissioners in

the European Commission. The German initiative to adopt a new definition of qualified majority in the Council of the European Union, i.e. the so-called double majority comprising the majority of the Member State Governments in the Council and the majority of the EU population representing those Governments, was a complete failure as well. At that time, only 7 out of the 15 Member States supported the double majority rule: Germany, Italy, the Benelux countries, Denmark and Austria.

Like the Maastricht Treaty, the Amsterdam Treaty did not therefore resolve all the contentious institutional issues. Proposals for changes in the composition of the European Commission, the new definition of qualified majority in the Council of the European Union (a new way of weighting votes or introducing a double majority rule and setting a threshold for decisions taken by a qualified majority), as well as that for extending the scope of the application of the qualified majority voting to new cases, remained unresolved. The need for making these changes in the future was mentioned in Protocol No 11 and Declaration No 6, annexed to the Treaty of Amsterdam.[37] Soon after the entry into force of this Treaty, these started to be called 'Amsterdam left-overs'[38]. However, unlike the Maastricht Treaty, the Amsterdam Treaty, the Protocol or the Declaration set no precise date for the beginning of the new Intergovernmental Conference. On the other hand, Protocol No 11 provided that the reform of the European Union should be carried out in two stages. Before the forthcoming enlargement of the European Union, it would be necessary to limit reforms to the most necessary institutional changes, consisting in limiting the composition of the European Commission and modifying the weighting of the votes in the Council of the European Union. A broader reform of the European Union would not be addressed until the following Intergovernmental Conference, convened at least one year before the membership of the European Union should exceed 20, 'in order to carry out a comprehensive revision of the provisions of the Treaties on the composition and functioning of the institutions' (Article 2 of the

[37] Protocol on the institutions with the prospect of enlargement of the European Union, [in:] Treaty of Amsterdam, op. cit., p. 111. Declaration by Belgium, France and Italy on the Protocol on the institutions with the prospect of enlargement of the European Union, [in:] Treaty of Amsterdam, op. cit., p. 144.

[38] Cologne European Council 3 and 4 June 1999. Presidency conclusions, p. 20, https://www.consilium.europa.eu/media/21070/57886.pdf [accessed: 18 May 2024].

Protocol).[39] This meant that the Amsterdam Treaty was the second Treaty of the EU, after the Treaty of Maastricht, to announce the convening of the next Intergovernmental Conference due to the failure to resolve all systemic (constitutional) problems at the IGC just concluded. However, apart from intra-Community considerations, another reason for convening the IGC was the international setting, as in the years 1990–1991 there was the planned enlargement of the European Union to the east, especially since the Union started accession negotiations with six candidate countries as early as March 1998.

[39] Protocol on the institutions with the prospect of enlargement of the European Union, op. cit., p. 111.

The 2000 Intergovernmental Conference

1. The preparatory phase. The Report of the Group of Wise Men

The legal basis for the convening of the new IGC was Article 48 of the Treaty on European Union[1] and Protocol No 11 on the institutions with the prospect of enlargement.[2] On 9 June 1998, in a joint letter, French President Chirac and German Chancellor Kohl requested British Prime Minister Blair, who was the President of the European Union, to address the following three urgent issues at the next European Council meeting: the application of the principle of subsidiarity and the related division of competences between the European Union and the Member States, as well as the changes in the institutional system that had not been regulated during the last IGC but which needed an agreement before the expected enlargement of the Union to the east. Further in the letter, Chirac and Kohl argued that as some EU institutions were increasingly distancing themselves from citizens and their everyday problems, it would be important for the members of the European Council to start a discussion on the practical application of the principle of subsidiarity in order to achieve a clear division of competences between the European Union and the Member States. Rather than having anything to do with renationalisation, such changes would correspond to the principles of proportionality, taking decisions as closely as possible to the citizen and

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1 Treaty of Amsterdam, op. cit., p. 60.

2 Protocol on the institutions with the prospect of enlargement of the European Union, op. cit., p. 111.

effectiveness (of the Union), and they would help prevent too much centralism. Therefore, institutions operating at the national level should be given more freedom. On the other hand, the authors had no doubt that in some areas deeper integration was urgently needed, in particular in the field of the common foreign and security policy.[3]

The application of the principle of subsidiarity and the related division of competences between the European Union and the Member States had already generated heated debates during the previous IGC. Whereas the Member States in favour of strengthening the supranational architecture or of federal solutions, such as Germany and the Benelux countries, saw in the application of the subsidiarity principle an instrument to empower regional structures within each Member State, or even to limit national sovereignty, those calling for the reinforcement of the intergovernmental architecture, such as the United Kingdom, Denmark, Sweden and Finland, intended to use the principle of subsidiarity as a tool for regaining the full independence of nation states, for example in areas such as education, culture, social policy, health protection, consumer protection, environmental protection and transport.

Nevertheless, the opinions of Chirac and Kohl had a significant impact on the conclusions of the European Council adopted at the Cardiff meeting a few days later (15–16 June 1998). The European Council announced that, following the entry into force of the Amsterdam Treaty, appropriate decisions would be taken on 'how and when to tackle the institutional issues not resolved at Amsterdam'.[4] On the basis that there was an urgent 'need to bring the EU closer to people and to focus it on the issues that matter most to the European citizens',[5] it also supported the idea of enhancing the democratic legitimacy of the principle of subsidiarity and implementing it in the form of concrete actions.[6] Consequently, at the Cologne European Council meeting on 3–4 June 1999, the Heads of State or Government decided to launch preparations and to establish the timetable and scope for the next Intergovernmental Conference. Basically, it was supposed to deal with the issues contained in

[3] AdG, 1999, p. 42870 et seq.

[4] Cardiff European Council (15–16 June 1998). Presidency conclusions, p. 21, https://www.consilium.europa.eu/media/21103/54315.pdf [accessed: 18 May 2024].

[5] Ibidem.

[6] Ibidem.

the above-mentioned Protocol No 11 and Declaration No 6, the so-called 'Amsterdam left-overs', namely changes in the size and composition of the European Commission, in the qualified majority decision-making procedure in the Council of the European Union (changing the system of weighting of the votes or the introduction of a completely new double majority and setting a threshold for qualified majority decision-making), as well as possible extension of the scope of qualified majority voting to new cases.[7] The IGC could also discuss other amendments to the provisions of the Treaties concerning the institutional system. The European Council also invited the Finnish Government, holding the Presidency of the European Union in the second half of 1999, to present, by the end of the year, a comprehensive report on the scope of institutional reform, taking into account the proposals from the Governments of the Member States, the European Commission and the European Parliament.[8] This meant that the idea of establishing a Reflection Group as a body preparing the agenda of the IGC was abandoned at that time. The IGC was scheduled to begin in early 2000 and to be concluded in the same year.[9]

At the same meeting, the European Council also decided to draw up a Charter of Fundamental Rights, arguing that protection of those rights was an indispensable prerequisite for the legitimacy of the European Union. The Charter of Fundamental Rights of the European Union was intended to cover, in the form of general principles of Community law, the fundamental rights and freedoms as well as basic procedural rights guaranteed by the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe, derived from the constitutional traditions common to the Member States of the European Union, and the economic and social rights contained in the 1961 European Social Charter of the Council of Europe and the 1989 Community Charter of the Fundamental Social Rights of Workers, insofar as they went beyond the integration objectives of the European Union. The draft Charter of Fundamental Rights should be developed by a body composed of representatives of the Heads of

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[7] Cologne European Council (3–4 June 1999). Presidency conclusions, p. 20, https://www.consilium.europa.eu/ media/21070/57886.pdf [accessed: 18 May 2024].

[8] The Governments of the candidate countries should also be consulted, cf. ibidem.

[9] AdG, 1999, p. 43568 et seq.

State or Government and of the President of the European Commission as well as of members of the European Parliament and national parliaments. Representatives of the European Court of Justice should have observer status in this body, whereas representatives of the Economic and Social Committee, the Committee of the Regions, social groups and experts would perform consultative functions. Administrative and technical support would be provided by the General Secretariat of the Council of the European Union. The body should submit a draft Charter by the end of 2000. Subsequently, at the request of the European Council, the Charter of Fundamental Rights would be solemnly proclaimed by the European Parliament, the European Commission and the Council of the European Union. By October 1999, the General Affairs Council was also to consider the possibility of integrating the Charter of Fundamental Rights into treaty law.[10] At the special meeting of the European Council held in Tampere (15–16 October 1999), a final agreement was reached on the composition and method of work of that body. It was to consist of thirty members of national parliaments, two from each Member State, sixteen members of the European Parliament, fifteen representatives of the Heads of State or Government of Member States and one representative of the President of the European Commission. The inaugural meeting of the body took place in Brussels on 17 December 1999. During the third meeting, at the request of the members of the European Parliament, the body adopted the name 'Convention' by its own decision (1–2 February 2000).[11]

Although the Cologne European Council withdrew from the creation of a Reflection Group on 1 September 1999, the new President of the European Commission, Romano Prodi, appointed the Group of Wise Men (also called the 'Three Wise Men'), to act completely independently with a view to determining the scope of work of the future Intergovernmental Conference. The

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[10] Cologne European Council, op.cit., p. 43. AdG, 1999, p. 43568 et seq.

[11] Tampere European Council (15–16 October 1999). Presidency conclusions, pp. 6–8, https://www.consilium.europa.eu/media/21059/tampere-european-council-presidency-conclusions.pdf [accessed: 18 May 2024]. The body was also composed of alternates that could replace its members as well as of representatives of the Court of Justice (2) and of the Council of Europe (2) as observers. Representatives of the Economic and Social Committee (3), of the Committee of the Regions (2) and of the European Ombudsman were also invited to give their views.

Group was chaired by former Belgian Prime Minister Jean-Luc Dehaene and also included former German President Richard von Weizsäcker and the former Minister for Trade and Competitiveness in Europe in the UK Department of Trade and Industry and H.M. Treasury David Simon, Lord Simon of Highbury. On 18 October 1999, the Group of Wise Men published a report entitled *The institutional implications of enlargement*. Most of the proposals included in the report served to strengthen the supranational architecture in the European Union. The Group of Wise Men found it necessary to expand the agenda of the IGC to include the following matters: strengthening the role of the President of the European Commission by granting them formal authority to dismiss individual Commissioners; establishing qualified majority voting as a rule in the decision-making procedure in the Council of the European Union and linking it to the legislative co-decision procedure in the first pillar; extending the scope of the qualified majority decision-making procedure in the Council of the European Union in the second and third pillars; simplifying the Treaties; consideration of giving the European Union a legal personality; revision of the procedure for establishing enhanced cooperation (decision by qualified majority, without the possibility of veto by any single Member State) and its introduction into the second pillar; consideration of the possibility of integrating the Charter of Fundamental Rights into the Treaties and the definition of the ultimate geographical extension of the European Union. In addition, the report pointed to the need for changes in the way negotiations are conducted at the Intergovernmental Conference. In the future, the participants in the IGC would discuss a draft Treaty prepared by the European Commission, which would significantly accelerate the proceedings.[12]

The report of the Group of Wise Men largely influenced the positions of the European Commission and of the European Parliament, which, under Article 48 TEU on the ordinary procedure for revising the Treaties, were required to submit their opinions to the forthcoming IGC. The two institutions supported, *inter alia*, a significant expansion of the agenda of the

[12] IGC 2000. Richard von Weizsäcker, Jean-Luc Dehaene, David Simon. The institutional implications of enlargement. Report to the European Commission, Brussels, 18 October 1999, pp. 1–15, https://aei.pitt.edu/41766/1/A5784.pdf [accessed: 21 January 2024].

Intergovernmental Conference.[13] As expected, however, the final shape of the agenda was determined by the Governments of the Member States during the consultation with the Finnish Presidency. The vast majority of the Member States were in favour of the idea of limiting the agenda of the IGC basically to three 'Amsterdam left-overs'. Only the Governments of the Benelux countries agreed to expand the agenda of the future IGC. Thus, the Dutch Government strongly advocated the additional inclusion in the agenda of the IGC of the individual responsibility of Commissioners, which seemed particularly important, especially when the corruption scandal involving some Commissioners came to light, leading to the resignation of the entire European Commission on 15 March 1999. It also stressed that the IGC should address the extension of the scope of the co-decision procedure to new cases, the competence and composition of the Court of Justice as well as the institutional and legal arrangements for the European security and defence policy. The Belgian Government demanded a global system reform preparing the European Union for enlargement and did not hide its very friendly position on the proposals contained in the report of the Group of Wise Men. At the same time, the Luxembourg Government proposed that the IGC should also deal with the issues of the individual responsibility of Commissioners, the allocation of seats in the European Parliament, the functioning of the Court of Justice and of the Court of Auditors, enhanced cooperation and the representation of the Union in international relations.[14]

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[13] IGC 2000. Commission Opinion. Adapting the Institutions to make a success of enlargement, Brussels, 26 January 2000, CONFER 4701/00, pp. 1–81. IGC 2000. European Parliament resolution on the convening of the Intergovernmental Conference, 3 February 2000, pp. 1–3, http://www.europarl.eu.int [accessed: 15 Juni 2024]. For more on the positions of the European Commission and of the European Parliament, cf. IGC 2000. European Parliament resolution on the preparation of the reform of the Treaties and the next Intergovernmental Conference, 18 November 1999, pp. 1–10, http://www.europarl.eu.int/ [accessed: 15 Juni 2024]. IGC 2000. European Parliament resolution containing the European Parliament's proposals for the Intergovernmental Conference, 13 April 2000, A5-0086/00/, pp. 1–9. IGC 2000. IGC 2000. Adapting the Institutions to make a success of enlargement. Contribution by the European Commission to preparations for the Intergovernmental Conference on institutional issues, Brussels, 10 November 1999, pp. 1–15, https://ec.europa.eu/commission/presscorner/detail/en/ip_00_79 [accessed: 17 Juni 2024].

[14] Cf. J.J. Węc, Spór o kształt ustrojowy, op. cit., p. 299.

In this context, at its meeting of 10–11 December 1999, the Helsinki European Council agreed on a compromise solution. It accepted the proposal from the majority of participants and decided that the IGC would essentially tackle the following issues: changes in the composition of the European Commission and in the qualified majority decision-making procedure in the Council of the European Union, as well as extending its scope to new cases. On the other hand, it acknowledged the expectations of the Benelux countries by deciding that other necessary amendments to the institutional system should also be discussed during the IGC in connection with the planned enlargement of the European Union to the east and the implementation of the Amsterdam Treaty, concerning the European Parliament, the Court of Justice, the Court of Auditors, the Economic and Social Committee and the Committee of the Regions. Furthermore, if necessary, the Presidency could propose additional problems to be resolved already during the IGC. It was also required to regularly inform the candidate countries about the progress of the IGC and to give them the opportunity to present their own views on the matters under discussion. Finally, the European Council also decided that the IGC would start its work in February 2000 and be concluded in December of that year.[15]

2. Proceedings of the IGC

The IGC was held under the auspices of two Presidencies: those held by Portugal and France. The negotiations were conducted under the general authority of the Heads of State or Government, supported by the Ministers for Foreign Affairs. Meetings of the latter were generally held at two-week intervals and prepared by lower level representatives of the Governments of the Member States. A representative of the European Commission and a representative of the European Parliament as an observer also took part in the proceedings.[16]

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[15] Helsinki European Council (10–11 December 1999). Presidency conclusions, p. 2, https://www.europarl.europa.eu/enlargement_new/europeancouncil/pdf/hel_en.pdf, [accessed: 19 May 2024]. For more on the course of the meeting, cf. AdG, 1999, p. 43953 et seq.

[16] W. Wessels, Nice Results, op. cit., pp. 197–219.

2.1. The first phase of the IGC

The IGC started its work in Brussels on 14 February 2000. The Portuguese Presidency identified five areas for the participants to focus on. These were as follows: reducing the composition of the European Commission, changes in the procedure of qualified majority decision-making in the Council of the European Union and the extension of its scope to new cases, other matters related to internal reforms of the European Commission and of the Council of the European Union as well as other issues that the Governments of the Member States might request. On 25 February 2000, the second meeting of Government representatives considered the views of Member States on possible changes in the functioning of the European Parliament, of the Court of Auditors, of the Economic and Social Committee and of the Committee of the Regions. On 4 April of the same year, representatives of the Governments of the Member States addressed the reform of the Court of Justice and of the Court of First Instance.[17] On 14–15 April 2000, during their extraordinary meeting in Sintra, the Ministers for Foreign Affairs of the Member States, quite unexpectedly, decided to include the enhanced cooperation procedure in the agenda of the IGC.[18]

As at the 1996–1997 Intergovernmental Conference, much controversy during the negotiators' deliberations was caused by the issue of modifying the procedure of qualified majority decision-making in the Council of the European Union. Italy and the Benelux countries, as well as the European Commission and the European Parliament, advocated the recognition of qualified majority voting as a general rule of decision-making within that institution, but subject to defining a precise list of exceptions in which decisions would still require unanimity. Germany opposed the creation of such a list of exceptions because it assumed that some Member States would seek to use it as an instrument to block the idea of extending the scope of the qualified majority voting to new cases. The United Kingdom and Sweden were also against drawing up a list of exceptions, but for a completely different reason. They called for a case-by-case examination where unanimity

[17] IGC 2000. Information note. Provisional Work Programme, Brussels, 15 February 2000, CONFER 4704/2/00, REV 2, pp. 1–2. IGC 2000. Conduct of the IGC, pp. 2–3, http://europa.eu.int/comm/archives/igc2000/geninfo/ index en.htm [accessed: 15 Juni 2024].

[18] IGC 2000. Conduct of the IGC, op. cit., p. 4. T. Wiedmann, Der Vertrag von Nizza – Genesis einer Reform, 'Europarecht' 2001, H. 2, pp. 185–202.

had been in place. The UK thus wished to limit its use in too many new areas.[19] With regard to the revision of the definition of qualified majority in the Council of the European Union, seven Member States (Germany, the Benelux countries, Denmark, Austria and Greece) were in favour of a double majority. That proposal was also traditionally supported by the European Parliament. On the other hand, the United Kingdom, Portugal, but also, quite unexpectedly, Italy, expressed doubts about it, although they did not firmly reject the proposal. The other five Member States, primarily France, Spain and Sweden, opposed it categorically, demanding only a change in the weighting of the votes.[20]

As for the composition of the European Commission, most Member States defended the principle of 'one Commissioner per Member State'. Belgium and France also hardened their positions, although they had called

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[19] IGC 2000. Presidency note. Possible extension of qualified majority voting – Articles which could move to qualified majority voting as they stand, Brussels, 11 February 2000, CONFER 4706/1/00, REV 1, pp. 1–8. IGC 2000. Presidency note. Possible extension of qualified majority voting (QMV) – Introductory note, Brussels, 11 February 2000, CONFER 4705/1/00, REV 1, pp. 1–2. IGC 2000. Note from the Presidency. Intergovernmental Conference – Possible extension of qualified majority voting, Brussels, 6 April 2000, CONFER 4734/00, pp. 1–3.

[20] IGC 2000. Italy's position, Brussels, 3 March 2000, CONFER 4717/00, pp. 1–8. IGC 2000. Memorandum from the Greek Government to the Intergovernmental Conference on institutional reform of the European Union, Brussels, 3 March 2000, CONFER 4719/00, pp. 1–8. IGC 2000. Contribution from the Dutch Government: An agenda for internal reforms in the European Union, Brussels, 6 March 2000, CONFER 4720/00, pp. 1–20. IGC 2000. Memorandum from Benelux, Brussels, 7 March 2000, CONFER 4721/00, pp. 1–4. IGC 2000. Contribution from the Danish Government: Basis for negotiations, Brussels, 7 March 2000, CONFER 4722/00, pp. 1–5. IGC 2000. Contribution from the Finnish Government: Background and objectives in the IGC 2000, Brussels, 7 March 2000, CONFER 4723/00, pp. 1–19. IGC 2000. Basic principles of Austria's position, Brussels, 15 February 2000, CONFER 4712/00, pp. 1–9. IGC 2000. Policy document of the Federal Republic of Germany on the Intergovernmental Conference on institutional reform, Brussels, 30 March 2000, CONFER 4733/00, pp. 1–8. IGC 2000. Weightings of votes in the Council. Presidency note, Brussels, 24 May 2000, CONFER 4745/00, pp. 1–8. IGC 2000. Cover note from Italian delegation. Reweighting Member States' votes in the Council of the European Union, Brussels, 16 June 2000, CONFER 4751/1/00, REV 1, pp. 1–13. G. Müller-Brandeck-Bocquet, Deutsche Leadership in der Europäischen Union? Die Europapolitik der rot-grünen Bundesregierung 1998–2002, [in:] G. Müller-Brandeck-Bocquet (et al.), Deutsche Europapolitik von Konrad Adenauer bis Gerhard Schröder, Opladen 2002, pp. 180–181.

for a reduction in the number of Commissioners during the previous IGC. The French delegation also opposed further strengthening of the position of the President of the European Commission, arguing that it could lead to disrupting the internal balance within the institution. At the same time, the European Commission and the European Parliament spoke in favour of two alternative solutions. One option was to maintain the principle of 'one Commissioner per Member State', but subject to strengthening the role of the President of the Commission and introducing an internal hierarchy in the College of the Commission. The other solution was to limit the number of Commissioners to twenty and to establish a system of rotation between individual Member States. The Netherlands also proposed defining the individual responsibility of Commissioners, to avoid the requirement to dismiss the Commission as a body if the Parliament's confidence should be lost by one or more Commissioners. The right to dismiss a Commissioner would be with the President of the Commission, but subject to approval by the European Council. The European Commission itself argued that the European Parliament should have the right to dismiss a Commissioner in such a situation. The vast majority of delegations were convinced of the need to increase the powers of the European Parliament by extending the scope of the co-decision procedure. Whereas Germany, the Benelux countries, but also the European Parliament and the European Commission, proposed the use of the procedure in the same cases as those where decision-making in the Council of the European Union by qualified majority would apply, most of the delegations demanded a case-by-case examination. In addition, the Netherlands called for the dissolution of the European Parliament and new elections to take place in the event of the resignation of the European Commission as an institution. Most of the delegations also advocated a new allocation of seats in the European Parliament, the Court of Justice, the Court of First Instance, the Economic and Social Committee and the Committee of the Regions. The Netherlands, supported by the United Kingdom, called for a deeper reform of the Court of Justice and of the Court of First Instance, including the transfer of part of the powers of the Court of Justice to the Court of First Instance as well as the gradual transition from full Court adjudication to adjudication in chambers. There was also much controversy about enhanced cooperation. In this case, the main dividing line was drawn between the advocates of maintaining the provisions of the Amsterdam Treaty

and the supporters of relaxing the existing conditions for establishing such cooperation, including, in particular, the abolition of the right of veto and the modification of the requirement for participation in enhanced cooperation by more than half of the Member States.[21]

After four months of deliberation, the Santa Maria da Feira European Council (19–20 June 2000) adopted the interim report on the progress of the IGC, prepared by the Portuguese Presidency on 14 June 2000, including the extension of the qualified majority voting in the Council of the European Union to new cases (subject to some exceptions), and the related extension of the legislative co-decision procedure to new areas, two ways of modifying the definition of qualified majority in the Council of the European Union, two options for changes in the composition of the European Commission, two versions for the allocation of seats in the European Parliament after the enlargement of the Union to the east as well as changes in the functioning of the Court of Justice.[22] In addition, the European Council confirmed the above-mentioned decision of the Ministers for Foreign Affairs of the Member

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[21] IGC 2000. Presidency note. Other amendments to be made to the Treaties with regard to the European institutions – European Parliament, Brussels, 24 February 2000, CONFER 4713/00, pp. 1–5. IGC 2000. Note from the Presidency. Other amendments to the Treaties with regard to: the Court of Auditors – the Economic and Social Committee – the Committee of the Regions, Brussels, 24 February 2000, CONFER 4715/00, pp. 1–4. IGC 2000. Note from the Presidency. The Commission, Brussels, 24 March 2000, CONFER 4727/00, pp. 1–5. IGC 2000. Note from the Presidency. The Commission, Brussels, 24 May 2000, CONFER 4744/00, pp. 1–4. IGC 2000. Size and composition of the European Commission, Brussels, 26 May 2000, CONFER 4746/00, pp. 1–8. IGC 2000. European Parliament resolution containing the European Parliament's proposals for the Intergovernmental Conference, 13 April 2000, pp. 2–5, http://www.europarl.eu.int/ [accessed: 15 Juni 2024]. IGC 2000. European Parliament resolution on the preparation of the reform of the Treaties and the next Intergovernmental Conference, 18 November 1999, pp. 5–8. IGC 2000. Adapting the Institutions to make a success of enlargement. Contribution by the European Commission to preparations for the Intergovernmental Conference on institutional issues, op. cit., pp. 1–66. IGC 2000. Conduct of the IGC, op. cit., p. 2. G. Müller-Brandeck-Bocquet, Deutsche Leadership in der Europäischen Union?, op. cit., pp. 177–186. J. Leinen, Die Positionen und Erwartungen des Europäischen Parlaments zur Regierungskonferenz, 'Integration' 2000, H. 2, pp. 73–80.

[22] IGC 2000. Presidency report to the Feira European Council. Intergovernmental Conference on institutional reform, Brussels, 14 June 2000, CONFER 4750/00, pp. 1–118.

States to put the enhanced cooperation procedure on the agenda of the IGC, but at the same time stressing the need for 'coherence and solidarity in an enlarged Union'.[23]

As regards the extension of the procedure for qualified majority voting in the Council of the European Union, the Portuguese Presidency drew up a list of twenty-eight articles of a systemic (constitutional) nature which should still require unanimity. These comprised/included: common defence; revision of the Treaties; accession of new Member States to the European Union; own resources; uniform electoral procedure for the European Parliament; amendments to legislative proposals from the European Commission; replacement of the provisions of the Protocol on the excessive deficit procedure; alteration of the number of members of the Commission; second co-decision reading after a negative opinion from the Commission.[24] The Presidency also submitted a list of twenty-one cases in which it proposed the use of co-decision. As for the definition of qualified majority, the Portuguese Presidency presented three options for the use of a double threshold (dual-majority system) and two proposals for a simple revision of the weighting of votes. The first option of a double majority provided for a simple majority of the votes of the Member States, i.e. for the Union of 27 Member States, a majority of 14/27, represented by 50.1% of the population of the Union. The second option was to maintain the existing system of the weighting of votes and to introduce a 'demographic clause' reflecting the population potential of the Member States. The third option was to change the number of weighted votes and to link it to the demographic clause. Under the second option, decisions in the Council of the European Union for the EU-27 would be taken by a qualified majority of 96/134 votes, represented by 58% of the Union's population, and in the case of the third option, by a qualified majority of 214/298 votes, from 58% or 60% of the Union's population. As for a simple revision of the weighting of votes, a characteristic feature of the first draft was that it was

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[23] Santa Maria da Feira European Council (19 and 20 June 2000). Presidency conclusions, p. 1, https://www.consilium.europa.eu/media/21027/santa-maria-da-feira-european-council-presidency-conclusions.pdf [accessed: 19 May 2024].

[24] As early as 3 July 2000, these proposals were confirmed by the French Presidency, which made it easier to reach a subsequent compromise more quickly, cf. IGC 2000. Presidency note. Extension of qualified majority voting, Brussels, 3 July 2000, CONFER 4753/00, pp. 1–19.

an extrapolation of the existing system: for the EU-27, it provided that decisions in the Council of the European Union would be taken by a qualified majority of 234/330 votes. According to the second draft, the number of votes per Member State would be a result of its population (in millions of persons) rounded to the nearest number and decisions for the EU-27 would be adopted by a majority of 134/188 votes. The proposals for the composition of the European Commission assumed maintaining the principle of 'one Commissioner per Member State' while strengthening the position of its President and introducing an internal hierarchy, or limiting the number of Commissioners and establishing a system of rotation in the appointment of the College of the Commission between individual Member States. The proposed changes to the distribution of seats in the European Parliament provided for maintaining the current number of 700 members. The first draft also retained the lowest number of six seats, whereas the second one reduced it to four. However, while the first draft favoured medium-sized and small Member States, based on the extrapolation of the previous allocation of seats and subsequent linear reduction, the second draft was the most unfavourable for small countries, reflecting demographic differences between individual Member States.[25]

As the 2000 IGC gained momentum, representatives of the Governments of the Member States began to put forward more and more new proposals for reforming the EU system. The most important of these were the initiatives of former European Commission President Jacques Delors, German Foreign Minister Joschka Fischer, French President Jacques Chirac and British Prime Minister Tony Blair. Prior to the start of the IGC, on 14 November 1999, Delors spoke in favour of the creation of a confederation as a form of new regulation of relations between the Member States of the European Union and the candidate countries. As Delors saw it, such a confederation would be the best way to reconcile the tasks arising from the desire to deepen and expand the integration process. In its framework, the candidate countries could cooperate on a permanent basis with the Member States of the European Union on fundamental issues concerning their external

[25] IGC 2000. Presidency report to the Feira European Council. Intergovernmental Conference on institutional reform, CONFER 4750/00, op. cit., pp. 25–32, 90, 36, 94–95, 17–24, 63–71, 11–16, 59–61, 33–35, 91–93.

and internal security. They would not then be required to immediately incorporate the *acquis communautaire* into their national legislations as that would pose significant difficulties. At the same time, within the European Union, some Member States, preferably the founding Member States of the European Communities, should establish a 'European avant-garde', with separate institutions, in order to move faster than other countries towards a 'united Europe'. It would be a better solution than expecting the euro area to play a role as a 'springboard for political union'. Delors did not share the opinion that progress in the field of political integration would somehow automatically emerge from economic integration.[26]

A few weeks before the end of the first phase of the Intergovernmental Conference, on 12 May 2000, at the University Humboldt in Berlin, German Foreign Minister Fischer gave a speech in which he advocated very profound changes in the EU, including the drafting of a constitutional Treaty, the gradual establishment of a 'federation of nation states', based on enhanced cooperation, as well as numerous changes in the institutional system of the European Communities. In his view, the enlargement of the European Union to the east and south could lead to reducing or even undermining its capacity to act in the future.[27] The German Foreign Minister called on all the Member States to launch a broad political and social debate on the system reform of the European Union. At the same time, however, he made it clear that the model of deliberative democracy, promoted for several years by the German philosopher Jürgen Habermas, would be a good solution for the European Union's reform process.[28] Under deliberative democracy, not only the Member State Governments, and Community institutions, but also the national parliaments and the public opinion of individual Member States would be involved in the debate, i.e. deliberation, on political reforms in the European Union. The associations with the work of the Convention, which

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[26] J. Delors, Ponowne zjednoczenie Europy: nasza misja historyczna [Reuniting Europe: Our Historic Mission], [in:] O przyszłości Europy. Głosy polityków [On the future of Europe. Politicians' views], Warszawa 2000, pp. 7–19.

[27] J. Fischer, Quo vadis, Europo? [Quo vadis, Europe?], [in:] O przyszłości Europy, op. cit., p. 28.

[28] For more on deliberative democracy, cf. J. Habermas, Drei normative Modelle der Demokratie. Zum Begriff der deliberativen Demokratie, [in:] J. Habermas, Die Einbeziehung des Anderen, Frankfurt am Main 1996, pp. 277–292.

was then discussing the contents of the Charter of Fundamental Rights, were obvious. Whereas deliberative democracy would provide broad public support for the EU's reform process, enhanced cooperation should ensure the completion of constituting Political Union. The process of creating Political Union would involve three development stages. In the first phase of development, cooperation between the countries concerned should be intensified by the gradual transformation of the Eurozone to a 'politico-economic union' as well as by cooperation in immigration, asylum, crime prevention, a common foreign and security policy, and environmental policy. In the second phase of development, a group of Member States should create a 'centre of gravity', a 'core Europe' or an 'avant-garde' capable of following the path of political integration. This group of countries would develop and conclude a constitutional Treaty, to form the basis for the future federation of nation states. On the basis of this Treaty, the 'avant-garde' would establish its own institutions, functioning independently of the institutions of the European Union, namely a parliament, a government and a directly elected president. Such a parliament, with legislative powers, would have two chambers. The lower chamber would be composed of members elected directly by all EU citizens and at the same time being members of their national parliaments. The upper house would be formed by senators, directly elected or appointed by the Governments of the Member States. A European government, with executive powers, would be created from the transformation of the European Council or the European Commission; in the latter case, based on the existing Commission structure as a starting point, the federation should opt for the direct election of its president. Next, mechanisms should be developed for cooperation between the 'avant-garde' and the European Union. Like Delors, Germany's Foreign Minister Fischer did not specify which countries would form the 'avant-garde', merely suggesting that these could be the founding members of the European Communities, the Eurozone 11 Member States or another group of countries. However, a closer analysis of his arguments led to the conclusion that the best solution would be to base the 'avant-garde' on the Eurozone 11 Member States. On the other hand, however, Fischer did not hide that the 'avant-garde' would need to be open to all the Member States of the European Union and to the candidate countries. In the final stage of development, the states forming the 'avant-garde', perhaps already comprising the majority of the Member States of the European Union, would form a

'federation of nation states'. A constitutional Treaty would also define the division of powers between the federation and the nation states. The federation would only obtain core sovereignties and matters which absolutely needed to be regulated at the European level. The rest of the competences and powers would remain the responsibility of the nation states. The nation states would retain a much larger role than the Länder had in Germany. The principle of subsidiarity would be constitutionally enshrined in such a federation.[29] Fischer's proposal aimed to establish four levels of power in the European Union instead of the three existing ones. These would include regional and local authorities; the nation states with legislative, executive and judicial powers; a federation with a parliament, a government and a president; and an enlarged European Union with the Council of the European Union, the European Commission, the European Parliament, and the Court of Justice. However, his proposal offered no answers to many important questions. Among these, the following issues should come to the fore: which Member States should form such an 'avant-garde'? If too many countries should wish to belong to the 'avant-garde', would it still be an avant-garde? How would it achieve its integration goals and objectives more quickly? How would a second parliamentary chamber and a European government be constituted? What powers should be conferred on the federation, and what competences should remain vested in the nation states? How realistic would the vision of a future merger of such a European Federation with the whole of the European Union be?

Fischer's speech, although agreed with French Foreign Minister Hubert Védrine,[30] apparently did not satisfy the Government of France as President Chirac himself joined the debate on these proposals. On 27 June 2000, in his

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[29] J. Fischer, op. cit., pp. 31–34, 35–36. J. Fischer: Vom Staatenverbund zur Föderation – Gedanken über die Finalität der europäischen Integration. Rede am 12. Mai 2000 in der Humboldt Universität in Berlin, pp. 1–10 http://www.uni-tuebingen.de/ezff/doku_euro-foederation.html [accessed: 20 July 2024]. For an analysis of J. Fischer's speech, cf. also: B. Thalmaier, Die zukünftige Gestalt der Europäischen Union. Integrationstheoretische Hintergründe und Perspektiven einer Reform, Baden-Baden 2005, pp. 35–37.

[30] For Fischer's explanations during the Bundestag debate on his speech, cf. Verhandlungen des Deutschen Bundestages. Stenographische Berichte. 14. Wahlperiode. 106. Sitzung, 19. Mai 2000, Berlin 2000, pp. 9979–9982. Cf. also: H. Védrine, Odpowiedź Joschce Fischerowi [Response to Joschka Fischer], [in:] O przyszłości Europy, op. cit., pp. 37–40.

speech to the Bundestag, Chirac confirmed France's interest in participating in the development of enhanced cooperation, carried out by a group of Member States seeking deeper or faster integration. Together with France and Germany, such a group of countries could form a 'pioneer group' that would pave the way for the other Member States on the basis of a new enhanced cooperation procedure defined by the IGC. In his view, the 'pioneer group' could also establish enhanced cooperation outside the framework of the European Union, without undermining its coherence or the *acquis*. The 'pioneer group' should remain open to all Member States. It should work on better coordination of economic policies and a strengthening of the defence and security policy. However, Chirac opposed the notion that the Member States belonging to the 'pioneer group' should sign a new international agreement or create new institutions as the European Union already had 'a great many' of those. He also indirectly expressed his disapproval of the idea of establishing a 'federation of nation states'. In his opinion, the 'pioneer group' could be coordinated by a secretariat specifically set up for the purpose. Chirac also made it clear that neither France nor Germany had the slightest intention of creating a European 'superstate' that would take the place of individual EU Member States and deprive them of their right to participate in international life. On the other hand, Chirac supported Fischer's idea of drawing up and signing a European constitution in the future, although he specified that it could only happen after the ratification of the new Treaty discussed by the IGC.[31]

The proposals for the creation of a federation of nation states as well as for the drafting and signing of a European constitution were opposed by British Prime Minister Tony Blair in his speech delivered in Warsaw on 6 October 2000. He spoke in favour of further developing the European Union as a

[31] J. Chirac, Nasza Europa [Our Europe], [in:] O przyszłości Europy, op. cit., pp. 53–59. J. Chirac, Unser Europa. Rede vor dem Deutschen Bundestag am 27.06.2000 in Berlin, 'Internationale Politik' 2000, H. 8, pp. 126–130. For an analysis of J. Chirac's speech, cf. G. Müller-Brandeck-Bocquet, Frankreichs Europapolitik unter Chirac und Jospin. Abkehr von einer konstruktiven Rolle in und für Europa?, 'Integration' 2001, H. 3, pp. 267–268. For more on the influence of Fischer's and Chirac's speeches on the proceedings of the IGC, cf. T. Jäger, T. Middendorf, Ordnungskonzepte für Europa: Die deutsch-französische Kerneuropa-Debatte und ihre Auswirkungen auf die Regierungskonferenz von Nizza, 'Zeitschrift für Politik' 2001, H. 3, pp. 268–301.

'unique combination of the intergovernmental and the supranational'; on the other hand, he did not hide his interest in strengthening the intergovernmental architecture within it. Instead of signing a constitution, he said, it would be 'both desirable and realistic' to draw up a statement of principles defining the division of competences between the European Union and the Member States. However, such a Statement of Principles would have the rank of a political document rather than of a legal one. That would also allow Member States to formulate integration tasks and objectives at a regional level. It could be much simpler, more transparent and accessible to the citizens of the European Union than a constitution. According to Blair, one of the most urgent tasks of the European Union in the institutional sphere was the need to establish a second chamber of the European Parliament, composed of representatives of national parliaments. However, it would not be involved in legislative activities; instead, it would watch over the implementation of the principle of subsidiarity in the European Union, thus helping overcome the democratic deficit. It could also contribute to 'democratic oversight at a European level of the common foreign and security policy'. Among other important institutional changes related to the enlargement of the European Union to the east, Blair mentioned the reform of the European Commission, of the Council of the European Union and of the European Parliament, to be addressed by the IGC. However, the British Prime Minister also recognised the reform of the common agricultural policy, social policy, the common foreign and security policy, the fight against unemployment, organised crime and the environmental protection as equally important tasks facing the European Union in the coming years.[32]

Although the political initiatives of Delors, Fischer, Chirac and Blair were fundamentally different, certain points of convergence could also be found. Whereas Delors, Chirac and Fischer were essentially in favour of basing the further development of European integration on enhanced cooperation, Blair placed the main emphasis on respecting the principle of subsidiarity and overcoming the democratic deficit. The reform of the European Union proposed by the first three politicians was supposed to be systemic (constitutional) in nature; the British Prime Minister argued that it should be limited

[32] T. Blair, Europa, ale jaka? [What sort of Europe?], [in:] O przyszłości Europy, op. cit., pp. 81–90. For an analysis of T. Blair's speech, cf. B. Thalmaier, op. cit., pp. 37–38.

to the most important institutional issues as well as to selected EU policies. The greatest convergence of views characterised the political initiatives of Fischer and Chirac. The two politicians preferred enhanced cooperation as the main method of European integration, advocated the development of a European constitution introducing, *inter alia*, a rigid division of competences between the European Union and the Member States on the basis of the principle of subsidiarity, and expressed interest in transforming the future Union into a world power. On the other hand, there were at least three fundamental differences between Fischer's and Chirac's views. Whereas the German Foreign Minister called for the European Union to be transformed into a 'federation of nation states', Chirac (like Blair) opposed it, satisfied with maintaining the Union's existing status as a 'partly integrated' and 'partly intergovernmental' organisation, something intermediate between a federation and a confederation.

Whereas Fischer advocated strengthening the supranational architecture in the future Union, Chirac proposed, above all, reinforcing the intergovernmental, opposing the creation of new institutions and advocating loose coordination of the pioneer group by a specially appointed secretariat. If Fischer suggested that the Eurozone Member States should form the 'avant-garde', the French President made it clear that in his opinion all the EU Member States interested in closer cooperation should participate in the 'pioneer group'. The new political initiatives of Fischer, Chirac and Blair had a significant impact on the further proceedings of the 2000 Intergovernmental Conference.

2.2. The second phase of the IGC

In the autumn of 2000, the debate on the system and scope of the reform of the European Union coincided with a discussion (outside the official deliberations of the Intergovernmental Conference) on the status of the Charter of Fundamental Rights, adopted by the Convention on 26 September 2000 and subsequently approved by the European Council at its informal meeting in Biarritz 13–14 October 2000. The most important consequence of the new political initiatives proposed by Fischer, Chirac and Blair was making the participants in the IGC aware of the need to carry out the system reform of the European Union in two stages. The decision was taken by the Ministers for Foreign Affairs of the Member States at their informal meeting in Evian (2–3 September 2000). In the first stage, it would be necessary to agree on

the most important constitutional changes necessary for the enlargement of the European Union to the east. Only in the second stage would a thorough system reform of the EU be carried out, including the possibility of adopting a European constitution. Three months later, on 5 December 2000, the German and Italian Governments proposed that the next IGC should be convened in 2004 to discuss the simplification of the Treaties, the division of competences between the Union and the Member States as well as the status of the Charter of Fundamental Rights.[33]

At the above-mentioned Biarritz European Council (13–14 October 2000), the initial compromise was only reached on two issues, i.e. extending the scope of qualified majority voting in the Council of the European Union to new cases and amending the procedure for establishing enhanced cooperation. As for issues regarding the extension of the scope of qualified majority decision-making to new cases in the Council of the European Union, taxes, social policy and justice, and home affairs were still to be resolved. However, no compromise was reached in other, seemingly easy, institutional matters concerning the European Parliament, the Court of Auditors, the Economic and Social Committee and the Committee of the Regions, although the proposals of the French Presidency had been known from 20 September 2000.[34] The reasons for the lack of a broader agreement included not only differences of views between large and small Member States, but also disagreements between France and Germany.[35] Therefore, the final discussion of the remaining contentious issues was postponed to the Nice European Council, which concluded the French Presidency. With regard to the new definition of qualified majority, two solutions were still discussed in the Council of the European Union: either a simple revision of the weighting of votes, or the introduction of a double majority. In addition, two drafts were still under consideration with regard to the reorganisation of the European Commission.

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[33] Cf. J.J. Węc, Spór o kształt ustrojowy, op. cit., pp. 309–310.

[34] Conférence intergouvernementale (hereafter: CIG) 2000. Note de la Présidence. Le Parlement européen, Bruxelles, le 20 septembre 2000, CONFER 4771/00, pp. 1–9. CIG 2000. Note de la Présidence. Modifications au traité concernant la Cour des comptes, le Comité économique et social et le Comité des regions, Bruxelles, le 20 septembre 2000, CONFER 4772/00, pp. 1–7.

[35] G. Müller-Brandeck-Bocquet, Deutsche Leadership in der Europäischen Union?, op. cit., pp. 180–183. R. Corbett, F. Jacobs, M. Shackleton, op. cit., p. 304.

One proposal set a ceiling on the number of Commissioners, with equal rights for all Member States to designate their respective representatives, whereas the other provided that each Member State should have one representative in the Commission. In addition, the European Council asked the IGC to examine the possibility of strengthening the provisions of Article 7 of the Treaty on European Union in order to avoid the risk of Member States breaking the fundamental principles of the EU.[36]

The Nice European Council was the longest summit meeting in the history of the European Communities and the European Union to that date. It was originally scheduled for three days (7–9 December 2000), but due to the number and importance of the issues raised there, the deliberations lasted until the early morning hours of 11 December 2000.[37] On the first day of the meeting, the European Council took note of the solemn proclamation of the Charter of Fundamental Rights made on the same day by the European Parliament, the European Commission and the Council of the European Union. The Charter thus became a political declaration, although the European Council also announced that it would consider giving it legal status at a later date. The Charter of Fundamental Rights combined civil, political, economic, and social rights, which had been scattered in various sources: international, European and national documents. Declaration No 23 on the future of the Union, annexed to the Final Act of the Intergovernmental Conference, provided that the 'status of the Charter of Fundamental Rights of the European Union, proclaimed in Nice' was to be addressed by the next IGC in 2004.[38]

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[36] IGC 2000. Presidency note. Weighting of votes, Brussels, 3 July 2000, CONFER 4754/00, pp. 1–5. IGC 2000. Weighting of votes in the Council, Brussels, 5 October 2000, CONFER 4781/00, pp. 1–4.

[37] Nice European Council Meeting 7–11 December 2000. Presidency conclusions, p. 1, https://www.consilium.europa.eu/media/21005/nice-european-council-presidency-conclusions.pdf [accessed: 18 May 2024].

[38] Declaration on the future of the Union, [in:] Final Act of the Conference of the Representatives of the Governments of the Member States convened in Brussels on 14 February 2000 to adopt by common accord the amendments to be made to the Treaty on European Union, the Treaties establishing respectively the European Community, the European Atomic Energy Community and the European Coal and Steel Community and certain related Acts, p. 85, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12001C/TXT&rid=10 [accessed: 20 May 2024].

After several days of dramatic negotiations in Nice, the European Council also adopted a draft version of the new Treaty.[39] At the meeting, a compromise was reached on all outstanding issues by linking them together in a single negotiating package. Thus, it was easier for medium-sized and small countries to adopt solutions favouring large Member States. The new definition of qualified majority in the Council of the European Union represented a compromise between a double majority system and a simple weighting of votes, in particular between the aforementioned third option of double majority and the first option of a simple weighting of Council votes proposed by the Portuguese Presidency in its interim report of 14 June 2000. The new weighting of votes would significantly increase the nominal value of each Member State's votes in a manner clearly favouring large countries. At the same time, it was linked to the right of each Member State to request that a qualified majority be represented by at least 62% of the Union's population. Moreover, the IGC maintained the existing provision that, in the case of proposals from the European Commission, the consent of the majority of the Member States would be required for qualified majority decisions, whereas in other cases acts of the Council would require the approval of two thirds of the Member States. In exchange for agreeing to the new definition of qualified majority in the Council of the European Union, medium-sized and small Member States managed to push through a proposal to grant each Member State one Commissioner in the European Commission until the twenty-seventh Member State should join the Union, combined with a strengthening of the role of its President. Another concession to medium-sized and small Member States was the new distribution of seats in the European Parliament, favouring them at the expense of large Member States. The total number of seats was increased from 700 to 732, although the previously considered minimum threshold of MEPs per Member State was not established. Belgium, Greece and Portugal each received two more seats

[39] CIG 2000. Projet de Traité de Nice, Conférence intergouvernementale sur la réforme institutionelle, Bruxelles, le 6 décembre 2000, CONFER 4816/00, pp. 1–120. For more on the proceedings and dramatic development of the Nice European Council meeting, cf. G. Müller-Brandeck-Bocquet, Deutsche Leadership in der Europäischen Union?, op. cit., pp. 180–184. M. Gray, A. Stubb, Keynote Article. The Treaty of Nice: Negotiating a Poisoned Chalice, 'Journal of Common Market Studies' 2001, Supplement 1, pp. 15–16.

than before (22),[40] whereas France, the UK and Italy lost fifteen seats (72) and Spain – fourteen (50). The only large Member State that managed to maintain its number of EP seats was Germany (99). Finally, in exchange for the smaller number of weighted votes in the Council of the European Union allocated to Belgium, it was decided that from 2002 one European Council meeting per Presidency would be held in Brussels, and each meeting of that institution would be organised there after the enlargement of the Union to 18 Member States. However, the composition of the Economic and Social Committee and of the Committee of the Regions was based on a simple rule of maintaining the previous number of members representing the old countries and adding representatives of the new Member States to it, according to the key resulting from the extrapolation of the existing allocation of seats. It should be emphasised that the new definition of qualified majority in the Council of the European Union brought the greatest benefits to the large Member States. Spain and Poland gained the most from the new weighting of votes (31% of their respective weights), ahead of Germany, France, the United Kingdom and Italy (13% of the weight each). Among the medium-sized Member States, the only beneficiary was the Netherlands (1% of the weight). All other Member States and candidate countries suffered losses, with the small candidate countries losing the most: Latvia, Slovenia and Estonia (50% of the weight each) as well as Malta (40% of the weight). On the other hand, the introduction of the demographic verification clause favoured the largest Member States in terms of population because already three such countries (e.g. Germany, the United Kingdom, France) forming a coalition could block a decision, even if they could not gather a blocking minority. To block a decision based on the number of votes rather on demographic potential, it was enough to have an agreement between three large Member States (such as Spain and Poland) and one medium-sized Member State with at least six votes (e.g. Lithuania).[41]

Finally, after legal and linguistic amendments, made under the supervision of the General Secretariat of the Council of the European Union, the Treaty was signed in Nice by the Foreign Ministers of the 15 Member States

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[40] However, the Czech Republic and Hungary, with the same number of inhabitants, received only 20 seats each.

[41] J.J. Węc, Spór o kształt ustrojowy, op. cit., pp. 311–313.

on 26 February 2001.[42] Like the Amsterdam Treaty, it was an agreement containing provisions revising the Treaty on European Union and the Treaties establishing the European Communities.[43] In Ireland, however, as many as two referendums on the new Treaty were needed. First, in June 2001, the people of that country rejected the Treaty in which there was a majority of 53.87%, and then again, in October 2002, but then accepted it with a majority of 62.89%. Then, after ratification in the remaining Member States, the Treaty of Nice entered into force on 1 February 2003.[44]

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As in the case of the 1996–1997 IGC, the reasons for convening the 2000 Intergovernmental Conference were both the constitutional issues of the EU unresolved during the former IGC and the accession negotiations with the Central and Eastern European countries. France, Germany and the United Kingdom were among the most active participants in the 2000 Intergovernmental Conference, but their achievements were not univocal.

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[42] Treaty of Nice (hereafter: the Treaty of Nice or the Nice Treaty) amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Official Journal of the European Communities C, 80, 10.3.2001, pp. 1–87, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12001C/TXT [accessed: 20 May 2024].

[43] For an analysis of the Treaty of Nice, cf. J.J. Węc, Spór o kształt ustrojowy, op. cit., pp. 314–332.

[44] The second referendum in Ireland was not held until the adoption by the Seville European Council of 21–22 June 2002 of a special declaration recognising that, after the entry into force of the Nice Treaty, 'like all Member States of the Union, Ireland would retain the right, after the entry into force of the Treaty of Nice, to take its own sovereign decision, in accordance with its constitution and its laws, whether to commit military personnel to participate in any operation carried out under the European Security and Defence Policy'. Furthermore, the European Council took note of the National Declaration of Ireland, which provided, inter alia, that the Member State's participation in the implementation of the common foreign and security policy of the European Union would not prejudice its 'traditional policy of military neutrality', that the country was 'not bound by any mutual defence commitment' and it would not be 'party to any plans to develop a European army'. Seville European Council (21 and 22 June 2002). Presidency conclusions. National declaration by Ireland, Declaration by the European Council, pp. 27–30, https://www.consilium.europa.eu/media/20928/72638.pdf [accessed: 20 May 2024].

Representatives of those Member States put forward the highest number of diplomatic initiatives, as reflected in the joint letter of Chancellor Kohl and President Chirac to the British Presidency in 1998 and the proposals from Delors, Chirac, Fischer and Blair made between 1999 and 2000. Despite their fundamental differences, certain points of convergence could also be found. Whereas Delors, Chirac and Fischer were essentially in favour of basing the further development of European integration on enhanced cooperation, Blair placed the main emphasis on respecting the principle of subsidiarity and overcoming the democratic deficit. The reform of the European Union proposed by Delors, Chirac and Fischer was supposed to be constitutional in nature; the British Prime Minister argued that it should be limited to the most important institutional issues as well as to selected EU policies. The greatest convergence of views characterised the political initiatives of Fischer and Chirac. The two politicians preferred enhanced cooperation as the main method of European integration, advocated the development of a European constitution introducing, *inter alia*, a rigid division of competences between the European Union and the Member States on the basis of the principle of subsidiarity, and expressed interest in transforming the European Union into a world power in the future. On the other hand, there were crucial differences between Fischer's and Chirac's views. Whereas the German Foreign Minister called for the European Union to be transformed into a 'federation of nation states', Chirac and Blair opposed this, satisfied with maintaining the Union's existing status as an international organisation, something intermediate between a federation and a confederation.

Even if the initiatives of Delors, Chirac, Fischer and Blair influenced the debate on the reform of the EU system, their contributions to the final outcome of the Intergovernmental Conference were not very significant because the fundamental changes made by the IGC only concerned only three so-called 'Amsterdam left-overs' and enhanced cooperation. The main results of the IGC included: (1) the new definition of qualified majority in the Council of the European Union, which was to be 255/345 votes for the EU-27 Member States, representing at least 62% of the EU population; (2) the largest extension of the scope of qualified majority voting in the history of the EU to 29 new cases; (3) introducing the 'one Commissioner per Member State' principle in the European Commission and maintaining it until the accession of the 27th Member State; (4) making enhanced

cooperation more flexible and extending it to the common foreign and security policy; (5) increasing the powers conferred on and strengthening the Court of Justice, making extremely important modifications in the structure and organisation of work and, consequently, setting the direction for changes in the division of competences between the Court of Justice and the Court of First Instance.

The reasons for the lack of agreement on a greater number of constitutional changes included not only differences of views between large and small Member States, but also significant disagreements between France and Germany. First, the Governments of the two countries failed – unlike the other Member States – to establish a rigid division of competences between the European Union and the Member States. Further, the German Government was unable to push through its main proposal for establishing a double majority in the Council of the European Union, which even led to sharp disagreements with France. However, 7 of the 15 Member States (Germany, the Benelux countries, Denmark, Austria and Greece) were in favour of its introduction and, in that sense, from the point of view of the German Government, it was an issue to be raised at the next IGC. The new definition of qualified majority in the Council of the European Union adopted by the 2000 IGC represented a compromise between a double majority system and a simple weighting of votes (255/345 votes represented by at least 62% of the EU-27 population). In exchange for agreeing to the new definition of qualified majority in the Council of the European Union, medium-sized and small Member States managed to push through a proposal to grant each Member State one Commissioner in the European Commission. At the same time, the joint achievements of Germany and France included greater flexibility of enhanced cooperation and its extension to the common foreign and security policy of the EU, whereas the success of the United Kingdom and the Netherlands was a profound reform of the Court of Justice and of the Court of First Instance.

In Declaration No 23 on the future of the Union, annexed to the Final Act of the 2000 Intergovernmental Conference, its participants stressed that the ratification of the Treaty of Nice would close the process of institutional changes necessary in view of the planned accession of new countries to the European Union. At the same time, they called on the EU Member States to engage in a 'deeper and wider debate about the future of the European

Union' involving all interested parties, i.e. representatives of the Community institutions and bodies as well as representatives of national parliaments and of civil society. Such a discussion should address the issues that had not been resolved by the previous IGCs, such as a more precise delimitation of powers between the European Union and the Member States, based on the principle of subsidiarity, the status of the Charter of Fundamental Rights, a simplification of the Treaties, the role of national parliaments in the EU legislative process, as well as bringing the Community institutions and bodies closer to citizens. Following the above-mentioned debate, it was stated that a new Intergovernmental Conference should/was to be convened in 2004, to address a fundamental reform of the European Union.[45] As shown by Declaration No 23 on the future of the Union, the signatory States to the Nice Treaty recognised the necessary, and very profound at that, constitutional changes in the European Union as the reason for convening the next IGC. It meant that between 1990 and 2004 Intergovernmental Conferences were held at an average frequency of every 2.75 years,[46] which implied that in the period in question the European Union was basically in a process of continuous treaty amendments.

[45] Declaration on the future of the Union, [in:] Treaty of Nice, op. cit., pp. 85–86.

[46] That average frequency is obtained by taking into account the time between individual IGCs, counted from the end of one IGC to the beginning of another. In 1990–2004, there were 4 Intergovernmental Conferences, with a total of 11 years in between, excluding their respective preparatory phases, with an average of 2.75 years (5+3+3=11; 11:4=2.75).

The 2003–2004 Intergovernmental Conference

1. The preparatory phase. The Convention on the Future of Europe (2002–2003)

1.1. The composition and structure of the Convention

Following the provisions of Declaration No 23 annexed to the Treaty of Nice, the Laeken European Council of 14–15 December 2001 adopted a declaration providing for the establishment of a Convention on the Future of Europe to 'pave the way' for the IGC. The declaration set out the main objectives of the future structural reform of the European Union. In addition to the issues already mentioned in the Nice Declaration, the reform was to cover issues such as simplifying the catalogue of legislative acts and procedures, the division of powers between the Community institutions, as well as the democratic legitimacy of the Union. The participants in the European Council meeting did not hide that such a thorough system reform of the European Union might even lead 'in the long run to the adoption of a constitutional text in the Union'.[1]

On the basis of the Laeken Declaration, the European Council appointed Valéry Giscard d'Estaing (France) as Chairman, and Giuliano Amato (Italy) and Jean-Luc Dehaene (Belgium) as Vice-Chairmen of the Convention. The declaration also set out the procedure for appointing the Praesidium and the members of the Convention. The Praesidium was to consist of the

[1] Laeken European Council (14 and 15 December 2001). Presidency conclusions, pp. 1, 19–26, https://www.consilium.europa.eu/media/20950/68827.pdf [accessed: 19 May 2024].

Convention Chairman, Vice-Chairmen and nine members representing the Governments holding the Council Presidency during the Convention (3), national parliaments (2), the European Parliament (2) and the European Commission (2).[2] The Praesidium should give political impetus and coordinate and supervise the work of the Convention. It was supposed to consult the European Commission officials and experts of its choice on technical aspects which might require further analysis. The Praesidium could also set up *ad hoc* working groups if necessary. The work of the Praesidium was to be assisted by the Convention Secretariat, whose services were provided by the General Secretariat of the Council of the European Union. The Secretariat could also include experts from the European Commission and from the European Parliament.[3]

Convention members included the representatives of Governments, of parliaments of the Member States and of the candidate countries, members of the European Parliament and representatives of the European Commission. Representatives of the Economic and Social Committee, of the Committee of the Regions, of the European Social Partners and of the European Ombudsman, participated as observers. Unlike the Convention preparing the Charter of Fundamental Rights, the Convention on the Future of Europe consisted of representatives of the candidate countries, although they had no right to block decisions taken by consensus by the Member States of the European Union. The outcome of the work of the Convention was to be a final document containing recommendations (if an agreement should be reached) or different options for solutions to a given issue, with a

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[2] The composition of the Praesidium was as follows: Chairman Valéry Giscard d'Estaing, Vice-Chairmen Giuliano Amato and Jean-Luc Dehaene, representatives of the European Commission Michel Barnier and António Vitorino, representatives of the European Parliament Klaus Hänsch and Iñigo Méndez de Vigo y Montojo, the Irish national John Bruton and the UK national Gisela Stuart, a representative of the Danish Presidency – Henning Christophersen, of the Spanish Presidency – Ana Palacio, later replaced by Alfonso Dastis, and of the Greek Presidency – Giorgos Katiforis, later replaced by Giorgos Papandreou, and at the special request of the candidate countries, their representative – the Slovenian national Alojz Peterle as an observer (Invitee). Cf. Draft Treaty establishing a Constitution for Europe, Official Journal C 169, 18.7.2003, pp. 100–105.

[3] Laeken European Council (14 and 15 December 2001). Presidency conclusions, op. cit., pp. 24–25.

clear indication of the degree of support for each of them by the individual participants. Together with the results of national debates on the future of the European Union, the Convention's final document was intended to be a 'starting point for discussions' at the Intergovernmental Conference convened to take 'ultimate decisions'.[4]

After the procedure for the selection of the Praesidium and of the Convention as a whole, the Convention was composed of 105 members and 102 alternate members (only the Chairman and Vice-Chairmen of the Convention had no alternates). The inaugural meeting of the Convention was held in Brussels on 28 February 2002.[5] In the following weeks, the Praesidium set up ten working groups. These were as follows: Group I: Subsidiarity; Group II: European Charter of Fundamental Rights; Group III: Legal personality; Group IV: National Parliaments; Group V: Complementary Competences; Group VI: Economic Governance; Group VII: External Action; Group VIII: Defence; Group IX: Simplification (of legislative procedures and documents); Group X: Freedom, Security and Justice. The decision to establish Group XI: Social Europe, was taken at the plenary meeting of the Convention on 5–6 December 2002.[6] In order to support the activities of the working groups, the Praesidium also set up three discussion circles: Circle I: Court of Justice; Circle II: Budgetary procedure; Circle III: Own resources. The work schedule of the Convention was divided into three phases. These were as follows: the listening phase, consisting in gathering the opinions of the members of the Convention and all interested groups (February to July 2002); the research phase, aimed at a comparative analysis of all the ideas and proposals for reforming the European Union and the development of a final document containing a draft Constitutional Treaty (September to December 2002); and the design phase, for the final draft of the Constitutional Treaty to be agreed (January to June 2003).[7]

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4 Ibidem.

5 Minister Hübner said: the Convention on the Future of the Europe held its inaugural meeting on 28 February 2002, Sekretariat Europejski, UKIE, http://www.ukie.gov.pl.

6 Europäischer Konvent (hereafter: EK). Plenartagungen des Europäischen Konvents, p. 4, http://european-convention.eu.int/ [accessed: 15 Juni 2024].

7 P. Norman, The Accidental Constitution. The Story of the European Convention, Brussels 2003, pp. 19–24.

The preliminary draft Constitutional Treaty was prepared by the Praesidium of the Convention and submitted by Giscard d'Estaing at the plenary session of the Convention on 28 October 2002. However, the document raised fundamental objections from supporters of federal solutions, arguing that the provisions contained therein gave too much importance to strictly intergovernmental cooperation.[8] It was to be reflected, *inter alia*, in the following provisions: the definition of the European Union, referring to the 'Union of European States' and not mentioning the concept of a 'union among the peoples of Europe' introduced in the preamble of the Maastricht Treaty (Article 1); the clause on the possibility of withdrawing from the European Union by a decision of a given Member State (Article 46); the intention to establish the Congress of the Peoples of Europe as a second parliamentary chamber composed of members from national parliaments (Article 19); new rules for the exercise of the Presidency of the European Council and the Council of the European Union, although the document in question did not specify the term of office or the procedure for appointing and dismissing the Presidents of the two institutions (Articles 15a, 17a).[9] From the preparation of the preliminary draft, the Praesidium began to exert an increasing influence on the most important decisions in the Convention, which largely determined the final version of the draft Constitutional Treaty.[10] In January 2003, the work of the Convention entered its final phase.[11] It resulted in the draft Treaty establishing a Constitution for Europe (hereinafter referred to as the DCT), adopted by the Convention's plenary meeting by consensus on 13 June (Parts I and II) and 10 July 2003 (Parts III and IV).[12]

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8 Der Europäische Konvent (hereafter: EK). Ein Zwischenstand. Beitrag von Gijs de Vries, Vertreter der Niederlande im Europäischen Konvent, 22. November 2002, pp. 1–3, http://www.europa.eu.int, [accessed: 15 Juni 2024].

9 EK. Vorentwurf des Verfassungsvertrages, 22. Oktober 2002, CONV 369/02, pp. 8–18. EK. Ein Zwischenstand, op. cit., pp. 3–4. EK. Organe. Entwurf von Artikeln fur Titel IV des Teils I der Verfassung, 23. April 2003, CONV 691/03, p. 12.

10 For more on the subject, cf. G. Milton, J. Keller-Noellet, The European Constitution. Its Origins, Negotiation and Meaning, London 2005.

11 European Convention (hereafter: EC). Reactions to draft Articles 1 to 16 of the Constitutional Treaty – Analysis, 26 February 2003, CONV 574/1/03, pp. 1–13.

12 Draft Treaty, op. cit., pp. 2–297.

1.2. Proceedings of the Convention

1.2.1. The international legal status of the European Union

One of the first contentious issues concerning the reform of the European Union was the very definition of the Union, especially since no reasonable compromise on the matter had been achieved in the Maastricht Treaty, the Amsterdam Treaty, or the Nice Treaty. Article 1 of the preliminary draft Constitutional Treaty of 28 October 2002 defined the European Union as 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'.[13] During the discussion on the subject, the last phase of the Convention's deliberations was dominated by the conviction, also shared by the representatives of Poland, that it was impossible to outline a vision of the future system of the European Union according to a predetermined model, such as the United States of Europe, the European federation or the federation of national states. Consequently, the final shape of the EU system was to be a result of the existing constitutional model rather than a completely new structure. However, it would have to take into account its current specifics, characterised by the mutual and balanced interpenetration of the intergovernmental and the supranational.

Many members of the Convention expressed their opposition to the further development of the integration process on a federal basis. Such objections were raised by Peter Hain (United Kingdom) and Dick Roche (Ireland). Unmoved by these opinions, the Ministers for Foreign Affairs of France and of the Federal Republic of Germany, Dominique de Villepin and Joschka Fischer, proposed, for tactical reasons, to replace the term 'on a federal basis' with a reference to a 'Federation of Nation States'. Other members, such as Hannes Farnleiter (Austria), Alberto Costa and Luis Queiró (Portugal/EP[14]), Gianfranco Fini (Italy), Matti Vanhanen and Kimmo Kiljunen (Finland), Joachim Wuermeling (Germany/EP) and Peter Altmaier (Germany), and Jan Kohout (Czech Republic), acknowledged that the expression 'on a federal basis' correctly described the method and long-term goal of integration, but

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[13] EC. Preliminary draft Constitutional Treaty, Cover note from the Praesidium to the Convention, Brussels, 28 October 2002, CONV 369/02, p. 8.

[14] The representatives of the European Parliament in the Convention will be hereafter so indicated.

it could lead to a conflict of interest or create misunderstandings in some Member States. Therefore, they proposed replacing the term 'on a federal basis' with the words 'in the Community way'.[15] This position was also supported by Poland's representatives Danuta Hübner and Józef Oleksy. Finally, the following wording was agreed as a compromise: '… this Constitution establishes the European Union, on which the Member States confer competences to attain objectives they have in common. The Union shall coordinate the policies by which the Member States aim to achieve these objectives, and shall exercise in the Community way the competences they confer on it' (Article I-1(1) DCT).[16] The replacement of the term 'on a federal basis' with the phrase 'in the Community way' should be interpreted in accordance with the intention of the Convention members themselves, i.e. as a desire to avoid the impression that the Constitutional Treaty would give the European Union new state-forming functions. On the other hand, it is worth noting that supporters of federal solutions did not hide that the term 'on a federal basis' properly indicated the long-term goal of the European integration process.

The Convention also discussed the issue of transforming the European Union into an international organisation. Working Group III (Legal Personality) first supported this solution in its final report of 1 October 2002. It proposed to introduce a new provision in the draft Constitutional Treaty stating that the Union had a legal personality. The legal personality of the European Union should replace the legal personalities of the European Community and of the European Atomic Energy Community, whereas the Union would have to assume all their commitments. As a result, the European Union would become an international organisation within the meaning of international law. The combination of the legal personality of the European Union and of those of the European Communities would open the way for the merging of the Treaties into a single text, which would have a positive effect on the simplification of the Treaties. However, neither the combination of legal personalities nor the merger of the Treaties automatically entailed

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[15] EC. Reactions to draft Articles, CONV 574/1/03, op. cit., pp. 2–7. EC. Draft Constitution, Volume I, Revised text of Part One, 24 May 2003, CONV 724/03, pp. 48–49.

[16] Draft Treaty, op. cit., p. 9. For greater clarity, the Roman numeration of the articles of the first part of the draft will be used throughout the book as it was later used during the Intergovernmental Conference and subsequently adopted in the Constitutional Treaty itself.

the merging of the existing pillars of the European Union. On the other hand, the members of Working Group III did not hide that the preservation of the existing 'pillar' structure 'in a single Treaty would be anachronistic'.[17]

However, some members of Working Group III allowed the possibility of maintaining a separate legal personality of Euratom, pointing to the specific nature of that Community which, after all, covered a rather narrow integration area and was characterised by a slightly different division of competences between the European Commission and the Council of the European Union. Unlike in the case of the European Community, the European Commission acting on behalf of Euratom was responsible not only for negotiating but also for signing international agreements with third countries and international organisations, subject to the prior approval of the Council of the European Union by a qualified majority (Article 101 of the Euratom Treaty).[18] The maintenance of Euratom's organisational autonomy was also justified by the internal policy considerations of Germany, Belgium and Sweden, whose Governments had been seeking to abandon nuclear energy for several years.[19]

The views expressed by the minority of Working Group III members were shared by the Praesidium; when preparing the preliminary draft Treaty, it included provisions on the explicit recognition of the legal personality of the European Union (Article 4), and the repeal of the existing Treaties and legal continuity for the future European Union in relation to the European Community and the then present European Union.[20] The issue of the legal personality of the future European Union was later the subject of a lively debate at the plenary meeting of the Convention. The concept of the legal personality of the European Union was supported by a vast majority of the Convention members.[21] The British delegates were of the opposite opinion and called for the deletion of the provisions of the preliminary draft Treaty of 28 October 2002 (Timothy Kirkhope/EP, David Heathcoat-Amory). Other representatives of the United Kingdom, representing a slightly more flexible position, demanded balancing those provisions by introducing

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17 EC. Final report of Working Group III on Legal Personality, 1 October 2002, CONV 305/02, p. 15.

18 Ibidem, pp. 3–4.

19 For more on the subject, cf. J.J. Węc, Spór o kształt ustrojowy, op. cit., pp. 343–344.

20 Preliminary draft Constitutional Treaty, CONV 369/02, op. cit., pp. 9, 17.

21 EC. Draft Constitution, CONV 724/03, op. cit., pp. 56–57.

an additional clause in the Treaty stating that the legal personality of the Union would not infringe upon the existing legal and treaty obligations of the Member States (Earl of Stockton/EP[22]). Finally, however, the Praesidium of the Convention proposed a solution corresponding to the minority view within Working Group III. Relevant amendments were then made to the draft Constitutional Treaty drawn up by the Convention, which expressly provided for the conferral of a single legal personality on the future European Union, the universal succession of the future European Union to the European Community and the present European Union, the transformation of the future European Union into an international organisation under international law, the repeal of the Treaty establishing the European Community and the Treaty on European Union and of the international acts and agreements amending or supplementing them, and the maintenance of the separate international organisation Euratom, endowed with its own legal personality, and the modification of the Euratom Treaty (Article I-6, Article IV-2, Article IV-3 DCT).[23]

1.2.2. The axiology and democratic principles of the European Union

During the work of the Convention, a dilemma arose as to how best to strengthen the axiology of the future European Union. Working Group II (Charter of Fundamental Rights) considered three possible scenarios: the inclusion of the Charter of Fundamental Rights in the Constitutional Treaty; the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe of 4 November 1950; and the indirect option of incorporating the Charter of Fundamental Rights into the Constitutional Treaty and at the same time creating the conditions for the future accession of the Union to the above-mentioned Convention. Finally, the plenary meeting of the Convention decided to include the Charter of Fundamental Rights in Part II of the draft Constitutional Treaty, which was to give it a legally binding force in the European Union for the first time (Articles II-1 to II-54 DCT). On the

[22] EC. Reactions to draft Articles, CONV 574/1/03, op. cit., p. 46.
[23] Draft Treaty, op. cit., pp. 9, 91.

other hand, the plenary decided to create the legal basis for the subsequent accession of the European Union to the said Convention (Article I-7(2) DCT).[24]

The efforts to strengthen the ties between the inhabitants of the Member States and the European Union were reflected in the confirmation of the citizenship of the Union established under the Maastricht Treaty (Article I-8(1) and (2) DCT).[25] However, the introduction of the citizenship provision in the draft Constitutional Treaty initially raised some controversy. It was understandable for many participants as a similar provision was already included in the Maastricht Treaty, the Amsterdam Treaty and the Nice Treaty. Nevertheless, a significant number of the Convention members opposed the idea, arguing that a separate article on citizenship was superfluous since its content would coincide with the provisions on civil rights as set out in the Charter of Fundamental Rights. On the other hand, some representatives, such as Josef Borrell (Spain), advocated not only the maintenance of that article, but also a considerable extension of the civil rights of the citizens of the European Union by establishing the institution of a European referendum.[26] However, during the plenary debate at the Convention, this request was rejected, as was the proposal to establish an institution for an individual complaint to the Court of Justice. Supporters of both solutions argued that the establishment of a new mechanism for consultation with citizens (referendum) or identification of citizens with the supranational judiciary of the European Union (individual complaint) could serve to strengthen the role of civil society in the integration process. However, while the call for a European referendum apparently raised legitimate concerns about the adoption of the Constitutional Treaty itself by the Member States in the future, the proposal to establish an individual complaint seemed justified, especially since such a legal instrument had so far been successfully used in the Council of Europe, and the existing legal regulations on citizens' access to the European Union's judiciary still seemed to be quite limited.

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[24] Further, the draft prepared by the Convention stated that '[t]he Union shall seek accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Constitution' (Article I-7(2) DCT). Cf. Draft Treaty, op. cit., p. 9.

[25] Ibidem, p. 9.

[26] EC. Reactions to draft Articles, CONV 574/1/03, op. cit., pp. 66–70.

As a result, the majority of the Convention members voted in favour of maintaining a separate article on citizenship and the aforementioned provisions of the Charter of Fundamental Rights in the draft Constitutional Treaty. In this case, the decisive argument was that such an article defined the rights of citizens of the European Union, whereas the Charter of Fundamental Rights conferred rights not only on citizens of the Union, but also on natural and legal persons residing or having its registered office in a Member State. Those rights concerned the lodging of complaints to the European Ombudsman and the filing of petitions to the European Parliament (Articles II-43 and II-44 DCT).[27] Moreover, under pressure mainly from French representatives Olivier Duhamel/EP and Pierre Lequiller, the principles of equality, pluralism and non-discrimination were introduced into the catalogue of EU values (Article I-2 DCT).[28]

However, during the discussions of the Convention the greatest controversy in the axiological sphere was raised by the matter of the Preamble to the Constitutional Treaty. Some countries, notably Italy, Poland, Spain and Ireland, as well as the Vatican, demanded that the Preamble refer to the Christian religion as an element of European identity. However, as a result of opposition from other delegations, in particular from the representatives of France, the preamble to the draft Constitutional Treaty lacked a provision containing *invocatio Dei*. It did include a reference to the 'cultural, religious and humanist inheritance of Europe, the values of which, still present in its heritage, have embedded within the life of society the central role of the human person and his or her inviolable and inalienable rights, and respect for law' (Preamble).[29]

In addition to axiology, the Convention also discussed the issue of strengthening the democratic legitimacy of the European Union. Overcoming the democratic legitimacy deficit was one of the oldest and most difficult challenges facing the European Communities and the European Union. It concerned, *inter alia*, the powers of the Community institutions, in particular

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[27] Such actions could be brought in cases of maladministration in the activities of the institutions, bodies or agencies of the European Union, with the exception of the European Court of Justice and the High Court acting in their judicial role. Cf. Draft Treaty, op. cit., p. 27.

[28] EC. Reactions to draft Articles, CONV 574/1/03, op. cit., p. 17.

[29] Draft Treaty, op. cit., p. 8.

of the European Parliament, to legislate and adopt acts directly or indirectly binding on Member States, the exercise of their legislative powers by national parliaments, and making the Union closer to citizens, which would allow them to increase their sense of shared responsibility for the development of the Union. In analyses of the previous efforts to strengthen the democratic legitimacy of the European Union, several basic lines of action were indicated to address these challenges. These were as follows: firstly, electing the European Parliament by direct universal suffrage in conjunction with the institution of citizenship of the Union (Article 17(1) EC (now Article 20(1) TFEU); secondly, guaranteeing the right of Union citizens to vote in elections to the European Parliament held in their Member State of residence, under the same conditions as nationals of those States (Article 19(2) TEC [now Article 22(2) TFEU]; thirdly, the pursuit of political parties at the European level (Article 191 TEC [now Article 10(4) TEU, Article 224 TFEU]); fourthly, the strengthening of the role of national parliaments in Community law-making (Protocol on the role of national parliaments in the European Union, annexed to the Amsterdam Treaty); fifthly, guaranteeing the right of Union citizens to vote in municipal elections held in their Member State of residence, under the same conditions as nationals of those States (Article 19(1) TEC [now Article 22(1) TEU]; sixthly, recognising the principle of democracy as one of the fundamental principles of the functioning of the Union (Article 6(1) TEU [now Article 2 TFEU]); seventhly, strengthening the democratic character of the Economic and Social Committee and of the Committee of the Regions (Article 257, Article 263 TEC [now Article 300(2) and (3) TFEU]); eighthly, involving the social partners in the process of adopting and implementing Community law (Articles 138 and 139 TEC [now Articles 154 and 155 TFEU]).[30] However, such actions, taken at the latest from the first direct elections to the European Parliament (7–10 June 1979), but with particular intensity following the entry into force of the Maastricht Treaty (1 November 1993), had proved so ineffective that the problem of strengthening the democratic legitimacy of the European Union had become one of the most serious challenges facing the Convention on the Future of Europe.

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[30] T. Oppermann, op. cit., pp. 80–81. Der Verfassungsentwurf des EU-Konvents. Bewertung der Strukturentscheidungen, Center for European Integration Studies, 'Discussion Paper' C, H. 124, Bonn 2003, pp. 6–7, 65–72.

The participants in the Convention organised and expanded the existing principles of democratic life of the European Union: the principle of democratic equality, the principle of representative democracy and the principle of participatory democracy. The initiators of referring in such matters to the provisions of the existing Treaties included representatives of the following Member States or institutions participating in the Convention: Poland (Hübner), Germany (Elmar Brok/EP), France (Jacques Floch), Italy (Marco Follini), Portugal (Ernâni Lopes) and Luxembourg (Santer).[31] A new regulation defining the principles of participatory democracy was the so-called civic legislative initiative. The idea of establishing such a regulation was born as late as the end of the Convention. The originators and advocates of its introduction into the draft Constitutional Treaty were primarily the representatives of Germany. On 5 and 11 June 2003, Jürgen Meyer made a formal request for such an initiative, signed by more than fifty members.[32] As a result, at its meeting on 11–13 June 2003, the plenary of the Convention agreed to introduce a relevant provision into the already prepared version of Part I of the draft Constitutional Treaty (Article I-46(4) DCT).[33]

1.2.3. The division of competences between the European Union and the Member States

The issue of the division of competences between the European Union and the Member States was one of the most difficult and controversial problems during the Convention. The need for a better division and definition of competence between the European Union and the Member States, while consistently using the principles of subsidiarity and proportionality as criteria in the selection of tasks to be carried out at the EU or national level, was pointed out by the declarations of the Nice and Laeken European Councils.[34] In June 2002, the representatives of the Governments of Poland, Germany, the United Kingdom, France and Ireland drew up and submitted to the

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[31] EC. Draft Constitution, CONV 724/03, op. cit., p. 111.

[32] Rede von Jürgen Meyer im Europäischen Konvent am 5. Juni 2003, p. 1, http://www.bundestag.de/ [accessed: 15 Juni 2024]. Rede von Jürgen Meyer im Europäischen Konvent am 11. Juni 2003, p. 1, http://www.bundestag.de/ [accessed: 15 Juni 2024].

[33] Draft Treaty, op. cit., pp. 19–20.

[34] Declaration on the future of the Union, op. cit., pp. 85–86. Laeken European Council (14 and 15 December 2001). Presidency conclusions, op. cit., pp. 21–22.

Secretariat of the Convention a joint memorandum on the division of competences. The authors of the memorandum called on the participants in the Convention to define clearly and precisely in the draft Constitutional Treaty the norms and principles according to which powers could be conferred on the European Union. In accordance with the general rules of international law, they argued that the European Union could not have powers other than those defined or to be defined by the Member States in international agreements (the principle of conferral). The powers of the European Union should be exercised in accordance with the principles of subsidiarity and proportionality. At the same time, competences in all areas not covered by international agreements would exclusively be the responsibility of the Member States.

The Maastricht Treaty of 7 February 1992 introduced, for the first time, three principles of the division of competences between the European Communities and the Member States, namely the principle of conferral, the principle of subsidiarity, and the principle of proportionality. Nevertheless, the delimitation of competences between the European Union and the Member States still lacked any specific Treaty definition. Various authors often referred to European Commission reports, proposals from the European Parliament or rulings of the Court of Justice that indicated the existence in the European Union of at least three categories of competences: exclusive competences of the Union, competences shared (concurrent competences) between the Union and the Member States, as well as supporting (supplementary or complementary) competences.[35]

A similar position was taken by Working Group V (Complementary Competences) of the Convention; in its report of 15 May 2002, presenting the delimitation of competence then in force between the European Union and the Member States, it identified the following types of competences: exclusive competence of the Union, concurrent (or shared) competence, and complementary competence in the first pillar of the EU; concurrent

[35] For example, the 1975 European Commission report divided the competences of the European Union into exclusive, concurrent and potential, whereas the aforementioned draft Treaty establishing the European Union, prepared by the Spinelli commission and adopted by the European Parliament in 1984, distinguished between exclusive and concurrent competences. For more on the subject, cf. A. Haratsch, Ch. Koenig, M. Pechstein, op. cit., pp. 70–72.

competence and complementary competence in the second pillar of the EU; exclusive competence of the Union and concurrent competence in the third pillar of the EU.[36] Critical of the existing arrangements, the members of Working Group V argued that, due to the lack of precision of the delimitation of competence, the European Union appeared in its activities, or even tended to act in areas, falling within the competence of the Member States.[37] A large number of the members of Working Group V also pointed out the European Union's disregard for the principles of subsidiarity and proportionality and the limitations on Member States' exercise of political control of compliance with the rules on the division of competences. These limitations were based on the fact that the national parliaments of the Member States could control and influence the conduct of their Governments during the legislative process carried out in the European Union ('*ex ante*'), but they no longer carried out any control of compliance with the rules on the division of competences and the principles of subsidiarity and proportionality in the implementation and application of Community law in their own countries ('*ex post*'). Therefore, some members of Working Group V advocated the establishment of a kind of permanent *ex post* control mechanism. They also supported the introduction of the principle of solidarity in that area.[38]

Taking account of these opinions, the authors of the preliminary draft Constitutional Treaty, namely the members of the Praesidium of the Convention, proposed the establishment of three main categories of division of competence: exclusive competence of the Union, competence shared between the European Union and the Member States (concurrent competence), and competence supporting the actions of the Member States. At the same time, the Praesidium voted in favour of two new categories of EU powers, namely competence to coordinate the economic policies of

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[36] EC. Final report of Working Group V 'Complementary Competences', 4 November 2002, CONV 375/1/02, pp. 1–18. EC. Description of the current system for the delimitation of competence between the European Union and the Member States, 28 March 2002, CONV 17/02, pp. 2–8. EC. Delimitation of competence between the European Union and the Member States – Existing system, problems and avenues to be explored, 15 May 2002, CONV 47/02, pp. 21–29.

[37] EC. Delimitation of competence between the European Union and the Member States, op. cit., p. 16.

[38] Ibidem, pp. 16–18.

the Member States, and competence to coordinate the common foreign and security policy, including the EU's common security and defence policy.[39]

During the debate that took place in the last phase of the Convention, it turned out that the opinions expressed by its members on the proposals from the Praesidium still differed widely. Some members, such as the representative of the Portuguese Government, Ernâni Lopes, generally opposed the introduction of a Treaty-based division of competences.[40] However, a vast majority agreed with the preliminary draft submitted by the Praesidium, calling for the following to be added: a clear indication in the draft Constitutional Treaty of the general principle of international law that the exclusive competence of the Union should be conferred on it by the Member States and that the exercise of competence in other areas by the Union must not restrict the powers of those States (Roche, Hain and other British representatives, Lord John Tomlinson and Heathcoat-Amory); establishing a separate division of competences for the area of freedom, security and justice (Dutch delegates led by Gijs de Vries); the exclusion of powers to conclude international agreements from the exclusive competence of the European Union (Lord Tomlinson), and the introduction of an obligation for the European Union to consult the Member States before proceeding to legislate in areas falling within its exclusive competence (Cristiana Muscardini-Italy/EP).[41]

The Praesidium's idea to specify the Union's competence to coordinate the Member States' economic policies and the EU's common foreign and security policy met with the most criticism. As argued by the members of the Praesidium, the introduction of the two new categories was justified by the 'specific nature' of the coordination of the economic policies of the Member States by the European Union as well as by the same 'specific nature' of the common foreign and security policy, which could not be integrated into

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[39] The provision specifically indicating the common security and defence policy was introduced during the deliberations of the Convention at the request of several of its members. Those were as follows: Gianfranco Fini (Italy), Josef Borrell Fontelles (Spain), Lord Maclennan of Rogart (United Kingdom), Andrew Nicholas Duff (United Kingdom), Alberto Costa (Portugal), Linda McAvan (United Kingdom), Ernani Lopes (Portugal), Dick Roche (Ireland), Giorgos Katiforis (Greece), cf. EC. Draft Constitution, CONV 724/03, op. cit., pp. 3, 68, 79.

[40] EC. Reactions to draft Articles, CONV 574/1/03, op. cit., pp. 86, 89, 101.

[41] Ibidem, pp. 81–82, 88. EC. Draft Constitution, CONV 724/03, op. cit., pp. 66, 79.

the shared competence or exclusive competence of the Member States.[42] The idea to establish separate coordination powers was opposed mainly by the British (Lord Tomlinson, Linda McAvan/EP) and Finnish (Teija Tiilikainen and Antti Peltomäki) delegates, proposing instead that they be included in the exclusive competence of the Member States.[43] The French members of the European Parliament (Duhamel and Pervenche Berès) called for those policies to be part of shared competences.[44] On the other hand, some supporters of the introduction of coordination competences called for their extension to the social and employment policies of the Member States. Such views were expressed by representatives of the Socialist faction in the European Parliament, led by the French MEP Duhamel, the Belgian delegates Karel De Gucht and Louis Michel, the Luxembourg representative Jacques Santer, and by Borrell, the Spanish representative in the Convention.[45]

In principle, the idea of separating the competences of the European Union in the common foreign and security policy was opposed by delegates from the United Kingdom (Heathcoat-Amory, Kirkhope, Earl of Stockton, Andrew Nicholas Duff/EP), Sweden (Ingvar Svensson) and Denmark (Jens-Peter Bonde/EP, Peter Skaarup and Per Dalgaard). Members from Austria (Johannes Voggenhuber/EP and Evelin Lichtenberger), Spain (Josef Borell and other Spanish socialists), Portugal (Luís Marinho/EP), Belgium (Marie Nagi) and France (Hubert Haenel) supported the inclusion of the common foreign and security policy in the scope of the exclusive competence of the European Union. The Italian delegate Lamberto Dini proposed that shared competence be exercised in the area concerned. Other members, such as Roche and Heathcoat-Amory, called for limiting the EU's competence under the rule that the exercise of its competence in the area should not affect the respective powers of the Member States. Yet other delegates demanded the deletion of the clause on loyal cooperation and mutual solidarity between Member States in the foreign and security policy of the European Union (Hain, Lord Tomlinson, Lopes, Valdo Spini and Elena Paciotti – Italy/EP) or at least for its content to be neutralised by a provision imposing on the

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42 EC. Draft Constitution, CONV 724/03, op. cit., p. 68.
43 Ibidem. EC. Reactions to draft Articles, CONV 574/1/03, op. cit., pp. 85, 95.
44 EC. Reactions to draft Articles, CONV 574/1/03, op. cit., pp. 85, 90, 95.
45 Ibidem, p. 95.

Union an obligation to respect the vital national interests of the Member States (Queiró).[46]

Finally, most of the solutions proposed by the Praesidium were adopted by the plenary of the Convention on three issues: rules governing the mutual relations between the European Union and the Member States, the principles of the division of competences, and categories of competence divided between the Union and the Member States. The rules governing relations between the Union and the Member States were to continue to be: the principle of loyal cooperation (the principle of solidarity), the principle of respect for the national identities of the Member States, and the principle of the primacy of Union law over national law. The draft developed by the Convention not only confirmed, leaving it essentially unchanged, the principle of solidarity in the implementation of individual EU policies, but it also assumed its application in the common foreign and security policy of the European Union, including in the common security and defence policy (Article I-15(2), Article III-195(1) and (2) DCT). However, this was contrary to the demands of the British, Italian and Portuguese delegates to the Convention. Furthermore, the draft established a special solidarity clause obliging the Union and the Member States to act jointly if a Member State should be the victim of a terrorist attack, or natural or man-made disaster (Article I-42(1) and (2) DCT). The principles of the division of competences were to continue to be: the principle of conferral, the principle of subsidiarity, and the principle of proportionality, whereby the application of the first principle as a rule for the division of competences between the European Union and the Member States (Article I-9(1) and (2) DCT) was included in the draft Constitutional Treaty at the express request of the British and Irish delegates to the Convention. Finally, the draft Constitutional Treaty also established three basic categories of competence: the Union's exclusive competences, shared (concurrent) competences, and competences supporting, coordinating or supplementing the actions of the Member States. In addition to the three basic categories of the division of competences, the draft provided for two specific categories of EU coordination competences in the economic policies of the Member States and in the common foreign and security policy, including the EU's common defence policy (Article I-11(1) to (5) DCT). In line with the expectations of

[46] Ibidem, pp. 78, 83, 87, 95, 99–100.

French, Belgian and Spanish delegates, the draft also extended the scope of the Union's coordination competences to the social and employment policies of the Member States (Article I-14(1) to (4) DCT). At the same time, contrary to the demands of the Dutch delegates, the document did not establish a separate category of competence for the area of freedom, security and justice, but included it in shared competences. Apart from the three basic and two specific categories of competence mentioned above, the draft changed nothing in the category of the exclusive competence of the Member States, comprising: definition of their political systems and form of government; organisation of administration and the judiciary; religious law; definition of tax systems; maintenance of public order and security; defining the fundamental principles of social security systems; definition of the content of teaching and the organisation of education systems; health policy, including the organisation and delivery of health services and medical care; determination of the rules governing the system of property ownership; as well as the protection of national security, including the production of and trade in arms, munitions and war materials.

1.2.4. Legislative acts and procedures

The issue of legislative acts and procedures was addressed by Working Group IX on Simplification (of the legislative procedures and documents), submitting their Final Report on its activities to the Convention on 29 November 2002. It put forward an initiative to introduce significant changes to the catalogue of sources of law. It proposed that the following typology of legislative acts should be applied to the areas of the first and third pillars of the EU: (1) European Union laws, equivalent to existing regulations; (2) European Union framework laws, corresponding to existing directives; (3) decisions, whose definition would be broader than at that time as those, so far, might or might not designate specific addressees, in the former case being binding only on the addressees; (4) recommendations and opinions, equivalent to existing recommendations and opinions. The framework decisions and decisions adopted so far in the third pillar would become, respectively, European Union framework laws and European Union laws, whereas conventions would be abolished and replaced in most cases by European Union laws. At the same time, Working Group IX recommended retaining the specific characteristics of legal instruments existing in the second pillar. On the other hand, common

strategies, joint actions and common positions should be replaced by decisions, on condition that the content of the decisions be further specified.[47] In addition, Working Group IX called for the introduction of a hierarchy of legislation, proposing a division into three main groups: legislative acts (European Union laws, European Union framework laws), adopted directly under the Treaty; delegated acts (delegated regulations), adopted on the basis of a Treaty delegation or legislative acts; implementing acts for legislative acts, delegated acts or acts provided for in the Treaty (implementing regulations, implementing decisions).[48]

Working Group IX also proposed to reduce the number of and to simplify the existing legislative procedures. The most important legislative procedure should be the co-decision procedure. Its application should become the general rule for the adoption of legislative acts. Exceptions to this rule should be maintained in policies where the 'special nature' of the European Union should require 'autonomous decision-making, or in areas of great political sensitivity for the Member States[49].' In all cases where the co-decision procedure was to be applied, qualified majority voting should be introduced in the Council of the European Union. The cooperation procedure, previously used only in four cases relating to the euro area, was to be replaced by the co-decision procedure or the consultation procedure. The assent procedure was only recommended for the ratification of international agreements. In this area, the assent procedure should become the 'general rule' in situations where such an international agreement should have repercussions for domestic legislation. In the other cases, then subject to the assent procedure, but with the exception of the 'uniform electoral procedure' (electoral law) for the European Parliament, the co-decision procedure was to be used. The legal bases for the use of the consultation procedure should also be changed. In addition, Working Group IX recommended simplifying the annual budgetary procedure, basing it on a simplified co-decision procedure and establishing a closer link with the multiannual financial perspectives of the European Union.[50] The plenary of the Convention approved the recommendations of

[47] EC. Final report of Working Group IX on Simplification, 29 November 2002, CONV 424/02, pp. 3–7.
[48] Ibidem, pp. 8–12.
[49] Ibidem, p. 15.
[50] Ibidem, pp. 13–21.

Working Group IX regarding legislative acts and procedures. They were subsequently slightly modified and introduced into the draft Constitutional Treaty.

1.2.5. The institutional system of the European Union

1.2.5.1. Proposals from the Governments of the Member States

In November 2002, the Heads of State or Government of Spain, the United Kingdom and France, José María Aznar, Tony Blair and Jacques Chirac, put forward a joint initiative indicating, *inter alia*, the need to further strengthen the position of the European Council in the institutional system of the European Union by establishing a permanent President of the European Council, to take over most of the powers hitherto vested in the rotating President. This proposal, later called by journalists the ABC proposal, reflected the pursuits of the leaders of Spain, the UK and France to reinforce the intergovernmental method at the expense of the Community method in the European Union. However, it met with strong opposition from the European Commission and the European Parliament. Germany and the Governments of the smaller Member States also expressed their doubts. The latter feared that their role in the European Union would be limited through violating the principle of equal rotation, ensuring equal access to the Presidency of the European Council for individual Member States.[51]

The controversy surrounding the ABC proposal largely accelerated the work on new solutions. On 15 January 2003, President Jacques Chirac and Chancellor Gerhard Schröder developed a joint Franco-German draft on the institutional reform of the European Union. On the following day, it was presented at the plenary session of the Convention by the Foreign Ministers of the two countries, de Villepin and Fischer. The draft proposed the establishment of a dual 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 dual presidency was supposed to be a compromise, reconciling the previously different positions of France and Germany on the institutional reform of the European Union. France decided to meet Germany's expectations that the President of the European Commission should be elected by a qualified majority by the European Parliament, subject to approval by the European Council, also

[51] P. Norman, op. cit., p. 174.

acting by a qualified majority. The President of the European Commission would decide on the division of Commissioners into two groups, namely 'full' Commissioners and 'associate' Commissioners with limited powers. Such a change would give the President of the Commission a stronger democratic legitimacy than before, simultaneously conferring on the Parliament additional powers reinforcing its position in the institutional system of the future European Union. The European Commission would be politically accountable to both the European Parliament and the European Council. In return, Germany accepted France's demand for the establishment of a permanent President of the European Council, elected by the institution by a qualified majority for a term of office of two and a half years or five years, renewable. France's proposal aimed at improving the work of the European Council, but it also meant the elimination of the six-month rotating Presidency.[52]

Further, Chirac and Schröder proposed the establishment of the office of the Union Minister for Foreign Affairs. This person would chair the External Relations Council. They would also attend European Council meetings and be a member of the European Commission. The leaders of both countries also agreed on a compromise on the voting rules in the second pillar of the European Union. The French President accepted the old German proposal that decisions on the common foreign and security policy could be made by a qualified majority. On the other hand, the German Chancellor agreed with the French President's demand for maintaining unanimous voting on issues of military and defence importance. In addition, a special mediation procedure was agreed on matters of vital interest to the Member States. If a decision should be contrary to such interests of any of the Member States, the Minister for Foreign Affairs of the Union would act as a mediator. If those should prove ineffective, mediation would be undertaken by the President of the European Council. If their actions should be unsuccessful, the dispute would be resolved by the European Council, acting by a qualified majority.[53]

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[52] EK. Jacques Chirac/Gerhard Schröder. Deutsch-französischer Beitrag zum Europäischen Konvent über die institutionelle Architektur der Union, Brüssel (Paris/Berlin), 16. Januar 2003 (15. Januar 2003), CONV 489/03, pp. 3–5. Bundesregierung. Frankreich und Deutschland legen Vorschläge für Reform der Europäischen Union vor, pp. 1–2, http://www.bundesregierung.de [accessed: 19 May 2024]. Cf. also: P. Norman, op. cit., pp. 174–179.

[53] Jacques Chirac/Gerhard Schröder, op. cit., pp. 6–7. Bundesregierung, op. cit., p. 2.

The Franco-German proposal stipulated that the European Parliament and the Council of the European Union should jointly exercise legislative powers. As a rule, the Council of the European Union should take its decisions by a qualified majority. In order to ensure the transparency of the activities of the Council of the European Union, its legislative and executive functions should be separated. Any extension of qualified majority voting in the Council of the European Union should automatically be linked to the possibility of a co-decision in the legislative process. The Presidency of the Council of the European Union would vary depending on the field of activity. Thus, the General Affairs Council would be chaired by the Secretary-General of the Council; the President of the External Relations Council would be, as mentioned above, the Union Minister for Foreign Affairs. The Economic and Financial Affairs Council, the Justice and Home Affairs Council and the Eurogroup would elect their Presidents from among their members for a term of two years. The Presidency of other formations of the Council of the European Union would be regulated in such a way as to ensure that Member States should have the opportunity to participate in their work to the greatest extent possible and on the basis of equal rotation.[54]

1.2.5.2. Proposals from the Community institutions

The European Parliament was also actively involved in the debate on the institutional changes discussed in the Convention. Even before the beginning of the deliberations of the Convention, on 23 January 2002, it adopted a resolution in which it expressed its support for deepening the process of 'parliamentarisation' of the European Union, reflected in extending the legislative powers of the institution and strengthening the monitoring powers of national parliaments over the Governments of the Member States in their European policies. The extension of the legislative powers of the European Parliament would consist in making the co-decision procedure the principal legislative procedure and extending it to all areas covered by the qualified majority voting in the Council of the European Union, conferring on the Parliament wider powers in the common agricultural, economic and monetary policies implemented within the framework of the Economic and Monetary Union, in the common foreign and security policy and in the

[54] Jacques Chirac/Gerhard Schröder, op. cit., pp. 5–6.

area of freedom, security and justice. The Parliament believed that the proposed changes should help stop the 'worrying' tendency of previous years to 'undermine the Community method' in favour of the intergovernmental dimension. At the same time, however, the authors of the resolution opposed the efforts of some national governments and parliaments, in particular the French Government and the Senate, to establish a new parliamentary chamber composed of representatives of national parliaments.[55] They argued that the creation of such a chamber would not only 'not solve the problems experienced by some parliaments in scrutinising the European policy of their governments in particular, but would only serve to prolong the Community legislative procedure, to the detriment of democracy and transparency'. They also expressed their hope that the deliberations of the Convention would not only enable 'effective preparation of reform of the treaties but would also give European integration efforts greater legitimacy'; thus, the institutional reform would mark a new chapter in the history of the European Parliament.[56]

In the following months, the European Parliament expressed its expectations towards the Convention. On 16 May 2002, it adopted a resolution on reform of the Council and transparency. According to the document, the main objective of the reform of the Council of the European Union should be to adapt its structure and forms of activity to the new challenges arising from the enlargement of the European Union, in particular with regard to legislative tasks. Further, the European Parliament proposed a distinction between the legislative Council, whose deliberations should be public, and the other formations of the Council of the European Union. The projected system reform of the European Union should 'give precedence to the Community method over the intergovernmental method in decision-making procedures in all the Union's spheres of activity'. Changes in the Council of the European Union 'must be consistent with the more general objective of rebalancing

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[55] This idea was supported by French Prime Minister Lionel Jospin in his speech delivered in Paris on 28 May 2001 and by the French Senate in its report of 13 June 2001 on the second European chamber (cf. European Parliament (hereafter: EP) 1999–2004. Report on relations between the European Parliament and the national parliaments in European integration – Committee on Constitutional Affairs, 23 January 2002, A5-0023/2002, pp. 5, 12, https://www.europarl.europa.eu/doceo/document/A-5-2002-0023_EN.html [accessed: 15 Juni 2024].

[56] Ibidem, pp. 6–8, 13–14, 17–18.

the powers of the Union's institutions' and bodies. Consequently, it would result in 'conferring legislative power on the Council and Parliament and executive power on the Commission', 're-establishing the European Council's role of laying down political guidelines', 'upgrading the role of the General Affairs Council', and transforming the co-decision procedure into a single legislative procedure.[57] Three months later, in its resolution on the evaluation of the outcome of the Seville European Council meeting (21–22 June 2002),[58] the European Parliament voted in favour of the European Council being granted institution status, expressed its support for a 'strong and independent' European Commission and proposed that 'all fundamental changes' in the institutional system of the future European Union be discussed within the Convention before the European Council should take any decision.[59] Two days after Chirac and Schröder put forward the above-mentioned proposals for a dual presidency of the European Union, the European Parliament adopted a declaration calling on the Convention members 'to include in the European Constitution the principle that the President of the European Commission has to be elected by the European Parliament'.[60] In addition, in other resolutions and declarations adopted during the Convention, the

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[57] EP 1999–2004. European Parliament resolution on reform of the Council and transparency, 16 May 2002, P5_TA (2002) 0246, pp. 1–4, https://www.europarl.europa.eu/doceo/document/TA-5-2002-0246_EN.pdf [accessed: 15 Juni 2024].

[58] The Seville European Council took decisions on the reform of the rules governing the European Council and the Council of the European Union. It was decided, inter alia, that the European Council would meet four times a year in ordinary session, that the General Affairs and External Relations Council would be responsible for preparing its agenda, and that the conclusions of the European Council would have to contain both guidelines and political decisions, cf. Seville European Council (21–22 June 2002). Presidency conclusions, Brussels, 24 October 2002, 13463/02, pp. 1–2, 19–26.

[59] At this point, the European Parliament insisted in the resolution that 'a strong European Council must be grounded in the Treaty and subject to the same regime as the other institutions', cf. EP 1999–2004. European Parliament resolution on the outcome of the European Council meeting on 21–22 June 2002 in Seville, 4 July 2002, P5_TA (2002) 0365, p. 1, https://eur-lex.europa.eu/legal-content/MT/TXT/?uri=CELEX:52002IP0365 [accessed: 15 Juni 2024].

[60] EP 1999–2004. Written declaration on the election of the President of the European Commission by the European Parliament, 16 January 2003, P5_DCL (2002) 0017, p. 2, https://www.europarl.europa.eu/ doceo/document/ DCL-5-2002-0017_EN.doc?redirect [accessed: 15 Juni 2024].

European Parliament pointed out the need to significantly reduce the scope of cases voted upon unanimously in the Council of the European Union, to appoint judges of the Court of Justice and of the Court of First Instance by qualified majority and to regulate the cooperation of the Court of Auditors with national audit institutions, to be coordinated by a special Contact Committee.

The debate on the reform of the institutional system of the future European Union also attracted the attention of the European Commission. On 4 December 2002, it submitted to the Convention, in the form of an official communication, its own draft on the institutional architecture of the European Union, entitled *For the European Union: Peace, Freedom, Solidarity*.[61] On the following day, the President of the European Commission, Romano Prodi, explained the features of the design to the European Parliament.[62] The main objective of the European Commission's draft was to ensure the institutional balance and effectiveness of the European Union's actions after the EU enlargement to the east. The Commission expressed its conviction that the objective could only be achieved by respecting and adhering to the principle of balancing forms of intergovernmental cooperation and federal structures using the Community method. Therefore, the Commission recommended

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[61] European Commission. For the European Union: Peace, Freedom, Solidarity – Communication of the Commission on the institutional architecture, COM (2002) 728 final/2 [CONV 448/02], pp. 1–22, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52002DC0728 [accessed: 18 May 2024]. On the same day, the European Commission sent the Convention another unofficial document entitled Contribution to a preliminary Draft Constitution of the European Union, also known as 'Penelope' or the 'Penelope Project'. It was produced by a group of legal experts at the request of Commission President Romano Prodi and Vitorino, its representative in the Convention. However, as it gave rise to criticism from certain members of the Praesidium of the Convention, the European Commission's website soon reported that it did not reflect its official position, cf. European Commission. Feasibility Study. Contribution to a preliminary Draft Constitution of the European Union – Working Document, Brussels, 4 December 2002, [in:] Der Konvent als Labor. Texte und Dokumente zum europäischen Verfassungsprozess, hrsg. von H. Kleger, Münster 2004, pp. 465–650.

[62] From then on, the document was also referred to as Prodi's draft, cf. Rede des Präsidenten der Europäischen Kommission, Romano Prodi, zur institutionellen Architektur der EU vor dem Europäischen Parlament am 5. Dezember 2002 in Brüssel, 'Internationale Politik. Dokumente' 2003, H. 1, pp. 116–119.

that the Convention 'safeguard the originality of the system while increasing the accountability of each institution and allowing it to meet the challenges of enlargement'. It would allow the Union to combine 'effectiveness with respect of national identities' of the Member States.[63]

The draft envisaged strengthening the position of the European Commission in the institutional system of the future European Union. The democratic legitimacy of the European Commission, as the guardian of Community interests, would continue to come from the European Council and the European Parliament. However, unlike before, these institutions would have equal powers to appoint and control the European Commission. The President of the European Commission would be elected by the European Parliament by a qualified majority of two thirds of the votes and approved by the European Council. Subsequently, the European Council, in agreement with the President designate of the European Commission, would elect the Secretary of the Union for External Relations combining, as proposed by the European Commission in its Communication of 22 May 2002,[64] the existing powers of the High Representative for Common Foreign and Security Policy and of the Commissioner for External Relations. The other members of the College of the European Commission would also be appointed by the European Council, acting by a qualified majority in agreement with the President designate of the Commission. Then the entire composition of the College of the European Commission would be subject to approval by the European Parliament.[65]

While opposing the establishment of the office of Permanent President of the European Council, the European Commission proposed that the European Union be represented externally by the Secretary of the Union for External Relations. This person would be one of the Vice-Presidents of the European Commission, which would strengthen their position in the decision-making process. They would be accountable to the European Council and the President of the European Commission, with the power to

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63 For the European Union, op. cit. p. 15.

64 Kommission der Europäischen Gemeinschaften. Ein Projekt für die Europäische Union. Mitteilung der Kommission, KOM (2002) 247, Brüssel, 22. Mai 2002, [in:] Der Konvent als Labor, op. cit., pp. 431–462.

65 For the European Union, op. cit., pp. 12, 18. Rede des Präsidenten der Europäischen Kommission, op. cit., pp. 116–117.

dismiss them. On the other hand, as a member of the College of the European Commission, they would be accountable to the European Parliament. During the transitional period, the Secretary of the Union for External Relations, on behalf of the European Commission, but within the framework of the guidelines and recommendations of the Council of the European Union or a group of Member States, and autonomously after the transitional period, would exercise the right of legislative initiative on all matters relating to the common foreign and security policy. This strengthening of the position of the European Commission would be accompanied by the extension of the circle of the European Union institutions with monitoring powers over it. Unlike before, not only the European Parliament but also the European Council would have the right to express no confidence in the European Commission. In this way, the European Council would indirectly limit the powers of scrutiny of the European Parliament; after all, the EP was then the only Community institution with such powers. However, the weakening of the position of the European Parliament was to be offset by the newly acquired powers of the institution to directly elect the President of the European Commission.[66]

The European Commission was also in favour of reducing the number of Commissioners, as already foreseen in the Treaty of Nice, after the accession of the twenty-seventh Member State to the European Union, but also of their selection on the basis of equal rotation. It further reiterated its proposal contained in its Communication of 26 January 2000 to extend the powers of the President of the Commission further by granting them the right to oppose draft acts which they should judge inopportune. In order to ensure better efficiency and effectiveness of the enlarged European Commission, its tasks would be coordinated by Vice-Presidents or Commissioners under the authority of the President of the Commission.[67]

The European Commission's proposal aimed at extending the legislative powers of the European Parliament, which would consist in conferring on it greater powers in budgetary matters by abolishing the existing division into compulsory and non-compulsory expenditure, and making co-decision the main legislative procedure. In addition, the Commission supported the

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[66] For the European Union, op. cit., pp. 12, 18.
[67] Ibidem, pp. 19–20.

implementation of the Council Decision of 25 June 2002 and 23 September 2002, providing for a uniform electoral procedure for all Member States for the European Parliament in the following parliamentary elections in 2004. The Commission also proposed that in the future a number of members of the European Parliament should be elected from European lists. Voters would then cast two votes: one in a national capacity and the other for candidates from the European lists.[68]

The European Commission was also in favour of continuing the reform of the Council of the European Union initiated by the decisions adopted by the Seville European Council (21–22 June 2002). The Commission proposed that, in addition to the nine existing formations of the Council of the European Union, a special 'Ecofin-eurozone' Council should be set up, consisting only of representatives of the euro area Member States. In opposition to the creation of the office of Permanent President of the European Council, the European Commission recommended retaining the six-monthly rotation for the Presidency of the European Council, the General Affairs Council and the External Relations Council and, if necessary, for Coreper I and Coreper II. The other formations of the Council of the European Union would themselves elect Presidents from among their members for a period of twelve months. Almost all decisions of the Council of the European Union would be taken by a qualified majority in accordance with the principles of the dual majority (a simple majority of the Member States representing a majority of citizens of the Union). In matters of particular importance, decisions would be taken on the basis of an enhanced qualified majority (three quarters of the Member States representing two thirds of the Union's total population).[69]

The European Commission also welcomed the request of the Governments of the Member States to extend and strengthen cooperation between the European Union institutions and national parliaments. It accepted the proposal of Working Group IV of the Convention to transmit to the national parliaments all its legislative proposals as well as all consultation materials (green papers, white papers and communications) and its strategic planning documents (e.g. annual legislative and work programmes). The Commission also supported the request of Working Group I of the Convention to ensure

[68] Ibidem, p. 16.
[69] Ibidem, pp. 16–19.

that national parliaments monitor compliance with the principle of subsidiarity throughout the legislative procedure, although without the possibility for them to express their views on the desirability of the Commission's proposals. Finally, it also proposed that the Convention examine the feasibility of access to the Court of Justice by the national parliaments and by the Committee of the Regions.[70]

1.2.5.3. The Praesidium's reports

The preparation of the institutional reform of the future European Union was fundamentally different from the way the other changes in the functioning of the Union were developed. The main assumptions of the reform were formulated not by any Working Group, but by the Praesidium of the Convention – in the form of two reports of 10 January and of 23 April 2003. In its first report, the Praesidium reviewed the principles of the functioning of the European Communities' institutions and bodies and made recommendations on how to reform them. It pointed to the need to increase efficiency and transparency in their activities as well as to ensure the necessary balance between the most important institutions in the enlarged European Union.[71] The second report of the Praesidium contained concrete proposals for changes to the 'institutional framework', to be formed by the following: the European Parliament, the European Council, the Council of the European Union, the European Commission, the Court of Justice of the European Union, the European Central Bank, and the Court of Auditors. The report recommended major changes in the functioning of particular institutions, including their structure and composition, the division of competences, decision-making procedures and the definition of qualified majority.[72] Despite criticism from many delegates, the Praesidium also maintained, albeit in a modified version, its earlier proposal in the preliminary draft Treaty, concerning the establishment of a Congress of the Peoples of Europe.[73]

The two above-mentioned reports of the Praesidium served for the Secretariat of the Convention to prepare, on 9 May 2003, a draft specifying

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[70] Ibidem, pp. 19–20.
[71] EK. Funktionsweise der Organe, 10. Januar 2003, CONV 477/03, pp. 2–12.
[72] EK. Organe, CONV 691/03, op. cit., pp. 2–11.
[73] Ibidem, p. 12.

changes to the institutional system of the future European Union, submitted to the plenary session at the last stage of deliberations.[74] The first important discussion on the subject took place on 15–16 May 2003. The draft was critically received by many members of the Convention, especially those in favour of maintaining the provisions of the Nice Treaty. The criticism concerned, particularly but not exclusively, the powers and composition of the European Parliament, the role and the Presidency of the European Council, the calculation of the qualified majority in the decision-making procedure for the European Council and the Council of the European Union, the procedure for appointing the President of the European Commission, the appointment and composition of the College of the European Commission, the appointment and competence of the Court of Justice and of the Court of Auditors, the composition and powers of the Committee of the Regions and of the Economic and Social Committee, and the establishment of the Congress of the Peoples of Europe.

The debate in the plenary session of the Convention, because of the pressure of time as well as due to often arbitrary decisions of the Praesidium, brought no material changes to the draft submitted. Therefore, the final version of the draft Constitutional Treaty, in the part concerning the institutional system, differed little from the Praesidium's report of 23 April and the draft of the Secretariat of 9 May 2003. At the plenary meeting of the Convention, the following were recognised as the Union's main institutions, or its 'institutional framework': the European Council, the Council of Ministers, the European Commission, the European Parliament, and the Court of Justice (Article I-18 DCT). The Court of Auditors and the European Central Bank were referred to as 'other institutions and bodies', also including the Committee of the Regions and the Economic and Social Committee (Articles I-29 to I-31 DCT). One of the most important amendments made by the Convention was abandoning the controversial idea of establishing a Congress of the Peoples of Europe.

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[74] EC. Summary sheet of proposals for amendments relating to: The Union's Institutions, draft Articles for Part One, Title IV of the Constitution (Articles 14, 15, 16, 16a, 17, 17a, 17b, 18, 18a, 19, 20, 21, 22, 23 and 41) – The democratic life of the Union (Part One, Title VI, Article X), 9 May 2003, CONV 709/03, pp. 1–44.

Institutional changes in the Economic and Monetary Union were prepared somewhat differently. These were dealt with by Working Group VI (Economic Governance) and summarised in its final report of 21 October 2002. The main recommendations of the Working Group concerned four issues: strengthening the powers of the European Commission and of the European Parliament in the multilateral surveillance procedure; reinforcing the position of the European Commission in the excessive deficit procedure; maintaining the Stability and Growth Pact outside the Constitutional Treaty because of its role as a political instrument for implementing the Treaty in the field in question; and extending the powers of the Economic and Financial Affairs (ECOFIN) Council bringing together the euro area Member States only.[75] At its plenary meeting, the Convention generally accepted the recommendations of Working Group VI. These were subsequently partially modified and introduced into the draft prepared by the Convention.

1.2.5.4. The European Council

The most controversial issues discussed at the Convention concerned establishing the office of President of the European Council as well as changes in its structure and composition. As many as eighty-nine Convention members, including German, Austrian, French, Italian, Belgian, Dutch, Luxembourg, British, Irish, Portuguese, Finnish, Danish, Swedish and Greek delegates, opposed the Praesidium's proposal to establish the office of President of the European Council and supported maintaining the existing system of a rotating Presidency.[76] Those delegates who welcomed the proposal argued that the President of the European Council should be elected by direct universal suffrage (Giorgos Papandreou – Greece), by the Congress of the Peoples of Europe (William Abitbol – France/EP) or that the chair of the European Council should be automatically entrusted to the President of the European Commission (Duff, Voggenhuber, among others).[77] Yet another group of delegates, including

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[75] EC. Final report of Working Group VI on Economic Governance, 21 October 2002, CONV 357/02, pp. 3–8.

[76] EC. Summary sheet, CONV 709/03, op. cit., pp. 9, 11.

[77] Finnish Prime Minister Paavo Lipponen, as well as representatives of the Governments of the Benelux countries, spoke against the election of the President of the European Council by direct universal suffrage. Austrian Chancellor Wolfgang Schüssel proposed that the President of the European Council be elected by the European Parliament.

Fischer (Germany), de Villepin (France), Christophersen (Denmark), Erwin Teufel (Germany), Hübner (Poland) and Adrian Severin (Romania), requested that the Treaty include a clear provision that the responsibilities of the President of the European Council in the area of the Union's external representation in common foreign and security policy matters should be without prejudice to the competences of the Union Minister for Foreign Affairs.[78]

The proposal to set up a board of the European Council (European Council Praesidium), chosen from among its members according to a system of rotation, was also an extremely emotional issue. Fifteen delegates, mainly the representatives of Denmark, Germany and Poland, strongly opposed the creation of a European Council Praesidium.[79] Fewer members of the Convention, including Haenel and Robert Badinter (France), Meyer (Germany), Caspar Einem (Austria) and Alexandru Athanasiu (Romania), supported the establishment of the European Council Praesidium, whose function would be to assist the President of the European Council.[80] Duhamel, a French representative of the European Parliament, called for members of the Praesidium to have the rank of Vice-Presidents of the European Council. Some delegates were in favour of maintaining the existing composition of the European Council, particularly to include the Foreign Ministers and/or other ministers depending on the agenda, primarily the ministers in charge of economic and financial affairs of the Member States.[81] The German and Italian representatives of the European Parliament, Wuermeling, Muscardini and Sylvia-Yvonne Kaufmann, proposed that the President of the European Parliament should also be included as a member of the European Council.[82]

A group of more than thirty delegates, led by Duff, Einem, Brok and Ana Palacio (Spain), called for the European Council to determine the medium-term strategic programme for the European Union, on a proposal from the European Commission, after consulting the European Parliament and national parliaments. Lopes (Portugal), Vanhanen (Finland) and Severin

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78 EC. Summary sheet, CONV 709/03, op. cit., pp. 11–12.

79 This group comprised, among others, Christophersen and Helle Thorning-Schmidt/PE (Denmark), Fischer and Teufel (Germany), Hübner and Oleksy (Poland), Papandreou (Greece), Anne Van Lancker (Belgium) and Hjelm-Wallén (Sweden), cf. ibidem, p. 13.

80 Ibidem, p. 12.

81 Ibidem, p. 10.

82 Ibidem.

(Romania) proposed the introduction of qualified majority voting within the European Council. Abitbol put forward an initiative that the European Council should be able to call a European referendum on European laws or European framework laws.[83] Some members of the Convention were also doubtful about the intention to include the European Council in the framework of the Union's institutions, as proposed by the Praesidium in its report (Article I-18 DCT).[84] The Convention approved the Praesidium's report with only minor changes. The most important amendment was deleting any reference to the European Council Praesidium.

1.2.5.5. The Council of Ministers[85]

During the plenary sessions of the Convention on the Council of Ministers, the most emotional issues debated were those of the powers, type and composition of formations of the Council as well as the decision-making procedure. However, at the very beginning of deliberations, a lively discussion was caused by the Praesidium's proposal to transform the Council of the European Union into a Council of Ministers. Quite unexpectedly, as many as thirty-four delegates opposed the restoration of the old name of the institution, demanding that the existing name be maintained or that the equally often used term 'Council' be introduced.[86] The most important proposal concerning the competences of the Council of Ministers was the proposal of sixteen members of the Convention that legislative powers of the Council of Ministers should be equal to those of the European Parliament in the budgetary procedure.[87]

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[83] Ibidem, pp. 9–10.

[84] Such doubts were expressed mainly by Hain (United Kingdom). In addition, a group of almost forty delegates demanded that the European Council be excluded from the institutional system (institutional framework) of the Union. Those were as follows: Roche (Ireland), Lopes and Costa (Portugal), Helle and Kiljunen (Finland), de Vries (the Netherlands), Michel (Belgium), Santer (Luxembourg), Maria Berger (Austria), Peter Balázs (Hungary), Attalides (Cyprus), Andriukaitis (Lithuania), Liepina (Latvia), Tunne Kelam (Estonia) and Severin (Romania), cf. ibidem, pp. 3, 5.

[85] The Council of Ministers was the new name of the Council of the European Union, provided for in the draft Constitutional Treaty and subsequently established in the Constitutional Treaty itself. It will be used hereafter.

[86] EC. Summary sheet, CONV 709/03, op. cit., pp. 5, 15–16.

[87] Ibidem, p. 15.

Opinions of the Convention members on the proposals contained in the Praesidium's report, announcing significant changes in the structure of individual formations of the Council of Ministers, were strongly divided. The Praesidium recommended the establishment of five Council formations instead of nine. These would be as follows: the General Affairs Council, the Legislative Council, the Foreign Affairs Council, the Economic and Financial Affairs Council, and the Council on Justice and Security. At the same time, the General Affairs Council, as before, could establish a list of other formations of the Council of Ministers (Article I-23 DCT). As many as ten delegates requested deleting the entire Article I-23 DCT.[88] Others proposed the creation of new formations of the Council of Ministers, e.g. adding the Council for Social and Employment Affairs (Duhamel and Emilio Gabaglio – European social partners) and the Euro Council (Duhamel, Lequiller). Yet others called for only three formations to be provided for in the draft Constitutional Treaty – the General Affairs Council, the Legislative Council, and the Foreign Affairs Council, arguing that the General Affairs Council would still be able to decide on further formations in the future (Kaufmann, Hain). With reference to the last issue, Spain's representative, Palacio, proposed that the European Council, rather than the General Affairs Council, acting by qualified majority, should determine the number of formations of the Council of Ministers and ensure adequate coordination of their activities. Hübner suggested that the European Council should also assign to Member States rotating presidencies of the Council of Minister for a period of at least a year. A group of eight delegates, including Hain (United Kingdom), Lequiller (France), Papandreou (Greece), Maria Berger (Austria), Lena Hjelm-Wallén (Sweden), Oleksy (Poland), Ivan Korčok (Slovakia) and Josef Zieleniec (Czech Republic), requested that the various formations of the Council of Ministers be chaired on a rotating basis by a team of Member States rather than by a single Member State.[89]

The issue of qualified majority voting in the Council of Ministers and in the European Council was even more controversial. The Praesidium's report recommended abandoning the definition of qualified majority as introduced by the Treaty of Nice. It would be replaced by a dual majority consisting of a

[88] Ibidem, p. 16.
[89] Ibidem, pp. 10, 16, 18–20.

simple majority of Member States, representing at least 60% (three fifths) of the population of the European Union. This implied abandoning the weighting of votes applicable from the inception of the European Communities, giving each Member State one vote and linking the procedure to the so-called demographic clause. Such a solution favoured the Member States with the largest populations, but reduced the importance of large countries such as Spain and Poland in the decision-making process. In response to the Praesidium's proposals, thirty members of the Convention, led by representatives of the United Kingdom (Hain, David Haethcoat-Amory), Spain (Palacio), Poland (Hübner, Oleksy), Ireland (Roche), Portugal (Queiró), Sweden (Hjelm-Wallén) and Denmark (Helle Thorning-Schmidt/PE), advocated remaining with the voting rules adopted under the Treaty of Nice.[90] Supporters of introducing a dual majority also included those who tried to reconcile the divergent positions of the Convention members. Some of them proposed raising the threshold for the majority of votes representing the population of the Member States to two thirds (Haenel, Badinter, Teufel) or to three quarters (Kirkhope). Others called for amending both majority thresholds to three quarters of Member States and to a simple majority for the population behind them (Bonde). However, some members of the Convention seemed to further exacerbate the controversy by demanding that the population threshold for the dual majority procedure proposed by the Praesidium be reduced to a simple majority.[91] During the discussions at the Convention, an idea was also born to introduce the so-called enhanced qualified majority voting into the decision-making procedure in the Council of Ministers, independently of the dual majority system. Such a solution was intended to facilitate the finding of a consensus between supporters and opponents of maintaining the principle of unanimous decision-making in some of the most sensitive areas of the Union's activities.[92]

At its plenary session, the Convention approved the Praesidium's report with three material changes. Its members welcomed the proposal to specify

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[90] Ibidem, p. 21.

[91] Ibidem, pp. 21–22.

[92] It would consist of a majority of three quarters of Member States and three fifths of the population represented (Duff) or of four fifths of Member States and three quarters of population (Zieleniec), or of three quarters of Member States and three quarters of the population (Meyer), cf. ibidem, p. 21. Rede von Jürgen Meyer im Europäischen Konvent am 16. Mai 2003, p. 1, http://www.bundestag.de/ [accessed: 15 Juni 2024].

the budgetary role of the Council of Ministers, acting jointly with the European Parliament; decided to merge the General Affairs Council with the Legislative Council into a single General Affairs and Legislative Council; and limited to two the number of Council formations, but subject to the reservation that the European Council would decide on other formations of the Council of Ministers. At the same time, the plenary meeting rejected both the proposal to establish a team presidency in the various formations of the Council of Ministers and the amendment to the procedure for qualified majority decision-making in the Council of Ministers and in the European Council, although the voting rules laid down by the Treaty of Nice were to apply until the end of October 2009.[93] Neither did the Convention share the opinion of Working Group VII (External Action) that the Union Minister for Foreign Affairs (or 'EU Minister of Foreign Affairs') should be deprived of the right to vote at meetings of the Foreign Affairs Council. In addition, most of the members of the Convention agreed that the new formation of the Council of Ministers responsible for external action should be called the Foreign Affairs Council.[94]

Ultimately, the draft Constitutional Treaty stipulated that the basic formation of the Council of Ministers would be the Legislative and General Affairs Council, ensuring consistency in the work of the whole Council of Ministers. Such a decision was undoubtedly an attempt to concentrate legislative powers in a single formation of the Council of Ministers. The other formation of the Council of Ministers was to be the Foreign Affairs Council, chaired by the Union Minister for Foreign Affairs. The Foreign Affairs Council would flesh out all the Union's external policies on the basis of strategic guidelines laid down by the European Council. The draft allowed for the establishment by the European Council of further formations of the Council of Ministers. The Presidency of individual Council of Ministers formations, with the exception of the Foreign Affairs Council, would be held, for at

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[93] EC. Summary sheet, CONV 709/03, op. cit., pp. 14–22.

[94] The Convention also rejected the proposal of Working Group VII that the Council in charge of external action should be called the External Action Council, cf. EC. Final report of Working Group VII on External Action, 16 December 2002, CONV 459/02, p. 6.

least one year, by Member State representatives on the basis of equal rotation (Article I-23(1) and (4) DCT).[95]

As a rule, the Council of Ministers was to take its decisions by qualified majority, except as otherwise provided for in the Constitution. Qualified majority voting was to be based on the principle of a dual majority (Article I-24(1) and (2) DCT), with such a stipulation introduced under pressure from Germany and supported by France.[96] In the opinion of voting theorists, it simplified the decision-making in the institution; on the other hand, the ease with which Member State Governments could form majority coalitions indirectly weakened the role of the Council of Ministers in the institutional system of the future European Union. However, contrary to the views of the supporters of the dual majority, such a vote did not guarantee the full democratisation of the decision-making procedure. According to voting theory, an equal influence of citizens on the outcome of a vote would be possible if the importance of a country in the vote should be approximately proportional to the root of its population and not to its population itself.[97]

1.2.5.6. The Union Minister of Foreign Affairs

The establishment of the office of Union Minister for Foreign Affairs was supported by the vast majority of the Convention members. The group of the most ardent advocates of the office, however, primarily included German delegates, especially Brok, Meyer and Peter Glotz.[98] Diametrically opposed opinions were expressed by the representatives of the United Kingdom

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[95] Draft Treaty, op. cit., p. 13.

[96] Information on the matter was submitted by German Foreign Minister Joschka Fischer at the Bundestag Committee for the European Union. Cf. Verhandlungen des Deutschen Bundestages. Stenographische Berichte. 15. Wahlperiode. Protokoll der 26. Sitzung des Ausschusses für die Angelegenheiten der Europäischen Union, 23. Juli 2003, http://www.bundestag.de/bic/plenarprotokolle/pp/index.html, p. 17.

[97] Słomczyński W., Życzkowski K., Czy warto (było) umierać za Niceę? Kompromis widziany oczami matematyka i fizyka [Was it (worth) dying for Nice? Compromise as seen through the eyes of a mathematician and physicist], 'Prace Komisji Spraw Europejskich' 2004, Vol. 1, pp. 83–93. https://chaos.if.uj.edu.pl/~karol/pdf/SZPAU.pdf [accessed: 19 May 2024].

[98] Rede von Jürgen Meyer im Europäischen Konvent am 11. Juli 2002, p. 1, http://www.bundestag.de/ [accessed: 15 Juni 2024]. Rede von Jürgen Meyer im Europäischen Konvent am 16. Mai 2003, op. cit., p. 1.

(Heathcoat-Amory, Kirkhope), Denmark (Bonde) and Sweden (Svensson). Other delegates also proposed the establishment of two (Hübner, Liene Liepina) or even up to five (Roche) deputy posts of Foreign Ministers. France's representative Berès, on the other hand, quite unexpectedly put forward an initiative of creating another new office: a Minister for Economic and Social Affairs.[99]

The procedure for appointing and dismissing the Union Minister for Foreign Affairs was also the subject of dispute. The Praesidium did not follow the recommendation of Working Group VII that the Minister for Foreign Affairs should be elected by the Council of Ministers, meeting in the composition of Heads of State or Government and acting by a qualified majority, with the approval of the President of the European Commission and endorsement by the European Parliament.[100] As proposed by the Praesidium, the Union's Foreign Minister would be appointed by the European Council, deciding by a qualified majority, with the agreement of the President of the European Commission, but without the participation of the European Parliament. However, the Praesidium's proposal met with the dissatisfaction of a large number of the Convention members. The largest group of opponents demanded the inclusion of the European Parliament in the procedure of appointing the EU Foreign Minister, with thirty-four delegates, led by Brok, advocating hearings of the candidate for the Foreign Minister by the European Parliament, whereas twelve other delegates called for the appointment to require ratification by the European Parliament.[101] In addition, some delegates proposed that the Union Minister for Foreign Affairs be appointed on basis of a proposal from the President of European Council (de Villepin) or even from the President of the European Commission, from among the members of the College of the Commission (Costa, Einem[102]). Several delegates requested adding a precise definition of the procedure for the dismissal of the Union's Foreign Minister (excluded from the Praesidium's

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99 EC. Summary sheet, CONV 709/03, op. cit., p. 30.

100 EC. Final report of Working Group VII, op. cit., pp. 4–5. EC. Summary sheet, CONV 709/03, op. cit., p. 30.

101 The latter group included Borrell, Duhamel, Meyer, Wuermeling, Muscardini, Severin and Voggenhuber, cf. EC. Summary sheet, CONV 709/03, op. cit., p. 31.

102 Ibidem.

report). Whereas the representatives of France (Michel Barnier/EC[103]) and the Benelux countries (Santer, Michel and de Vries) proposed that it should be done by the European Council, the Austrian representative Voggenhuber suggested adding reference to a censure motion for dismissing the Union Minister for Foreign Affairs, but without specifying whether the relevant vote of no confidence should be taken by the European Parliament or by the European Council.[104]

The matter of terminology also generated a lively discussion among the members of the Convention. Working Group VII proposed three names: the European External Representative, the EU Minister of Foreign Affairs, and the EU Foreign Secretary. Most of its members felt that the name 'European External Representative' was the most appropriate as it did not correspond to the names of the foreign ministries of any of the EU Member States. However, the Praesidium did not share this opinion, proposing instead that the new office be referred to as the Union's Foreign Minister. During the plenary session, some members of the Convention submitted other preferred titles: the Secretary of Union (Duff), the European External Representative (Hain), the Foreign Representative (Hübner), or the Union Minister for Foreign Affairs (Roche), but already at that time there were many indications that the Convention would eventually accept the Praesidium's proposal.[105]

The discussion at the Convention had rather little influence on the final text of the provisions of the draft Constitutional Treaty. The Convention's plenary meeting adopted almost all the proposals contained in the Praesidium's report, adding a provision on the dismissal of the Union's Foreign Minister. The European Council was to appoint the Union Minister for Foreign Affairs, acting by a qualified majority and with the agreement of the President of the European Commission, as that person would also be one of its Vice-Presidents. In accordance with the same procedure, the European Council

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[103] The delegates of the European Commission to the Convention will be hereafter so indicated.

[104] Duff (United Kingdom), Hübner (Poland) and Papandreou (Greece) also supported the introduction in the draft Constitutional Treaty of a provision setting out procedures for the dismissal of the Foreign Minister, cf. EC. Summary sheet, CONV 709/03, op. cit., p. 32.

[105] EC. Final report of Working Group VII on External Action, op. cit., pp. 4–5. EC. Summary sheet, CONV 709/03, op. cit., p. 30.

would decide on ending his tenure. The Union Minister for Foreign Affairs should conduct the Union's common foreign and security policy, with responsibility for handling all external relations of the Union (Article I-27(1) to (3) DCT).[106]

1.2.5.7. The European Commission

During the plenary session of the Convention regarding the European Commission, the most controversy was raised by its composition, accountability to the European Parliament, the procedure for the appointment and powers of the President of the institution and the procedure for selecting the remaining members of the College. As many as ninety participants of the meeting, including delegates from Germany, France, the UK, Italy, Ireland, Belgium, the Netherlands, Luxembourg, Austria, Denmark, Spain, Portugal, Greece, Poland, Slovakia, Lithuania, Latvia, Estonia and Cyprus, rejected the Praesidium's proposal that the European Commission should consist of a President, a Union Minister of Foreign Affairs as Vice-President, and have thirteen members of the College as well as so-called Associate Commissioners whose number could not exceed the total number of members of the College (Article I-25(3) DCT). They submitted proposals in which they expressed their support for maintaining the provisions of the Treaty of Nice on the composition of the European Commission or for introducing the principle that each Member State should have one full representative in it.[107] Some delegates, such as Berger (Austria), Esko Helle (Finland) and Peter Serracino-Inglott (Malta), proposed raising the total number of members of the Commission to twenty, twenty-five or even twenty-seven, while simultaneously abolishing the posts of Associate Commissioners. A radically different view was represented by a group of delegates led by Anne Van Lancker (Belgium/EP), who demanded the deletion of the concept of Associate Commissioners, but with a limit of fifteen full members of the European Commission. In contrast, the Convention participants supporting the Praesidium's proposals called for a

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[106] Draft Treaty, op. cit., p. 27.

[107] Those were as follows: Brok, Barnier, Duff, Heathcoat-Amory, Vitorino, Muscardini, Roche, Michel, de Vries, Santer, Farnleitner, Berger, Bonde, Christophersen, Palacio, Costa, Lopes, Queiró, Hjelm-Wallén, Helle, Papandreou, Marietta Giannakou, Hübner, Oleksy, Korčok and Juraj Migaš (Slovakia), Kelam, Liepina, Andriukaitis, Serracino-Inglott and Attalides, cf. EC. Summary sheet, CONV 709/03, op. cit., pp. 24, 29.

more precise specification of the number of, and the tasks to be entrusted to, the Associate Commissioners (Haenel and Athanasiu), and even for granting them full voting rights within the College of the European Commission (Wuermeling, Costa, Severin).[108] Yet others demanded that the Associate Commissioners, like the President and members of the College, be subject to a collective vote of approval by the European Parliament (Fini).[109]

With regard to the European Commission's accountability to the European Parliament, the prevailing opinion was that the existing Treaty arrangements should be maintained. This view was shared by the Praesidium and the vast majority of the Convention members. At the same time, the advocates of change represented two opposite directions. The largest group of delegates, led by representatives of the Benelux countries (Michel, de Vries and Santer), Austria (Farnleitner) and the Czech Republic (Zieleniec), supported strengthening the Parliament's functions of political control by introducing the possibility for the President of the Commission to seek a vote of confidence before it. Other delegates, however, called for limiting those functions, proposing that the Commission should also be responsible to the European Council/Council of Ministers (Duff, Hain, Hjelm-Wallén) or that there should be a provision for the individual responsibility of Commissioners to the Parliament and the Council of Ministers (Kirkhope, Muscardrni). Some delegates requested indicating that the Parliament's adoption of a censure motion on the Commission might, 'under certain circumstances', lead to the dissolution of the Parliament (Michel, de Vries, Santer, Duff, Haenel). Spain's Foreign Minister Palacio, on the other hand, put forward an initiative to introduce a clear provision in the draft Constitutional Treaty that the EU's Minister for Foreign Affairs could continue to exercise their duties in the field of the common foreign and security policy even in the event of a censure motion on the Commission being passed by the European Parliament.[110]

There was also a dispute about the election of the President of the European Commission. A great number of delegates disagreed with the Praesidium's proposal that the President, on a proposal from the European Council, be elected by the European Parliament by a majority of its members

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[108] Ibidem, pp. 24, 29.
[109] Ibidem, p. 27.
[110] Ibidem, p. 28.

(Article I-26(1) DCT). Some delegates, such as Duff and the Earl of Stockton (UK), Meyer (Germany), Voggenhuber (Austria), Michel (Belgium), de Vries (the Netherlands) and Santer (Luxembourg), were in favour of the election of the President by the European Council by a qualified majority, whereas the candidate for President of the Commission would be chosen by the European Parliament.[111] German Foreign Minister Fischer proposed that the choice be made by a special joint committee composed of an equal number of representatives of the European Council and of the European Parliament.[112] In contrast, the Bundestag delegate Altmaier explicitly supported the proposal of the Praesidium of the Convention, arguing that it was the only way for European Union citizens to be able to indirectly elect and dismiss the President of the European Commission, and thus sanction decisions taken within the Union.[113] Another group of delegates, including Christophersen (Denmark), Roche (Ireland), Sören Lekberg (Sweden) and Serracino-Inglott (Malta), called for entrusting the choice of the President to a special 'electoral college' composed of representatives of the European Parliament and the national parliaments.[114] Yet other participants in the Convention argued that the European Parliament should elect the President of the European Commission by a qualified majority of three fifths of its members.[115]

Quite unexpectedly, however, a large convergence of views prevailed among the Convention members with regard to the powers of the President of the European Commission. The Praesidium's proposals would already lead to a significant strengthening of the President's position. The President was to be given the right to select members of the Commission, to independently elect the Vice-Presidents (without the Commission's collective consent) and to agree to the appointment by the European Council of the

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111 Ibidem, p. 26.

112 Ibidem.

113 Rede von Peter Altmaier im Europäischen Konvent am 23. Mai 2002, http://www.bundestag.de/, p. 1.

114 EC. Summary sheet, CONV 709/03, op. cit., p. 26.

115 These were as follows: Santer, Michel, de Vries (the Benelux countries), Papandreou (Greece), Lopes (Portugal), Farnleitner (Austria), Korčok (Slovakia), Attalides (Cyprus), Kelam (Estonia) and Kohout (the Czech Republic), cf. ibidem, p. 27. Bonde, Heathcoat-Amory and Queiró put forward an initiative that the European Parliament should decide 'unanimously' (sic !) on the election of a candidate for the President of the European Commission, cf. ibidem, p. 26.

Union's Foreign Minister, who would at the same time be one of the Vice-Presidents of the Commission. Nevertheless, a great number of participants proposed a further extension of those powers. The most important initiative was that put forward by a group of twenty-nine delegates requesting that the President of the Commission be given the right to independently dismiss its members. Under the existing provisions, the President's demanding the resignation of a Commissioner was impossible without the agreement of the College of the Commission. The group in question included Barnier, António Vitorino (Italy/EC), Farnleitner, Michel, de Vries, Santer, but also Duff, Lopes, Papandreou, Hübner, Liepina, McAvan, Kiljunen and Michael Attalides.[116]

At the plenary meeting, the Convention members also debated the matter of electing members of the College of the European Commission. Many delegates questioned the Praesidium's proposal that each Member State determined by the system of rotation should submit a list of three persons whom it considered qualified to be a European Commissioner and, by choosing one person from each of the proposed lists, the President-elect should then appoint up to thirteen Commissioners, to be submitted collectively to a vote of approval by the European Parliament (Article I-26(2) DCT). The British delegates called for entrusting the choice of members of the College to the national parliaments (Heathcoat-Amory) or for reserving the nomination of Commissioners for the Member States (Kirkhope). The representatives of Poland (Hübner), Sweden (Svensson, Hjelm-Wallén) and Portugal (Lopes, Queiró) proposed that the members of the College be chosen by 'common agreement' by the President of the Commission and the Council of Ministers, acting by a qualified majority. A group of as many as thirty-six delegates, led by Brok, Barnier, Vitorino, Berger and Papandreou, requested that the President and the members of the College, including the Minister for Foreign Affairs, be submitted as a body to a vote of approval by the European Parliament.[117]

The Convention adopted the Praesidium's report with five amendments, directly or indirectly resulting from the plenary discussion. Firstly, it introduced a distinction between European Commissioners, i.e. members of the College, and non-voting Commissioners (the so-called Associate

[116] Ibidem, p. 28.
[117] Ibidem, pp. 27–28.

Commissioners). Secondly, it decided that the European Commissioners would be selected on the basis of a system of equal rotation between the Member States, which should be established by a European decision adopted by the European Council. Thirdly, it agreed with the proposal put forward at the plenary session that the President and members of the College of the European Commission, including the Union Minister of Foreign Affairs, as well as the persons nominated as non-voting Commissioners, should be submitted collectively to a vote of approval by the European Parliament. Fourthly, it accepted the proposals of a very large number of delegates for the President to have the right to request the resignation of a European Commissioner or Commissioner. Fifthly, it took account of the demand made during the plenary meeting for adding to the draft a clear provision that the Union Minister for Foreign Affairs could continue to exercise their duties in relation to the common foreign and security policy even in the event of a censure motion on the Commission being passed by the European Parliament.

Therefore, the draft provided that the Commission should consist of a College comprising its President, the Union Minister of Foreign Affairs and thirteen European Commissioners selected on the basis of a system of equal rotation between the Member States, as well as of non-voting Commissioners coming from all other Member States (Article I-25(3) DCT). The draft prepared by the Convention also shortened the procedure for setting up the College of the European Commission from five to four phases. In the first phase, taking into account the elections to the European Parliament and after appropriate consultations, the European Council, deciding by a qualified majority, should put to the European Parliament its proposed candidate for the Presidency of the Commission. In the second phase, that candidate should be elected by the European Parliament by a majority of its members (otherwise the procedure would start again). In the third phase, by choosing one person from each of the lists proposed by the Member States, including three candidates and representing both genders, the President-elect should appoint the thirteen European Commissioners. In the fourth phase, the President and the persons so nominated for membership of the College, including the future Union Minister for Foreign Affairs, as well as the persons nominated as non-voting Commissioners, should be submitted collectively to a vote of approval by the European Parliament (Article I-26(1) and (2) DCT). Moreover, the President of the European Commission was to be politically responsible

to the European Parliament for the activities of the Commissioners (Article I-25(5) DCT).[118]

1.2.5.8. The European Parliament

The most contentious issues discussed by the Convention included the legislative powers of the European Parliament. Some delegates were in favour of their extension, while others opposed the idea. Whereas a group of twenty-eight delegates led by Brok called for introducing a limited right of legislative initiative for the European Parliament, Kirkhope and Antonio Tajani (Italy/EP) even called for the transfer of the right of initiative from the European Commission to the European Parliament.[119] Heathcoat-Amory (United Kingdom) proposed to reject the reference, included in the draft elaborated by the Praesidium, to the European Parliament enacting legislation 'jointly with the Council of Ministers'. He argued that the Parliament should, as before, only assist the Council of Ministers in its legislative activities. Following the failure to implement the Amsterdam Treaty's provision for a uniform electoral procedure, the French delegates (Haenel and Alain Lamassoure/EP), supported by a Romanian representative (Athanasius), proposed to introduce a provision in the draft Constitutional Treaty imposing on the European Parliament a requirement (rather than granting the right) to take a legislative initiative in this matter. Among other requests, it is worth noting the proposal by John Gormley (Ireland) that the European Parliament should elect the President of the Commission 'jointly with national Parliaments'.[120]

In the last phase of the Convention, devoted to elaborating the text of Part IV of the draft Constitutional Treaty, the Bundestag member Meyer put forward an initiative to strengthen the role of the European Parliament in the ordinary procedure for revising the future Constitution. As proposed by the Praesidium, the European Parliament could submit to the Council of Ministers proposals for the amendment of the Constitution and be consulted by the European Council before adopting a decision in favour of

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[118] Draft Treaty, op. cit., p. 14.

[119] EC. Summary sheet, CONV 709/03, op. cit., p. 7.

[120] In addition, Brok, Kaufmann, Wuermeling, Duff, Paciotti and Kelam (Estonia) proposed describing the European Parliament as the 'House of Citizens' or the 'representative of the citizens of the Union', cf. EC. Summary sheet, CONV 709/03, op. cit., pp. 3, 6–8.

examining the proposed amendments. Meyer, however, demanded introducing to the draft Constitutional Treaty a provision that would also guarantee the European Parliament the right to consent to the European Council's decision not to convene a Convention should it not be justified by the extent of the proposed amendments.[121]

The discussion at the Convention had rather little influence on the final text of the provisions of the draft Constitutional Treaty. In fact, the Convention's plenary meeting adopted an almost unchanged version of the proposals contained in the Praesidium's report. The most important amendments included increasing the legislative powers of the European Parliament; in the procedure of establishing the future European Union's annual budget, its position was even stronger than that of the Council of Ministers (Article III-310 DCT). Meyer's proposal to reinforce the role of the European Parliament in the ordinary procedure for revising the Constitution was also accepted (Article IV-7(2) DCT). In addition, the plenary meeting decided to increase the total number of MEPs from seven hundred and thirty-two to seven hundred and thirty-six, simultaneously reducing the minimum threshold to four members, but without fixing a maximum number of seats per Member State (Article I-19(2) DCT).[122]

1.2.5.9. The Court of Justice

The most emotional issues during the Convention's plenary sessions on the Court of Justice were those related to the appointment and competence of the institution in question. However, at the very beginning of the proceedings, the naming and structure of the judiciary of the European Union, until then comprising the Court of Justice and the Court of First Instance, gave rise to a lively discussion. A group of delegates disagreed with the Praesidium's proposal to change the name of the Court of Justice to the Court of the European Union, consisting of the Court of Justice and the General Court. Some of the delegates demanded that the existing name of the Court of First Instance be maintained (e.g. Roche, Heathcoat-Amory) or that it should

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[121] Rede von Jürgen Meyer im Europäischen Konvent am 4. Juli 2003, p. 1, http://www.bundestag.de/ [accessed: 15 Juni 2024]. Rede von Jürgen Meyer im Europäischen Konvent am 9. Juli 2003, p. 1, http://www.bundestag.de/ [accessed: 15 Juni 2024].

[122] Draft Treaty, op. cit., p. 12.

be changed to the Court of the Union (Haenel) or the General Court (e.g. Kiljunen, Michel). In addition, a group of twenty-three delegates, led by Vitorino, Fini, Papandreou, Kiljunen, Hjelm-Wallén and Eduarda Azevedo, put forward the initiative to add the so-called 'specialised courts'.[123]

Many members of the Convention opposed the Praesidium's proposal to maintain the existing procedure for the designation of the Court of Justice, consisting in the appointment of the judges and the Advocates-General by common accord of the Governments of the Member States for a term of six years, renewable (Article I-28(2) DCT). They were in favour of conferring these powers on the Council of Ministers. Brok, McAvan, Voggenhuber and thirty other delegates put forward an initiative for the designation to be decided by the Council of Ministers acting by a qualified majority after obtaining the assent of the European Parliament. Other participants in the Convention proposed that the appointment be made by a resolution of the Council of Ministers and subject to approval by the European Parliament (Borrell) or that the procedure exclude the participation of the European Parliament (Vitorino). Six delegates led by Michel proposed the establishment of Advocates-General at the Court of First Instance.[124] A great number of the Convention members also challenged the length of the mandate of the judges and Advocates-General, proposing extensions while making it non-renewable. The largest group of twenty-seven delegates, led by Brok, supported an eight-year term, twenty-six members called for a mandate of nine years and two delegates even spoke of a twelve-year term.[125]

Many members of the Convention also expressed their reservations and made comments regarding the competence of the institution in question. Some argued that the Court of Justice must respect the Member States' constitutions (Bonde) and the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (Bonde, Gormley), and that it should be competent for examining individual complaints regarding the violation of any fundamental rights recognised in the Charter of Fundamental

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[123] EC. Summary sheet, CONV 709/03, op. cit., p. 34.

[124] Ibidem, p. 35. Under Article 224 TEC in the version of the Treaty of Nice (now Article 254 TFEU), the Court of First Instance could be assisted by Advocates-General if such a provision should be included in the Statute of the Court of Justice. Cf. Treaty of Nice, op. cit., p. 23.

[125] EC. Summary sheet, CONV 709/03, op. cit., p. 35.

Rights (Voggenhuber, Duhamel, Berès). Others demanded that the Court of Justice should not be competent for ruling on decisions of the Member States' constitutional courts (Abitbol). Yet other members proposed specifying that it should not be competent for matters of the European Union's common foreign and security policy (Hain).[126]

The Convention adopted the Praesidium's report with a few amendments, directly or indirectly resulting from the plenary discussion. The most important of these concerned the naming, structure and competence of the Court of Justice. The Court of Justice would consist of the European Court of Justice, the General Court, and specialised courts (Article 28(1) DCT). The most important amendments regarding its competence included the conferral on the Court of Justice of the power to review the legality of acts of bodies or agencies of the Union intended to produce legal effects vis-à-vis third parties, its having jurisdiction in actions brought by the Union's institutions and Member States if the Union's institutions, bodies or agencies should fail to act, as well as strengthening the effectiveness of the mechanism for imposing sanctions in the event of non-compliance by Member States with the Court's judgments (Article III-267(1) and (2), Article III-270(1), Article III-272 DCT). However, the Convention's plenary meeting rejected the proposals of many delegates to amend the term of office of the judges and Advocates-General. Those would still be appointed for a term of six years, renewable (Article I-28(2) DCT).[127]

1.2.5.10. The Court of Auditors

During the plenary session of the Convention concerning the Court of Auditors, the most attention was paid to the procedure for Auditors' appointment and the scope of responsibilities of the institution. Some delegates expressed doubts about the number of members of the Court of Auditors proposed by the Praesidium. They argued that maintaining the existing regulations, i.e. that the institution should consist of one representative of each Member State, would significantly undermine its effectiveness. They therefore demanded that the number of its members be reduced or even

[126] Ibidem, pp. 33, 36.
[127] Draft Treaty, op. cit., pp. 15, 79–80.

radically cut (McAvan, Teufel).[128] Other delegates, such as Fischer, de Vries, Hain and Hjelm-Wallén, proposed the creation of a new body within the Court of Auditors, with an unspecified name, to act as a *sui generis* supervisory board.[129] The UK representative Heathcoat-Amory called for extending powers of the Court of Auditors by adding a requirement that the continued funding of 'non-essential programmes' from the EU budget should be subject to its assent. The Danish representative of the European Parliament, Bonde, put forward an initiative for national parliaments to exercise control of the Court of Auditors.[130] However, the Convention members took no account of any of the requests made by the delegates, accepting the Praesidium's proposals with minor editorial changes. Therefore, the draft Constitutional Treaty did not change much in the activities of the Court of Auditors.

1.2.5.11. The European Central Bank

Among the less controversial issues discussed at the plenary session of the Convention were the Praesidium's proposals regarding the ECB. Nevertheless, the participants in the debate paid a lot of attention to the powers of the institution in question. A group of thirty-six delegates, led by the representatives of Germany Brok, Teufel and Wuermeling, put forward an initiative that the provisions on the ECB should, in the part concerning support for general economic policies in the Union, highlight actions conducive to the 'open market economy and free competition'. At the same time, sixteen other delegates made proposals with the greatest emphasis on social matters. Whereas Vytenis Andriukaitis and Einem demanded adding reference to support for social policies as particularly significant tasks of the ECB, Bonde, Borrell, Duhamel, Lamassoure and ten other delegates focused on its role in fostering sustainable growth and high employment in the European Union.[131] As in the case of the Court of Auditors, the Convention members rejected all of the requests made by the delegates, adopting the Praesidium's proposals with minor amendments, mainly of an editorial nature.

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[128] The most significant request was that by a UK representative of the European Parliament, McAvan, who demanded that the number of Court members be reduced to nine, cf. EC. Summary sheet, CONV 709/03, op. cit., p. 41.

[129] Ibidem, pp. 40–41.

[130] Ibidem, pp. 40–41.

[131] Ibidem, pp. 38–39.

1.2.5.12. The Union's advisory bodies: the Committee of the Regions and the Economic and Social Committee

The most emotional issues debated during the plenary sessions of the Convention on the advisory bodies concerned their composition and powers. The Maltese Government representative, Serracino-Inglott, called for a radical reduction in the number of members of both Committees. He also requested introducing a minimum threshold of six representatives per Member State on each of the Committees. The Bundestag representative Meyer categorically opposed that proposal. On the other hand, he was also in favour of direct elections of the members of the Committee of the Regions by the regional or local communities of the Member States as well as of conferring on that body the power to bring an action before the Court of Justice on the grounds of any infringement of the principle of subsidiarity.[132] Some delegates proposed amending the provision on 'reviewing the rules' governing the composition of the Committees, which had been carried out at regular intervals by the Council of Ministers, at the request of the European Commission (Article I-31(5) DCT). Whereas a group of the Convention members, including Berger, Einem, Severin and Vytenis Andriukaitis, proposed that the Council of Ministers and the European Parliament should jointly 'review the rules', Kaufmann and Teufel demanded deleting the paragraph on reviewing the composition of both Committees, especially of the Committee of the Regions. A representative of the Committee of the Regions, Josef Chabert, with the support of six other delegates, requested that the Committee of the Regions and the Economic and Social Committee be informed and consulted on any proposal to change their composition. Thirty-three delegates, led by Brok and Marietta Giannakou, put forward an initiative that the Committee of the Regions should ensure the giving of due regard by the European Union to the diversity of the cultures between the Member States, whereas the Economic and Social Committee should promote the Union's being in constant and regular dialogue with civil society. A Danish member of the European Parliament, Thorning-Schmidt, called for

[132] Rede von Jürgen Meyer im Europäischen Konvent am 6. Februar 2003, p. 1, http://www.bundestag.de/ [accessed: 15 Juni 2024]. Rede von Jürgen Meyer im Europäischen Konvent am 7. Februar 2003, p. 1, http://www.bundestag.de/ [accessed: 15 Juni 2024].

the name of the Economic and Social Committee to be replaced by a 'Civil and Social Committee' and for the body to consist of representatives of the social partners and civil society. The Hungarian Parliament's representative, József Szájer, proposed the creation of a third advisory body composed of representatives of national and ethnic minorities. Yet other delegates demanded the removal of both existing Committees because of the 'debatable added value' of their activities (Heathcoat-Amory, Kirkhope) or the maintenance of the Economic and Social Committee and the abolition of the Committee of the Regions (Skaarup).[133] As in the case of the Court of Auditors and the European Central Bank, the Convention members rejected all of the requests made by the delegates, approving the Praesidium's proposals with minor editorial amendments.

1.2.5.13. The Congress of the Peoples of Europe

The Praesidium's proposal to establish a Congress of the Peoples of Europe was one of the most controversial issues of the plenary discussions of the Convention. The Congress of the Peoples of Europe was intended as a forum for contact and consultation in European political life. It would be composed in one third of members of the European Parliament and in two thirds of representatives of national parliaments. However, the upper limit was set at seven hundred members. The Congress would not intervene in any legislative activities, it would meet at least once a year, and be convened and chaired by the President of the European Parliament. Its meetings should be public. The President of the European Council would report to the Congress on the State of the Union, and the President of the European Commission would present the annual legislative programmes.[134]

The plenary discussions of the Convention showed that the vast majority of delegates opposed the establishment of the Congress of the Peoples of Europe. A group of sixty-seven members formally requested that the entire article be deleted. It included not only supporters of federal solutions, but also those among advocates of the intergovernmental solutions who were fundamentally opposed to the creation of new institutions and bodies of the

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[133] EC. Summary sheet, CONV 709/03, op. cit., pp. 42–43.

[134] EK. Organe, CONV 691/03, op. cit., p. 12. EC. Draft Constitution, CONV 724/03, p. 119. EC. Summary sheet, CONV 709/03, op. cit., p. 44.

European Union.[135] However, differences of opinion also occurred within a small group of supporters of the setting up of the Congress of the Peoples of Europe. Some of them made their approval dependent on specifying that the Congress would not be a 'new institution' of the European Union, but a sort of interparliamentary conference without any powers (Roche, Lequiller, Costa). Others advocated strengthening its role as a counterweight to the European Council (Athanasiu, Haenel, Abitbol). A representative of the Romanian Parliament, Severin, even put forward an initiative for the Congress of the Peoples of Europe to 'assess the progress of the Union and … initiate, if necessary, amendments for the revision of the Constitution'.[136] In the end, however, the Convention members rejected the establishment of a Congress of the Peoples of Europe. It was one of the most important amendments introduced by the Convention to the draft Constitutional Treaty in relation to the two discussed reports of the Praesidium and to the resulting proposals from the Secretariat.

1.2.6. The role of national parliaments in the legislative process in the European Union

The Convention also debated on strengthening the role of national parliaments in the EU legislative process. Thies issue was addressed by two working groups: Working Group IV (The role of national parliaments) and Working Group I (The principle of subsidiarity). The former prepared recommendations on the Protocol on the role of national Parliaments, whereas the latter worked on recommendations regarding compliance with the principle of subsidiarity. The recommendations made by Working Group IV were generally accepted by the Praesidium and subsequently supplemented and modified during the plenary discussions of the Convention.[137] Only minor modifications were made to the draft Protocol by the Convention. At the initiative

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[135] That group included Andriukaitis, Giannakou, Farnleitner, Barnier, Vitorino, Berger, Borrell, Christophersen, Bonde, Van Lancker, Einem, Fini, Helle, Hjelm-Wallén, Hübner, Kaufmann, Kelam, Kiljunen, Kirkhope, Kohout, Korčok, Lopes, Meyer, Queiró, Santer, Michel, de Vries, Voggenhuber and Zieleniec, cf. EC. Summary sheet, CONV 709/03, op. cit., p. 44.

[136] Ibidem.

[137] EC. Final report of Working Group IV on the role of national parliaments, 22 October 2002, CONV 353/02, pp. 1–15.

of a group of more than sixty members, led by Brok, Duff and Farnleitner (Austria), the annual legislative programmes were added to the list of documents sent by the European Commission to the national parliaments.[138] At the request of delegates from Germany (Altmaier, Wuermeling) and Belgium (Michel, Danny Pieters), it was decided that in the case of bicameral parliaments the activities of the institutions of the European Union would be simultaneously notified to each chamber of the parliament of the Member State concerned.[139] Under pressure from French and Portuguese delegates, a provision was introduced into the draft requiring the European Parliament and the national parliaments to jointly determine how to effectively and regularly organise and promote interparliamentary cooperation within the European Union.[140] At the same time, the Convention rejected the proposal from more than forty members, led by British, Portuguese, French and Danish delegates, for expanding the role of COSAC in the European Union and defining it more accurately.[141]

The recommendations drawn up by Working Group I (The principle of subsidiarity) provided for increasing the responsibility of the European Commission for respecting the principle of subsidiarity in the preparation of its legislative proposals, establishing an early warning system, and extending (to the national parliaments and the Committee of the Regions) the possibility of referral to the Court of Justice for violation of the principle of subsidiarity. A particularly innovative solution was the proposal to set up an early warning system as an instrument for monitoring compliance with the principle of subsidiarity, as it meant that, for the first time in the history of European integration, the national parliaments would be involved in the European legislative process.[142]

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[138] EC. Draft Constitution, CONV 724/03, op. cit., pp. 136, 139.

[139] Ibidem, pp. 138, 140.

[140] Those were as follows: Duhamel and Lequiller (France) as well as Ernâni Lopes, Eduarda Azevedo, Manuel Lobo Antunes and António Nazaré Pereira (Portugal), cf. ibidem, pp. 138, 140.

[141] Those were as follows: Stuart, Duff and Kirkhope (the United Kingdom), Azevedo, António Nazaré Pereira, Costa and Guilherme d'Oliveira Martins (Portugal), Lequiller (France) and Poul Schlüter (Denmark), cf. ibidem, p. 141.

[142] EC. Conclusions of Working Group I on the Principle of Subsidiarity, 23 September 2002, CONV 286/02, pp. 1–11.

The recommendations made by Working Group I were generally accepted by the Praesidium and subsequently supplemented and modified during the plenary discussions of the Convention. 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 (Josef Zieleniec), the early warning system against any non-compliance of legislative proposals from the European Commission with the principle of subsidiarity was extended to involve both of the parliamentary chambers in the Member States with bicameral parliaments.[143] At the initiative of the Praesidium, it was decided that the European Commission should review its legislative proposals when reasoned opinions on their non-compliance with the principle of subsidiarity should represent at least one third of the votes allocated to the Member States' national parliaments and their chambers (the relevant recommendation from Working Group I referred to national parliaments only); in the case of proposals from the Commission or from the Governments of the Member States relating to the area of freedom, security and justice, the threshold should be at least one fourth of the votes. At the same time, it was agreed that when deciding on these matters, unicameral national parliaments should have two votes, whereas each of the chambers of a bicameral parliamentary system should have one vote.[144] Representatives of Germany (Teufel, Meyer) and Austria (Farnleitner) as well as representatives of the United Kingdom (Duff, Neil MacCormick/EP) and Ireland (John Cushnahan/EP) pushed for a clear link between the principle of subsidiarity and the powers of regional and local authorities in the Member States.[145] At the initiative of delegates from the United Kingdom, Portugal, France, Denmark, Finland, the Netherlands, Slovakia and Lithuania, a provision was introduced that the European Commission should also report annually to

[143] EC. Draft Constitution, CONV 724/03, op. cit., p. 146. Rede von Jürgen Meyer im Europäischen Konvent am 18. März 2003, p. 1, http://www.bundestag.de/ [accessed: 15 Juni 2024].

[144] EC. Draft Constitution, CONV 724/03, op. cit., p. 146.

[145] Ibidem, pp. 62, 147–148. Rede von Jürgen Meyer im Europäischen Konvent am 18. März 2003, op. cit., p. 1.

the national parliaments on the application of the principles of subsidiarity and proportionality.[146]

1.2.7. Enhanced cooperation

Enhanced cooperation was also the subject of discussions by the Convention members. This was put on the agenda despite the recognised fact that, in its classic form, enhanced cooperation had never been used in practice by the Member States of the European Union, due to too many preconditions and restrictions imposed on it by the Treaty of Amsterdam, and also because of the circumstance that the Treaty of Nice, significantly relaxing those conditions, had not yet entered into force.[147] Whereas the majority of delegates welcomed the provisions on enhanced cooperation contained in the Treaty of Nice, some of them doubted whether the enhanced cooperation mechanism was at all necessary, given that the existing Treaties allowed for the development of 'differentiated integration', as was the case with the euro area or the Schengen system. Ultimately, however, during the plenary discussions the Convention members shared the opinion of the Praesidium that it was indispensable to maintain and expand enhanced cooperation, even if for the process of enlargement of the European Union. In the longer term, it could prove to be the most 'appropriate' for the pursuit of the 'respective interests or specific needs' of a growing number of the EU Member States.[148]

The deliberations of the Convention focused on matters such as: the number of Member States needed to establish enhanced cooperation, the decision-making procedure, the strengthening of the role of the European Parliament, the conditions for the authorisation by the Council of the European Union to undertake enhanced cooperation, and the extension of enhanced cooperation to the common security and defence policy. The most emotional issue was the number of Member States needed to establish

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[146] These were as follows: Stuart (United Kingdom), Azevedo, Manuel Lobo Antunes and António Nazaré Pereira (Portugal), Lequiller and Floch (France), Bonde (Denmark), Vanhanen, Kiljunen and Esko Seppänen (Finland/EP), de Vries and Thom de Bruijn (the Netherlands), Jan Figel and Irena Belohorska (Slovakia) as well as Vytenis Andriukaitis, Algirdas Gricius and Gintautas Sivickas (Lithuania), cf. EC. Draft Constitution, CONV 724/03, op. cit., p. 148.

[147] For more on the subject, cf. EC. Draft Constitution, CONV 724/03, p. 106.

[148] EC. Enhanced cooperation, 14 May 2003, CONV 723/03, p. 10.

enhanced cooperation. Some delegations, in particular those of Finland, Lithuania, Latvia, the Czech Republic and Hungary, argued that enhanced cooperation should cover at least half of the Member States. The French representatives called for maintaining the relevant provision of the Treaty of Nice, stipulating that the establishment of enhanced cooperation should be subject to the consent of at least eight Member States. On the other hand, the Convention Praesidium proposed that enhanced cooperation should take place if it should bring together at least one third of the Member States. Finally, the Convention members accepted the Praesidium's proposal and a provision to such effect was included in the draft Constitutional Treaty. The positions of individual delegations on the decision-making procedure used for establishing enhanced cooperation were also strongly divided. Some of the delegates called for the provisions of the Treaty of Nice to be maintained, others demanded a unanimous vote, while yet others advocated the introduction of qualified majority voting in this area. However, the plenary of the Convention agreed that decisions on the establishment of enhanced cooperation would be made subject to the decision-making procedure applicable to the integration area concerned. Where decisions should be taken by a qualified majority, a qualified majority would apply, whereas unanimity would be maintained where unanimous voting should be used. At the same time, the possibility for contentious matters to be referred to the European Council as provided for by the Treaty of Nice was abandoned. On the other hand, the plenary of the Convention decided to introduce a general 'bridging clause' (also known as a general *passerelle* clause) into enhanced cooperation, allowing unanimity voting to be replaced by qualified majority voting and a special legislative procedure by the ordinary legislative procedure.[149] The plenary of the Convention also extended the powers of the European Parliament in enhanced cooperation, granting it the right to consent to the establishment of enhanced cooperation in all areas of integration, except for the common foreign and security policy. Under existing provisions, its consent was only required in the fields covered by the co-decision procedure.

As regards the conditions for establishing enhanced cooperation, these were significantly relaxed. The Convention abandoned the condition laid down by the Treaty of Nice that the Council of the European Union needed to

[149] For the origin of the *passerelle* clauses, cf. P. Norman, op. cit., pp. 284–293.

determine whether the objectives of such cooperation could not be attained by applying the relevant provisions of the Treaties. Under new rules, the Council of the European Union would only check whether those integration objectives could not be achieved by the European Union as a whole. It implied a more flexible approach to enhanced cooperation; if it should be determined that the Union as a whole would be likely to fail to meet the relevant integration objectives, the Council of the European Union could immediately proceed with authorising the establishment of such cooperation. In addition, the existing reservation on the need for respecting the provisions of the Protocol integrating the Schengen *acquis* into the framework of the European Union was excluded. One of the reasons for the amendment was the view taken by the Praesidium, subsequently shared by the plenary of the Convention, that cooperation under the Schengen system should be interpreted as a 'variant of the general enhanced cooperation mechanism'.[150]

During the work of the Convention much controversy was also generated by the issue of extending the application of the rules governing enhanced cooperation to the common security and defence policy. At the Convention, France and Germany, supported by Belgium and Luxembourg, were mainly in favour of the possibility of establishing enhanced cooperation in the security and defence policy area. Opposing views were presented by the United Kingdom, Ireland, Sweden, Finland, Latvia and Estonia. The Netherlands, Poland and Denmark also expressed their doubts about the matter. Ultimately, however, the plenary of the Convention adopted a compromise solution, consisting in establishing rules providing that enhanced cooperation would in principle apply to the EU's non-exclusive competences, thus also to the common security and defence policy (Article I-43(1) DCT). On the other hand, it was decided to create two new forms of cooperation regarding the common security and defence policy, namely structured cooperation and closer cooperation in the field of mutual defence. However, both forms of cooperation were to be based, in fact, on the concept of a Europe *à la carte* rather than on the legal construction of enhanced cooperation. Although the draft prepared by the Convention explicitly stated that (with some reservations) the provisions on enhanced cooperation also applied to structured cooperation (Article III-213(5) DCT), the decision to establish it

[150] EC. Enhanced cooperation, CONV 723/03, op. cit., pp. 18, 22, 28.

was to be made by the Governments of the Member States rather than by the institutions of the European Union (Article III-213(1) DCT). This, in turn, determined its identification with the concept of a Europe *à la carte*.[151] Structured cooperation was to be established between those Member States of the Union whose military capabilities fulfilled higher criteria and which had made more binding commitments to one another in the area of the common security and defence policy (Article I-40(6) DCT)[152]. The list of Member States interested in undertaking structured cooperation as well as the military capability criteria and commitments were to be set out in a special protocol annexed to the Constitutional Treaty. If a Member State should wish to participate in such cooperation at a later stage, it would inform the European Council. The Council of the European Union should then consider the request of that Member State, with only the members of the Council representing the Member States taking part in structured cooperation participating in the vote. A similar rule applied when the Council of the European Union should adopt other European decisions on matters covered by structured cooperation. However, the Union Minister for Foreign Affairs was also to attend the deliberations. The Council of the European Union could ask the Member States participating in structural cooperation to carry out Petersberg missions (Article III-213(1) to (4) DCT).[153]

The Maastricht, Amsterdam and Nice Treaties already mentioned the possibility of establishing a common defence, but the idea was then understood as a long-term and rather vaguely formulated objective of the common foreign

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[151] T. Risse, Auf dem Weg zu einer gemeinsamen Außenpolitik? Der Verfassungsvertragsentwurf und die europäische Außen- und Sicherheitspolitik, 'Integration' 2003, H. 4, p. 571.

[152] The idea of establishing structured cooperation largely referred to the statement of the Heads of State or Governments of France, Germany, Belgium and Luxembourg, adopted in Brussels on 29 April 2003 and calling on the Convention to set up in the draft Constitutional Treaty a framework of legal conditions for the establishment of a new European defence organisation (European Security and Defence Union) in the future. Cf. Gemeinsame Erklärung Deutschlands, Frankreichs, Luxemburgs und Belgiens zur Europäischen Sicherheits- und Verteidigungspolitik vom 29. April 2003 in Brüssel, 'Internationale Politik. Dokumente'2003, H. 9, pp. 85–88.

[153] Draft Treaty, op. cit., pp. 37, 189–190. During the deliberations of the Convention, it was not possible to reach an agreement on the protocol referred to in Article III-213(1) of the draft Constitutional Treaty.

and security policy of the European Union. For the first time, the Convention sought to clearly define its scope and implementation, including enhanced cooperation in the field of mutual defence. However, under pressure from mainly Danish delegates (Henning Christophersen, Helle Thorning-Schmidt/EP), the execution of that cooperation was made dependent on close cooperation with NATO.[154] Finally, the draft Constitutional Treaty stated that, until the European Council should decide to establish a common defence, 'closer cooperation shall be established, in the Union framework, as regards mutual defence'. Under this cooperation, if one of the Member States participating in such cooperation is the victim of armed aggression on its territory, the other participating States shall give it aid and assistance by all the means in their power, military or other, in accordance with Article 51 of the United Nations Charter. In the execution of closer cooperation on mutual defence, the participating Member States shall work in close cooperation with the North Atlantic Treaty Organisation' (Article I-40(7) DCT).[155]

The provision in question corresponded in its content to the alliance clause of the Brussels Treaty of 17 March 1948, providing for automatic security guarantees and, in that sense, even going beyond the commitments of the members of the North Atlantic Treaty Organisation. That could lead to a conflict of interest between the European Union and NATO in the future. However, the alliance clause in the European Union's common security and defence policy was intended to apply only to the Member States establishing closer cooperation in the field of mutual defence.[156]

Closer cooperation in the field of mutual defence, as well as structured cooperation, was to be established on the basis of an agreement between Member States (rather than under a decision of the Council of the European Union) and executed in accordance with Article 51 of the United Nations

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154 EC. Draft Constitution, CONV 724/03, op. cit., p. 103.

155 Draft Treaty, op. cit., p. 18.

156 With reference to the joint proposal of the French and German Foreign Ministers, de Villepin and Fischer, submitted to the Convention on 22 November 2002, on the assumption by the EU Member States concerned of their commitments under the Brussels Treaty, including the alliance clause, cf. EK. Beitrag von Herrn Dominique de Villepin und von Herrn Joschka Fischer 'Gemeinsame deutsch-französische Vorschläge fur den Europäischen Konvent zum Bereich Europäische Sicherheits- und Verteidigungspolitik', 22. November 2002, CONV 422/02, pp. 1–4.

Charter and in cooperation with NATO. If a Member State participating in such cooperation should be the victim of armed aggression on its territory, it was to inform the other participating States of the situation and could request aid and assistance from them. The decision to provide aid and assistance to such a State was to be taken by the participating Member States meeting at ministerial level. Their representatives on the Political and Security Committee and the Military Committee of the Council of the European Union were also to take part in the deliberations. Any armed aggression and the measures taken as a result should be immediately notified to the United Nations Security Council. The list of Member States participating in mutual defence was to be set out in a special declaration annexed to the Final Act of the Intergovernmental Conference. A Member State wishing to take part in such cooperation at a later stage would have to accept the obligations it imposed, inform the European Council of its intention and then subscribe to that declaration (Article I-40(7), Article III-214(1) to (4) DCT)[157].

1.2.8. The *passerelle* procedure

The plenary of the Convention introduced a simplified procedure for revising the Constitution, called the *passerelle* procedure, into the draft Constitutional Treaty. The essence of the procedure was the possibility of using general *passerelle* clauses. These made it possible for unanimity and a special legislative procedure to be replaced by qualified majority voting and the ordinary legislative procedure respectively. However, these clauses could only be applied to Part III of the Constitution. Thus, the European Council could adopt a European decision allowing the Council of Ministers to act by qualified majority in areas or cases where it should act unanimously. Any initiative taken by the European Council on the matter was to be communicated to national parliaments no later than four months before making any such decision. In addition, where European laws and framework laws should be adopted by the Council of Ministers according to a special legislative procedure, the

[157] Draft Treaty, op. cit., pp. 37–38, 189–191. During the deliberations of the Convention, it was not possible to reach an agreement on the declaration referred to in Article III-214(1) of the draft Constitutional Treaty. For an analysis of the provisions of the draft Constitutional Treaty, cf. J. Howorth, The European Draft Constitutional Treaty and the Future of the European Defence Initiative: A Question of Flexibility, pp. 1–26, http://www.cap.lmu.de/transatlantic/download/howorth.pdf [accessed: 20 July 2024].

European Council could adopt, after a period of consideration of at least six months, a decision allowing for the application of the ordinary legislative procedure. The European Council was to act in these matters on its own initiative and by unanimity, but after consulting the European Parliament and informing the national parliaments (Article 24(4) DCT).[158]

The plenary of the Convention also confirmed and extended to new areas of activity of the European Union the possibility, provided for in the existing Treaties, of using specific 'bridging clauses', also known as specific *passerelle* clauses.[159] These allowed the replacement of a special legislative procedure by the ordinary legislative procedure or of a unanimous vote by qualified majority voting. The specific *passerelle* clauses could only be used in specifically defined areas of Union activity (hence their name). They took effect in principle by a decision of the Council of Ministers, acting unanimously, after consulting the European Parliament or the European Parliament, the Economic and Social Committee and the Committee of the Regions.[160]

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The draft Constitutional Treaty adopted by the Convention on 10 July 2003 essentially confirmed and developed the integration model already developed in previous years, based on the interpenetration of the supranational and intergovernmental architectures[161]. The transformation of the European

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[158] Draft Treaty, op. cit., p. 13.

[159] Under existing provisions, specific *passerelle* clauses applied, for example, in environmental protection (Article 175(2) TEC [now Article 192(2) TFEU]) and in social policy (Article 137(2) TEC [now Article 153(2) TFEU]). The draft Constitutional Treaty slightly modified the specific *passerelle* clause regarding environmental protection policy (Article III-130(2) DCT) and confirmed such a clause in social policy (Article III-104(3) DCT). Furthermore, it established a new specific *passerelle* clause in judicial cooperation in civil matters, in the part concerning aspects of family law with cross-border implications (Article III-170(3) DCT), cf. Draft Treaty, op. cit., pp. 48, 53, 59.

[160] IGC 2003. Note from Presidency to Delegations (hereafter: NPD). Treaty revision, Brussels, 11 November 2003, CIG 46/03, pp. 1–3.

[161] Draft Treaty establishing a Constitution for Europe. Adopted by consensus by the European Convention on 13 June and 10 July 2003. Submitted to the President of the European Council in Rom 18 July 2003, Official Journal of the European Union C, 303, 14.12.2007.

Union into an international organisation within the meaning of international law, the dismantling of the pillar structure, the establishment of a single legal order, the strengthening of the common axiology and democratic principles of the Union, as well as the changes introduced in decision-making procedures, strengthened the supranational institutional and legislative base in the European Union. On the other hand, however, the process was accompanied by a further reinforcement of the intergovernmental architecture, reflected in particular in the increasing importance of the European Council, the introduction of a clause on the possibility of the voluntary withdrawal of Member States from the European Union, the adoption of the Protocol on the role of national Parliaments in the European Union and the Protocol on the application of the principles of subsidiarity and proportionality, and the maintenance of the basic peculiarities and specificities of the common foreign and security policy, police cooperation and judicial cooperation in criminal matters. The draft did not resolve many of the issues presented or discussed during the Convention. Above all, however, it provided no solution to the problem of the democratic deficit in the European Union, in particular with regard to the European Parliament, although it confirmed the Union's continued pursuit in that direction.

2. Proceedings of the IGC (2003–2004)

The draft Constitutional Treaty, elaborated and adopted by the Convention, generated various political controversies in the capitals of many EU Member States. These were an extension of the debate that had already taken place between large, medium-sized and small Member States and candidate countries during the deliberations of the Convention. The discussion concerned a new balance of forces and the defence of national interests in an enlarged European Union of twenty-five (and, subsequently, of twenty-seven) Member States. Notwithstanding the views of many Governments interested in a thorough examination of the draft Constitutional Treaty, on 20 June 2003 the European Council meeting in Porto Carras near Thessaloniki asked the Italian Government, taking over the Presidency on 1 July of the same year, to convene an Intergovernmental Conference on the revision of the founding Treaties. It would begin its deliberations in October 2003. In addition to the Member States, the IGC would involve the candidate countries having

signed the Accession Treaty on 16 April 2003 as well as Bulgaria, Romania and Turkey as observers.[162]

On 1 July 2003, the Italian Government submitted an official request to the Council of the European Union for the convening of an Intergovernmental Conference. In line with the recommendations of the European Council adopted in Porto Carras, the Italian Government declared its intention to conclude the negotiations in December 2003 so that the new Constitutional Treaty could be signed immediately after 1 May 2004 (i.e. after the EU accession of 10 new Member States), but before the European Parliament elections scheduled for June of that year. On 18 July 2003, the Chairman of the Convention, Giscard d'Estaing, submitted to the President of the European Council, Silvio Berlusconi, the final version of the draft Treaty establishing a Constitution for Europe.[163]

Almost simultaneously, in the summer of 2003, some Member State and candidate Governments began to raise numerous objections regarding the draft Constitutional Treaty. On 1 September 2003, a meeting in Prague gathered the Deputy Foreign Ministers of fifteen Member States and candidate countries which for several months had contested some of the provisions of the draft Constitutional Treaty and called for appropriate amendments. During the Convention, they had set up an informal consultation group to represent the interests of eighteen medium-sized and small European countries. As the Benelux countries refused to accept the invitation to Prague, the meeting was attended by representatives of eight candidate countries: Poland, the Czech Republic, Slovakia, Hungary, Lithuania, Latvia, Estonia and Slovenia, as well as of seven Member States: Denmark, Finland, Sweden, Ireland, Portugal, Austria and Greece. Referring to the decision of the Porto Carras European Council, the participants agreed that the draft Constitutional Treaty should be a 'good basis for further discussion'. On the other hand, however, they proposed five important amendments to the document in question, including

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[162] Rat der Europäischen Union. Übermittlungsvermerk des Vorsitzes für die Delegationen. Europäischer Rat (Thessaloniki). Tagung vom 19. und 20. Juni 2003. Schlussfolgerungen des Vorsitzes, Brüssel, 1. Oktober 2003, CIG 11638/03, p. 2.

[163] IGC 2003/2004. Negotiations under the Italian Presidency, p. 2, http://europa.eu.int/scadplus/cig2004/negociations1 [accessed: 17 May 2024].

maintaining the strong position of medium-sized and small Member States in the Council of Ministers, granting each Member State one Commissioner in the European Commission, the right of veto in social, tax and common security and defence policies, blocking the possibility of establishing military alliances in competition with NATO in the European Union, as well as the introduction of *invocatio Dei* into the Preamble.

In response to the decisions of the Deputy Foreign Ministers of the fifteen Member States and the candidate countries, the former Chairman of the Convention, Giscard d'Estaing, speaking at the European Parliament on 3 September 2003, warned against attempts to amend the draft Constitutional Treaty, arguing that such changes would threaten to undermine the whole design of the draft text, or even encourage citizens of the Member States of the enlarged European Union to reject it in their respective national referendums. However, the former French President's concerns were not shared by the President of the European Commission Romano Prodi, who at the same meeting of the European Parliament supported the advocates of introducing key changes to the draft Constitutional Treaty. However, only one of the amendments tabled by Prodi was in line with the proposals of the fifteen European countries. It was the right of each Member State to have one Commissioner in the European Commission. In addition, Prodi spoke in favour of limiting the scope of any veto in the decision-making procedure in the Council of Ministers and simplifying the procedure for revising the future Constitution. Prodi did not share the opinion of Giscard d'Estaing that the European Constitution would be 'forever' and, therefore, the need to amend it would not materialise until the distant future. On 18 September 2003, Chancellor Schröder and President Chirac warned against discussing changes to the draft Constitutional Treaty as that could lead to an escalation of new demands and, as a result, disrupt the IGC. A slightly more pragmatic approach was shown by another representative of the European Commission, Günter Verheugen, German Commissioner for Enlargement, who on the next day, during a press conference in Berlin, called on the Governments of the Member States and the candidate countries to consider amending a few 'selected' provisions of the draft text. He argued that if these new objections to the draft Constitution should not be taken into account, the risk of rejecting the Treaty would increase. Like Prodi, Verheugen was in favour of granting each Member State the right

to have one Commissioner in the European Commission, but at the same time he was opposed to returning to the Nice system of qualified majority voting in the Council of Ministers. On 24 September 2003, at a meeting in New York, representatives of nine Member States and of ten candidate countries (with the exception of Bulgaria and Romania) called on the Italian Presidency to allow the free presentation and discussion of any proposal for the Constitutional Treaty during the IGC. The Foreign Ministers of Finland, Erkki Tuomioja, and of Austria, Benita Ferrero-Waldner, speaking on their behalf during the press conference, stressed that the representatives of the nineteen Member States and candidate countries had not agreed on and did not intend to make any joint demands yet, but at the same time requested that the forthcoming IGC be open and that larger Member States refrain from putting undue pressure on other countries.[164]

Five days later, in Brussels, at a meeting of the Ministers for Foreign Affairs of all future participants in the IGC, the Italian Presidency's proposal to discuss only amendments with majority support at the IGC was rejected. The reservations of the States questioning certain provisions of the draft text prepared by the Convention were so serious that it became indispensable to re-negotiate them at the IGC. This, in turn, significantly reduced the chances of reaching a compromise by the end of 2003. In order to ensure an efficient flow of information and to facilitate negotiations during the deliberation of the IGC, it was decided to designate 'Focal Points', which were usually made up of senior officials of the Foreign Ministries of individual Member States, meeting on an *ad hoc* basis.[165]At the same time, the procedure for revising the Treaties was initiated. In accordance with Article 48 TEU, the European Commission, the European Parliament and the European Central Bank submitted their opinions on the IGC and the draft Constitutional Treaty itself. The position of the ECB was necessary because of the changes introduced by the Convention into provisions on the functioning of the Economic and Monetary Union. Further, the Economic

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[164] The New York meeting was not attended by representatives of Germany, France, the United Kingdom, Italy, Spain and Greece. For more on the subject, cf. J.J. Węc, Spór o kształt ustrojowy, op. cit., pp. 385–391.

[165] IGC 2003/2004. Negotiations under the Italian Presidency, op. cit., p 2.

and Social Committee and the Committee of the Regions published their respective opinions on the IGC.[166]

On 17 September 2003, the European Commission adopted its opinion recognising the draft Constitutional Treaty as a 'key step in European integration', preserving the achievements of fifty years and extending the Community method in which the European Union's 'institutional architecture' remained 'essentially rooted'. The Commission also expressed the opinion that the draft prepared by the Convention 'must constitute the basis for the work of the Intergovernmental Conference', with the task of 'improving, clarifying and finalising' it but 'without upsetting the general balance'.[167] At the same time, the Commission proposed amending the draft Constitutional Treaty on the following points: the composition of the European Commission and the number of members of the College; the extension of the scope of qualified majority voting to new cases; the simplification of the procedure for revising the future Constitution; and the coordination of economic policies in the euro area.[168]

A week later, the European Parliament adopted its official position, stating that the results of the Convention's work on preparing the draft Constitution 'fully vindicated' the decision of the Laeken European Council to abandon the intergovernmental method as a means of revising the Treaties and justified the European Parliament's proposal for setting up a constitutional Convention. The proceedings and, above all, the outcome of the 2000 IGC 'definitively demonstrated' that 'purely diplomatic negotiations are not capable of providing solutions to the needs of a Union with twenty-five Member States'. Although not all provisions of the draft Constitutional Treaty were assessed as satisfactory, the European Parliament called on the IGC not to 'reopen the

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[166] Ibidem, pp. 3–5. For the relevant opinions of the Economic and Social Committee and of the Committee of the Regions, cf. IGC 2003. Opinion of the European Economic and Social Committee addressed to the 2003 Intergovernmental Conference, Brussels, 24 September 2003, pp. 1–11. IGC 2003. Opinion of the Committee of the Regions of 9 October 2003 on the CoR proposals for the Intergovernmental Conference, Brussels, 9 October 2003, pp. 1–12.

[167] IGC 2003. Commission of the European Communities. Communication from the Commission. A Constitution for the Union, Brussels, 17 September 2003, COM (2003) 548, pp. 1–4.

[168] Ibidem, pp. 4–24.

important compromises reached within the Convention' and not to 'subvert the whole Convention method', and thus to accept the draft Treaty.[169]

On 19 September 2003, the European Central Bank requested the IGC to include an explicit reference to price stability in the catalogue of the Union's objectives. In its view, it was all the more necessary that Article 4(3) TEC (now Article 119(3) TFEU) contained a provision on the need to respect 'stable prices' as a guiding principle for the activities of the Member States and the Community. In addition, the ECB demanded that a clear reference to the independence of the central banks of the euro area Member States be included in the new Treaty.[170] Following these positive opinions from the European Commission, the European Parliament and the European Central Bank, on 29 September 2003 the General Affairs and External Relations Council decided to convene an Intergovernmental Conference, with a view to its first meeting in Rome on 4 October 2003.[171]

The Intergovernmental Conference was held under the auspices of two Presidencies: those held by Italy and Ireland. The negotiations were conducted under the general authority of the Heads of State or Government, supported by the Ministers for Foreign Affairs of the Member States and of the candidate countries. Meetings of the latter were prepared by lower level representatives of the Governments of the Member States and of the candidate countries. A representative of the European Commission as a full member and a representative of the European Parliament as an observer also took part in the proceedings. The first phase of the IGC took place in the last three months of Italy's Presidency of the European Union. It was launched with a meeting of the Heads of State or Government of the Member States

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[169] EP 1999–2004. European Parliament resolution on the draft Treaty establishing a Constitution for Europe and the European Parliament's opinion on the convening of the Intergovernmental Conference (IGC) (11047/2003 - C5-0340/2003 - 2003/0902(CNS)), 24 September 2003, P5-TA(2003) 0407, pp. 1–5, https://www.europarl.europa.eu/doceo/document/TA-5-2003-0407_EN.pdf?redirect [accessed: 18 May 2024].

[170] Opinion of the European Central Bank of 19 September 2003 at the request of the Council of the European Union on the draft Treaty establishing a Constitution for Europe (CON/2003/20), Official Journal of the European Union C, 229, 25.9.2003, pp. 8–9.

[171] 2526th Council meeting (General Affairs and External Relations), Brussels, 29 September 2003, C/03/251, 2293/1/03 REV 1, pp. 6–7, https://ec.europa.eu/commission/presscorner/api/files/document/print/en/pres_03_251/PRES_03_251_EN.pdf [accessed: 19 May 2024].

and of the candidate countries in Rome on 4 October 2003, and completed with the Brussels European Council summit on 12–13 December of the same year. In the period in question, another meeting of the Heads of State or Government organised under the auspices of the European Council took place on 16–17 October and there were six meetings of Foreign Ministers within the framework of the General Affairs and External Relations Council held on 4, 14 and 27 October, 18 and 28–29 November and 9 December 2003. As expected, participants in the IGC submitted such a large number of amendments that in the first phase of the deliberations the IGC only managed to identify several dozen contentious issues.[172]

The second phase of the IGC was preceded by intensive bilateral consultations conducted by the Irish Presidency. These allowed defining the directions of possible compromise. The arrangements were approved by the Brussels European Council on 25–26 March 2004.[173] The most intense negotiations took place in the last two months of Ireland's Presidency of the European Union, i.e. in May and June 2004. Three further meetings of the Ministers for Foreign Affairs of the Member States were held under the auspices of the General Affairs and External Relations Council on 17–18 May, 24 May and 14 June 2004. However, the most contentious issues were not finally resolved until the Brussels European Council summit on 17–18 June 2004.[174]

At their meeting in Rome on 4 October 2004, the Heads of State or Government of the 25 Member States and candidate countries officially

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[172] IGC 2003/2004. Negotiations under the Italian Presidency, op. cit., pp. 1–9. Konferenz der Vertreter der Regierungen der Mitgliedstaaten (hereafter: RK) 2003. Vermerk des Vorsitzes für die Delegationen (hereafter: VVD). Vorläufiger Zeitplan, Brüssel, 6. Oktober 2003, CIG 5/03, Anlage, p. 1.

[173] IGC 2003. Presidency Note to the European Council (Brussels, 25–26 March 2004). Report on the Intergovernmental Conference, Brussels, 24 March 2004, CIG 70/04, p. 5. IGC 2003/2004. Negotiations under the Irish Presidency, p. 2, http://europa.eu.int/scadplus/cig2004/negociations2_en.htm/ [accessed: 17 Mai 2024].

[174] IGC 2003/2004. Negotiations under the Irish Presidency, op. cit., pp. 2–7. IGC 2003. NPD. Meeting of Heads of State or Government, Brussels, Brussels, 17–18 June 2004, CIG 81/04. IGC 2003. NPD. Meeting of Heads of State or Government, Brussels, Brussels, 17–18 June 2004, CIG 82/04. IGC 2003. NPD. Meeting of Heads of State or Government, Brussels, Brussels, 17–18 June 2004, CIG 83/04. IGC 2003. NPD. Meeting of Heads of State or Government, Brussels, Brussels, 17–18 June 2004, CIG 84/04. IGC 2003. NPD. Meeting of Heads of State or Government, Brussels, 17–18 June 2004, CIG 85/04.

opened the Intergovernmental Conference. The participants first engaged in a general debate on the importance of the future Constitution for Europe, followed by setting out a preliminary timetable for the negotiations. At the end of the meeting, they issued a declaration stressing that the adoption of a Constitutional Treaty was a vital condition for 'making Europe more cohesive, more transparent and democratic, more efficient and closer to its citizens, inspired by the will to promote universal values above all through cooperation with international multilateral organisations and confirming a strong and balanced transatlantic relationship'. On the other hand, the authors of the declaration renewed their 'expectation of a conclusion of the constitutional negotiations in advance of the European Parliament elections in June 2004 in order to allow European citizens to cast their vote in full awareness of the future architecture of the Union'.[175]

The first meeting of the Foreign Ministers of the 25 Member States and candidate countries was held in Rome on 4 October 2003. The Italian Presidency called on all delegations to prepare proposals for amendments regarding the so-called non-institutional issues by 20 October at the latest. Such amendments were to be limited to the 'bare essentials', but also including the provisions of Part III of the draft Constitutional Treaty.[176] At the third meeting of the Foreign Ministers of the Member States and of the candidate countries, convened in Brussels on 27 October 2003, the Presidency submitted a note with proposals for as many as one hundred and seventy-nine amendments, concerning ninety-one provisions of the draft Constitutional Treaty. These were divided into ten categories: the Preamble; general issues;[177] the economic and monetary policy; the Union's finances and budget; the area of freedom,

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[175] IGC 2003. Declaration of Rome, Brussels, 6 October 2003, CIG 3/03, p. 2, https://www.cvce.eu/obj/declaration_of_rome_on_the_occasion_of_the_opening_of_the_igc_4_october_2003-en-dfee76a1-33c4-46ae-a0e3-a2e8920d9dd3.html [accessed: 15 Juni 2024]. RK 2003. VVD. Vorläufiger Zeitplan, CIG 5/03, Anlage, op. cit., p. 1.

[176] IGC 2003/2004. Negotiations under the Italian Presidency, op. cit., p 5.

[177] The Italian Presidency classified as general affairs the integration objectives, axiology, the democratic legitimacy of the EU and the division of competences between the Union and the Member States, cf. IGC 2003. NPD. Non-institutional issues, CIG 37/03, op. cit., pp. 3–5.

security and justice; external action; the Union's other policies; enhanced cooperation; the revision of the Constitutional Treaty; miscellaneous.[178]

Within one month, the Italian Presidency analysed and verified all the proposed amendments on institutional and non-institutional matters, thus reducing the number of contentious issues to fifty-six, six of which were considered to require a longer debate in order to reach a final agreement. These latter issues included: the text of the Preamble; the definition of qualified majority; the composition of the European Commission; the minimum threshold of members of the European Parliament; the annual budgetary procedure; and the procedure for adopting the multiannual financial framework of the European Union after 2013.[179] However, while steering clear of the political reefs in the last two cases seemed a real possibility, reaching compromise solutions quickly in the first four issues was from the very beginning unlikely.

2.1. The integration objectives, axiology and democratic principles of the EU

Some delegations proposed to extend the catalogue of the Union's objectives and values as set out in the draft Constitutional Treaty. Greece demanded adding new objectives of the European Union, i.e. actions aimed at the creation of a full Economic and Monetary Union, the protection of public health, and political strategies defining the principles of the development of economic and social cohesion (Article I-3).[180] Belgium put forward an initiative for the Constitutional Treaty to ensure taking into account social objectives in all areas of the European Union's activities.[181] Although the

[178] IGC 2003. NPD. Non-institutional issues; including amendments in the economic and financial field, Brussels, 24 October 2003, CIG 37/03, pp. 1–18. IGC 2003/2004. Negotiations under the Italian Presidency, op. cit., pp. 6–7.

[179] IGC 2003. NPD. Naples Ministerial Conclave: Presidency proposal, Brussels, 25 November 2003, CIG 52/1/03 REV 1, pp. 1–2, 6. IGC 2003. Addendum to the NPD. Naples Ministerial Conclave: Presidency proposal, Brussels, 25 November 2003, CIG 52/03 ADD 1, pp. 1–56.

[180] IGC 2003. NPD. Non-institutional issues, CIG 37/03, op. cit., pp. 3–5.

[181] Ibidem, p. 4.

Italian Presidency rejected the Greek proposal to set new objectives for the European Union, it accepted Belgium's request by proposing the introduction of a social clause into the Constitutional Treaty. In addition, the Presidency confirmed the promotion of 'territorial cohesion' as an objective of the European Union, as already adopted by the plenary of the Convention at the request of delegates from Italy (Muscardini, Spini, Paciotti), Spain (Borrell), France (de Villepin, Lequiller), Slovenia (Franc Horvat) and Malta (Serracino-Inglot, Dolores Cristina, Michael Frendo), as well as by representatives of the Committee of the Regions (Chabert) and the European social partners (Joao Cravinho).[182]

With regard to axiology, two delegations demanded the inclusion as the Union's new values of the rights of national and ethnic minorities (Hungary) and of the principle of equality between men and women (Sweden).[183] However, Hungary's efforts were strongly opposed by Slovakia and Latvia due to the significant share of national minorities in the total population of those countries.[184] But the most controversial issue remained the text of the Preamble. Representatives of Poland, Spain, Ireland, Malta, Portugal, Slovakia, the Czech Republic and Lithuania supported the introduction of a reference to ancient Greek philosophy, Roman law, Jewish and Christian roots and rationalism in Europe's traditions. However, Turkey and Cyprus opposed these proposals.[185]

During the Naples Ministerial Conclave (28–29 November 2003), the Italian Presidency proposed, and then repeated at the December European Council meeting in Brussels, that the rights of national minorities and the principle of equality between women and men should be raised to the rank of the European Union's values in accordance with the demands of

[182] IGC 2003. Addendum to the NPD. Naples Ministerial Conclave, CIG 52/03 ADD 1, op. cit., p. 26. IGC 2003. Addendum to the NPD. Intergovernmental Conference (12–13 December 2003): Addendum 1, CIG 60/03 ADD 1, op. cit., p. 37. EC. Draft Constitution, CONV 724/03, op. cit., p. 53.

[183] IGC 2003. NPD. Non-institutional issues, CIG 37/03, op. cit., p. 3.

[184] Ibidem.

[185] Ibidem.

Hungary and Sweden respectively (Article I-2 DCT).[186] On the other hand, the Italian Presidency rejected the requests of some delegations on participatory democracy (Slovakia) and the European Ombudsman (Greece), but it accepted – although at the December European Council meeting in Brussels rather than during the Naples Ministerial Conclave – the proposal of Portugal and Slovenia to respect the principle of equality between the Member States of the Union vis-à-vis the Constitution. However, the proposal was modified in such a way that it was combined, which seemed more logical, with the draft provisions on respecting the national identities of the Member States (Article I-5(2) DCT) rather than, as expected by the applicants, with the principle of the equality of citizens (Article I-44 DCT).[187]

As regards the democratic legitimacy of the European Union, Portugal and Slovenia proposed introducing into the draft the principle of equality between the Member States, to be treated by the EU on an equal footing with the principle of the equality of citizens (Article I-44 DCT). Further, Slovakia requested clarification of the provision on the conditions for putting forward a civic initiative by setting a specific number of Member States necessary to submit an appropriate proposal to the European Commission (Article I-46 DCT). Greece proposed that the European Ombudsman be directly elected rather than appointed by the European Parliament, as provided for in the Maastricht, Amsterdam and Nice Treaties and in the draft Constitutional Treaty (Article I-48 DCT).[188]

At the seventh meeting of the Ministers for Foreign Affairs of the Member States held on 17–18 May 2004, the Irish Presidency confirmed or only slightly modified all the above-mentioned amendments, as set out by the Italian

[186] IGC 2003. Addendum to the NPD. Naples Ministerial Conclave, CIG 52/03 ADD 1, op. cit., p. 4. IGC 2003. Addendum to the NPD. Intergovernmental Conference (12–13 December 2003): Addendum 1 to the Presidency's proposal, Brussels, 9 December 2003, CIG 60/03 ADD 1, p. 5.

[187] IGC 2003. Addendum to the NPD. Intergovernmental Conference (12–13 December 2003): Addendum 1, CIG 60/03 ADD 1, op. cit., p. 6.

[188] IGC 2003. NPD. Non-institutional issues, CIG 37/03, op. cit., p. 3.

Government in the draft prepared by the Convention, with regard to the social clause, the rights of national minorities, equality between women and men, the principle of equality between the Member States and vis-à-vis the Constitution.[189] The Irish Presidency also included, for the first time, the ECB's request to ensure price stability for the Union in the catalogue of its objectives. Furthermore, as proposed by Slovakia, then supported by other delegations as well, the Irish Government clarified the provision on the conditions for the submission of a civic initiative by requiring the legislator to specify in a European law the minimum number of Member States whose citizens could put forward such an initiative.[190]

On 14 June 2004, at the ninth meeting of the Foreign Ministers of the Member States in Luxembourg, the Irish Presidency proposed to resolve the dispute over the content of the Preamble by referring to the cultural, religious and humanist heritage of Europe but without introducing *invocatio Dei*. Nevertheless, the final version of the Preamble differed from the Convention's draft as at the request of the delegations of many countries, including Poland, the controversial motto and the first paragraph of the initial text were removed.[191] All these amendments were subsequently

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189 RK 2003. VVD. Treffen der Kontaktstellen (Dublin, 4. Mai 2004). Arbeitsdokument, Brüssel, 29. April 2004, CIG 73/04, pp. 1–130.

190 RK 2003. Treffen der Kontaktstellen, CIG 73/04, op. cit., pp. 5, 14–15. RK 2003. VVD. Treffen der Kontaktstellen (Dublin, 4. Mai 2004). Arbeitsdokument, Brüssel, 29. April 2004, CIG 73/04, pp. 1–13. RK 2003. Vorschläge des Vorsitzes im Anschluss an das Treffen der 'Kontaktstellen', CIG 76/04, op. cit., pp. 5, 8. J. Falke, Verbesserung, Verwässerung oder Stillstand? Das Ergebnis der Regierungskonferenz im Vergleich zum Konvent, [in:] U. Liebert, J. Falke, A. Maurer (eds.), Postnational Constitutionalisation in the New Europe. Postnationaler Verfassungsprozess im neuen Europa, Baden-Baden 2006, p. 155.

191 The motto introduced by the Convention was as follows: 'Our Constitution … is called a democracy because power is in the hands not of a minority but of the greatest number' (Thucydides II, 37). Cf. Draft Treaty, op. cit., p. 8. For more on the subject, cf. J.J. Węc, Kultur und Kulturpolitik im Vertrag über die Verfassung für Europa, [in:] Germanistische Erfahrungen und Perspektiven der Interkulturalität, hrsg. von F. Grucza, Warszawa 2005, pp. 229–236.

confirmed by the Presidency at the Brussels European Council meeting on 17–18 June 2004.[192]

2.2. The division of competences between the European Union and the Member States

As regards the division of competences between the European Union and the Member States, many delegations questioned the provision of the draft Constitutional Treaty on the classification of tourism as an area of exclusive competence of the Member States. They called for the area to be regarded as one of shared competence (Greece) or of supporting, coordinating or complementary action (Poland, Spain, France, Portugal, Latvia, Malta, Lithuania, Slovakia and Cyprus).[193] The Italian Presidency accepted the latter proposal in a note submitted to the Naples Ministerial Conclave (Article I-16 DCT).[194] After minor changes presented in the note of 1 December 2003, the Presidency repeated it at the Brussels European Council meeting held on 12–13 December of that year.[195] During the seventh meeting of the Foreign Ministers of the Member States on 17–18 May 2004, the Irish Presidency submitted a note accepting the proposals of the Italian Government on the issue, including tourism as an area of supporting, coordinating or complementary action of the European Union.[196]

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[192] RK 2003. VVD. Vorschlag des Vorsitzes im Anschluss an die Ministertagung vom 24. Mai 2004, Brüssel, 10. Juni 2004, CIG 79/04, pp. 5–7, 9, 39, 50. RK 2003. VVD. Ministertagung am 14. Juni 2004 in Luxemburg, Brüssel, 12. Juni 2004, CIG 80/04, pp. 4–5. IGC 2003. NPD. Meeting of Heads of State or Government, Brussels, 16 June 2004, CIG 81/04, pp. 5–9, 11, 49, 62.

[193] IGC 2003. NPD. Non-institutional issues, CIG 37/03, op. cit., p. 3.

[194] IGC 2003. Addendum to the NPD. Naples Ministerial Conclave, CIG 52/03 ADD 1, op. cit., p. 37.

[195] IGC 2003. NPD. Tourism, Brussels, 1 December 2003, CIG 56/03, pp. 1–2. IGC 2003. Addendum to the NPD. Intergovernmental Conference (12–13 December 2003): Addendum 1, CIG 60/03 ADD 1, op. cit., p. 48.

[196] RK 2003. VVD. Treffen der Kontaktstellen (Dublin, 4. Mai 2004). Arbeitsdokument, Brüssel, 29. April 2004, CIG 73/04, op. cit., pp. 6–8, 72–73, 94–95. RK 2003. VVD. Vorschläge des Vorsitzes im Anschluss an das Treffen der 'Kontaktstellen' vom 4. Mai 2004, Brüssel, 13. Mai 2004, CIG 76/04, pp. 4, 6, 29, 38.

2.3. The institutional system of the European Union

The rather superficial, devoid of thorough debate and sometimes even arbitrary treatment by the Praesidium of the reform of the institutional system during the work of the Convention caused the most controversy among the participants in the IGC. This included, in particular, issues concerning the type, number of formations and nature of the Presidency of the Council of Ministers, the definition of qualified majority and the procedure for qualified majority voting in the Council of Ministers, the composition of the European Commission, the status of the Union Minister for Foreign Affairs as well as the number of seats and legislative powers of the European Parliament.

2.3.1. The Council of Ministers

2.3.1.1. The formations and Presidency of the Council of Ministers

Already at the first meeting of the Foreign Ministers of the 25 Member States and candidate countries on 4 October 2003 in Rome, was a debate on the Presidency note. This note contained the responses of the individual delegations to a catalogue of 14 questions sent to them back on 19 September 2003. The participants also discussed the preliminary position of the Italian Government on possible amendments to the draft Constitutional Treaty, in the part concerning the legislative function, the types and number of Council formations and the way of holding the Presidency of the Council of Ministers.[197] The responses of the individual delegations to the catalogue of questions drawn up by the Italian Presidency, as well as the bilateral discussions held with them, strengthened the Presidency's conviction of the need to 'define more clearly the legislative function' of the Council of Ministers, to establish a list of Council formations, and to clarify the 'rotation rules' during the presidency in its various formations.[198]

In a catalogue of 14 questions sent to the governments of the Member States and candidate countries, as well as to the European Commission,

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[197] RK 2003. Vermerk des Vorsitzes (hereafter: VV). Ratsvorsitz, Brüssel, 3. Oktober 2003, CIG 1/03, pp. 1–4.

[198] RK 2003. Übermittungsvermerk des Vorsitzes für die Delegationen. Fragenkatalog betreffend die Gesetzgebungsfunktion, die Zusammensetzungen des Rates und den Vorsitz im Ministerrat, Brüssel, 15. Oktober 2003, CIG 9/03, p. 2.

the Italian Presidency asked: (1) whether the exercise of the legislative function should be conferred on a single formation or on all formations of the Council of Ministers, but with a simultaneous determination of a legislative function (public) and a part dedicated to other activities for each Council formation?; (2) should the public legislative part be concerned only with European laws and European framework laws adopted under the ordinary legislative procedure (jointly adopted by the European Parliament and the Council of Ministers), or with all European laws and European framework laws?; (3) should the European Council's European decision on the list of Council formations of the Council of Ministers be taken unanimously or by a qualified majority, or even by a simple majority?; (4) should such a list include a limited number of formations as agreed in Seville?; (5) should other Council formations apart from the Foreign Affairs Council have a fixed Presidency, i.e. not subject to the rotation system provided for in the draft Constitutional Treaty? If so, which formations, of what duration and what rules should be applied (election by the members of the Council formation concerned)?; (6) should there be a Team Presidency system for the Council formations for which the rotation system would still be in place?; (7) if the option of a Team Presidency should be introduced, how many Member States should there be in the 'Team'? Three? Four? Five? What should be the duration of its term? One year? Eighteen months? Longer?; (8) should the composition of the Presidency Team be fixed in advance or left open on the basis of criteria to be determined in accordance with the principle of equal rotation, taking into account the need to maintain political and geographical balance and the diversity of the Member States of the Union as provided for in the draft Constitutional Treaty?; (9) should the allocation of the different Council formations within the team be fixed in advance or left to the discretion of the Member States in the team?; (10) should the Member State chairing the General Affairs Council also chair Coreper I and Coreper II?; (11) should committees and *ad hoc* working parties subordinate to a particular Council automatically be chaired by the Member State holding the Presidency of the Council in question?; (12) in accordance with that logic, if the EU Foreign Affairs Minister should chair the Foreign Affairs Council, should the Political and Security Committee and other external relations working parties be chaired by a representative of the Foreign Affairs Minister?; (13) in order to achieve greater coherence

in the Council's proceedings, should there be an 'informal structure for coordination' between the representatives of the Member States holding the Presidency, in which the President of the European Council, the President of the Commission and the Minister for Foreign Affairs could participate?; (14) should the detailed arrangements for the rotation of the Presidency of the Council be the subject of a decision to be taken unanimously by the European Council? If so, should such a decision be adopted at the same time as the Constitutional Treaty or later?[199]

The replies of the delegations participating in the IGC differed significantly on a number of issues. However, the clearest dividing line was that between the positions of the German Government and of the European Commission on the one hand, and the opinions of the other Member States and of the candidate countries on the other. The German delegation consistently opposed any changes to the draft Constitutional Treaty, arguing that in a complex matter such as the European Constitution any compromise reached would be difficult to re-negotiate.[200] Poland's representatives expressed their support for the exercise of legislative functions by each formation of the Council of Ministers, although without proposing a formal division into legislative and executive tasks. The European Council, by a European decision adopted by a qualified majority, would determine the number of formations of the Council of Ministers, other than those provided for in the draft Constitutional Treaty, in accordance with the conclusions adopted at the above-mentioned European Council meeting in Seville. As one of the initiators of the establishment of the Team Presidency of the Council of Ministers,[201] the Polish party proposed that it be held by four Member States for a period of two years in all Council formations other than the General Affairs Council and the Foreign Affairs Council. Each Member State within the Team Presidency would chair selected formations of the Council of Ministers as well as committees and *ad hoc* working groups assigned to them for a full period of two years, with the allocation

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[199] Ibidem, pp. 2–4.

[200] RK 2003. Vermerk der deutschen Delegation. Antwort der Bundesrepublik Deutschland auf den Fragenkatalog zu der Gesetzgebungsfunktion, der Zusammensetzung des Rates und dem Vorsitz im Ministerrat, Brüssel, 15. Oktober 2003, CIG 14/03, p. 1.

[201] EC. Summary sheet, CONV 709/03, op. cit., pp. 5, 15–16.

of formations, committees and working groups to be established one year before taking over the Presidency. The Presidency of the General Affairs Council and of the Foreign Affairs Council would be held on an equal rotation basis for six months. The detailed arrangements for the exercise of the Presidency would be laid down by the European Council, acting unanimously. The General Affairs Council would coordinate the activities of the other formations of the Council of Ministers. Informal coordination rules could be established between members of the Team Presidency. The Member State chairing the General Affairs Council should also chair Coreper I and Coreper II.[202]

Like Poland, other countries supported the deletion of the provision of the draft Constitutional Treaty stipulating the creation of a Legislative and General Affairs Council. Most of them proposed that legislative functions should be separated from other tasks in the various formations of the Council of Ministers. Only Hungary and Denmark were in principle opposed to such a division. However, the European Commission, while standing on the basis of the conclusions of the Convention, did not rule out its agreement to the fulfilment of legislative tasks by individual formations of the Council of Ministers and, in such a case, demanded their separation from executive functions.[203] According to the majority of delegations, the public legislative activites of the Council of Ministers would include the adoption of all European laws and European framework laws. Almost all delegations also agreed on the need to reduce the number of Council of Ministers in line with the conclusions adopted by the Seville European Council. On the other hand, already during the IGC, they demanded that the European Council take a European decision on the list of Council formations, although without the need to codify the list in the Constitutional Treaty. However, the opinions of individual delegations were strongly divided as to the procedure for the European Council to adopt such a decision. The majority favoured unanimity (most of the delegations) and qualified majority voting (Poland,

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[202] IGC 2003. Reply from Poland to the questionnaire on the Legislative Function, the Formations of the Council and the Presidency of the Council of Ministers, Brussels, 15 October 2003, CIG 26/03, pp. 2–5.

[203] IGC 2003. Reply from the Commission to the questionnaire on the Legislative Function, the Formations of the Council and the Presidency of the Council of Ministers, Brussels, 15 October 2003, CIG 35/03, p. 2.

France, Ireland, Spain, Greece and Hungary), whereas voting by a simple majority received the least support (the United Kingdom and the European Commission).

The vast majority of delegations supported, or at least did not reject, the idea of the Team Presidency of the Council of Ministers. It was opposed only by the European Commission and Germany, referring to the provisions of the draft Constitutional Treaty. Opinions of the various delegations were also divided on the duration of the term of the Team Presidency and on the number of members within the Team. Some supporters of the idea of the Team Presidency proposed concrete solutions, whereas others did not specify their positions at all. Of the former, the majority of the delegations requested that each Member State within the Team Presidency chair a certain number of Council formations throughout the Presidency. On the other hand, a minority of delegations proposed a six-month rotation system, with the effect that at the end of the Team Presidency all the Member States within the Team should have had a period of chairing each formation of the Council of Ministers. France and the European Commission put forward an initiative that each Council of Ministers formation should elect a President from among its members. The vast majority of countries in favour of the Team Presidency system supported the provisions of the draft Constitutional Treaty, stipulating that the Union Minister for Foreign Affairs should chair the Foreign Affairs Council. A small number of delegations, including those of Poland, Sweden and the Benelux countries, opposed the idea of establishing a fixed Presidency of the Foreign Affairs Council, arguing that it should be treated in the same way as the other formations of the Council of Ministers. There were also differences of opinion between the various delegations on the issue of chairing the General Affairs Council. Some of them took the view that the formation in question should be included in the Team Presidency system. Other delegates called for separate arrangements in this regard and proposed that the General Affairs Council be chaired by each member of the Team Presidency for six months (Poland) or by the President of the European Council (the United Kingdom). Moreover, the vast majority of delegations supported the provisions of the draft Constitutional Treaty stipulating that the General Affairs Council should ensure consistency in the work of the other formations of the Council of Ministers. Different positions on the issue were taken by the United Kingdom, calling for the President of the

European Council to perform such functions, and by France, proposing to entrust this role to a new coordination institution involving the President of the European Council, the President of the European Commission and the Union Minister for Foreign Affairs.[204]

Having received replies from the various delegations, in its note presented on 4 October 2003, the Italian Presidency proposed solutions corresponding to the majority views. It expressed its opinion in favour of separating legislative functions from other tasks of particular formations of the

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[204] RK 2003. VV. Ratsvorsitz, Brüssel, 3. Oktober 2003, CIG 1/03, op.cit., pp. 1–3. For the positions of particular delegations, cf. IGC 2003. Reply from Benelux to the questionnaire on the Legislative Function, the Formations of the Council and the Presidency of the Council of Ministers, Brussels, 15 October 2003, CIG 10/03, pp. 1–3. IGC 2003. Reply from the Czech Republic to the questionnaire on the Legislative Function, the Formations of the Council and the Presidency of the Council of Ministers, Brussels, 15 October 2003, CIG 12/03, pp. 1–3. IGC 2003. Reply from Denmark to the questionnaire on the Legislative Function, the Formations of the Council and the Presidency of the Council of Ministers, Brussels, 15 October 2003, CIG 13/03, pp. 1–3. IGC 2003. Reply from Greece to the questionnaire on the Legislative Function, the Formations of the Council and the Presidency of the Council of Ministers, Brussels, 15 October 2003, CIG 16/03, pp. 1–5. IGC 2003. Reply from Spain to the questionnaire on the Legislative Function, the Formations of the Council and the Presidency of the Council of Ministers, Brussels, 15 October 2003, CIG 17/03, pp. 1–4. IGC 2003. Replies by France to the questionnaire on the Legislative Function, the Formations of the Council and the Presidency of the Council of Ministers, Brussels, 15 October 2003, CIG 18/03, pp. 1–4. IGC 2003. Reply from Ireland to the questionnaire on the Legislative Function, the Formations of the Council and the Presidency of the Council of Ministers, Brussels, 15 October 2003, CIG 19/03, pp. 1–5. IGC 2003. Reply from Hungary to the questionnaire on the Legislative Function, the Formations of the Council and the Presidency of the Council of Ministers, Brussels, 15 October 2003, CIG 23/03, pp. 1–3. IGC 2003. Reply from Austria to the questionnaire on the Legislative Function, the Formations of the Council and the Presidency of the Council of Ministers, Brussels, 15 October 2003, CIG 25/03, pp. 1–4. IGC 2003. Reply from Portugal to the questionnaire on the Legislative Function, the Formations of the Council and the Presidency of the Council of Ministers, Brussels, 15 October 2003, CIG 27/03, pp. 1–4. IGC 2003. Reply from Finland to the questionnaire on the Legislative Function, the Formations of the Council and the Presidency of the Council of Ministers, Brussels, 15 October 2003, CIG 31/03, pp. 1–4. IGC 2003. Reply from Sweden to the questionnaire on the Legislative Function, the Formations of the Council and the Presidency of the Council of Ministers, Brussels, 15 October 2003, CIG 32/03, pp. 1–3. IGC 2003. Reply from the UK to the questionnaire on the Legislative Function, the Formations of the Council and the Presidency of the Council of Ministers, Brussels, 15 October 2003, CIG 34/03, pp. 1–5.

Council of Ministers, which made it superfluous to establish the Legislative and General Affairs Council envisaged by the draft Constitutional Treaty (Article I-23(1) DCT). It also implied abandoning the idea of concentrating legislative powers in a single formation of the Council of Ministers. At the same time, the Italian Presidency proposed to maintain the existing principle, i.e. that any formation of the Council of Ministers could have legislative powers. The number of other Council formations would be determined by the European Council by a qualified majority decision and based on the conclusions adopted at the Seville meeting. With regard to the Team Presidency, the Italian Presidency was convinced that the best solution would be for four or five Member States to hold it over a period of two years, in accordance with a unanimous European decision taken by the European Council at an appropriately early stage before the entry into force of the Constitutional Treaty.[205] Each Member State making up the Team would chair a set number of Council formations for a full period of two years, as proposed by Poland, Spain and the United Kingdom, and not for six months simultaneously in all formations of the Council of Ministers, as requested by Austria and Finland. The allocation of the different formations among the Member States within the Team Presidency would be left to the discretion of the Member States in the Team. According to the proposals of the Polish delegation, the work of individual formations of the Council of Ministers would be coordinated by the General Affairs Council,[206] whose Presidency would also involve directing the activities of Coreper I and Coreper II. The Presidency of a particular formation of the Council of Ministers should entail the Presidency of the related committees and *ad hoc* working groups. The Presidency of the Foreign Affairs Council would be held by the Union Minister for Foreign Affairs. However, the Italian Presidency did not insist that its proposals should be treated as ultimate solutions and announced the continuation of the discussion on the number of formations and arrangements for the exercise of the Presidency of the Council of Ministers.[207]

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[205] RK 2003. VV. Ratsvorsitz, CIG 1/03, op. cit., p. 4.

[206] The name 'General Affairs Council' will be hereafter used as it was included in the final version of the Constitutional Treaty.

[207] RK 2003. VV. Ratsvorsitz, CIG 1/03, op. cit., p. 4.

At the third meeting of the Foreign Ministers of the Member States and of the candidate countries held in Brussels on 27 October 2003, the Italian Presidency finally supported the establishment of a Team Presidency system, arguing that the idea had gained the approval of a very large number of delegations. Therefore, it proposed to amend the provisions of Article I-23 DCT, defining the formations and Presidency of the Council of Ministers. In addition, the Italian Presidency put forward an initiative that detailed that arrangements for the exercise of the Team Presidency of the Council of Ministers should be codified in a special declaration on Article I-23 DCT, containing a draft decision of the European Council on the matter. At the Brussels European Council meeting on 12–13 December 2003, the Italian Government proposed that the Presidencies of all Council of Ministers formations (and of the related preparatory bodies) other than the General Affairs Council and the Foreign Affairs Council should be held collectively by three Member States for a continuous period of eighteen months. However, unlike all previous proposals, this provision contained an important reservation allowing the European Council to decide otherwise under Article 5 of the draft European Decision.[208] The Presidency of the General Affairs Council and the chair of Coreper I and Coreper II would be held for six months by each of the members of the group in turn.[209]

The new proposals submitted by the Italian Presidency did not end the discussion on the provisions of Article I-23 DCT defining the number of formations and the Presidency of the Council of Ministers or on a declaration on the exercise of the Presidency under such a system. At the meeting of Focal Points held in Dublin on 4 May 2004, the Irish Presidency repeated the proposals of the Italian Government concerning the content of Article I-23 DCT, but with amended provisions of the draft decision of the European Council on the exercise of the Presidency of the Council of Ministers. Thus, each State within the relevant pre-established group of three Member States holding the Presidency of the Council for a period of eighteen months should chair each Council formation, with the exception of the Foreign Affairs formation, for one six-month period, whereas the other members of

[208] IGC 2003. Addendum to the NPD. Intergovernmental Conference (12–13 December 2003): Addendum 1, CIG 60/03 ADD 1, op. cit., p. 10.

[209] Ibidem, pp. 9–10.

the group should assist the Presidency in all its responsibilities, on the basis of a common programme.[210]

In the note from the Irish Presidency presented at the seventh meeting of Foreign Ministers of 17–18 May 2004, a new provision was added that the members of the group holding the Team Presidency could also make other arrangements within the group. Simultaneously, in the same note, the Presidency proposed to change the procedure for the European Council to decide on the issue. It would act by a qualified majority rather than by unanimity, as envisaged by the relevant note from the Italian Presidency.[211] All the above-mentioned amendments, concerning the legislative function, the types and number of Council formations and the exercise of the Presidency of the Council of Ministers, were approved at the eighth meeting of the Foreign Ministers of the Member States on 24 May 2004 and confirmed by the Irish Presidency at the Brussels European Council meeting on 17–18 June of that year. At the same meeting, the European Council agreed on another amendment to Article I-23 DCT, namely that the Committee of Permanent Representatives should be responsible for preparing the work of the Council of Ministers.[212] While this did not change the competence of this body, it meant that it was incorporated into European Union primary law for the first time.[213]

2.3.1.2. The definition of qualified majority

The definition of qualified majority was one of the four most controversial issues dealt with by the IGC. However, as it concerned a quite fundamental matter of influence on decision-making in the European Union, it was in fact also extremely emotional from the beginning. Soon after the completion of the work of the Convention, the Governments of Poland and Spain, which would lose the most on the amendments proposed in the draft Constitutional

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[210] RK 2003. VVD. Treffen der Kontaktstellen, CIG 73/04, op. cit., pp. 16–21.

[211] RK 2003. VVD. Erörterungen auf der Ministertagung am 17./18. Mai 2004, Brüssel, 13. Mai 2004, CIG 75/04, pp. 9–11.

[212] RK 2003. VVD. Vorschlag des Vorsitzes im Anschluss an die Ministertagung vom 24. Mai 2004, CIG 79/04, op. cit. pp. 10–12. IGC 2003. NPD. Meeting of Heads of State or Government, CIG 81/04, op. cit., pp. 12–14.

[213] J. Falke, op. cit., p. 158.

Treaty, made it clear that their aim during the IGC would be to change the definition of qualified majority.

On 10 September 2003, the Polish Government adopted a negotiation mandate for the forthcoming Intergovernmental Conference. It implied that during the deliberations of the IGC Poland would demand the introduction of four basic amendments to the draft Constitutional Treaty, including, above all, the maintenance of the Nice system of qualified majority voting in the Council of Ministers.[214] On 26 September of the same year, in their article published by the *Financial Times*, the Foreign Ministers of Poland and Spain Włodzimierz Cimoszewicz and Ana Palacio clearly indicated the convergence of views of their respective Governments on changes in the draft Constitutional Treaty. They stressed that their most important joint demand during the Intergovernmental Conference would be to maintain the Nice system of qualified majority voting. In their opinion, the weighting of votes laid down in the Treaty of Nice guaranteed a balance between small, medium-sized and large Member States in an enlarged European Union, whereas the dual majority system proposed by the Convention favoured four large countries, of which as few as three could block all decisions together. The Foreign Ministers of Poland and Spain also questioned the position of Germany and France that the dual majority system proposed in the draft prepared by the Convention would be more democratic and would increase the legitimacy of the European Union's actions. Furthermore, they pointed out that the Convention had not been authorised to revise the Nice system.

Adopting the draft Constitutional Treaty without major changes was primarily advocated by the German Government, and initially also by the Governments of Italy and France. However, the German Government was undoubtedly the most ardent supporter of maintaining the *status quo* set out in the draft developed by the Convention. Germany's tactic was to prevent the reopening of the discussion on the draft and to lead to the signing of the document as soon as possible during the Intergovernmental Conference. Elements of this tactic were made very clear at a meeting between Chancellor

[214] The other amendments concerned granting each Member State the right to have a full Commissioner in the European Commission, establishing the Team Presidency of all formations of the Council of Ministers other than the Foreign Affairs Council and preventing the use of structured cooperation to form a military alliance in competition with NATO.

Gerhard Schröder and Prime Minister Leszek Miller, held during the sixth German-Polish intergovernmental consultations in Gelsenkirchen on 22 September 2003. Both parties confined themselves to presenting the official positions of their respective Governments. With regard to the most controversial issue, i.e. the definition of qualified majority, the Heads of Government of the two countries said that their room for manoeuvre in this area was limited, but talks on a convergence of positions should continue. Chancellor Schröder stressed that in December 2000 the Federal Government had agreed to the Nice system of qualified majority voting under pressure from the French delegation. However, due to the change of France's position during the Convention, it was possible to agree on more democratic rules for qualified majority voting under the draft Constitutional Treaty, giving more influence on decision-making in the Council of Ministers to Member States with larger populations. Leaving the voting system laid down by the Treaty of Nice would mean that 80% of the Member States of an enlarged European Union, accounting for a total of 20% of the population, could vote on financial matters for other Member States, including Germany. Reporting on the course of his meeting with Schröder on the following day, the Polish Prime Minister expressed his opinion that during consultations with the German delegation he had not heard any convincing argument why the weighing of votes adopted at Nice should be changed, even though it had not yet entered into force. The system had not been tried in practice and yet the need for changing it was already assumed. At the same time, Miller expressed his hope that the chances of winning the German Government's support for the other three of Poland's proposals for amendments to the draft Constitutional Treaty seemed much higher.[215]

Having read all the proposals submitted by the various delegations at the end of October 2003, the Italian Presidency was undoubtedly fully aware that the issue would require a longer debate. Nevertheless, in its note to the Naples Ministerial Conclave of 28–29 November 2003, the Presidency confined itself to the laconic conclusion that many Governments supported the definition of qualified majority as set out in the draft elaborated by the Convention, although it was unacceptable to some delegations. In addition, the Presidency declared no intention to present any proposals on the matter

[215] J.J. Węc, Spór o kształt ustrojowy, op. cit., pp. 407–408.

so as not to call into question the institutional balance achieved by the Convention too quickly. However, it also expressed its conviction that in further negotiations consideration should be given to solutions that would reconcile these concerns, 'bearing in mind the shared overall objective of having simple, efficient and transparent decision making procedures'.[216]

Finally, the Italian Government decided to postpone the discussion on the definition of qualified majority to the Brussels European Council of 12–13 December 2003. However, the summit started off rather badly. Due to the moderate results of the entire negotiations to that date, even the most limited objectives of the December European Council seemed illusory. Three days before the meeting, the Italian Presidency submitted a new note together with two addenda. In the view of the Italian Government, Addendum 1 was a 'balanced package', taking into account the different positions of the various delegations as proposed at the IGC, in particular at the Naples Ministerial Conclave. Those opinions had given 'sufficient guidance' allowing Italy to propose concrete amendments to the draft Constitutional Treaty. Addendum 2, which was made available to the individual delegations as late as the day before the European Council meeting, contained no proposals for amendments, but only suggestions as to the existing possibilities of reaching a final compromise. It included four of the most controversial issues: the text of the Preamble, the definition of qualified majority, the composition of the European Commission, and the minimum threshold of members of the European Parliament. Despite the lack of a final agreement on the remaining contentious issues, the Italian Presidency considered that the most important problem to be resolved at that European Council meeting would be the definition of qualified majority. Therefore, the tactic proposed by the President of the European Council, Berlusconi, was to first agree on a compromise on the most difficult item and then to debate the remaining contentious issues. The Italian Prime Minister hoped that if that should be successful, it would be easier to resolve other controversial matters.[217]

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[216] IGC 2003. NPD. Naples Ministerial Conclave, CIG 52/1/03 REV 1, op. cit., p. 4.

[217] IGC 2003/2004. Negotiations under the Italian Presidency, op. cit., p. 9. IGC 2003. Addendum 2 to the NPD. Intergovernmental Conference (12–13 December 2003): Addendum 2, Brussels, 11 December 2003, CIG 60/03 ADD 2. IGC 2003. NPD. Intergovernmental Conference (12–13 December 2003): Presidency's proposal, Brussels, 9 December 2003, CIG 60/03. IGC 2003. NPD. Intergovernmental Conference (12–13 December 2003): Addendum 1, CIG 60/03 ADD 1.

After hearing brief opinions of the Heads of State or Government on their respective positions on the draft Constitutional Treaty, the Italian Presidency proposed to continue the deliberations in the form of talks behind closed doors with individual delegations, also called the 'confessional' method in EU jargon. The essence of these meetings was for the Italian delegation to sound out the possibility to reach a compromise on the definition of qualified majority. Bilateral negotiations of the Italian Presidency lasted from the afternoon of 12 December to the late night hours of 13 December and continued the following morning. However, all was to no avail. At lunch on 13 December at the latest, it became clear that the differing positions of the various delegations on the definition of qualified majority did not offer even the slightest chance of reaching a compromise. Some delegations, especially that of Germany, insisted on maintaining the arrangements contained in the draft Constitutional Treaty. At the same time, the representatives of Poland and Spain defended the provisions of the Treaty of Nice. Unofficial proposals for indirect solutions, i.e. changes to the thresholds necessary for the establishment of a qualified majority, also appeared to be unacceptable to many delegations. The conclusions adopted by the European Council confirmed the failure of the negotiations and authorised the Irish Presidency to continue consultations with the Member State Governments.[218]

Those consultations began as early as January 2004, but initially did not offer much hope for a quick compromise. Until the end of February of the same year, the Governments of the individual Member States participating in the IGC basically maintained their views. A breakthrough in this 'dialogue of the deaf' occurred in March 2004. It was made possible by the changed positions of three Governments: those of Germany, Spain, and Poland. On 13 February 2004, in his speech given to the Bundestag, Foreign Minister Fischer signalled his readiness to seek a compromise, whereas on 7 March of that year, for the first time, the Federal Government spoke in favour of a possible change in the thresholds of the qualified majority decision-making system as developed by the Convention.[219] The taking of power in Spain

[218] Brussels European Council (12–13 December 2013). Presidency conclusions, p. 1, https://www.consilium.europa.eu/media/20906/73842.pdf [accessed: 19 May 2024].

[219] Verhandlungen des Deutschen Bundestages. Stenographische Berichte. 15. Wahlperiode. 92. Sitzung, 13. Februar 2004, pp. 18–19, http://www.bundestag.de/bic/plenarprotokolle/pp/index.html [accessed: 19 May 2024].

by the Spanish Socialist Workers' Party (*Partido Socialista Obrero Español* – PSOE) on 15 March and the declaration of the new Prime Minister José Luis Zapatero on the interest of his Government in the adoption of the European Constitution as quickly as possible by the Intergovernmental Conference not only offered an opportunity for a compromise, but these events also forced Poland to completely change its negotiating tactics. In this situation, during the European Council meeting of 25–26 March 2004, the Polish delegation announced for the first time its withdrawal from supporting the Nice system and readiness for a compromise based on the dual majority proposed in the draft prepared by the Convention. On the other hand, the Polish Government expected the same openness from its partners in search of mutually satisfactory solutions. At that meeting, the Irish Presidency stated its conviction that it would be possible to resolve the dispute over the definition of qualified majority, provided that the proposals contained in the draft Constitutional Treaty should be modified so as to guarantee more effective decision-making than the existing system and to take account of the specific interests of the individual Member States.[220]

At the eighth meeting of Foreign Ministers on 24 May 2004, Irish Foreign Minister Brian Cowen expressed the opinion that all the principles that would characterise the future voting system, namely efficiency, clarity, simplicity and fairness, must be complemented by the necessary political compromise. Based on the consultations with the Member State Governments, the Presidency concluded that a compromise on the definition of qualified majority could be reached by raising the population threshold. However, as some delegations were very keen to maintain parity between the two thresholds or to keep the difference between them as small as possible, the Irish Government proposed raising both thresholds at the same time. Such a solution would have one advantage. It would mean that the difference between the two thresholds would not be much greater than in the draft Constitutional Treaty. In addition, the Irish Government put forward an initiative to consider the possibility of finding additional solutions for the blocking minority. Finally, it also advocated that abstentions, hitherto regarded in practice as votes

[220] IGC 2003. Presidency note to the European Council (Brussels, 25–26 March 2004), CIG 70/04, op. cit., p. 4.

against, should not count at all in qualified majority decision-making, which would significantly increase the efficiency of the decision-making process.[221]

Indeed, the meeting confirmed that all the delegations had already fully supported the idea of establishing a dual majority system based on the number of Member States and the population represented. However, there were still very clear differences of views between them on the thresholds to be applied in the new voting procedure. A few delegations demanded that the dual majority system be left with the proportion of the respective thresholds of the Member States and population as proposed in the draft Constitutional Treaty (50%–60%). Representatives of small Member States were in favour of a parity between the two thresholds between 50–50% and 60–60%, but they were clearly inclined towards the first proportion. At the same time, they opposed the introduction of any safeguard mechanism into the new system. However, what seemed to unite representatives of the large and small Member States was the conviction that there was a need to find a political compromise constituting an integral part of the whole package of institutional solutions.

Such a compromise was not reached until at the decisive Brussels European Council summit of 17–18 June 2004. In its note presented on the first day of the meeting, the Irish Presidency stated that, during the consultations, many delegations requested that the gap between the thresholds for the number of Member States and the population be small or equal to zero. However, other delegations firmly insisted on maintaining the difference of ten percentage points between the two thresholds as set out in the draft developed by the Convention. Therefore, the Irish Government proposed raising the threshold for the number of Member States to 55% and the population threshold to 65%. The blocking minority was to be formed by at least four Member States. Such a solution would prevent the three largest Member States from blocking decisions together. At the same time, the Presidency rejected the suggestions by some Governments for the blocking minority to include Member States representing at least 12% to 15% of the Union's population. It considered that the requirement was not justified in the light of its proposal to raise both thresholds. Further in its note, the Irish Government stated that no compromise had been reached on an arrangement under which abstentions

[221] RK 2003. VVD. Erörterungen auf der Ministertagung am 24. Mai in Brüssel, Brüssel, 19. Mai 2004, CIG 77/04, p. 2.

would no longer count for the purposes of calculating a qualified majority, although it encouraged further discussion on the subject. On the other hand, the Irish Presidency, in consultation with the Polish Government, proposed that the IGC adopt a special Declaration or a Protocol (and, if necessary, a draft European decision of the Council of Ministers) to provide for the establishment of an additional consultation mechanism, which might be similar to the Ioannina Compromise adopted on 29 March 1994.[222] Such a mechanism would serve to strengthen the democratic legitimacy of qualified majority decisions. Thus, if a group of Member States somewhat less than the blocking minority required by the Treaty should be opposed to a particular measure to be adopted by a qualified majority, the Council of Ministers must 'do all in its power, within a reasonable timeframe and without prejudice to any time limits set by Union law, and respecting the Council's Rules of Procedures, to reach a satisfactory outcome'.[223] In the Presidency's view, the IGC participants should also consider whether such a compromise should be permanent in nature or whether it should apply only for a specified period, at the same time deciding on appropriate Member State and population thresholds. In its opinion, one possibility would be to set the thresholds in either case at 5 percentage points below the requirements for a blocking minority, i.e. 40% for the number of Member States and 30% for the population.[224]

On the first day of the deliberations, the participants in the European Council meeting found it impossible to arrive at a final compromise. This was not reached until the following day, after lengthy negotiations; as a result, the Irish Presidency's proposals on both thresholds for qualified majority were supplemented by a provision that 55% of the members of the Council must comprise at least fifteen of them. It was agreed that in the case of decisions not taken on a proposal from the European Commission or from the Union Minister for Foreign Affairs, the Member State and population thresholds would be 72% and 65% respectively. The idea of introducing into

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[222] Council Decision of 29 March 1994 concerning the taking of Decision by qualified majority by the Council, Official Journal of the European Communities C, 105, 13.4.1994, p. 1. Council Decision of 1 January 1995 amending the Council Decision of 29 March 1994 concerning the taking of decisions by qualified majority by the Council, Official Journal of the European Communities C 1, 1.1.1995, p. 1.

[223] IGC 2003. NPD. Meeting of Heads of State or Government, CIG 82/04, op. cit., p. 3.

[224] Ibidem, pp. 1–3.

the Constitutional Treaty a provision that abstentions would not count for the purposes of qualified majority voting was finally rejected. At the same time, in the declaration containing the draft European decision of the Council of Ministers on the establishment of an additional consultation mechanism, intended to apply from 1 November 2009 to at least 2014, the respective Member State and population thresholds were raised from 30% and 40% as initially proposed by the Irish Government each to 75%. Until the last moment, the subject of particularly dramatic negotiations was the procedure under which the Council of Ministers would repeal such a decision in the future. Finally, as a result of the Polish negotiators' insistence, it was agreed that the Council of Ministers would then act by a qualified majority rather than by a simple majority, as requested by some delegations.[225]

2.3.1.3. The qualified majority voting procedure

When preparing proposals for amendments to the draft Constitutional Treaty, many delegations also presented their views on qualified majority voting (QMV) in the Council of Ministers. On this basis, at the third meeting of Foreign Ministers convened in Brussels on 27 October 2003, the Italian Presidency submitted a note indicating that the opinions of the various delegations on the procedure could be divided into at least three groups: some opted for maintaining the provisions contained in the draft Constitutional Treaty; other delegates called for extending the scope of qualified majority voting to new areas; yet others even proposed a return to unanimous voting in areas where the draft Constitutional Treaty already provided for a qualified majority. The area which should be covered by qualified majority voting according to a significant share of the delegations was primarily the common foreign and security policy. Some demanded that qualified majority voting become the 'general rule' in the common foreign and security policy, with the exception of defence matters and those with military implications. Other delegates called for the procedure to be applied only in the case of legal acts adopted on the basis of a joint proposal from the Union Minister for Foreign Affairs and the European Commission. Yet other delegations proposed the

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[225] IGC 2003. NPD. Meeting of Heads of State or Government, CIG 83/04, op. cit., pp. 7–9. IGC 2003. NPD. Meeting of Heads of State or Government, CIG 84/04, op. cit., pp. 7–9. KM 2003. Note from Presidency to Delegations, CIG 85/04, op. cit., pp. 8–9.

generalised application of QMV in the area in question, but subject to raising the thresholds for weighting votes, or its introduction after a transitional period of five years, except in cases where 'vital national interests' should be at stake. Some put forward an initiative to extend the application of the qualified majority voting procedure to taxation, environmental protection, the area of freedom, security and justice, social affairs, the common commercial policy (trade in services, excluding transport), intellectual property, the flexibility clause, future accessions to the European Union, as well as structural funds.[226]

In particular, the European Commission submitted extremely bold proposals, namely the extension of qualified majority voting to the following areas: measures to combat discrimination, the right to vote in European Parliament elections, association agreements, the European Union's accession to the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe, taxation relating to the operation of the internal market (modernisation and simplification of existing legislation, administrative cooperation, measures to combat tax evasion and avoidance and measures relating to the tax base applicable to companies, with the exclusion of tax rates), combating fraud in relation to the free movement of capital, certain aspects of social security, and activities of the European Public Prosecutor's Office regarding the protection of the Union's financial interests. The European Commission and the ECOFIN Council proposed amending the rules on appointing the Executive Board of the ECB. Instead of deciding by common accord of the Governments of the Member States at the level of Heads of State or Government, as envisaged by the draft Constitutional Treaty, a European decision of the European Council, acting by qualified majority, should be introduced (Article III-84(2)(b) DCT).[227] Some delegations also called for the extension of qualified majority voting in the field of public health (Article III-179(4) DCT). The rules for QMV would also apply to measures to fight against major health scourges affecting more than one Member State (the European Commission) and measures establishing high norms of

[226] IGC 2003. NPD. Qualified Majority Voting, CIG 38/03, op. cit., pp. 1–3. IGC 2003. NPD. Non-institutional issues, CIG 37/03, op. cit., p. 1.

[227] On the other hand, Finland voted in favour of a simple majority vote, whereas Portugal opposed the amendment of the provisions of the draft Constitutional Treaty on the issue in question, cf. IGC 2003. NPD. Non-institutional issues, CIG 37/03, p. 8.

quality and security for blood products and medical use provisions (France).[228] In addition, the European Commission considered that the application of the qualified majority voting procedure should be extended to family law and police cooperation in the future.[229]

As mentioned above, some of the delegations called for a return to unanimous voting, particularly in the most sensitive areas. The Economic and Financial Affairs Council as well as the delegations of the Netherlands, the Czech Republic, Slovakia and Latvia expressed their support for the European laws of the Council of Ministers laying down the multiannual financial framework after 2013 to be adopted unanimously after consulting the European Parliament rather than, as provided for in the draft Constitutional Treaty, by a qualified majority after obtaining the consent of the European Parliament given by a majority of its component members (Article I-54(2) DCT).[230] The United Kingdom, Portugal, the Czech Republic and Slovakia proposed that European laws of the Council of Ministers laying down the modalities relating to the Union's own resources be adopted unanimously (Article I-53(4) DCT). Poland, the United Kingdom, Spain and Ireland demanded that the legislative procedure envisaged by the draft Constitutional Treaty (qualified majority, ECB consultation) be changed to the existing legislative procedure (unanimity, ECB consultation and EP consent) when the Council of Ministers should adopt European laws conferring on the ECB specific tasks in the field of the prudential supervision of credit institutions and other financial institutions, with the exception of insurance undertakings (Article III-77(6) DCT). Finland was in favour of this request, simultaneously proposing a slight modification of the existing legislative procedure (unanimity, consulting the ECB and the EP[231]).

The United Kingdom, supported by Poland and Spain, proposed a return to unanimous voting with regard to taxation (Articles III-59 to III-63 DCT). The same change was demanded by some delegations in the area of freedom, security and justice (including judicial cooperation in criminal matters, certain aspects of police cooperation, asylum and immigration policy), in

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[228] Ibidem, p. 15, IGC 2003. NPD. Qualified Majority Voting, CIG 38/03, op. cit., p. 2.
[229] IGC 2003. NPD. Qualified Majority Voting, CIG 38/03, op. cit., p. 2.
[230] IGC 2003. NPD. Non-institutional issues, CIG 37/03, op. cit., p. 5.
[231] Ibidem, p. 8.

the common commercial policy (social, health and education services) and in social security. With regard to this last field, Luxembourg pointed out the need to adjust the benefits granted to employed and self-employed migrant workers and their dependants to take into account specificities of the national situations of the individual Member States of the European Union, so as to prevent financial imbalances in their social security systems (Article III-21 DCT).[232] Other delegations proposed a return to unanimous voting in the areas of culture, the common commercial policy (including foreign direct investments) and the environmental protection (Article III-300 DCT) as well as maintaining the requirement of a unanimous vote (after 1 January 2007) in the adoption of European laws defining the tasks, priority objectives and the organisation of the Structural Funds and the Cohesion Fund (Article III-119 DCT).[233] Spain put forward an initiative that the first European laws on the Structural Funds and the Cohesion Fund following the entry into force of the Constitution should be adopted unanimously, as in the case of the multiannual financial framework, or that the Council of Ministers should act unanimously until 1 January 2007 if the multiannual framework should be adopted or, if not, the Council should act unanimously until the date of its adoption (Article III-119 DCT).[234] It would help avoid a situation where European laws on the Structural Funds and the Cohesion Fund should be adopted under a procedure different from that applicable to the adoption of the multiannual financial framework (Article I-54(2) and (4) DCT).

During the Naples Ministerial Conclave (28–29 November 2003), the Italian Presidency proposed changes to the decision-making procedure in the Council of Ministers, with only four of them aimed to extend the scope of qualified majority voting. A total of eleven amendments to the draft Constitutional Treaty were put forward by the Presidency, as follows. First, changing the decision-making procedure for enhanced cooperation in the framework of the common foreign and security policy. European decisions in this area would be adopted by the Council of Ministers unanimously rather than by qualified majority as provided for in the draft Constitutional Treaty (Article III-325(2), Article III-326(2) DCT). The proposed amendment

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[232] Ibidem, p. 13.
[233] IGC 2003. NPD. Qualified Majority Voting, CIG 38/03, op. cit., p. 3.
[234] IGC 2003. NPD. Non-institutional issues, CIG 37/03, op. cit., p. 6.

was to be the result of the planned removal of the specific *passerelle* clause from enhanced cooperation. Second, strengthening the role of the Union Minister for Foreign Affairs in the adoption of European decisions on actions and positions in the common foreign and security policy. In order for such decisions to be taken by a qualified majority, it would be sufficient for the Union Minister for Foreign Affairs to independently put forward a proposal rather than, as provided for in the draft Constitutional Treaty, only following a specific request to them from the European Council made on its own initiative or that of the Minister (Article III-201(2) DCT). From the point of view of the decision-making procedure, this amendment implied a significant simplification in the use of qualified majority voting in the adoption of European decisions on Union actions and positions in the common foreign and security policy. Third, amending the provisions of Article III-231 DCT on the solidarity clause; if the decisions of the Council of Ministers defining the arrangements for the implementation of the clause in question should have defence implications, the Council would have to act unanimously in accordance with Article III-201(1) DCT rather than by qualified majority, as stipulated by the draft prepared by the Convention. Fourth, changing the legislative procedure envisaged by the draft Constitutional Treaty (qualified majority, ECB consultation) to one similar to the existing legislative procedure (unanimity, consulting the ECB and the EP) where the Council of Ministers should adopt European laws conferring on the ECB specific tasks in the field of the prudential supervision of credit institutions and other financial institutions, with the exception of insurance undertakings (Article III-77(6) DCT).[235] This amendment was in line with the demands of Finland, but to a large extent it also met the expectations of Poland, the United Kingdom, Ireland and Spain. Fifth, amending the procedure for appointing the Executive Board of the ECB under a decision of the European Council taken by a qualified majority rather than by common accord of the Governments of the Member States at the level of Heads of State or Government, as provided for in the draft Constitutional Treaty (Article III-84(2)(b) DCT), which was in line with the relevant proposal of the European Commission and the Economic and Financial Affairs Council. Sixth, for Union accession to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms

[235] Ibidem, p. 8.

of the Council of Europe the Council of Ministers would act by a qualified majority rather than unanimously, as provided for in the draft Constitutional Treaty (Article III-227(9) DCT). Seventh, introducing a requirement to take account of differences between the legal systems and traditions of individual Member States when adopting the European framework laws referred to in Article III-171(2) DCT, which was in line with the relevant demand of the United Kingdom. Eighth, establishing an appeal procedure in judicial cooperation in criminal matters referred to in Article III-171(2) and in Article III-172(1) and (2) DCT.[236] A Member State would have the right to always request the European Council to examine a draft European framework law if it should consider that such a draft law would violate the fundamental principles of its legal order, which was in line with the expectations of the British delegation and partly also of the Polish and Finnish delegations. Ninth, amending the tax provisions on the functioning of the internal market and avoiding distortion of competition. The Council of Ministers, acting by a qualified majority, could adopt European laws or European framework laws laying down measures for the harmonisation of legislation concerning indirect taxation and relating to administrative cooperation or to combating tax fraud and tax evasion, but provided – which was the subject of the amendment in question – that they should not affect the essential elements of the fiscal regimes of the Member States (Article III-62(2) DCT). Tenth, extending qualified majority voting to establishing measures setting high standards of quality and safety for medicinal products and medical devices, which was in line with the relevant demand of France (Article III-179(4) DCT)[237]. Eleventh, and last, as requested by Luxembourg, reducing benefits granted

[236] It concerned proposals for European framework laws to establish minimum rules to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension (Article III-171(2) DCT) or minimum rules on the definition of criminal offences and sanctions in the areas of particularly serious crime with cross-border dimensions or in areas which had been subject to harmonisation measures (Article III-172(1) and (2) DCT), cf. Draft Treaty, op. cit., p. 60.

[237] However, the Italian Presidency did not take into account a similar request from the European Commission regarding measures concerning the monitoring, early warning and fight against major health scourges affecting more than one Member State (Article III-179(4) DCT). Cf. IGC 2003. Addendum to the NPD. Naples Ministerial Conclave, CIG 52/03 ADD 1, op. cit., pp. 34–35.

to employed and self-employed migrant workers and their dependants so as to prevent significantly affecting the overall financial balance in the social security system of the Member State concerned (Article III-21 DCT).[238]

At the sixth meeting of the Foreign Ministers of the Member States and of the candidate countries held in Brussels on 9 December 2003, the Italian Presidency submitted a note containing amendments to the draft Constitutional Treaty in the field of structured cooperation. These resulted from the exchange of views between the various delegations during the Naples Ministerial Conclave as well as from the work of legal experts undertaken shortly thereafter.[239] In the part on decision-making, the Ministers of Foreign Affairs accepted all the amendments tabled by the Italian Presidency. Thus, the Council of Ministers was to adopt European decisions, acting by a qualified majority, in the following three cases: firstly, on the establishment of permanent structured cooperation, including the list of participants, after obtaining the opinion of the Union Minister for Foreign Affairs; secondly, on the admission of a Member State wishing to participate in permanent structured cooperation at a later stage, after consulting the Union Minister for Foreign Affairs, with only the Member States participating in such cooperation allowed to vote; thirdly, on the suspension of the participation of a Member State in permanent structured cooperation if it should no longer meet the criteria or be able to fulfil its commitments, with a vote limited to the participating States, except for the Member State concerned. In all other matters, European decisions and recommendations of the Council of Ministers within the framework of permanent structured cooperation would be adopted unanimously (Article III-213(1) to (6) DCT).[240]

At the Brussels European Council of 12–13 December 2003, the Italian Presidency included all of the above-mentioned contentious issues concerning the application of qualified majority voting in Addendum 1, containing concrete proposals for amendments to the draft Constitutional Treaty.[241]

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[238] Ibidem, pp. 12, 14, 19–20, 25, 27–28, 34–35, 49, 54–55. Cf. also: IGC 2003. NPD. Naples Ministerial Conclave, CIG 52/1/03 REV 1, op. cit., p. 13.

[239] IGC 2003. NPD. Defence, CIG 57/03, op. cit., pp. 1–7. IGC 2003. NPD. Defence, CIG 57/1/03, REV 1, op. cit., pp. 1–9.

[240] IGC 2003. NPD. Defence, CIG 57/1/03, REV 1, op. cit., pp. 2–3.

[241] IGC 2003. NPD. Intergovernmental Conference (12–13 December 2003): Addendum 1, CIG 60/03 ADD 1, op. cit., pp. 1–70.

Obviously, it did not determine the final nature of the amendments since in Addendum 2 the Presidency simultaneously expressed its opinion that the controversial issue of the 'scope of QMV will have to be seen in the context of the final agreement covering all the outstanding issues'.[242]

In Addendum 1, the Italian Government reiterated its proposal to amend the voting rules in the field of permanent structured cooperation as agreed at the sixth meeting of Foreign Ministers in Brussels on 9 December 2003[243] as well as seven of the eleven amendments already presented during the Naples Ministerial Conclave of 28–29 November 2003. With regard to the four other amendments, the Presidency put forward important modifications. The first of these was to specify the clause on 'not affecting the fiscal regimes of the Member States' as a condition for the adoption by the Council of Ministers of European laws and European framework laws referred to in Article III-62(2) DCT.[244] The second modification was to clarify the appeal procedure in judicial cooperation in criminal matters (Article III-171(2) and Article III-172(1) and (2) DCT). Where a Member State, concerned that a draft European framework law as referred to in Article III-171(2) and Article III-172(1) and (2) DCT would 'infringe the fundamental principles of its legal system', should refer such a draft to the European Council, the legislative procedure would be automatically suspended. The draft would then be discussed at a meeting of the European Council, which could refer it back to the Council of Ministers (thus terminating the suspension of the procedure) or request that the European Commission or the group of Member States from which the draft framework law emanated submit a new draft.[245]

The third modification was that the Italian Presidency proposed a similar appeal procedure for the social security system (Article III-21 DCT). It could

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[242] IGC 2003. Addendum 2 to the NPD. Intergovernmental Conference (12–13 December 2003): Addendum 2, CIG 60/03 ADD 2, op. cit., p. 3.

[243] The only modification of these arrangements was that permanent structured cooperation must not affect the provisions of Article III-210 DCT on the implementation of Petersberg missions. Cf. IGC 2003. NPD. Intergovernmental Conference (12–13 December 2003): Addendum 1, CIG 60/03 ADD 1, op. cit., pp. 1–70.

[244] Ibidem, p. 39. The previous provision referred to not affecting the essential elements of the fiscal regimes of the Member States. Cf. IGC 2003. Addendum to the NPD. Naples Ministerial Conclave, CIG 52/03 ADD 1, op. cit., p. 28.

[245] IGC 2003. Addendum to the NPD. Intergovernmental Conference (12–13 December 2003): Addendum 1, CIG 60/03 ADD 1, op. cit., pp. 25–27.

be initiated by any Member State should it consider that a draft European law or a draft European framework law as referred to in Article III-21 DCT would infringe the fundamental principles of its social security system or would significantly affect the overall financial balance.[246] The establishment of appeal procedures in both areas would largely alleviate the concerns of some delegations who feared the effects of qualified majority decision-making. The fourth modification was the amendment proposed in the procedure for the adoption of the multiannual financial framework after 2013. In line with the expectations of the Economic and Financial Affairs Council, the Netherlands, the Czech Republic, Slovakia and Latvia, not only the first financial perspective after the entry into force of the Constitutional Treaty, as provided for in the draft prepared by the Convention, but also the following multiannual financial framework would be adopted unanimously by the Council of Ministers if the European Council, acting by a qualified majority, should adopt a European decision authorising the Council of Ministers to do so (Article I-54(4) DCT).[247]

The proposals presented by the Italian Presidency did not end the discussion on the controversial issue of extending the scope of qualified majority voting to new cases in the Council of Ministers. The Irish Presidency returned to it in its note presented at the Brussels European Council meeting of 25–26 March 2004. The Presidency expressed the opinion that a compromise on the matter would be possible on the condition of balancing the special interests of some Member States on a number of specific issues and the general need to extend the scope of qualified majority voting in view of the need to increase the efficiency of decision-making in the enlarged Union.[248] In the document submitted at the seventh meeting of Foreign Ministers on 17–18 May 2004, the Irish Presidency made no new proposals, identifying the use of the procedure in question as an 'outstanding issue'.[249] Only the note prepared for the ninth meeting of Foreign Ministers held on 14 June 2004 contained proposals for amendments, taking account of the views of

[246] Ibidem, p. 38.
[247] Ibidem, p. 15.
[248] IGC 2003. Presidency note to the European Council (Brussels, 25–26 March 2004), CIG 70/04, op. cit., p. 4.
[249] RK 2003. VVD. Erörterungen auf der Ministertagung am 17./18. Mai 2004, CIG 75/04, op. cit., p. 2.

the majority of delegations, presented both during the IGC and in bilateral talks with the Irish Government. The Presidency was convinced that they constituted a 'fair overall balance' between the sometimes opposing positions of individual Governments.[250]

It presented five major amendments. The first of these consisted in the inclusion of judicial cooperation in criminal matters, as provided for in Article III-171(2) and Article III-172(1) and (2) DCT, in the framework of enhanced cooperation. It would be established by at least one third of the Member States if the European Council should take no action or if, within 12 months from the submission of a new draft, the relevant European framework law should not be adopted. The second amendment, as demanded by several delegations led by the United Kingdom, restored the provisions of the draft Constitutional Treaty, weakening the position of the Union Minister for Foreign Affairs in the procedure of adopting European decisions defining a Union action or position in the common foreign and security policy. The Union Minister for Foreign Affairs could no longer independently present proposals for such decisions as the Italian Presidency had proposed, but only following a specific request to them from the European Council, made on its own initiative or that of the Minister, as envisaged by the draft prepared by the Convention (Article III-201(2) DCT). The third amendment concerned extending the scope of unanimity voting in the common commercial policy. The Council of Ministers would act unanimously not only on the negotiation and conclusion of international agreements in the field of trade in services, commercial aspects of intellectual property and foreign direct investment and trade in cultural and audiovisual services, but also – and this was the amendment – trade in social, education and health services (Article 217(4) DCT). The fourth amendment concerned fiscal policy. The Irish Presidency deleted the above-mentioned exceptional provisions set out in Article III-63 DCT, allowing for the use of qualified majority voting on tax measures, and also signalled the need to similarly amend the provisions of Article III-62(2) DCT.[251] Thus, the fiscal policy would be fully covered by the unanimity voting system. The fifth amendment concerned the procedure for establishing the multiannual financial framework after 2013 and established a specific

[250] RK 2003. VVD. Ministertagung am 14. Juni 2004, CIG 80/04, p. 1.
[251] Ibidem, pp. 6–8, 10, 18–19.

passerelle clause in this area. The European Council could adopt, by unanimity, a European decision authorising the Council of Ministers to take a decision on the matter by qualified majority (Article I-54(4) DCT). The Irish Presidency therefore proposed to reverse the order of the arrangements contained in the draft prepared by the Convention. However, these were even more in line with the expectations of the EU's net payers than the amendments proposed by the Italian Presidency. Due to the many controversies that had traditionally been raised by the procedure for the adoption of the multiannual financial framework, it seemed quite doubtful that the clause would be applied quickly, which meant the actual establishment of the unanimity requirement in this area.[252] All the above-mentioned amendments, including those to the provisions of Article III-62(2) DCT, were confirmed by the Irish Presidency in its note submitted at the Brussels European Council meeting of 17–18 June 2004.[253]

2.3.2. The status of the Union Minister for Foreign Affairs

During the IGC, opinions on the status and powers of the Minister for Foreign Affairs in the European Commission and in the Foreign Affairs Council continued to vary. Some delegations held the view that the Union Minister for Foreign Affairs should be treated as an integral 'part of the College' and should therefore be subject to a 'system of equal rotation' used in the election of the members of the European Commission. The Minister should also have full voting rights when deciding on all matters discussed at meetings of the European Commission. Opponents of this position expressed the opinion that the Union Minister for Foreign Affairs should not be treated as an integral 'part of the College' and should therefore have the full right to vote only on matters relating to the external relations of the European Union. Some delegations believed that the Union Minister for Foreign Affairs should resign in the event of the resignation of the European Commission, if forced by a censure motion passed by the European Parliament or, like other Commissioners, at the request of the President of the European Commission. Other delegations demanded maintaining the procedure for the dismissal

[252] Cf. also: J. Falke, op. cit., p. 141.

[253] IGC 2003. NPD. Meeting of Heads of State or Government, CIG 81/04, op. cit., pp. 46–48, 52.

of the Union Minister for Foreign Affairs by the European Council, as provided for in the draft Constitutional Treaty (Article I-27(1) DCT). Yet other representatives opposed the provisions of the draft Constitutional Treaty granting the Minister of Foreign Affairs of the Union the function of President of the Foreign Affairs Council. The question of how the Union Minister for Foreign Affairs would coordinate 'other aspects of the Union's external action' also raised doubts (Article I-27(3) DCT). All delegations, on the other hand, were in favour of maintaining those provisions of the draft Constitutional Treaty which defined the full autonomy of the Union Minister of Foreign Affairs in the common foreign and security policy, expressed in the Minister's right of legislative initiative and independence from the procedures in force in the European Commission (Article I-27(2) and (3), Article I-39(7) DCT).[254]

Despite such a wide divergence of views, the status of the Union Minister for Foreign Affairs in the European Commission and in the Foreign Affairs Council was the first issue on which the participants in the IGC arrived at an agreement. The compromise was reached at the fourth meeting of the Foreign Ministers of the Member States and of the candidate countries held in Brussels on 18 November 2003. Following the proposals tabled on 14 October 2003, the Italian Presidency prepared a compromise note providing for four major amendments to the draft Constitutional Treaty. Firstly, unlike the other members of the College of the European Commission, the Union Minister for Foreign Affairs could seek and take instructions from the Governments or other bodies of the Member States when acting as mandated by the Council of Ministers for the common foreign and security policy (Article I-25(4) DCT). Secondly, if the European Parliament should pass a censure motion on the European Commission in accordance with Article III-243 DCT, the Union Minister for Foreign Affairs, as one of the Vice-Presidents of the European Commission, would have to resign from the Commission, but not from their duties performed in the Foreign Affairs Council (Article I-25(5) DCT). Thirdly, the EU's Foreign Minister should also resign if the President of

[254] IGC 2003. NPD. Preparation of the IGC ministerial meeting on 14 October 2003: questionnaires, Brussels, 7 October 2003, CIG 6/03, Annex II, pp. 3–4. RK 2003. VV. Der Außenminister der Union: wichtigste Punkte, Brüssel, 2. Oktober 2003, CIG 2/03, pp. 1–2.

the European Commission should so request with the European Council's agreement (Article I-26(3) DCT). Fourthly, the Union Minister for Foreign Affairs would ensure that Union action in external relations should be consistent with the common foreign and security policy (Article I-27(3) DCT).[255]

The Irish Presidency accepted all four amendments of the Italian Government in its note prepared for the meeting of Focal Points held in Dublin on 4 May 2004. On the other hand, however, it announced minor editorial changes to the provisions defining the status of the Union Minister for Foreign Affairs in order to ensure consistency between their powers in the area of the common foreign and security policy and in the other areas of the Union's external action. The Presidency did so in its note submitted at the eighth meeting of the Foreign Ministers of the Member States on 24 May 2004. In addition, it accepted the amendments made by the Italian Government to the provisions of Article III-197(3) DCT on the procedure for setting up the European External Action Service. At the same time, the note submitted by the Irish Presidency to the Ministers of Foreign Affairs of the Member States on 24 May 2004 clarified the provisions concerning the structure of the European External Action Service. In addition, the text of the declaration setting out the time limit for the initiation of preparatory work for the creation of the European External Action Service was then also agreed, providing that it should be done upon the signature of the Constitutional Treaty rather than within the first year after its entry into force, as envisaged by the draft Constitutional Treaty. All these amendments were subsequently confirmed by the Irish Presidency at the Brussels European Council meeting on 17–18 June of the same year.[256]

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[255] IGC 2003. NPD. Union Minister for Foreign Affairs, Brussels, 10 November 2003, CIG 45/03, pp. 1–5.

[256] IGC 2003. Addendum to the NPD. Intergovernmental Conference (12–13 December 2003): Addendum 1, CIG 60/03 ADD 1, op. cit., p. 13. RK 2003. Treffen der Kontaktstellen, CIG 73/04, op. cit., pp. 23–26. RK 2003. VVD. Vorschläge des Vorsitzes im Anschluss an das Treffen der 'Kontaktstellen', CIG 76/04, op. cit., pp. 9–10. RK 2003. VVD. Vorschlag des Vorsitzes im Anschluss an die Ministertagung vom 24. Mai 2004, CIG 79/04, op. cit. pp. 16–17. IGC 2003. NPD. Meeting of Heads of State or Government, CIG 81/04, op. cit., pp. 18–19.

2.3.3. The European Commission

Like the status of the Union Minister for Foreign Affairs, the composition of the European Commission was first discussed at the second meeting of the Foreign Ministers of the Member States and of the candidate countries held in Luxembourg on 14 October 2003. The debate was based on a questionnaire sent to individual delegations during the IGC.[257] The Presidency asked five questions. Should the relationship between the two tiers of Commissioners be clarified, and in particular should there be a more precise indication in the text of the role of the 'non-voting' Commissioners? Should it be stated that the 'non-voting' Commissioners take part in the College without voting rights and can be appointed by the President to specific tasks? What else could this role consist of? Should the procedure of choosing by the President the European Commissioners out of three candidates proposed by each Member State, as provided for by the draft Constitutional Treaty, be maintained? Are there other formulas able to ensure both the parity of Member States and the efficiency of the European Commission? If so, which ones?[258]

In response to the above-mentioned questionnaire, representatives of several delegations expressed their support for amending the provisions of the draft Constitutional Treaty on the composition of the European Commission.[259] Some, including the representatives of Poland and of the European Commission, demanded that each Member State have one full Commissioner in the College of the Commission. Other delegations requested a clarification of the relationship between the two tiers of Commissioners and a precise determination of the powers of the non-voting Commissioners.[260] The first discussion on the composition of the European Commission, taking place at the aforementioned meeting of Foreign Ministers in Luxembourg, showed that it would be one of the most debatable issues addressed by the IGC.

Less controversial were the competences of the European Commission, although opinions were also divided on this issue. Some delegations demanded that the powers of the European Commission be extended in specific

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[257] IGC 2003. NPD. Preparation, CIG 6/03, op. cit., Annex I, p. 2.
[258] Ibidem.
[259] Ibidem.
[260] Ibidem.

areas. However, the vast majority of participants in the Intergovernmental Conference opposed this. These differences of views were later reflected in the proposals for amendments to the draft Constitutional Treaty. They were presented by individual delegations around mid-October 2003 and then put forward by the Italian Presidency at the meeting of Foreign Ministers in Brussels on 27 October of the same year. Whereas the Netherlands proposed that the position of the European Commission be bolstered in economic and monetary policy, particularly in terms of implementing the Stability and Growth Pact, the Economic and Financial Affairs Council called for its powers to be strengthened in the excessive deficit procedure. The Economic and Financial Affairs Council, the European Commission, as well as the delegations of Spain, Portugal, Belgium and Greece, were also in favour of inviting Commission representatives to take part in the meetings of the Eurogroup Finance Ministers (Article 1 of the Protocol on the Euro Group). In addition, the European Commission proposed to introduce into the draft Constitutional Treaty a provision allowing it to adopt implementing acts relating to European laws or framework laws, European regulations or decisions concerning the common agricultural policy and the common fisheries policy (Article III-127(2) and (3) DCT), as well as a provision on the need for consultation of the European Parliament by the Council of Ministers when adopting European regulations or decisions on fixing prices, levies, aid and quantitative limitations and on the fixing and allocation of fishing opportunities (Article III-127(3) DCT).[261]

Despite the differences of views between the various delegations on the composition of the European Commission, in its note submitted to the Naples Ministerial Conclave (28–29 November 2003) the Italian Presidency concluded that the draft Constitutional Treaty provided a 'good basis' for the Commission 'to function effectively'. On the other hand, the composition of the European Commission was ranked among the most controversial issues.[262] In the above-mentioned note, the Italian Presidency proposed that the role and responsibilities of the non-voting Commissioners be clarified in the future Constitutional Treaty. Thus, the proposal provided for maintaining the two tiers of Commissioners, but at the same time significantly

[261] IGC 2003. NPD. Non-institutional issues, CIG 37/03, op. cit., pp. 6, 10, 14.
[262] IGC 2003. NPD. Naples Ministerial Conclave, CIG 52/1/03 REV 1, op. cit., pp. 4–6.

strengthening the position of the non-voting Commissioners. In the view of the Italian Presidency, the Associate Commissioners should participate without restriction in the deliberations of the European Commission, including those of the College. In addition, the President of the European Commission should assign to them important duties and actual responsibilities.[263] In support of its request, the Italian Government argued that a number of delegations, due to the rules of legitimisation, would prefer that each Member State should have its full Commissioner. However, this would undermine the effectiveness and efficiency of the Commission. Although the proposal of the Italian Presidency was discussed on the second day of the Naples Ministerial Conclave, the participants only managed to agree on a slight convergence of their positions on the disputed issue.[264]

The Brussels European Council of 12–13 June 2003 resumed discussions on the composition of the European Commission. However, the Italian Presidency included it in Addendum 2 to the note submitted to the European Council at that time, thus ranking it as one of the most controversial issues. In its comments on this item, the Presidency confined itself to the significant conclusion that '[i]t is generally acknowledged by all delegations that the Commission has both to satisfy the requirement for legitimisation and to function effectively'.[265]

In its note addressed to the Brussels European Council meeting on 25–26 March 2004, the Irish Presidency shared this opinion, but without accepting the proposals of the Italian Government contained in its note submitted during the Naples Ministerial Conclave. On the other hand, the Presidency pointed out that the positions of the IGC remained strongly divided on the issue concerned. Many delegations, stressing the criterion of legitimisation, demanded that each Member State should have a representative in the European Commission. Other delegations, referring to the effectiveness requirement for the Commission, pointed to the principle of equal rotation already contained in the Treaty of Nice, which would apply to a reduced Commission. Apparently counting on the possibility of resolving

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[263] Ibidem, pp. 4–5.

[264] IGC 2003/2004. Negotiations under the Italian Presidency, op. cit., p 8.

[265] IGC 2003. Addendum 2 to the NPD. Intergovernmental Conference (12–13 December 2003): Addendum 2, CIG 60/03 ADD 2, op. cit., p. 2.

the composition of the European Commission within the whole package of the most controversial institutional issues, the Irish Presidency expressed its belief that 'the two perspectives can be reconciled'.[266]

In its note prepared for the seventh meeting of Foreign Ministers on 17–18 May 2004, the Irish Presidency proposed amendments to the procedure for the setting up of the College of the Commission. These consisted in amending the third phase (appointment of the remaining members of the College) and restoring the fifth phase in the procedure (nomination of the entire College). Thus, in the third phase, the Council of Ministers, by common agreement with the President-elect of the Commission, was to adopt a list of other persons whom it proposed to be appointed as members of the Commission. The list would be established in accordance with the proposals from the individual Member States. In the fifth phase, the European Council, acting by a qualified majority, would appoint the entire College of the Commission. These amendments were clearly aimed at weakening the position of the President of the European Commission, who should, according to the draft prepared by the Convention, independently select European Commissioners and non-voting Commissioners.[267] In this sense, these changes only slightly went beyond the provisions of the Treaty of Nice. At the same time, the Irish Presidency intentionally refrained from putting forward proposals for the composition of the European Commission, arguing again that the matter in question could solely be resolved together with all the other major institutional issues.[268]

As a result, the item of the composition of the European Commission was moved to the agenda of the decisive Brussels European Council summit of 17–18 June 2004. In its note submitted on the first day of the European Council meeting, containing the outstanding issues, the Presidency proposed a compromise solution. Until 2014, the composition of the European Commission would be determined according to the principle of 'one Commissioner per Member State'. From 2014, the number of Commissioners, including the President of the Commission and the Union Minister for Foreign Affairs,

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[266] IGC 2003. Presidency note to the European Council (Brussels, 25–26 March 2004), CIG 70/04, op. cit., p. 4.

[267] RK 2003. VVD. Erörterungen auf der Ministertagung am 17./18. Mai 2004, CIG 75/04, op. cit., pp. 2, 35–36.

[268] Ibidem, p. 2. Negotiations under the Irish Presidency, op. cit., pp. 4–5.

would be reduced to eighteen and their appointment would be subject to the principle of equal rotation.[269] These proposals were modified as a result of discussions within the European Council. As agreed by the Heads of State or Government, the first European Commission appointed after the entry into force of the Constitutional Treaty should consist of one national of each Member State; as from the end of its term of office, the number of members of the Commission would be reduced to correspond to two thirds of the number of Member States. However, the European Council, acting unanimously, could decide to change that number. At the meeting, the European Council also adopted the above-mentioned recommendations of the Irish Presidency concerning the procedure for the appointment of the European Commission.[270]

2.3.4. The European Parliament

In its note submitted at the third meeting of Foreign Ministers convened in Brussels on 27 October 2003, the Italian Presidency included the demands of some delegations aimed at weakening the position of the European Parliament. Thus, the ECOFIN Council as well as the delegations of the Netherlands, the Czech Republic, Latvia, Spain, Portugal, France, the United Kingdom, Ireland, Sweden and Denmark proposed limiting the role of the European Parliament in the legislative procedure for adopting the annual budget of the European Union. If, within the twenty-one days referred to in Article III-310(5) DCT, the Conciliation Committee should not approve a joint text or if the Council of Ministers should reject the joint text, a budget providing, in the case of each budget item subject to disagreement, for the lowest amount proposed either by the Council of Ministers or by the European Parliament or, where it should be higher, the figure in the budget law for the previous year would be adopted.[271] This meant that, in the absence of an agreement between the European Parliament and the Council of Ministers in the Conciliation Committee, the Parliament could no longer confirm all its amendments, as envisaged by the draft prepared

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[269] IGC 2003. NPD. Meeting of Heads of State or Government, CIG 82/04, op. cit., p. 4.
[270] IGC 2003. NPD. Meeting of Heads of State or Government, CIG 83/04, op. cit., pp. 4–6. IGC 2003. NPD. Meeting of Heads of State or Government, CIG 84/04, op. cit., pp. 4–6.
[271] IGC 2003. NPD. Non-institutional issues, CIG 37/03, op. cit., p. 5.

by the Convention (Article III-310(8) DCT), but the European Commission would have to proceed with the preparation of a new draft budget. The European Parliament would therefore lose some of its bargaining strength as its powers would be equalised with those of the Council of Ministers in the sense that no budget law could be adopted without the consent of either of those institutions. Another proposal to weaken the position of the European Parliament was submitted by Spain, demanding that its role in the ordinary procedure for revising the Constitutional Treaty be restricted. The Spanish delegation challenged the provision introduced in the draft Constitutional Treaty at the request of the representative of the Bundestag, Meyer, in the last phase of the Convention and stipulating that a decision of the European Council not to convene the Convention should that not be justified by the extent of the proposed amendments would be subject to obtaining the consent of the European Parliament (Article IV-7(2) DCT). The Spanish Government proposed that the European Parliament should only be informed of that fact by the European Council before taking such a decision.[272]

The Italian Presidency was ambivalent towards the proposal on the role of the European Parliament in the adoption of the annual budget. In its note submitted to the participants in the Naples Ministerial Conclave, it ranked the matter among the already mentioned six 'outstanding issues'. On the other hand, the Presidency even considered it, at that stage, 'appropriate to maintain the provisions in the Convention text, given that the various alternative approaches put forward so far would have the effect of calling into question the overall institutional balance within the budget procedures'. At the same time, the Presidency did not address at all the Spanish proposal to limit the role of the European Parliament in the ordinary procedure for revising the Constitutional Treaty.[273] The procedure for adopting the annual budget was also one of the two main issues discussed at the sixth meeting of the Foreign Ministers of the Member States and of the candidate countries held in Brussels on 9 December 2003. However, the Italian Presidency put forward no constructive proposals, although increasing the powers of the European Parliament in the annual budgetary procedure by the Convention continued to raise much controversy. The Italian Government again expressed

[272] Ibidem, p. 16.
[273] IGC 2003. NPD. Naples Ministerial Conclave, CIG 52/1/03 REV 1, p. 4.

its support for maintaining the provisions of the draft Constitutional Treaty in this area.[274]

It was not until the Brussels European Council meeting held in December that the Presidency proposed to revise the procedure in question. The main change was that the Council of Ministers, acting by a qualified majority, within a period of fourteen days from the date of confirmation by the European Parliament of its amendments, could reject the draft budget resulting from the application of those amendments and request that a new draft budget be submitted by the European Commission (Article III-310(8) DCT). Since the corresponding power of the European Parliament, already proposed in the draft Constitutional Treaty, was maintained (Article III-310(9) DCT[275]), the amendment of the Italian Presidency equalised the bargaining strengths of the European Parliament and of the Council of Ministers in the annual budgetary procedure. At the same time, the European Commission, the Council of Ministers and the European Parliament were required to exercise the powers conferred on them in the procedure in compliance with the provisions of the Constitution and the acts adopted thereunder, with particular regard to the Union's own resources and the balance between revenue and expenditure (Article III-310(11) DCT).[276]

The Irish Presidency returned to the issue of the European Parliament's powers in the annual budgetary procedure. On 4 May 2004, during the meeting of Focal Points in Dublin, the Presidency proposed amendments to the conciliation procedure.[277] Its proposals brought the annual budgetary procedure closer to the ordinary legislative procedure. These amendments were reiterated by the Irish Presidency in its note submitted at the seventh meeting of Foreign Ministers on 17–18 May 2004 and, after minor modifications, subsequently confirmed by the Brussels European Council on 17–18 June of the

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[274] IGC 2003/2004. Negotiations under the Italian Presidency, op. cit., p 9.

[275] Under this provision, the European Parliament could, acting by a majority of its component members and three fifths of the votes cast, reject the joint text within fourteen days from the date of its approval by the Conciliation Committee and ask for a new draft budget to be submitted by the Commission. Cf. IGC 2003. Addendum to the NPD. Intergovernmental Conference (12–13 December 2003): Addendum 1, CIG 60/03 ADD 1, op. cit., p. 17.

[276] Ibidem.

[277] Treffen der Kontaktstellen, CIG 73/04, op. cit., pp. 32–35.

same year. They meant that if, within the twenty-one days mentioned above, the Conciliation Committee should not approve a joint text, the European Commission would be required to submit a new draft budget (Article III-310(8) DCT). If, on the other hand, the Conciliation Committee should reach an agreement on the matter within the same period, the European Parliament and the Council of Ministers would each have fourteen days from that date and four options to adopt the joint text. Firstly, if the European Parliament and the Council of Ministers should approve the joint text or take no decision, or if only one of those institutions should approve the joint text, while the other should take no decision, the European budget law would be deemed to have been finally adopted in accordance with the joint text. Secondly, if the European Parliament, acting by a majority of its component members, and the Council of Ministers should reject the joint text or if either of them should reject it, while the other should take no decision, the European Commission would be required to submit a new draft budget. Thirdly, if the European Parliament, acting by a majority of its component members, should reject the joint text, while the Council of Ministers should approve it, the European Commission would also have to submit a new draft budget. Fourthly, if the European Parliament should approve the joint text, while the Council of Ministers should reject it, the European Parliament could, within fourteen days from the rejection by the Council of Ministers of the joint text, acting by a majority of its component members and a qualified majority of three fifths of the votes cast, confirm all or some of its amendments. However, if any of the European Parliament's amendments should not be confirmed, the position agreed by the Conciliation Committee on the budget item which was the subject of the amendment would have to be maintained. On this basis, the relevant European budget law would be deemed to have been finally adopted (Article III-310(7)(a) to (d) DCT).[278]

According to the amendments introduced by the Irish Presidency to the annual budgetary procedure, the European Parliament could not, as envisaged by the draft prepared by the Convention, confirm its amendments if the

[278] RK 2003. VVD. Erörterungen auf der Ministertagung am 17./18. Mai 2004, CIG 75/04, op. cit., pp. 13–15. RK 2003. VVD. Vorschlag des Vorsitzes im Anschluss an die Ministertagung vom 24. Mai 2004, CIG 79/04, op. cit., pp. 19–21. IGC 2003. NPD. Meeting of Heads of State or Government, CIG 81/04, op. cit., pp. 21–23.

Conciliation Committee should not approve the joint text, and the European Commission would be required to submit a new draft budget. On the other hand, the European Parliament could do so if the Conciliation Committee should reach an agreement and yet the Council of Ministers should reject the joint text. Therefore, the adoption of the annual budget required either the simultaneous agreement of the European Parliament and of the Council of Ministers, as in the ordinary legislative procedure, or the confirmation of the amendments by the European Parliament after the approval of the joint text by the Conciliation Committee, previously not provided for in the procedure in question. It was tantamount to a re-strengthening of the position of the European Parliament vis-à-vis the Council of Ministers, compared to the proposals contained in the Italian Presidency's amendments, albeit differently from the arrangements contained in the draft prepared by the Convention, as it was a roundabout solution under the above-mentioned conditions.

From the beginning of the IGC, the issue of the minimum threshold and total number of members of the European Parliament was extremely emotional. The biggest concerns were raised by delegations of small Member States, demanding that the minimum threshold of MEPs be increased. In its proposal presented during the Naples Ministerial Conclave, the Italian Presidency took note of the doubts expressed by the small Member States. On the other hand, the Presidency merely stated that many delegations supported the relevant provisions of the draft Convention text, although some had proposed increasing the minimum threshold of four members per Member State.[279] The Italian Government did not return to this issue until the end of the first phase of the IGC. In its note submitted to the Brussels European Council of 12–13 December 2003, the Presidency indicated that it did not rule out the 'possibility of a limited increase' in that threshold, 'whilst maintaining the overall approach on the composition of the European Parliament'.[280]

Neither did the Irish Presidency treat the issue of the minimum threshold of members of the European Parliament per Member State as one to require separate negotiations. As in the case of the composition of the European

[279] IGC 2003. NPD. Naples Ministerial Conclave, CIG 52/1/03 REV 1, op. cit., p. 5.

[280] IGC 2003. Addendum 2 to the NPD. Intergovernmental Conference (12–13 December 2003): Addendum 2, CIG 60/03 ADD 2, op. cit., p. 4.

Commission, the Presidency intended to resolve it together with all the most important institutional issues. Therefore, its first official proposal on the matter was not put forward until the decisive Brussels European Council summit of 17–18 June 2004. In its note addressed to the participants, the Irish Presidency proposed raising the minimum number of seats per Member State to six. At the same time, the Irish Government pointed to the proposal of some delegations that the European Parliament, in line with the provisions of the draft Constitutional Treaty, in bringing forward its initiative for a European decision of the European Council on the composition of the Parliament in 2009–2014, should be provided with the 'necessary degree of flexibility' and the maximum number of seats in the European Parliament should be raised to seven hundred and forty-five or even seven hundred and fifty. The maximum number of seats per Member State should also be specified.[281]

However, following a discussion within the European Council on 17 June 2004 and quite unexpectedly, it was decided that all of the above proposals of the Irish Presidency should be inserted immediately into the text of the Constitutional Treaty. It was therefore agreed that members of the European Parliament must not exceed seven hundred and fifty in number. The minimum threshold of members per Member State should be six and the maximum number attributed to a Member State should not exceed ninety-six. At the same time, it was decided that these principles should be respected by the European Council when adopting a European decision on the composition of the European Parliament in the future.[282]

2.3.5. The Court of Justice

The note submitted by the Italian Presidency at the third meeting of Foreign Ministers held on 27 October 2003 included proposals from some delegations for amending the powers of the Court of Justice. Austria put forward an initiative that the Court of Justice should be granted the right to review the legality of European decisions by the European Council intended to produce legal effects vis-à-vis third parties (Article III-270(1) DCT). Sweden opted for the exclusion of the solidarity clause from the jurisdiction of the Court of Justice, calling for an appropriate amendment to Article III-282 DCT.

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[281] IGC 2003. NPD. Meeting of Heads of State or Government, CIG 82/04, op. cit., pp. 3–4.
[282] IGC 2003. NPD. Meeting of Heads of State or Government, CIG 83/04, op. cit., p. 10.

Belgium, on the other hand, proposed to ensure 'direct access of regions with legislative powers' to the Court of Justice. Furthermore, Slovakia opposed the conferral of any powers on the Court of Justice in the field of the common foreign and security policy.[283]

The Italian Presidency referred only to the request of the Austrian delegation. In its note to the Naples Ministerial Conclave, the Presidency submitted the amendment that the European decisions intended to produce legal effects vis-à-vis third parties adopted by the European Council should be subject to judicial control by the Court of Justice (Article III-270(1) DCT). At the same time, it proposed that the European Council should be subject to actions for failure to act, which meant that other institutions and Member States would be able to bring an action before the Court of Justice to have the infringement established (Article III-272(1) DCT).[284] Neither of the amendments prepared by the Italian Government raised any major objections from the participants in the second phase of the IGC. Therefore, as was the case with the amendments proposed with regard to structured cooperation and the alliance clause, described below, the Irish Presidency introduced them in a basically unchanged form into the Constitutional Treaty.[285]

2.4. The reform of the EU's common security and defence policy

A number of delegations raised the issue of the reform of the European Union's common security and defence policy, in particular the adoption of provisions on mutual defence and arms cooperation. The Italian Presidency therefore treated any changes to the common security and defence policy as 'one of several key issues' for the deliberations of the IGC and scheduled separate discussions.[286] On the first day of the Naples Ministerial Conclave, only preliminary arrangements were agreed on the content of the alliance clause as well as on the rules of structured cooperation. This was largely

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[283] IGC 2003. NPD. Non-institutional issues, CIG 37/03, op. cit., p. 17.

[284] IGC 2003. NPD. Naples Ministerial Conclave, CIG 52/1/03 REV 1, op. cit., p. 5. IGC 2003. Addendum to the NPD. Naples Ministerial Conclave, CIG 52/03 ADD 1, op. cit., p. 11.

[285] RK 2003. VVD. Vorschlag des Vorsitzes im Anschluss an die Ministertagung vom 24. Mai 2004, CIG 79/04, op. cit. pp. 34–35. IGC 2003. NPD. Meeting of Heads of State or Government, CIG 81/04, op. cit., pp. 41–42.

[286] IGC 2003. NPD. Non-institutional issues, CIG 37/03, op. cit., p. 1.

facilitated by the compromise previously reached between Germany, France and the United Kingdom with regard to the principles of the functioning of the common security and defence policy of the European Union.[287] Therefore, in Naples the Italian Presidency proposed a fundamental modification of the provisions of the draft Constitutional Treaty in this respect. It deleted the aforementioned provisions of Article III-214(1) to (4) DCT, setting out the conditions for the participation of a Member State in closer cooperation on mutual defence and the procedure for granting such a State aid and assistance if it should be the victim of armed aggression on its territory. On the other hand, however, it maintained, albeit in a modified form, the alliance clause contained in the draft Constitutional Treaty. In order to meet the expectations of the United Kingdom and Poland, the Italian Presidency proposed to supplement the previous text of the clause with provisions stating that the commitments and cooperation in this field must not affect the obligations of the Member States of the European Union resulting from their simultaneous membership of NATO.[288]

In addition, during the Naples Ministerial Conclave, the Italian Presidency proposed aligning *mutatis mutandis* the structured cooperation provisions, 'with a view to making such cooperation inclusive', more closely with the general rules on enhanced cooperation within the common security and defence policy.[289] In contrast to the provisions of the draft Constitutional Treaty, structured cooperation was to be permanent in nature (Article I-40(6) DCT). It would be covered by certain provisions on enhanced cooperation specific to the common foreign and security policy, namely those laid down in Article III-325(2) and Article III-326(2) of the draft Constitutional Treaty (Article III-213(1) to (5) DCT).[290] It would mean that structured cooperation should be initiated by the institutions of the future European Union rather than by the Governments of the Member States, and that it should be open to all, not only to a few Member States of the Union. Therefore, it would cease

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[287] IGC 2003/2004. Negotiations under the Italian Presidency, op. cit., p 8.

[288] IGC 2003. Addendum to the NPD. Naples Ministerial Conclave, CIG 52/03 ADD 1, op. cit., p. 24.

[289] IGC 2003. NPD. Naples Ministerial Conclave, CIG 52/1/03 REV 1, op. cit., p. 8.

[290] IGC 2003. Addendum to the NPD. Naples Ministerial Conclave, CIG 52/03 ADD 1, op. cit., p. 23.

to be cooperation carried out in accordance with the concept of a Europe *à la carte*, as envisaged, in fact, by the draft Convention text.

During the sixth meeting of the Foreign Ministers of the Member States and of the candidate countries held in Brussels on 9 December 2003, the Italian Presidency submitted a detailed document containing amendments to the draft Constitutional Treaty with regard to the alliance clause and structured cooperation. However, the Foreign Ministers were unable to agree on a final compromise on the content of the alliance clause. Neutral Member States or those pursuing policies of neutrality opposed possible 'automatism' in the application of such a clause in defence policy.[291] At the same time, a consensus was reached on permanent structured cooperation, although, in contrast to the Naples arrangements, two very important changes were introduced. These were as follows: the possibility of suspending a State participating in structured cooperation, and the right of a State to voluntarily withdraw from such cooperation.[292] The amendments concerning permanent structured cooperation were subsequently confirmed by the Italian Presidency during the Brussels European Council summit of 12–13 June 2003.[293] At the same meeting, the Italian Government also tabled an amendment to the alliance clause, in line with the expectations of neutral Member States or those pursuing policies of neutrality. It stated that the obligations arising from the application of this clause must not prejudice the specific character of the security and defence policy of certain Member States (Article I-40(7) DCT).[294]

The provisions on permanent structural cooperation and the alliance clause prepared by the Italian Government no longer raised major objections from the participants in the second phase of the IGC. They were also accepted by the Irish Presidency, confirming them first in the consultation of Focal Points in Dublin on 4 May 2004 and subsequently at the ninth meeting of the Foreign Ministers of the Member States held in Luxembourg on 14 June

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[291] IGC 2003/2004. Negotiations under the Italian Presidency, op. cit., p 9.

[292] IGC 2003. NPD. Defence, Brussels, 2 December 2003, CIG 57/03, p. 2. IGC 2003. NPD. Defence, Brussels, 5 December 2003, CIG 57/1/03, REV 1, pp. 2–3.

[293] The only modification of these arrangements was that permanent structured cooperation must not affect the provisions of Article III-210 DCT on the implementation of Petersberg missions (Article I-40(6) DCT), cf. IGC 2003. NPD. Intergovernmental Conference (12–13 December 2003): Addendum 1, CIG 60/03 ADD 1, op. cit., pp. 31–35.

[294] Ibidem, p. 33.

2004 and during the Brussels European Council summit on 17–18 June of the same year.[295]

2.5. The two simplified treaty revision procedures. The specific *passerelle* clause in enhanced cooperation

The *passerelle* procedure was also the subject of dispute during the IGC. Already at the third meeting of Foreign Ministers on 27 October 2003, some delegations requested the removal of the *passerelle* procedure, allowing a simplified revision of Part III of the draft of the Constitutional Treaty (Article I-24(4) DCT).[296] Other delegations raised concerns about the limited role of national parliaments in the procedure.[297] Greece and the European Commission also expressed their support for simplifying the ordinary procedure for revising the Constitutional Treaty (Article IV-7(1) and (2) DCT).[298] Spain demanded that the role of the European Parliament in the procedure be limited.[299] Together with Poland, it also requested the removal of the specific *passerelle* clause from enhanced cooperation (Article III-328 DCT). The British delegation expressed doubts about the applicability of the clause in enhanced cooperation.[300]

The contentious issue of the *passerelle* procedure was further discussed at the fourth meeting of Foreign Ministers convened in Brussels on 18 November 2003.[301] The Italian Presidency proposed that the *nihil obstat* procedure should also be used, following the example of the above-mentioned Protocol on the application of the principles of subsidiarity and proportionality. It meant that the use of the *passerelle* procedure could be blocked by an opposition expressed

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[295] RK 2003. VVD. Vorschlag des Vorsitzes im Anschluss an die Ministertagung vom 24. Mai 2004, CIG 79/04, op. cit. pp. 34–35. IGC 2003. NPD. Meeting of Heads of State or Government, CIG 81/04, op. cit., pp. 41–42.

[296] IGC 2003. NPD. Qualified Majority Voting, Brussels, 24 October 2003, CIG 38/03, p. 3.

[297] IGC 2003. NPD. Non-institutional issues, CIG 37/03, op. cit., pp. 16–17.

[298] Ibidem, p. 16.

[299] Ibidem.

[300] It should be noted here that Hungary, the Czech Republic and Slovenia put forward an initiative to increase from one third to half the threshold of EU Member States necessary for the authorisation of enhanced cooperation (Article I-43(2) DCT), cf. ibidem.

[301] IGC 2003. NPD. Treaty revision, CIG 46/03, op. cit., p. 3.

by at least one third of the national parliaments within a specified period. In addition, the Italian Presidency, in order to meet the expectations of some delegations, mainly those of Greece and of the European Commission, put forward a new initiative aimed at establishing a second simplified procedure for the revision of the Constitutional Treaty, in addition to the *passerelle* procedure. It would apply to all or only some of the provisions of Title III (Part III) defining the Union's internal policies and action, but provided that it would not lead to an extension of the powers conferred on it in the Constitutional Treaty. Proposals for amendments could be submitted by the Government of any Member State, the European Parliament, or the European Commission. The European Council, acting by a qualified majority, would then adopt a European decision, to enter into force either in accordance with the *nihil obstat* procedure or after approval by all Member States in accordance with their respective constitutional requirements.[302] Although the Foreign Ministers did not reach a final agreement on any of the issues discussed at the meeting, there were indications that the proposals of the Italian Presidency were going 'in the right direction'.[303]

During the Naples Ministerial Conclave on 28–29 November 2003, the Italian Presidency proposed to amend the *passerelle* clause by strengthening the role of national parliaments through the *nihil obstat* procedure and to change the ordinary procedure for revising the Constitutional Treaty with regard to all or part of the provisions of Title III (Part III) defining internal policies and action of the Union. An important restriction on the use of the *passerelle* procedure in the part concerning the change of unanimity to qualified majority voting was that it could not apply to decisions having military or defence implications.[304] The second simplified procedure for the revision was to create the possibility of amending the Constitutional Treaty by the European Council, acting by a qualified majority, provided that such decisions did not increase the powers conferred on the Union in this Treaty and were approved by all Member States in accordance with their constitutional requirements.[305] In the view of the Italian Presidency, such a change would

[302] Ibidem, p. 4.
[303] IGC 2003/2004. Negotiations under the Italian Presidency, op. cit., p. 7.
[304] IGC 2003. Addendum to the NPD. Naples Ministerial Conclave, CIG 52/03 ADD 1, op. cit., p. 38.
[305] Ibidem, p. 39.

make it unnecessary to convene Intergovernmental Conferences too often in the future.[306] At the same time, during the Naples Ministerial Conclave, the Italian Presidency proposed to remove the specific *passerelle* clause from the enhanced cooperation provided for in Article III-328 DCT, which was in line with the expectations of the Polish and Spanish delegations, supported by the British delegation.[307]

At the Brussels European Council meeting on 12–13 December 2003, the Italian Presidency presented new proposals for two simplified procedures for the revision of the Constitutional Treaty. One modification was to require the approval by all the national parliaments of European Council decisions in the *passerelle* procedure. Any initiative taken by the European Council on this matter would be notified to the national parliaments. If even one national Parliament should make known its opposition within six months of the date of such notification, the relevant European decision by the European Council would not be adopted.[308] Another amendment should be to introduce the requirement of unanimity (rather than that of a qualified majority) where European decisions should be taken by the European Council in the second simplified procedure for the revision of the Constitutional Treaty, in the part concerning all or only some of the provisions of Title III (Part III) defining internal policies and action of the Union.[309] At the same time, the Italian Presidency confirmed its proposal, already tabled during the Naples Ministerial Conclave, to remove the specific *passerelle* clause from enhanced cooperation.[310]

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[306] IGC 2003. NPD. Naples Ministerial Conclave, CIG 52/1/03 REV 1, op. cit., pp. 9–10.

[307] It resulted in the deletion of Article III-328 DCT and the introduction of the requirement of unanimous decision-making by the Council of Ministers on the establishment and implementation of enhanced cooperation (Article III-325(2), Article III-326(2) DCT), cf. IGC 2003. NPD. Naples Ministerial Conclave, CIG 52/1/03 REV 1, op. cit., p. 13. IGC 2003. Addendum to the NPD. Naples Ministerial Conclave, CIG 52/03 ADD 1, op. cit., pp. 54–55. On the other hand, the Presidency rejected the proposal from Hungary, the Czech Republic and Slovenia to increase the threshold of EU Member States necessary for the authorisation of enhanced cooperation from one third to half.

[308] IGC 2003. Addendum to the NPD. Intergovernmental Conference (12–13 December 2003): Addendum 1, CIG 60/03 ADD 1, op. cit., p. 49.

[309] Ibidem, p. 50.

[310] Ibidem, p. 68.

It should be emphasised that the modifications proposed by the Italian Presidency in both of the above-mentioned procedures undoubtedly hindered the future revision of the Constitutional Treaty as compared to the draft Convention text and strengthened the position of the Member States. The draft Constitutional Treaty did not provide for the application of the *nihil obstat* procedure, allowing the national parliaments to block an initiative of the European Council, or for the European Parliament to give its consent to European decisions of the European Council.

The proposals of the Italian Presidency concerning the *passerelle* procedure, aimed to reinforce the role of the national parliaments through the *nihil obstat* procedure, met with no fundamental opposition from the participants in the IGC, whether during the seventh or the ninth meeting of the Foreign Ministers of the Member States held on 17–18 May 2004 and 14 June of the same year. Therefore, the Irish Presidency confirmed them at the Brussels European Council summit of 17–18 June 2004.[311] However, the proposals relating to the second simplified revision procedure of the Constitutional Treaty in the part concerning all or only some of the provisions of Title III (Part III) defining internal policies and action of the Union, were slightly amended. The relevant decision was taken as a result of the meeting of the Foreign Ministers of the Member States held on 17–18 May 2004. The difference was that the European Council would be required to consult its decisions amending those provisions not only with the European Parliament and the European Commission, as envisaged by the Italian Presidency, but also with the ECB in the case of institutional changes in the monetary area. The Irish Presidency confirmed this amendment at the ninth meeting of Foreign Ministers on 14 June 2004 and subsequently during the Brussels European Council summit on 17–18 June of the same year.[312]

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311 RK 2003. VVD. Vorschläge des Vorsitzes im Anschluss an das Treffen der 'Kontaktstellen', CIG 76/04, op. cit., p. 55. RK 2003. VVD. Vorschlag des Vorsitzes im Anschluss an die Ministertagung vom 24. Mai 2004, CIG 79/04, op. cit. p. 67. IGC 2003. NPD. Meeting of Heads of State or Government, CIG 81/04, op. cit., p. 79.

312 RK 2003. VVD. Vorschläge des Vorsitzes im Anschluss an das Treffen der 'Kontaktstellen', CIG 76/04, op. cit., p. 56. RK 2003. VVD. Vorschlag des Vorsitzes im Anschluss an die Ministertagung vom 24. Mai 2004, CIG 79/04, op. cit. p. 68. IGC 2003. NPD. Meeting of Heads of State or Government, CIG 81/04, op. cit., p. 80.

However, the proposal from the Italian Presidency to remove the specific *passerelle* clause from enhanced cooperation was not accepted by the IGC. Although the Irish Presidency supported the Italian Government's position on this matter during the meeting of Focal Points held in Dublin on 4 May 2004, many delegations opted for maintaining it. Therefore, on 24 May 2004, the Irish Government proposed a discussion on the subject.[313] As a result, in its note submitted at the eighth meeting of Foreign Ministers on 14 June 2004, the Presidency restored the specific *passerelle* clause in enhanced cooperation. A concession to opponents of such a solution – which was also different from the draft prepared by the Convention – was the provision that the clause would not apply to decisions having military or defence implications. At the Brussels European Council of 17–18 June 2004, the Presidency not only confirmed the proposed changes, but even went a step further by presenting a draft declaration on enhanced cooperation, facilitating the use of the specific *passerelle* clause in this area.[314]

The Treaty establishing a Constitution for Europe was signed in Rome by the Heads of State or Government and the Ministers for Foreign Affairs of the 25 Member States on 29 October 2004. The Treaty was concluded for an unlimited period. In comparison with the draft Convention text, it substantially strengthened the position of the Member States in the European Union. That reinforcement resulted from the introduction in ten important cases of unanimous voting, at the express request of some Governments, instead of a qualified majority envisaged by the draft prepared by the Convention. It concerned, *inter alia*, the procedure for adopting the multiannual financial framework (the Netherlands, the Czech Republic, Slovakia and Latvia), the common commercial policy (trade in social, education and health services – most of the Member States) as well as fiscal policy which consequently was entirely subject to the unanimity regime (the United Kingdom, Poland and Spain). The Treaty established two appeal procedures in judicial cooperation

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[313] RK 2003. VVD. Treffen der Kontaktstellen, CIG 73/04, op. cit., pp. 124–125. RK 2003. VVD. Vorschlag des Vorsitzes im Anschluss an die Ministertagung vom 24. Mai 2004, CIG 79/04, op. cit., p. 69.

[314] RK 2003. VVD. Ministertagung am 14. Juni 2004, CIG 80/04, op. cit., p. 15. IGC 2003. NPD. Meeting of Heads of State or Government, CIG 81/04, op. cit., pp. 81–82. IGC 2003. NPD. Meeting of Heads of State or Government, CIG 83/04, op. cit., pp. 21–22. KM 2003. Note from Presidency to Delegations, CIG 85/04, op. cit., pp. 21–22.

in criminal matters (the United Kingdom, Finland and Poland) and one in the field of social security (Germany, Luxembourg, the United Kingdom, Sweden and Denmark). Among other things, they enabled establishing enhanced cooperation under certain conditions. In the annual budgetary procedure, the Constitutional Treaty reinforced the position of the Council of Ministers at the expense of that of the European Parliament, which equalised the bargaining strengths of the two institutions in the procedure in question (the Netherlands, the Czech Republic, Latvia, Spain, Portugal, France, the United Kingdom, Ireland, Sweden and Denmark). In the draft Convention text, the European Parliament had a much stronger position than the Council of Ministers. In addition, two important amendments were introduced in the *passerelle* procedure to allow revising the provisions of Part III of the Constitutional Treaty: firstly, the opposition of a single national parliament would prevent the adoption by the European Council of a unanimous decision authorising the Council of Ministers to change unanimous voting to a qualified majority vote or to change a special legislative procedure to the ordinary legislative procedure (in the DCT, the national parliaments would be only informed); secondly, the *passerelle* procedure in the part concerning the change of unanimity to qualified majority voting could not apply to decisions having military or defence implications (the Italian Presidency and most of the delegations). On the other hand, in comparison with the draft prepared by the Convention, the Constitutional Treaty extended the Union's competences in areas such as the common commercial policy, tourism, civil protection, administrative cooperation, services of general economic interest, public health and sport.

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During the Convention on the Future of Europe (2002–2003), Germany and France attempted to exert the greatest influence on the negotiations. The Governments of the two countries were the only ones in the EU to delegate their Ministers for Foreign Affairs, Fischer and de Villepin, to participate in the Convention. Although it did not take place until November 2002, it received legitimate criticism from the Government delegations of most Member States. None of the delegations were represented at such a high level; moreover, the participation of Foreign Ministers in the deliberations of the

Convention gave it a certain character of an Intergovernmental Conference. During the Convention, the Governments of Germany and France submitted four joint proposals for system reforms of the European Union, three of which were submitted officially and discussed by the Convention. The German delegates were also among the most active participants in the negotiations. Under their influence, a great number of provisions defining the scope of the system reform of the European Union were introduced into the draft Constitutional Treaty, although not all of the proposals were pushed through by the German delegates. However, one thing was not in doubt. During the Convention, close Franco-German cooperation resulted in France's support for the German initiative on introducing a dual qualified majority in the Council of the European Union, put forward from 1996. But France's support was not the only decisive factor. A role was also played by the arbitrary decisions of the Praesidium of the Convention, headed by the former French President Valéry Giscard d'Estaing. The decision that the basic principles of the institutional reform would be formulated not by any Working Group but by the Praesidium of the Convention in just a few months was certainly calculated to create a situation where, under time pressure, it would be much easier for the delegates of Germany and France to push through their own proposals for changes in the institutional system of the European Communities, particularly issues as controversial as the German demand for a dual qualified majority in the Council of the European Union.

The Intergovernmental Conference held in 2003–2004 was the first such IGC to carry out a comprehensive system reform of the European Union in a new constituting Treaty. The reform covered all horizontal components and most sectoral elements of the EU system. The name of the new constituting Treaty, i.e. the Treaty establishing a Constitution for Europe, also had a symbolic meaning. During the 2003–2004 Intergovernmental Conference, the representatives of Germany and France made every endeavour to maintain at all costs the provisions contained in the draft Convention text. But the German delegation was the one to most consistently oppose any changes to the draft Constitutional Treaty, arguing that in a complex matter such as the European Constitution any compromise reached would be difficult to re-negotiate. The tactic of the German Government was to prevent the reopening of the discussion on the draft and to lead to the signing of the

document as soon as possible during the Intergovernmental Conference. As a result, Germany and France managed to retain in the Constitutional Treaty the most important institutional arrangements already contained in the draft prepared by the Convention, primarily including a solution very favourable for Germany, i.e. dual majority voting in the Council of Ministers, which was also extended to the European Council and approved by France. Ranking among the four most controversial issues addressed by the IGC, the definition of qualified majority was also the most emotional one for the representatives of the Governments of the Member States from the very beginning. Finally, it was agreed that the thresholds necessary for qualified majority decision-making would be 55% for the number of Member States and 65% for the population of the Union, whereas a blocking minority would include at least four Member States representing 35% of the EU population. Although that definition of a blocking minority made it impossible for the three largest EU Member States to block decisions on their own, neither was it very beneficial particularly for Poland or Spain, compared to the definitions of qualified majority and of a blocking minority contained in the Treaty of Nice. Germany, France, the United Kingdom, Poland and the Netherlands had the greatest influence on the proceedings of the Convention and of the Intergovernmental Conference. Germany and France were mainly active in the preparatory phase (the Convention), whereas they acted as the main brakes during the actual IGC deliberations. In contrast, the United Kingdom, Poland and the Netherlands submitted the most proposals both in the preparatory phase and during the IGC proceedings.

The 2007 Intergovernmental Conference

1. The preparatory phase

The Constitutional Treaty was unexpectedly rejected in referendums in France (29 May 2005) and the Netherlands (1 June 2005). This led to a major constitutional crisis, during which the governments of the EU Member States reflected on the legitimacy of continuing with the ratification procedure. Immediately after the negative results of the referendums, the German Government, like the Governments of many other Member States, advocated the continuation of the ratification process in the remaining Member States of the EU. In addition, alongside Austria, Ireland, Spain, Estonia and Lithuania, Germany was one of the few countries that proposed the adoption of the Constitutional Treaty without major amendments.[1] The position of the German Government on the latter issue remained unchanged after the takeover of power in Germany by the grand coalition of the CDU/CSU and the SPD. It was confirmed by both the coalition agreement and the CDU/CSU/SPD Government's policy statement. In the new coalition agreement of 11 November 2005, the CDU/CSU and the SPD stated as follows:

Germany will take over the Presidency of the European Union in the first half of 2007. At this crucial time, we will have a special responsibility for the European project. We will do whatever we can to end our Presidency

[1] B. Thalmaier, Die Zukunft des Vertrages über eine Verfassung für Europa. Optionen und Positionen, Centrum für angewandte Politikforschung (CAP), pp. 4–10, http://www.proyectos.cchs.csic.es/euroconstitution/library/working%20papers/Thalmaier%20sep%202006.pdf [accessed: 20 July 2024].

with success … . We are advocates of the European Constitutional Treaty. It represents an important step forward towards a value-oriented, socially just Europe, with more civil rights, a better division of competences between the Union and the Member States, a reduction in overregulation and bureaucracy as well as a stronger participation of national parliaments. The Union will become more democratic, more efficient, more transparent, more capable of action. We are in favour of continuing the ratification of the European Constitutional Treaty in the first half of 2006, and of giving new impetus to this in the first half of 2007, during the German Presidency. [own translation – hereinafter: o.t.][2]

On 30 November 2005, in the policy statement of the new CDU/CSU/SPD coalition government submitted to the Bundestag, Chancellor Angela Merkel assured that her Cabinet was keenly interested in 'the success of the Constitutional Treaty, even if today it seems partially illusory' [o.t.].[3] In justifying her position on the issue, Merkel made it clear that the Treaty would significantly strengthen the identity of the European Union, without which Europe would not be possible. She referred thereby to the obligations of the Christian Democrats and the Social Democrats under the coalition agreement.

On 11 May 2006, in a Government statement devoted exclusively to European policy, Merkel made the first very clear mention of the need for internal and external consolidation (*Verfassheit*) of the European Union, simultaneously expressing doubts about the possibility of reconciling the task with the process of further enlargement of the Union.[4] In this context,

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[2] Gemeinsam für Deutschland. Mit Mut und Menschlichkeit, Koalitionsvertrag von CDU, CSU und SPD, 11. November 2005, pp 148–149, http://www.bundesregierung.de/nsc_true/Content/DE/__Anlagen/koalitionsvertrag [accessed: 19 May 2024].

[3] Verhandlungen des Deutschen Bundestages. Stenographischer Bericht. 16. Wahlperiode, 4. Sitzung am 30. November 2005, p. 88, https://dserver.bundestag.de/btp/16/16004.pdf [accessed: 19 May 2024].

[4] Verhandlungen des Deutschen Bundestages. Stenographischer Bericht. 16. Wahlperiode, 35. Sitzung am 11. Mai 2006, pp. 2892–2893, https://dserver.bundestag.de/btp/16/16035.pdf [accessed: 19 May 2024]. The assumptions of the new enlargement strategy of the European Union were elaborated on in a speech delivered by Chancellor Merkel at the Bertelsmann Stiftung on 22 September 2006, cf. Rede von Bundeskanzlerin Dr. Angela Merkel zur Eröffnung des Internationalen Bertelsmann Forums 'Die Zukunft der Europäischen Union' am 22. September 2006 in Berlin, 'Bulletin des Presse- und Informationsamtes der Bundesregierung' vom 24. September 2006.

enlargement and deepening of integration within the European Union would take on an entirely new dimension. The internal and external consolidation of the European Union was supposed to be a necessary prerequisite for its capacity to act. The task of internal and external consolidation, understood as the strengthening of the European Union both inside and outside, was given absolute priority over the enlargement process of the European Union. It was tantamount to a departure from the dual strategy of deepening and enlarging the Union pursued by the previous German Governments.[5]

For the German Government, the condition for the internal and external consolidation of the European Union was to complete the system reform of the Union, codified in the Constitutional Treaty. Recognising the negative results of the referendums in France and the Netherlands as a 'step backwards' in the process of Treaty reform, the German Chancellor once again stressed that the European Union absolutely needed a Constitutional Treaty because it would provide it with the full capacity to act. In this context, she pointed to those provisions of the Treaty which extended the axiology of the Union, established for the first time a rigid division of competences between the Union and the Member States, strengthened the position of national parliaments in the Union's legislative process and introduced significant changes to the institutional system of the Union, in particular, the creation of a new office of Union Minister for Foreign Affairs, the granting to the European Parliament of the right to elect the President of the European Commission, the determination of a new composition of the European Commission, as well as the establishment of a new definition of qualified majority in the Council. On the other hand, the German Chancellor did not hide how important it would be for the identity of the European Union to incorporate a reference to the Christian roots of Europeans into the Constitutional Treaty. Further, she also suggested possible amendments to those provisions of the Constitutional Treaty which set out the categories of the division of competences between the Union and the Member States. It would include the creation of formal possibilities to restore competences to the Member States in certain policies that had so far fallen into the category of shared competences. In any case,

[5] For more on the subject of changes in Germany's European policy after 2005, cf. J.J. Węc, Polish-German Relations in the European Union. Between Cooperation and Conflict of Interests, 'Przegląd Zachodni' 2012, Special number, pp. 241–263.

however, it could only happen if it should be beneficial for the citizens of the Union, their social security, jobs, or their internal and external security. At the same time, the German Chancellor made a rather surprising statement: 'We absolutely need a Constitutional Treaty to make Europe capable of acting. This issue will be dealt with by the German Presidency at the latest' [o.t.].[6] It was an unambiguous declaration that the German Government, during the Presidency of the European Union held in the first half of 2007, would focus on the outcome of the Constitutional Treaty.

On 22 September 2006, in a speech delivered at the Bertelsmann Stiftung on the occasion of the opening of the international forum entitled *Die Zukunft der Europäischen Union* ('The Future of the European Union'), Chancellor Merkel set out five priorities on which Member State Governments should focus in the coming years. These were as follows: further development of axiology; the deepening of integration; the expansion of internal cohesion; the challenges of globalisation; and the Constitution of the Union. In Merkel's opinion, the development of the axiological foundations of the Union should consist in creating conditions for establishing intercultural (including inter-religious) dialogue. It would also be useful to return to the discussion on the inclusion of *invocatio Dei* in the Constitutional Treaty. In this regard, the Chancellor announced that the German Presidency would address the issue in a special declaration by the European Union, to be signed by the Heads of State or Government on 25 March 2007 on the occasion of the 50th anniversary of the signature of the Treaties of Rome. According to Merkel, the deepening of integration and the internal consolidation of the European Union should have priority over enlarging the organisation any further. For the German Government, it would be unrealistic to achieve both of these objectives at the same time, especially after the largest enlargement of the European Union in history on 1 May 2004 and in view of the accession of Romania and Bulgaria to the organisation scheduled for 1 January 2007. Instead of the existing strategy, under which the deepening and enlargement of the Union were seen as two sides of the same coin, a new strategy had to be introduced, with the aim of the internal and external consolidation of the Union, in order to 'sharpen the European contours externally'. The internal consolidation programme envisaged by the Constitutional Treaty should

[6] Verhandlungen, 35. Sitzung am 11. Mai 2006, op. cit., pp. 2893–2895.

contribute to greater internal cohesion in the European Union. However, that cohesion should be further consistently developed, *inter alia*, by completing the single internal market, fostering research and technological progress, eliminating red tape and strengthening parliamentary scrutiny in the Union. Another major challenge facing the European Union was the process of globalisation. If the EU should be an important actor on the international stage, it would also need to be consolidated externally. The programme of such consolidation also included the Constitutional Treaty, which provided, *inter alia*, for the establishment of a new office of Union Minister for Foreign Affairs and for the strengthening of cooperation and contribution of the Member States of the Union in international organisations. However, the external consolidation of the European Union should be further reinforced, e.g. by the consistent development of the Union's common foreign and security policy. As in her speech of 11 May 2006, Merkel very clearly highlighted the link between the internal and external consolidation of the Union and its system reform, codified in the Constitutional Treaty. The German Chancellor again was inclined to conclude that the condition for the internal and external consolidation of the European Union should be the completion of the system reform. Therefore, Merkel unambiguously advocated maintaining the Constitutional Treaty as it was at that time.[7]

During the preparation of its Presidency's action programme, the German Government was well aware of the challenges ahead. In its working document which provided the basis for the development of such a programme, *Auswärtiges Amt* (the Federal Ministry of Foreign Affairs) pointed out that the Federal Government should prepare such a proposal for dealing with the Constitutional Treaty as would be acceptable to all the Member States, particularly to France and the Netherlands. It was necessary to take into account the opinions of the French and Dutch Governments, which, for obvious reasons, categorically opposed the submission of the same Treaty for ratification. On the other hand, the German Government assumed that the Member States having not ratified the Treaty could not impose their

[7] Rede von Bundeskanzlerin Dr. Angela Merkel zur Eröffnung des Internationalen Bertelsmann Forums 'Die Zukunft der Europäischen Union' am 22. September 2006 in Berlin, 'Bulletin des Presse- und Informationsamtes der Bundesregierung' vom 24. September 2006.

positions on those which had done so.[8] Although that stance of the German Government confirmed its consistency in the evaluation of the Constitutional Treaty, it significantly reduced the room for manoeuvre in reaching a future compromise.

On 30 November 2006, the German Government submitted its Presidency programme entitled 'Europe – succeeding together'. It referred to the 18-month programme prepared by the three successive Presidencies of the European Union between 1 January 2007 and 30 June 2008, namely those held by Germany, Portugal and Slovenia. The German Presidency was to be the first group presidency in the history of the European Union, as envisaged in the Constitutional Treaty.[9] The programme also drew on the achievements of the Finnish Presidency (1 July – 31 December 2006) and took into account the European Commission's strategic work programme for 2007.

The programme of the German Presidency included four priorities. These were as follows: ensuring the European Union's capacity to act; shaping Europe's economic, social and environmental future; developing an area of freedom, security and justice; and strengthening the common foreign and security policy, external economic relations and development policy of the Union. The first priority was based on the need to continue the system reform of the European Union. The 'European Constitutional Treaty' contained a programme of 'the internal reforms needed to ensure the viability of the enlarged European Union'. Not only providing for reinforced protection of fundamental rights, increased cooperation in the area of freedom, security and justice, clearer division of competences between the European Union and the Member States, extending the powers of national parliaments in the Union's legislative process, strengthening the common foreign and security policy, it also made 'the European Union more democratic, efficient and transparent' and gave it 'more scope to act'. The programme of the German Presidency was oriented towards maintaining the Constitutional Treaty and largely referred to the provisions of the CDU/CSU and SPD coalition

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[8] Ausblick auf die deutsche Präsidentschaft: Stand der Vorbereitung in der Bundesregierung. Rede von Staatssekretär Reinhard Silberberg vom 4. Oktober 2006. Pressemeldung vom Auswärtigen Amt, http://www.bundesregierung.de [accessed: 19 May 2024].

[9] Cf. Council Decision of 15 September 2006 adopting the Council's Rules of Procedure, Official Journal of the European Union L, 285, 16.10.2006, p. 47–71.

agreement of 11 November 2005. Further, it announced the launch of in-depth consultations with the Member States' Governments and Community institutions and bodies 'to drive forward the EU reform process'. As a result of the consultations, the German Presidency would prepare and submit to the European Council on 21–22 June 2007 a report on the future of the Constitutional Treaty, to 'serve as a basis for decisions on how to continue the EU reform process'.[10]

Germany's taking over the Presidency of the European Union on 1 January 2007 undoubtedly required some flexibility in its position. Indeed, each Presidency is always faced with a choice between defending its own national interests and taking care of the effectiveness of the work of the European Council or the Council of the European Union, especially when, as in this case, there was more at stake, namely overcoming the existing constitutional crisis, the system reform of the European Union, and further direction of the whole process of European integration.

On 2 January 2007, in a letter addressed to the Heads of State or Government, Chancellor Angela Merkel proposed to her partners a strictly confidential intergovernmental consultation in order to carry out both tasks imposed on the German Presidency in the European Council conclusions of June 2006, i.e. the drafting of a declaration commemorating the 50th anniversary of the signature of the Treaties of Rome and preparing a report on the state of discussion on the Constitutional Treaty as well as exploring possible future developments. The consultation would be conducted at the level of the so-called 'Sherpas', also referred to as 'Focal Points' in some documents.[11] The methodology of the German Government was therefore similar to that adopted by the Irish Presidency in the first half of 2004, which greatly

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[10] The Federal Government. 'Europe – succeeding together'. Presidency Programme, 1 January to 30 June 2007, pp. 4–5, https://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/eu_presidency_programme_/eu_presidency_programme_en.pdf [accessed: 18 May 2024]. For an analysis of the German Presidency Programme, cf. D. Göler, M. Jopp, Kann Europa gelingen? Vorhaben und Chancen der deutschen Ratspräsidentenschaft, 'Integration' 2007, H. 1, pp. 3–24.

[11] Brussels European Council, 15–16 June 2006, Presidency Conclusions, Brussels, 17 July 2006, 10633/1/06 REV 1, p. 17. A. Maurer, Die Verhandlungen zum Reformvertrag unter deutschem Vorsitz, 'Aus Politik und Zeitgeschichte', 22. Oktober 2007, B 43, p. 4.

facilitated the stepping up of work on the Constitutional Treaty and the completion of the Intergovernmental Conference in June 2004.

On 17 January 2007, during her inaugural address to the European Parliament and in line with the existing tradition, Merkel discussed the German Presidency programme, pointing out all the above-mentioned priorities. Referring to the first priority, i.e. the system reform of the European Union, Merkel once again drew attention to the crucial importance of the Constitutional Treaty both for the internal reform of the Union and for its position on the international arena. She said that the 'phase of reflection' on the Constitutional Treaty, initially planned to last a year, was 'over'. Following the conclusions of the European Council of June 2006, the Chancellor also announced that new decisions on the Treaty would be taken by the end of the German Presidency at the latest. Therefore, she expressed the opinion that the German Government would strive to produce not only the report requested under those conclusions, but also a precise 'road map setting the way forward' for future developments regarding the Treaty, not mentioned in the conclusions. It should be in the interests of the European Union, the Member States and their citizens to bring the reform of the Union 'to a successful conclusion by the next elections to the European Parliament in spring 2009'.[12]

It is worth noting that such a declaration by the German Chancellor must have sounded surprising since it assumed that the fate of the system reform of the European Union would be decided one and a half years before the deadline provided for in the above-mentioned conclusions of the European Council of June 2006. On the other hand, however, that declaration was not fundamentally at odds with the conclusions themselves as those contained rather general wording that 'further decisions on how to continue the reform process' would be taken 'during the second semester of 2008 at the latest'.[13]

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[12] Address by Angela Merkel to the European Parliament on the programme of the German Presidency (17 January 2007), Centre virtuel de la connaissance sur l'Europe (CVCE), p. 5, https://www.cvce.eu/content/publication/2013/9/30/49b9e77a-188f-423e-bfc8-7b48d279a492/publishable_en.pdf [accessed: 18 May 2024]. Cf. also: Rede der Bundeskanzlerin der Bundesrepublik Deutschland Angela Merkel am 17. Januar 2007 im Europäischen Parlament in Straßburg, pp. 4–5, https://www.europarl.europa.eu/doceo/document/CRE-6-2007-01-17_DE.html?redirect#creitem3 [accessed: 20 July 2024].

[13] Brussels European Council, 15–16 June 2006, Presidency Conclusions, Brussels, 17 July 2006, 10633/1/06 REV 1, p. 17.

On 26 January 2007 in Madrid, at the initiative of Spain and Luxembourg, an informal meeting gathered the representatives of the eighteen Member States of the European Union having ratified the Constitutional Treaty or that initiated the ratification procedure, as well as the representatives of Portugal and Ireland, in favour of the Treaty itself and its ratification. Their respective observers were also sent by Denmark, Sweden and the United Kingdom. The intention of the 'friends of the Constitutional Treaty', as the participants in the meeting called themselves, was to create a common front of its supporters, in order to encourage the still hesitant Member States to change their positions. In the long term, it was also hoped that the 'friends of the Constitutional Treaty' would come together to defend it at the June 2007 European Council in Brussels. However, the Madrid meeting was essentially limited to an exchange of views, without bringing about anything of a breakthrough to the debate on the future fate of the European Union's system reform. Although the participants opposed Sarkozy's proposal to sign a mini-Treaty, there were also opinions that too literal a foundation of a new international agreement on the Constitutional Treaty would make it difficult to win the support for the reform of some Member States, such as the United Kingdom. On the other hand, the final communiqué of the Madrid meeting stated that the Constitutional Treaty should be the basis for the discussion on the system reform of the European Union.

1.1. The Berlin Declaration

Before any final decisions on the fate of the Constitutional Treaty were taken, the issue of drawing up a political Declaration on the occasion of the 50th anniversary of the signature of the EEC and Euratom Treaties was on the agenda of the German Presidency.[14] The preparation and drafting of the Declaration were preceded by a confidential diplomatic consultation of the German Government with representatives of the Member States of the European Union, conducted using the 'confessional' method. Lasting from January to March 2007, the consultation was carried out, on behalf of the German Government, by Reinhard Silberberg, the Secretary of State at the German Foreign Ministry, and by Uwe Corsepius, the Head of the Department for European Policy at the Federal Chancellery. Each of the

[14] For more on the subject, cf. J.J. Węc, Traktat Lizboński, op. cit., pp. 58–63.

Member States had two representatives, called Sherpas. Poland was represented by Marek Cichocki and Ewa Ośniecka-Tamecka. Representatives of the European Commission and of the European Parliament were also involved in the negotiations. The first phase of the consultation concluded at the beginning of February 2007 and resulted in a preliminary draft Declaration drawn up by the German delegation, in agreement with the representatives of the various Member States. At the end of February of that year, the draft was also consulted with representatives of the European Commission and of the European Parliament.[15]

The course of the consultation highlighted the important differences of opinion between the Member States of the European Union on the content of the Declaration. The most controversial issues concerned the possible inclusion in the Declaration of wording regarding the future fate of the Constitutional Treaty, the introduction of *invocatio Dei*, the confirmation of guarantees of the sovereignty of the Member States in the European Union, references to European solidarity, the common currency (the euro), the social dimension of the Union, and the enlargement strategy.

The German Government did not hide that its purpose was to sound out during the aforementioned consultation the positions of individual Member States on the possible options to overcome the constitutional crisis. According to German Foreign Minister Frank-Walter Steinmeier, the Declaration was intended to include a commitment by the Member States to create the necessary prerequisites for the completion of the European Union's political reform process before the European Parliament elections in 2009.[16] The President of the European Parliament, Hans-Gert Pöttering, expressed similar expectations, calling for the inclusion in the Declaration of the need to preserve the 'substance of the Constitutional Treaty', including its Part II, containing the Charter of Fundamental Rights.[17] The stance of the German Presidency on the issue was supported by other Member States. Austria demanded that the Declaration include a passage on the need for the German Presidency

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[15] T. Goosmann, Die 'Berliner Erklärung' – Dokument europäischer Identität oder pragmatischer Zwischenschritt zum Reformvertrag?, 'Integration' 2007, H. 3, p. 254.

[16] EP 2004–2009. Rede des Bundesminister des Auswärtigen, Dr. Frank-Walter Steinmeier, zur Berliner Erklärung vor dem Europäischen Parlament in Straßburg, 14. März 2007, p. 1, http://www.eu2007.de/ [accessed: 15 Juni 2024].

[17] T. Goosmann, op. cit., p. 252.

to draw up a 'road map' for further proceedings with the Constitutional Treaty. At the same time, Romania expected a direct link between the content of the Declaration and the European Council agenda planned for June 2007. On the other hand, however, many Member States exercised significant reserve in the matter, e.g. Finland and France, or even categorically opposed the above-mentioned proposals, e.g. the Czech Republic, the United Kingdom and Poland. Czech Prime Minister Mirek Topolanek argued that the Declaration should only include statements about the past, in particular the achievements of European integration. Simultaneously, he warned that the dispute over the Constitutional Treaty could jeopardise the very idea of adopting such a Declaration. The opinion of the Czech Prime Minister was fully shared by the British Minister for European Affairs Geoff Hoon as well as by some French and Finnish diplomats. Poland represented a similar position on the Constitutional Treaty, but it also demanded the incorporation into the Declaration of *invocatio Dei*, the confirmation of guarantees of the sovereignty of the Member States, and a reference to European solidarity. In addition, Poland, the United Kingdom and other Central and Eastern European countries sought to ensure that the Declaration should include the need to continue the existing enlargement strategy of the European Union. However, they encountered strong opposition in the matter, especially from France, the Netherlands and Germany.[18]

The German Presidency initially supported, at least tactically, Poland's demand for *invocatio Dei*, but as a result of categorical opposition from France, as well as of doubts of other countries, it changed its position on the issue. It was only the visit of Chancellor Merkel to Poland on 16–17 March 2007, and especially her meeting with President Lech Kaczyński in Jurata, that led to Polish support for the Declaration. As expected by Poland, the Declaration was supposed to include references to the sovereignty of the Member States and to the principle of solidarity. L. Kaczyński agreed to abandon the pursuit of *invocatio Dei* and accepted the German position, according to which the Declaration would be the starting point for further proceedings on the Constitutional Treaty. Explaining the change of his view on the matter, the President emphasised that Poland had some reservations about the provisions in the Berlin Declaration, but if it should refuse to sign

[18] Ibidem, pp. 253–254.

the document, it would be the only country to do so. Some commentators even expressed the opinion that Poland thus gave the 'green light for the Declaration'. Apparently, L. Kaczyński did not wish to directly contribute to blocking the idea of drafting the Declaration; on the other hand, the change in his position did not imply that Poland would abandon all the reservations it had previously raised.

Other controversies regarding the content of the Declaration also ended with compromise solutions. Thus, the Luxembourg Government, despite the initial opposition of the United Kingdom, managed to push through wording that assessed the euro area as one of the successes of European integration. Under pressure from the United Kingdom and the Czech Republic, the French delegation slightly modified its early proposal for including a passage on the 'European social model' in the document in question. Finally, France settled for a reference to a social model combining economic success and social responsibility. A compromise was reached on the enlargement strategy; although it did not exclude in principle the possibility of the admission of new Member States into the European Union, preference was also given to alternatives resulting from the objectives of the European neighbourhood policy. The last amendment to the Declaration, requested by Spain, was the announcement of a joint fight of the Member States of the European Union against illegal immigration.[19]

Meanwhile, the Czech Republic continued to raise serious concerns about both the content of the Declaration and the way the German Presidency conducted the diplomatic consultation. Three days before the Declaration was signed, on 22 March 2007, the Czech Government was extremely critical of the fact that the document provided the date of the 2009 European Parliament elections as the date of the settlement of the dispute over the Constitutional Treaty. In this regard, Czech negotiator Jan Zahradil even warned the Presidency that Germany would take full responsibility for the text and that the Czech Republic had imagined it differently. Nevertheless, on 24 March 2007, the German Presidency accepted the final version of the Declaration.

The following day, Angela Merkel, José Manuel Barroso and Hans-Gert Pöttering solemnly signed the *Declaration on the occasion of the 50th anniversary*

[19] For more on the subject, cf. J.J. Węc, Traktat Lizboński, op. cit., pp. 63–64.

of the signature of the Treaties of Rome at the German Historical Museum in Berlin. Undoubtedly, the Declaration was a diplomatic success for Germany. However, it came at the price of abandoning the signing of the Declaration by the Heads of State or Government as previously planned. The German delegation feared that such a solution would require close consultation of all the details of the document under preparation with twenty-six Governments, which would jeopardise the very idea of its adoption. Under these circumstances, it was decided that the Declaration would be signed in the presence of the Heads of State or Government of all the Member States of the European Union by the President of the European Council, the President of the European Commission and the President of the European Parliament.[20]

The Berlin Declaration consists of an introduction and three chapters. The introduction points to the historical achievements of the European integration process, in particular to the overcoming of conflicts and Europe's painful history, as well as to European unification in peace and prosperity, with a contribution from each Member State. Chapter I reaffirms the fundamental values of the European Union, such as respect for human dignity, freedom, equal rights, democracy and the rule of law, as already set out in Article I-2 of the Constitutional Treaty. With reference to the Community method, it is stressed that the European Union is based on the coexistence ('democratic interaction') of the Member States and the Community institutions. On the other hand, according to the principle of the protection of national identity, of particular importance to Poland, it is pointed out that the European Union protects the 'identities and diverse traditions of its Member States'. Equal rights and solidarity ('mutually supportive cooperation') within the Union enable the Member States to 'strike a fair balance between Member States' interests'. With reference to the principle of subsidiarity, it is stated that the European Union is enriched by 'a lively variety of languages, cultures and regions'. Chapter II addresses the most important challenges facing the European Union. Already the second sentence of that chapter states that the Union is the 'response' to those challenges. With reference to the Franco-British-Czech compromise mentioned above, it is pointed out that the 'European model combines economic success and social responsibility'. As expected by Luxembourg, it is stressed that the single market and the

[20] T. Goosmann, op. cit., pp. 256–257.

euro should help the European Union meet the challenges arising from the globalisation process as the EU could 'shape the increasing interdependence of the global economy and ever-growing competition on international markets'. The chapter further declares the Union's common fight against terrorism, organised crime and illegal immigration, efforts to protect liberties and civil rights, commitment to the peaceful resolution of conflicts in the world, as well as promoting freedom and development. Finally, the Declaration expresses the EU's joint intention to 'lead the way in energy policy and climate protection'. Chapter III contains commitments relating to the future of the Union. It assures that '[t]he European Union will continue to thrive both on openness and on the will of its Member States to consolidate the Union's internal development', which might herald a change in the EU's enlargement strategy in line with the expectations of some Member States, in particular Germany, France and the Netherlands. On the other hand, with reference to, *inter alia*, the European neighbourhood policy, it is stated that the Union 'will continue to promote democracy, stability and prosperity beyond its borders'. Simultaneously, there is a commitment to 'always renew the political shape of Europe in keeping with the times', but also to place 'the European Union on a renewed common basis before the European Parliament elections in 2009', as pushed for by the German Presidency.[21]

However, opinions on the last commitment contained in the Berlin Declaration were divided. During the joint press conference held by Merkel, Barroso and Pöttering at the end of the 50th anniversary celebrations in Berlin, the German Chancellor made it clear that the German Presidency regarded the Declaration as a great success also in the sense that the document was the starting point to finally determine the fate of the reform of the European Union. Merkel announced that a precise 'road map' for the new Treaty would be set at the next European Council meeting in June 2007, followed by the convening of an Intergovernmental Conference.[22] It was the first very clear announcement of a new international agreement based on the

[21] Declaration on the occasion of the 50th anniversary of the signature of the Treaties of Rome, Berlin, 25 March 2007, https://europa.eu/50/docs/berlin_declaration_en.pdf, pp. 1–2.

[22] Pressekonferenz von Bundeskanzlerin Angela Merkel, EU-Kommissionspräsident José Manuel Barroso und EU Parlamentspräsident Hans-Gert Pöttering am 25. März 2007 in Berlin, p. 1, http://www.bundesregierung.de/ [accessed: 20 July 2024].

substance of the Constitutional Treaty and through an Intergovernmental Conference. The text of the Berlin Declaration was interpreted by Pöttering and Barroso in a similar way. The former even expressed the opinion that the Declaration indeed announced that the issue of the Constitutional Treaty would be resolved by June 2009. This meant, Pöttering further argued, that the process of ratifying the new Treaty, which would probably have a different title while preserving the substance of the Constitutional Treaty, would be completed by June 2009.[23]

At the same time, however, Czech President Václav Klaus pointed out that the Berlin Declaration had no legally binding value, which meant that also the commitment or 'aim of placing the European Union on a renewed common basis' was of political significance only. Other critics drew attention to the fact that even the politically binding force of the Declaration was seriously questionable due to the method of conducting the diplomatic consultation by the German Presidency as well as to the lack of public debate on its provisions.[24] Polish President L. Kaczyński assessed the declaration ambivalently. He shared the view that the European Union should 'speak together' on many issues, e.g. the fight against organised crime and climate change, or in relations with 'emerging world powers'. The statement of the Union's preserving the sovereignty ('identities') of individual Member States was also seen as an extremely important part of the Declaration. On the other hand, however, he explicitly questioned the fragments of the Declaration referring to the completion of the system reform of the European Union by June 2009:

The Declaration also sets out the objectives for the future Treaty. I do not use the term Constitutional Treaty on purpose here because it is not yet known what its title will be. There is an objective that some people interpret as we do, in a realistic way as I see it, that the text of the Treaty will be ready before the European Parliament elections in 2009. Ready and approved by all states, but not yet ratified. However, there are such states, from what I understand, this is the goal of Chancellor Merkel and the German Presidency, that in June 2009 it will be after ratification. The goal may be beautiful, I do not question it, but it does not seem feasible to me [o.t.][25].

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[23] Ibidem, p. 2.
[24] T. Goosmann, op. cit., p. 257.
[25] J.J. Węc, Traktat Lizboński op. cit., p. 67.

The wording of the Berlin Declaration, calling for the renewal of the common basis of the European Union by June 2009, seemed to confirm the will to complete the system reform of the Union by that time. Therefore, the Berlin Declaration was a breakthrough in the sense that it marked the return to intensive negotiations on a new amending Treaty. After the rejection of the Constitutional Treaty in the referendums in France and the Netherlands in 2005, it was the first document to send such a clear political message to all Member States to take new steps to overcome the constitutional crisis and to complete the process of reforming the Union.

1.2. Bilateral and multilateral consultations of the Sherpas

During the negotiations on the Berlin Declaration, but in March 2007 at the latest, the German Government changed its position on the fate of the Constitutional Treaty itself and on the way of conducting negotiations with the other Member States. From then on, the negotiations carried out at the Sherpa level aimed – which was the first change – to arrive at a compromise on the conclusion of a new amending Treaty. However, it should be largely based on the provisions of the Constitutional Treaty. It had become unrealistic to maintain the Constitutional Treaty at all costs, especially in view of the September 2006 proposal by French President Sarkozy for the conclusion of a mini-treaty. Consequently, in the diplomatic negotiations on overcoming the constitutional crisis, the German Government intended to take account of the positions of the Governments of France and the Netherlands, assuming that in these two countries the Constitutional Treaty could not be re-submitted for ratification in its original form. The second top priority in the unofficial, yet still followed by the German government, hierarchy of goals should be those Member States that had neither ratified the Constitutional Treaty nor intended to do so during the German Presidency. Only in the third place – and that was the second change – attention was to be given to the Member States having already ratified the Constitutional Treaty.[26]

The methodology of the German government's work included conducting a confidential bilateral consultation and multilateral talks with the Sherpas,

[26] A. Maurer, Reflexionsphase und Regierungskonferenz 2007, [in:] Der Vertrag von Lissabon, hrsg. von J. Lieb, A. Maurer und N. von Ondarza, Diskussionspapier der FG 1, 2008/07, April 2008, SWP Berlin, pp. 6–7.

previously designated for negotiations on the Berlin Declaration, in order to assess the positions of individual Member States on the Treaty reform. In order to preserve the maximum confidentiality of the consultation, the German Presidency deliberately limited not only the exchange of views between the various delegations, as the first plenary meeting of the Sherpas was held as late as 15 May 2007, but it also presented no progress report.[27] The first (preliminary) phase of the bilateral consultation took place in February and March 2007. As a result, the German Presidency produced an informal questionnaire containing twelve proposals, most important in its view, for amendments to the Constitutional Treaty, together with the opinions of the Member States which had taken clear positions on these issues. The questionnaire was sent to the Governments of the Member States in early April 2007. At the same time, the Presidency asked them to put forward any other proposals they might have to give their support for the future Treaty.[28]

The first of the proposals included in the questionnaire was to return to the classical method of revising the Treaties, while giving the European Union a single legal personality. It would mean abandoning the repeal of the TEU and the TEC, provided for by the Constitutional Treaty. On this issue, France opted for a consolidated mini-treaty revising the existing Treaties; the United Kingdom only called for technical changes to these Treaties, whereas the Czech Republic and the Netherlands demanded that any analogies to the Constitution be avoided. The second proposal was to maintain Part I of the Constitutional Treaty, containing the most important institutional provisions, objectives, values and principles of the functioning of the European Union. This solution was primarily supported by France and Italy. The third and fourth proposals concerned the 'deconstitutionalisation' of the Constitutional Treaty, i.e. giving up its title, the name of the

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[27] According to C. Herma, the German Presidency even chose, which was unprecedented, to proceed without the assistance of the Legal Service of the General Secretariat of the Council of the European Union. However, this was denied by A. Maurer – pointing to the involvement of the Legal Service in the final phase of preparing the mandate of the Intergovernmental Conference. Cf. C. Herma, Konferencja Międzyrządowa w sprawie Traktatu z Lizbony [The Intergovernmental Conference on the Treaty of Lisbon], 'Biuletyn Analiz UKIE', 2008, No. 20, p. 6. A. Maurer, Die Verhandlungen, op. cit., p. 5.

[28] C. Herma, Konferencja Międzyrządowa, op. cit., pp. 4–6.

Union Minister for Foreign Affairs, the new names of legal acts (European laws and European framework laws) and the symbols of the Union, i.e. the flag, the anthem, the motto, the currency and Europe Day. It was primarily expected by the Netherlands, the United Kingdom, the Czech Republic and Poland, whereas all the Member States but Belgium and Luxembourg demanded that the symbols of the Union be abandoned. The fifth proposal concerned the deletion of articles referring to the primacy of Union law over national law. This was advocated by the Netherlands, the United Kingdom, the Czech Republic and Poland as well as by some German political circles. The United Kingdom, supported by Poland, was in favour of replacing – which was the sixth proposal – Part II of the Constitutional Treaty (the Charter of Fundamental Rights) with a special reference provision indicating its existence and giving it legally binding force. The seventh proposal was to maintain the institutional reform package contained in the Constitutional Treaty. Such a solution was favoured by the majority of Member States, including in particular the 'friends of the Constitutional Treaty', as well as Denmark, Sweden, Portugal and Ireland. Its ardent opponent was Poland, supported by the Czech Republic. The eighth proposal included a question concerning the preservation of other system changes envisaged in the Constitutional Treaty. At a later time, it inspired the Netherlands and the United Kingdom to put forward the initiative to strengthen the position of national parliaments in the European Union's legislative process. The ninth proposal provided for the introduction of new provisions on energy, climate policy and illegal immigration into the future Treaty. The originators of the amendment included the United Kingdom, Poland, Lithuania, Latvia, Estonia, Hungary, Germany, Austria and the Netherlands. France and the Netherlands, supported by Austria and Germany, as well as by the Group of the European People's Party (Christian Democrats) and European Democrats in the European Parliament, were in favour of granting Treaty status to the Copenhagen criteria or inserting a special reference provision into the Treaty, which was the tenth proposal. The eleventh proposal assumed reinforcing the social dimension of the European Union in the future Treaty. It was particularly advocated by France, Germany and Belgium, and supported by the political group of the Party of European Socialists in the European Parliament. The twelfth proposal concerned the possibility of granting certain Member States opt-out arrangements and/or special rules for enhanced

cooperation in areas where the powers of the institutions of the European Union would be strengthened. The United Kingdom and Poland were in favour of opt-out arrangements, whereas Belgium, Luxembourg, Italy and Germany supported enhanced cooperation.[29]

This informal questionnaire clearly indicated the scope of the emerging changes proposed by individual Member States, while confirming that the German Presidency not only regarded the Constitutional Treaty as the starting point but also as a basis for the system reform of the European Union envisaged in the new amending Treaty. In its view, any amendments to the Constitutional Treaty were to be limited to the minimum necessary, but they should also allow arriving at a compromise and ensure the ratification of the future Treaty by all the Member States. The questionnaire was the basis for the second phase of the confidential bilateral consultation between the German Presidency and the Sherpas, taking place from 23 April to 4 May 2007. It resulted in the initial agreement of almost all Member States to those proposals. The most controversial issues identified during this phase of the consultation were then the subject of negotiations by the highest representatives of the German Presidency with their partners from individual Member States.[30] Additionally, in close consultation with the German Presidency, French President Sarkozy, as well as Spanish Prime Ministers Zapatero, Luxembourg Prime Minister Jean-Claude Juncker, and Italian Prime Minister Silvio Berlusconi, conducted exploratory discussions with the leaders of the United Kingdom, Poland and the Czech Republic.[31]

On 15 May 2007, the first plenary meeting of the Sherpas took place in Berlin, which meant that the consultation at that level entered the phase of multilateral talks. On 6 June of the same year, the Sherpas submitted to the German Presidency a preliminary report on the results of bilateral and multilateral consultations, containing important information on the possibility of reaching a compromise on the most controversial matters. The list of the twelve proposals from the beginning of April 2007 was reduced to three outstanding issues. These included the symbols of the Union, the primacy of EU law over national law and the legal nature of the Charter of Fundamental

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29 Cf. J.J. Węc, Traktat Lizboński, op. cit., pp. 67–71.
30 C. Herma, Konferencja Międzyrządowa, op. cit., p. 7.
31 A. Maurer, Die Verhandlungen, op. cit., p. 4.

Rights. Additionally, the four new requests made by some Member States during the consultation needed clarification. Thus, the United Kingdom proposed to introduce provisions explicitly emphasising the specificity of the common foreign and security policy and of the common security and defence policy of the European Union. The Czech Republic called for a clearer division of competences between the European Union and the Member States. The Netherlands demanded strengthening the role of national parliaments in the legislative process in the European Union. Finally, Poland expected a change in the definition of qualified majority in the decision-making procedure in the Council of the European Union and the European Council.[32]

On 14 June 2007, on the basis of the preliminary report of the Sherpas, the German Presidency presented its own final report. It was the only official report by the Presidency on the results of its bilateral and multilateral consultations. According to the report, after two years of uncertainty resulting from the constitutional crisis, final decisions on the Treaty reform should be taken, as any further delay in the matter would jeopardise the capacity of the European Union to act. The Presidency also pointed out that there was a strong need in the Member States to increase efficiency, strengthen democratic principles of operation, and improve the coherence of the European Union's external action. At the same time, it referred to the supposedly unanimous position of the Member States expressed in the Berlin Declaration on the necessity of a new international agreement to enter into force before the European Parliament elections in June 2009. The Presidency also indicated the preliminary agreement of all the Member States on four issues: a return to the traditional method of revising the Treaties as a way towards signing a new international agreement at the IGC; the process of 'deconstitutionalisation' of the Constitutional Treaty; the maintenance of the institutional reform package; and the introduction into the new Treaty of provisions excluded from the Constitutional Treaty but concerning energy security, combating climate change and granting Treaty status to the Copenhagen criteria. However, such provisions could not lead to an extension of the European Union's competences in these

[32] Ibidem, p. 5.

areas[33]. Simultaneously, the Presidency expressed the opinion that a number of issues, including the above-mentioned proposals submitted during the consultation by the Member States, would require further discussion. These were as follows: the symbols of the Union; the primacy of EU law over national law; the legal status of the Charter of Fundamental Rights; the specific nature of the common foreign and security policy; the clarification of the division of competences between the Union and the Member States; the reinforcement of the role of national parliaments in the Union; and the scope of terminological changes.[34]

In its recommendations, the Presidency called on the European Council to decide, at its meeting to be held in June 2007, on the prompt convening of an Intergovernmental Conference. However, it would require the European Council to adopt a precise and comprehensive mandate for the IGC at the same summit. As a result, negotiations on the signing of a new Treaty could be completed by the end of 2007. The Presidency proposed a return to the classical method of revising the Treaties. The IGC would then draft a Treaty to reform the European Union, amending rather than repealing the existing Treaties. The Treaty on European Union would retain its current title and the Treaty establishing the European Community would become a Treaty on the Functioning of the European Union. The two Treaties would have the same legal force and form the basis of the European Union, whereas the Union itself would be granted a legal personality for the first time.[35]

On the same day, 14 June 2007, the Presidency's final report, together with a diplomatic note containing a new and official questionnaire, was circulated to all the Member States. In the diplomatic note, the Foreign Ministers of the Member States were invited to submit, within three days, replies to five questions at the General Affairs and External Relations Council of 17–18 June of the same year. The Presidency asked whether the Member States agreed to return to the traditional method of revising the Treaties, to give the European Union a legal personality, to overcome the Union's pillar structure while maintaining special rules applicable to the EU's common foreign and

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[33] IGC 2007. Report from the Presidency to the Council/European Council. Pursuing the treaty reform process, Brussels, 14 June 2007, 10659/07, Polgen 67, pp. 2–4.

[34] Ibidem. p. 5.

[35] Ibidem.

security policy, to preserve the full text of the Charter of Fundamental Rights in the new Treaty or to exclude it from that Treaty and to make the Charter legally binding by introducing a specific reference provision in it, and to accept certain terminological changes, in particular to abandon the term 'constitution', and the granting of Treaty status to the symbols of the Union and to the principle of the primacy of EU law over national law.[36] However, the questionnaire did not address many important but outstanding issues, such as clarifying the division of competences between the European Union and the Member States, the definition of qualified majority in the Council of the European Union and the European Council, the role of national parliaments in the European Union, energy policy, combating climate change and granting Treaty status to the Copenhagen criteria.

The questionnaire was supposed to be discussed at a Foreign Ministers' level at the General Affairs and External Relations Council in Luxembourg on 17–18 June 2007. In fact, however, the meeting was only limited to the individual delegations' agreeing to or opposing the German Presidency's proposals and postponing the compromise until the Brussels European Council summit scheduled for 21–22 June 2007. The German Presidency therefore made it clear that it intended to narrow the scope of the discussions as far as possible in the final phase of the negotiations. On the other hand, it was apparent from the course of the General Affairs and External Relations Council, in particular the atmosphere of the meeting and the number of comments submitted, that it would be neither easy nor obvious for the Heads of State or Government to reach a consensus in Brussels.[37]

On the basis of the final report of the Presidency, the German Sherpas prepared the first version of the mandate for the Intergovernmental Conference. The multilateral consultation on the report and the draft mandate continued at the second plenary session of the Sherpas on 19 June 2007. The issue of most interest to the Polish delegation, namely the modification of the

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[36] IGC 2007. Note from the Presidency to the Council. Pursuing the treaty reform process, Brussels, 14 June 2007, 10837/07, Polgen 69, pp. 1–2.

[37] For more on the subject, cf. A. Kremer, Aspekty prawne negocjacji podczas Konferencji Międzyrządowej 2007 ze szczególnym uwzględnieniem udziału Polski [The legal aspects of the 2007 Intergovernmental Conference negotiations with a focus on Poland's participation], [in:] Traktat z Lizbony. Główne reformy ustrojowe, op.cit., pp. 25–26. C. Herma, Konferencja Międzyrządowa, op. cit., pp. 8–9.

definition of qualified majority in the Council of the European Union and the European Council, was found in a footnote with a comment that only two Member States had demanded it, without identifying the Member States concerned.[38] Following amendments by the Legal Service of the General Secretariat of the Council of the European Union, the second version of the mandate was discussed at the third plenary meeting of the Sherpas on 22 June 2007.[39] This second version of the mandate included changes tabled by individual Member States immediately before the meeting and also during the Brussels European Council.

1.3. The IGC mandate

The European Council meeting in Brussels, originally scheduled for 21 and 22 June 2007, lasted until the early hours of 23 June of that year. Although not the longest, it was undoubtedly one of the most dramatic ones in the history of the European Communities and the European Union. The negotiations concerned both issues which the German Presidency had already recognised in its report as pre-agreed and matters which it regarded as those requiring further discussion. In addition, during the European Council meeting, the delegations of many Member States submitted new proposals for changes to the draft mandate, with the Governments of the United Kingdom, Poland, the Czech Republic and the Netherlands expressing the most reservations.

The UK delegation primarily called for the Charter of Fundamental Rights to be excluded from the new Treaty, but at the same time demanded that a special reference provision be inserted in its place in order to give it a legally binding value. The United Kingdom also advocated limiting the scope of the qualified majority decision-making procedure in the common foreign and security policy and in the policies of the area of freedom, security and justice, weakening the powers and giving up the title of the office of Union Minister for Foreign Affairs, as well as extending to judicial cooperation in criminal matters and police cooperation and to acts constituting a development of the Schengen *acquis* the opt-out arrangements obtained by the United Kingdom and Ireland in the area of freedom, security and justice

[38] C. Herma, Konferencja Międzyrządowa, op. cit., pp. 6–7. A. Kremer, op. cit., p. 25.
[39] A. Maurer, Die Verhandlungen, op. cit., p. 5.

in accordance with Protocol No 4 annexed to the TEU and the TEC under the Treaty of Amsterdam.[40] The representatives of Poland proposed five fundamental changes to the draft mandate. These were as follows: firstly, the modification of the definition of qualified majority in the Council of the European Union and the European Council; secondly, the clarification of the division of competences between the Union and the Member States and, especially, the provisions on national security to specify that it remained the sole responsibility of each Member State, as well as of the rules on the legal personality of the future European Union; thirdly, the abandonment of giving Treaty status to the principle of the primacy of EU law over national law; fourthly, the exclusion of the Charter of Fundamental Rights from the new Treaty; fifthly, the introduction of the principle of solidarity in energy policy and a more precise definition of energy security rules. With regard to the definition of qualified majority, the Polish Government proposed to modify the double majority voting system provided for in the Constitutional Treaty (at least 55% of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65% of the population of the Union). The modifications would consist in lowering the population threshold from 65% to 62%, raising the threshold of the number of Member States necessary to form a blocking minority from 4 to 5 or 6, while maintaining the threshold of 55% of the votes of all Member States needed for a qualified majority. The Polish Government, which stood to lose the most from the abandonment by the European Union of the Nice voting rules, argued that, according to the voting theory, the equal influence of EU citizens on the outcome of voting in the Council of the European Union and the European Council would be possible if the importance of a given state in voting should be roughly proportional to the root of its population, rather than to the number of the population itself. It is worth noting that the system of equal influence (square root) referred to

[40] In addition, the UK delegation opposed the extension of the European Union's competences in taxation and called for the maintenance of the United Kingdom's social security system. The UK government thus returned to its flagship proposals, already presented at the 2003–2004 Intergovernmental Conference, also called Blair's four 'red lines', to protect the sovereign rights of the United Kingdom in the common foreign and security policy, the area of freedom, security and justice, taxation and the social security system. Cf. J.J. Węc, Traktat Lizboński, op. cit., pp. 75–76.

the principle of degressive proportionality in calculating the allocation of seats in the European Parliament. On the other hand, the 62% population threshold itself was used in the Council of the European Union in taking decisions by a qualified majority in accordance with the Nice rules. The Polish Government's intention was therefore that the blocking minority should comprise 38% of the population of the Union and that it should be made up of at least 5 or 6 Member States. As a result, the average share of one of the blocking countries would be 7.6% of the population of The Union, which would be similar to the share of the population of Poland in the overall population of the Union of 7.7%.[41]

Like the German Presidency, the Polish party also supported the flagship demand of the Czech Republic to clarify the provisions concerning the categories of competences shared between the European Union and the Member States. On this issue, the Czech Government even called for the establishment of a mechanism allowing the transfer of competence back to the Member States by the Union. The United Kingdom, Poland, the Czech Republic and Romania also supported the main Dutch demand for strengthening the role of national parliaments in the European Union's legislative process. In this respect, the Dutch delegation even demanded that provisions be introduced into the mandate to allow national parliaments to block the European Commission's draft legislation directly if they should consider that such draft acts violated the principle of subsidiarity (the so-called 'red card' procedure).[42] On other issues, too, many delegations supported each other's proposals or even made almost identical requests. The convergence of views characterised, in particular: the positions of Poland and the United Kingdom on the clarification of national security provisions; the opinions of Poland and Lithuania on the implementation of the principle of solidarity in energy policy and the determination of the rules on energy security; the expectations of the United Kingdom, Poland, France and the Netherlands on the non-inclusion of the Charter of Fundamental Rights in the new Treaty; the desiderata of Poland, the United Kingdom, the Netherlands and the

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41 A. Kremer, op. cit., pp. 28–29.

42 The desiderata of the Romanian delegation went even further as it demanded that the European Parliament must consult its decisions with national parliaments. Cf. J.J. Węc, Traktat Lizboński, op. cit., pp. 77–78.

Czech Republic regarding the abandonment of the idea to give Treaty status to the principle of primacy of EU law over national law; the proposals of the Netherlands and Germany to partially exempt services of general economic interest from Community competition rules; the pursuit of France, supported by Germany, to remove from the list of objectives of the Union the provision on free and undistorted competition; the demands of Poland and the majority of Member States to specify the provisions on the legal personality of the European Union, i.e. to clarify whether the future European Union would be granted legal personality upon the entry into force of the new Treaty or replace and succeed the European Community.[43]

On the other hand, during the discussions at the European Council, there were voices opposing many of these demands. Belgium, particularly active in this matter, even managed to build an *ad hoc* coalition with Italy, Luxembourg, Greece, Spain, Slovenia and Hungary. The delegations of these countries protested, *inter alia*, against the proposal to establish the 'red card' procedure, the intention to give up granting Treaty status to the principle of the primacy of EU law over national law, as well as against, previously agreed, modifications in the common foreign and security policy of the European Union. In addition, the Belgian Government demanded changing the threshold for Member States wishing to establish enhanced cooperation from one third of their total number, as envisaged by the Constitutional Treaty, to nine.[44]

As a result of extremely intense and sometimes dramatic negotiations, the participants in the European Council meeting finally managed to reach a compromise on the vast majority of the contentious issues. Basically, only the delegations of three Member States – the United Kingdom, the Netherlands and Poland – did not push through all their demands. Thus, the British delegation failed in its efforts to limit the scope of the qualified majority decision-making procedure in the common foreign and security policy and in the policies of the area of freedom of security and justice, to weaken the powers of the Union Minister for Foreign Affairs and to deprive the Charter of Fundamental Rights of a legally binding force. However, a compromise was reached on the last two issues. It was agreed to change the

[43] A. Kremer, op. cit., pp. 28–29.
[44] Cf. J.J. Węc, Traktat Lizboński, op. cit., pp. 78–79.

title of the Union Minister for Foreign Affairs to the High Representative of the Union for Foreign Affairs and Security Policy. Furthermore, the United Kingdom was assured of the possibility of annexing to the future Treaty a special Protocol precluding its citizens from asserting certain rights under the Charter of Fundamental Rights before UK courts. Poland and Ireland also reserved in the negotiation mandate the option to join in this Protocol, henceforth referred to as the British Protocol. In addition, the UK delegation managed to push through the extension of the opt-out arrangements in the area of freedom, security and justice to judicial cooperation in criminal matters and police cooperation and to acts constituting a development of the Schengen *acquis*.[45] The Dutch delegation failed to convince the participants in the meeting to establish a 'red card' procedure. However, the dispute on the issue ended with a settlement: the Protocol on subsidiarity and proportionality, to be annexed to the future Treaty, would include a slightly less radical 'orange card' procedure. Similarly, the Polish delegation failed to push through its flagship desideratum on the modification of the definition of qualified majority in the Council of the European Union and the European Council, but a compromise solution was also reached in this matter.

However, the discussion on the last issue led to a sharp dispute between the participants in the meeting. The position of the Polish delegation was significantly weakened by the fact that almost all the Governments opposed the proposed solution from the very beginning. Moreover, the participants were given a very negative impression by the extremely unfortunate speech made by Prime Minister Jarosław Kaczyński shortly before the European Council meeting. He referred to Poland's war losses suffered during World War II and treated them as an argument in his efforts to maintain the Nice voting rules.[46] In such an atmosphere, President L. Kaczyński initially tried to defend the Polish square root proposal, but it proved ineffective. Poland's proposal might perhaps have been acceptable, but it met with strong opposition from Germany, the main beneficiary of the double majority, as well

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[45] Ibidem, p. 23.

[46] At that time, J. Kaczyński stated that 'if Poland had not lived through the years 1939–1945, today, with reference to the demographic criterion, it would be a country with a population of 66 million' [o.t.]. Cf. J.J. Węc, Traktat Lizboński, op. cit., pp. 80–81.

as with a lack of interest from the medium-sized and small Member States, who gained nothing or only little (e.g. the Netherlands). Moreover, it had been submitted too late for the Polish Government to be able to effectively form an *ad hoc* coalition of Member States for pushing it through. Only the representatives of the Czech Government gave Poland tacit support, but provided that the issue would not lead to blocking the entire negotiations. In this situation, already on the night of 21 to 22 June 2007, in his conversation with German Chancellor Merkel, L. Kaczyński suggested that, in exchange for a possible abandonment by Poland of the square root proposal, the Nice voting rules would be maintained until 2020.[47] But Chancellor Merkel opposed this suggestion as well, demanding that the period be shortened to 2014. The relevant talks on the subject between Merkel and L. Kaczyński, held on the second day of the meeting, failed to bring results for a very long time. Under these circumstances, in a television interview for TVP in Warsaw, Prime Minister J. Kaczyński threatened that if the new Polish proposal should not be accepted, his Government would exercise its right of veto and the summit would fail. However, the opening of J. Kaczyński's 'poker game' proved to be completely ineffective. The German Presidency, acting in agreement with several other delegations, warned the Polish delegation that it would propose to the European Council to accept the Intergovernmental Conference mandate with a separate position from Poland, and that the IGC would be convened by a simple majority of votes.[48] Although such a solution would be

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[47] H. Bacia, M. Stabenow, Europäischer Rat. Schwierige Verhandlungen in Brüssel, 'Frankfurter Allgemeine Zeitung' vom 23. Juni 2007, https://www.faz.net/aktuell/politik/europaeische-union/europaeischer-rat-schwierige-verhandlungen-in-bruessel-1436898.html [accessed: 20 July 2024]. W. Schmiese, EU-Gipfel. Merkels Mitternachtsmarathon, 'Frankfurter Allgemeine Zeitung'vom 23. Juni 2007, https://www.faz.net/aktuell/politik/europaeische-union/europaeischer-rat-schwierige-verhandlungen-in-bruessel-1436898.html [accessed: 20 July 2024].

[48] It is also worth noting that Article 48 TEU did not specify the procedure for the Council of the European Union to decide on the convening of an Intergovernmental Conference. Therefore, in accordance with Article 205(1) TEC, the Council of the European Union was to act by a majority of its members on the matter. Only after the adoption of such a decision of the Council of the European Union, could the Presidency convene an Intergovernmental Conference (Article 48 TEU and Article 205(1) TEC in the Nice Treaty).

in line with the provisions of the Treaties, it would be the second such case in the history of the European Communities and the European Union after 1985, the year in which an IGC had been convened with a separate position of one of the Member States.[49]

This time, however, Chancellor Merkel's categorical stance met with criticism from several Member States, mainly the Czech Republic and Lithuania. The representative of the Czech delegation even declared support for Poland's opposition to the adoption of the mandate in the presented version.[50] In this situation, another attempt to reach a compromise was made by French President Sarkozy and British Prime Minister Blair, seeking to convince Prime Minister J. Kaczyński in a telephone conversation to accept the German proposal. Shortly thereafter, Luxembourg's Prime Minister Juncker and Austrian Chancellor Alfred Gusenbauer also made a last-chance offer, proposing that the double-majority decision-making procedure should apply as early as 2014. However, there would be a transitional period until 2017, allowing each Member State to vote in accordance with the Nice rules if necessary. Further, following President Sarkozy's earlier idea, the criteria for using the additional consultation mechanism, known as the Ioannina mechanism, were to be modified after 2017. The change would mean lowering both thresholds, for the number of Member States and the population needed to constitute a blocking minority, from 75% to 55%. It would imply making the mechanism significantly more flexible. Although Belgian Prime Minister Guy Verhofstadt opposed the Luxembourg-Austrian proposals, he eventually withdrew his objections and a consensus was reached in the early hours of 23 June.[51]

The European Council then adopted the final version of the mandate, intended to 'provide the exclusive basis and framework for the work of the

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[49] In 1985, the Council of Ministers of the European Communities, contrary to the United Kingdom's position, decided to convene an Intergovernmental Conference on the drafting of a Single European Act, cf. J.J. Węc, Spór o kształt ustrojowy, op. cit., pp. 172–173.

[50] C. Herma, Konferencja Międzyrządowa, op. cit., p. 12.

[51] EU-Gipfel. Merkel: Notfalls gegen den Willen Polens, „Süddeutsche Zeitung" vom 23. Juni 2007, https://www.sueddeutsche.de/politik/eu-gipfel-merkel-notfalls-gegen-den-willen-polens-1.918132 [accessed: 20 July 2024].

IGC'.[52] The task of the IGC was to prepare a draft amending Treaty, called the Reform Treaty. The mandate therefore finally abandoned the intention of concluding a founding treaty (constitutional treaty), in favour of signing a new revision treaty. In accordance with the provisions of the mandate, the Reform Treaty would contain two substantive clauses amending the TEU and the TEC, the latter to be referred to as the Treaty on the Functioning of the European Union (TFEU). At the same time, technical amendments to the Euratom Treaty (and to the existing Protocols thereto) should be done via Protocols annexed to the Reform Treaty, in accordance with the arrangements adopted at the 2003–2004 Intergovernmental Conference.[53]

The mandate provided for the transfer to the revision Treaty of the vast majority of the provisions of the Constitutional Treaty, to be divided and integrated into the TEU and the TFEU. The Treaty on European Union would consist of six titles, with two new Titles (II and III) introduced and the existing Titles renumbered (VII to IV and VIII to VI). The text of the preamble of the Constitutional Treaty on the cultural, religious and humanistic heritage of Europe was added to the previous preamble of the TEU. The new Title II of the TEU (Provisions on democratic principles) was to contain the provisions on democratic equality, representative democracy, participatory democracy, and the citizens' initiative transferred from the Constitutional Treaty. The new Title III of the TEU (Provisions on institutions) should cover part of the provisions of the Constitutional Treaty relating to the institutional system of the Union: the European Parliament (new composition), the European Council (transformation into an institution and creation of the office of President), the Council (new definition of qualified majority and changes in the functioning of the Presidency), the European Commission (new composition and strengthening of the position of its President), and the High

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[52] IGC 2007. Draft mandate of the Intergovernmental Conference, Annex I, [in:] Brussels European Council (21–22 June 2007). Presidency conclusions, 11177/1/07 REV 1, p. 15. For an analysis of the text of the mandate, cf. P.Ch. Müller-Graff, Die Zukunft des europäischen Verfassungstopos und Primärrechts nach der deutschen Ratspräsidentschaft, 'Integration' 2007, H. 3, pp. 223–237. A. Duff, Das Mandat für die Regierungskonferenz – Die zweite Chance, 'Integration' 2007, H. 3, pp. 333–337.

[53] IGC 2007. Draft mandate of the Intergovernmental Conference, op. cit., p. 15.

Representative of the Union for Foreign Affairs and Security Policy and the Court of Justice of the European Union.[54]

The remaining Titles of the existing TEU would only contain minor amendments, resulting from the provisions of the Constitutional Treaty. Thus, Title I of the TEU (Common Provisions) would include the provisions of the Constitutional Treaty concerning the values and objectives of the Union, the relations between the Union and the Member States, the suspension of rights of Member States and the relationship of the Union with neighbouring countries. Part of the provisions of the Constitutional Treaty on enhanced cooperation should be transferred to Title IV of the TEU (Provisions on enhanced cooperation). Title V of the TEU (General Provisions on the Union's external action and specific Provisions on the Common Foreign and Security Policy) would include the provisions of the Constitutional Treaty on the principles and objectives of the Union's external action and on the role of the European Council in that field, the principles of the functioning of the European External Action Service and the permanent structured cooperation in the field of defence. Title VI of the TEU (Final Provisions) should contain the provisions of the Constitutional Treaty concerning the legal personality of the Union, the procedure for voluntary withdrawal from the Union, the ordinary procedure for revising the Treaties, the two simplified revision procedures and the accession procedure.[55]

It was agreed to insert into the TFEU the provisions of the Constitutional Treaty concerning the categories and areas of competences, the scope of qualified majority voting and of the ordinary legislative procedure, the catalogue of legal acts with the distinction between legislative and non-legislative acts, the area of freedom, security and justice, the solidarity clause, improvements to the governance of the euro system, the social clause, public services, space, energy, civil protection, humanitarian aid, public health, sport, tourism, outermost regions, administrative cooperation, as well as those on own resources, the multiannual financial framework and the new budgetary procedure.[56]

At the same time, the mandate contained modifications to the Constitutional Treaty, agreed during the consultations conducted by the German Presidency

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[54] Ibidem, p. 18.
[55] Ibidem, pp. 16–19.
[56] Ibidem, p. 20.

(the initial version of the mandate of 19 June 2007) and then at the Brussels European Council meeting held in June (the final version of the mandate of 23 June 2007). These should be introduced into both the TEU and the TFEU as well as into the Protocols and Declarations annexed thereto. Thus, Title I of the TEU was to include the following provisions not provided for in the Constitutional Treaty: firstly, a provision stating that the European Union should be founded on the TEU and on the TFEU, having the same legal value, and that the Union should replace and succeed the European Community; secondly, a provision excluding from the catalogue of the objectives of the European Union the provision on free and undistorted competition; thirdly, a provision clarifying the rules on the division of competences between the Union and the Member States, according to which competences not conferred upon the Union in the Treaties should remain with the Member States; fourthly, a cross-reference to the Charter of Fundamental Rights, giving it legally binding value (while excluding it from the text of the Treaty) as well as setting out the scope of its application, and the rules governing the interpretation of the Charter in accordance with Title VII thereof. The new Title II of the TEU would contain provisions clearly defining the role of national parliaments in the European Union. Furthermore, the Protocol on the application of the principles of subsidiarity and proportionality would extend the time limit for the national parliaments to express their opinions from six to eight weeks and the early warning mechanism would be distinctly strengthened (*ex ante* control of draft legal acts) by establishing in it the 'orange card' procedure in addition to the 'yellow card' procedure, already provided for in the Constitutional Treaty. Title III was to include provisions laying down general rules for qualified majority decision-making in the Council of the European Union and the European Council. The double majority voting system would take effect from 1 November 2014. At the same time, the Protocol on transitional provisions would contain provisions on the definition of qualified majority applicable from 1 November 2014 to 31 March 2017. Thus, during the period in question, the Nice voting rules would be available for a decision to be adopted by qualified majority if a Member State should so request. In addition, it was agreed to introduce new rules in the relevant Declaration annexed to the Final Act of the 2007 Intergovernmental Conference to make the Ioannina mechanism more flexible. As from 1 April 2017, both thresholds, for the number of Member States and the population necessary to constitute

a blocking minority, would be reduced from 75% to 55%. Title IV of the TEU would contain a new provision setting out the minimum number of nine Member States required for establishing enhanced cooperation. Title V of the TEU would include provisions clearly specifying that the common foreign and security policy of the European Union was subject to specific procedures and rules (excluding the adoption of legislative acts, among other things) and that there was a specific legal basis for personal data protection in the CFSP area. Moreover, the common foreign and security policy would be the only EU policy to be incorporated into the TEU rather than into the TFEU. Title VI of the TEU would contain provisions making it clear that the Treaties could be amended in order to increase or reduce the competences conferred on the Union (the ordinary revision procedure of the Treaties) as well as provisions defining the criteria for the eligibility of candidate countries to the European Union, as adopted by the European Council (the procedure for accession).[57]

The most important modifications to the Constitutional Treaty introduced into the TFEU were as follows: firstly, a provision stating that the European Union should be founded on the TEU and on the TFEU, having the same legal value (Part One, Article 1); secondly, the introduction of a provision stipulating that the Member States would again exercise their competence to the extent that the Union should cease to exercise its competence (Part One, Title I); thirdly, the simplification of the two appeal procedures provided for in the Constitutional Treaty for judicial cooperation in criminal matters where a Member State should not agree to the introduction of minimum rules in that field by a qualified majority, but other Member States should intend to establish enhanced cooperation (Part Three, Title V); fourthly, the introduction of two new appeal procedures and of the possibility to establish enhanced cooperation (under a simplified procedure) for the creation of the European Public Prosecutor's Office and in the field of police cooperation where the Council should be unable to take a unanimous decision on those matters (Part Three, Title V); fifthly, strengthening, as compared with the Constitutional Treaty, the appeal procedure for the adoption by qualified majority of legal acts concerning the coordination of social security systems by providing that, in the absence of a consensus on the matter at the European Council within four months, the draft act would be deemed not

[57] Ibidem, pp. 16–19.

to have been adopted (Part Three, Title X); sixthly, the introduction of a provision stipulating that the accession of the European Union to the ECHR would require an agreement unanimously concluded by the Council of the European Union and ratification by all the Member States (Part Five, Title V); seventhly, the maintenance of the existing denominations of legal acts (regulations, directives and decisions) and extending them to all EU policies, with the exception of the Union's common foreign and security policy (Part Six, Title I); eighthly, the exclusion of the flexibility clause from the Union's common foreign and security policy (Part Seven, General and Final Provisions); ninthly and lastly, the maintenance of the existing unanimity rule at the Council of the European Union when deciding to confer on the Court of Justice of the European Union jurisdiction in disputes relating to European intellectual property rights (Part Six, Title I).

Other modifications to the Constitutional Treaty would be introduced under new Protocols annexed to the TFEU. These would be as follows: firstly, the Protocol on services of general economic interest, indicating the essential role and the wide discretion of national, regional and local authorities, as well as the exclusive competence of the Member States, in providing non-economic services of general interest; secondly, the Protocol on the exercise of shared competences, stating that, when the Union should take action in a certain area, the scope of that exercise of shared competence should only cover those elements governed by the Union act in question and therefore should not cover the whole area; thirdly, the Protocol on the internal market and competition, providing that the market should include a system ensuring undistorted competition. This was established in connection with the above-mentioned exclusion from the catalogue of the objectives of the Union of the internal market with free and undistorted competition.[58] Another modification to the Constitutional Treaty was the extension of the Amsterdam Protocol on the position of the United Kingdom and Ireland to police cooperation and judicial cooperation in criminal matters, which would allow the two Member States to freely choose whether or not to participate in the cooperation.[59]

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[58] That Protocol would also be annexed to the TEU.

[59] IGC 2007. Draft mandate of the Intergovernmental Conference, op. cit., p. 15–21. Cf. also: C. Herma, Konferencja Międzyrządowa, op. cit., pp. 9–11, 13–14.

In its Conclusions from the meeting held on 21–23 June 2007, the European Council stressed that 'after two years of uncertainty' over the Treaty reform, 'the time has come to resolve the issue and for the Union to move on'. It 'welcomed' the report of the German Presidency and expressed the opinion that 'settling this issue quickly is a priority'. To this end, the European Council invited the Portuguese Government, which was due to hold the Presidency in the second half of 2007, 'without delay to take the necessary steps in accordance with Article 48 of the TEU' to convene an Intergovernmental Conference before the end of July 2007. Further, the European Council again emphasised that the work of the IGC should be carried out strictly in accordance with the mandate adopted for it on 23 June 2007. The European Council also invited the Portuguese Government to prepare a draft text of a new Treaty in line with the terms of the mandate and to submit it to the IGC 'as soon as it opens'. The deliberations should be concluded 'as quickly as possible', but in any case before the end of 2007, so that the resulting Treaty could be ratified 'before the European Parliament elections in June 2009'.[60]

2. Proceedings of the IGC

On 26 June 2007, the IGC mandate, annexed to a note of the Permanent Representative of Germany to the European Union, was sent to the Secretary-General of the Council of the European Union. This initiated the procedure laid down in Article 48 TEU, providing that, *inter alia*, the Government of any Member State might submit proposals for the amendment of the Treaties. In July 2007, in accordance with the same procedure, opinions on the need to convene an Intergovernmental Conference were presented by the European Commission, the European Parliament and the European Central Bank.[61]

The European Commission adopted its position on 10 July 2007. It welcomed the convocation of an Intergovernmental Conference and fully supported the content of the negotiation mandate. The Commission also

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[60] Brussels European Council, 21–22 June 2007, Presidency conclusions, op. cit., p. 2.

[61] In an own-initiative opinion, the Committee of the Regions also announced its position on the matter, cf. Opinion of the Committee of the Regions on relaunching the process of reforming the European Union in anticipation of the European Council of 21 and 22 June 2007, Official Journal of the European Union C, 197, 24.8.2007, p. 30–36.

expressed its hope that the new revision Treaty would allow the European Union to adapt to the needs of the 21st century. In addition, it advocated the swift signature of the Reform Treaty and its ratification ahead of the European Parliamentary elections in 2009.[62]

On the following day, the European Parliament announced a positive opinion on the convening of the Intergovernmental Conference by adopting a special resolution to that end. However, unlike the European Commission's opinion, the European Parliament's resolution was distinctly ambivalent. The document stressed that the IGC mandate 'safeguards much of the substance of the Constitutional Treaty', including the single legal personality of the Union and the abolition of the pillar-based structure, a significant extension to new cases of the scope of qualified majority voting in the Council of the European Union and of the ordinary legislative procedure of the European Parliament and of the Council of the European Union, elements of participatory democracy, the legally binding force of the Charter of Fundamental Rights, improving the coherence of the Union's external action, and the 'balanced institutional package'. It was also welcomed that the mandate provided for the introduction of new elements into the Treaties, e.g. provisions on climate change and the solidarity clause in the field of energy. On the other hand, however, the European Parliament emphasised that the negotiation mandate adopted by the European Council implied abandoning certain important provisions of the Constitutional Treaty, such as the very concept of a European Constitution, the symbols of the Union, the names for the legal acts of the Union, giving Treaty status to the primacy of EU law over national law and the definition of the European Union as a Union of citizens and states. It also expressed its concern that the mandate allowed for certain Member States to be granted an increasing number of derogations from the implementation of major provisions of the Treaties, which could weaken the cohesion of the European Union in the future. At the same time, the European Parliament considered it a 'dramatic setback' that some

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[62] European Commission. Communication from the Commission to the Council. Reforming Europe for the 21st Century, Brussels, 10.7.2007, COM(2007) 412 final. European Commission. Opinion of the European Commission, pursuant to Article 48 of the Treaty on European Union, on the Conference of representatives of the governments of the Member States convened to revise the Treaties, Council of the European Union, 11625/07, POLGEN 83, pp. 1–10.

Member States claimed an opt-out from the Charter of Fundamental Rights, which was to strengthen the axiology and the 'community of values' of the European Union, as repeatedly recognised by the Community institutions and bodies as well as by the Governments of the Member States. The European Parliament therefore urgently appealed to all Member States to 'make every effort to overcome this internal division and to reach a consensus after all on the complete validity' of the Charter of Fundamental Rights. It also invited the participants in the IGC to conclude their deliberations in 2007, so as to enable the new amending Treaty to enter into force before the 2009 European Parliamentary elections.[63]

The European Central Bank announced its position as early as 5 July 2007. Like the European Commission, it welcomed both the intention to convene an Intergovernmental Conference and the content of the negotiating mandate itself, pointing in particular to those provisions which directly concerned the ECB, namely, to including price stability in the catalogue of objectives of the European Union, making monetary policy among the exclusive competences of the Union, and amending the article on the catalogue of objectives of the Union so that it should also comprise including the 'establishment of an Economic and Monetary Union whose currency is the euro'.[64]

Having received the positive opinions from the European Commission, the European Parliament and the European Central Bank, on 16 July 2007 the Council of the European Union unanimously decided to convene an Intergovernmental Conference. The work of the IGC began in Lisbon on 23 July 2007 and ended at the European Council meeting held in the capital city of Portugal on 18–19 October 2007. The IGC deliberated under the auspices of the Portuguese Presidency. The negotiations were conducted under the overall authority of the Heads of State or Government,

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[63] EP 2004–2009. European Parliament resolution of 11 July 2007 on the convening of the Intergovernmental Conference (IGC): the European Parliament's opinion (Article 48 of the EU Treaty) (11222/2007 – C6-0206/2007-2007/0808(CNS)), P6_TA(2007)0328, Official Journal of the European Union C, 175E, 10.7.2008, p. 347–349.

[64] Opinion of the European Central Bank of 5 July 2007 at the request of the Council of the European Union on the opening of an Intergovernmental Conference to draw up a Treaty amending the existing Treaties (CON/2007/20) (2007/C 160/02), Official Journal of the European Union C, 160, 13.7.2007, pp. 2–4.

supported by the Foreign Ministers of the Member States. The meetings of the latter were held on 23 July, 7–8 September and 15 October 2007. These were prepared by lower level representatives of the Governments of the Member States. The IGC meetings were also attended by one representative of the European Commission and three representatives of the European Parliament; in accordance with the Presidency Conclusions of the Brussels European Council of 23 June 2007, for the first time the latter were fully involved rather than mere observers.[65]

Unlike during the previous IGCs, the Legal Service of the General Secretariat of the Council of the European Union had an extremely important influence on the IGC proceedings. It worked closely with the Presidency and lower level representatives of the Governments of the Member States, forming together a Working Group of Legal Experts.[66] The Working Group gathered at an organisational meeting on 24–25 July 2007 and then worked on the final drafting of the Reform Treaty between 29 August and 3 October of that year. Although it was headed by the representative of the Portuguese Presidency Miguel de Serpa Soares, its work was in fact supervised by the French diplomat Jean-Claude Piris, Director-General of the Legal Service of the General Secretariat of the Council of the European Union. The latter had previously led a similar working group having drafted the Constitutional Treaty during the 2003–2004 Intergovernmental Conference. The Piris Group, as it was commonly called, soon became the main forum of the Intergovernmental Conference, gaining significant influence on its proceedings and outcome. Rather than negotiating a comprehensive Treaty, the aim of the IGC was

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[65] Brussels European Council (21–22 June 2007). Presidency conclusions, op. cit., p. 3. The representatives of the European Parliament at the Intergovernmental Conference were Elmar Brok (EPP), Enrique Crespo (PES) and Andrew Nicholas Duff (ALDE).

[66] The Working Group consisted of two representatives from each of the twenty-seven Member States and of representatives of the European Commission and of the European Parliament. However, the composition of the national delegations could vary depending on the issues raised during the relevant meeting. Poland's representatives were as follows: Artur Harazim – Head of the Parliamentary and Legal Department at the Permanent Representation of the Republic of Poland to the European Union; Cezary Herma – Deputy Director of the European Law Department at the Office of the Committee for European Integration (UKIE); and Andrzej Kremer – Director of the Legal and Treaty Department at the Ministry of Foreign Affairs, cf. A. Kremer, op. cit., p. 31. C. Herma, Konferencja Międzyrządowa, op. cit., p. 15.

to supplement or clarify the provisions of the draft Reform Treaty already prepared by the Portuguese Presidency in strict accordance with the negotiating mandate.

2.1. The first meeting of the Ministers for Foreign Affairs

On 23 July 2007, the General Affairs and External Relations Council solemnly opened the Intergovernmental Conference. On the same day, the Portuguese Presidency presented to the Ministers of Foreign Affairs of the Member States a draft 'Treaty amending the Treaty on European Union and the Treaty establishing the European Community'. The draft Reform Treaty had been drawn up by the Legal Service of the General Secretariat of the Council of the European Union, essentially on the basis of the IGC mandate. The document was also accompanied by the drafts of twelve Protocols and fifty-one Declarations annexed to it, whereas the draft Preamble to the Reform Treaty and the indicative and forward timetable of the Working Group of Legal Experts were submitted on the following day.[67]

During the inaugural meeting, Polish Foreign Minister Anna Fotyga made a statement in which she expressed her satisfaction with the compromise reached by the European Council on 21–23 June 2007, but at the same time she pointed out that the Polish Government understood full implementation of the mandate as comprising the inclusion of the Ioannina mechanism in the

[67] Conference of the Representatives of the Governments of the Member States (hereinafter: IGC) 2007. Note from the Presidency to the Intergovernmental Conference. Draft Treaty amending the Treaty on European Union and the Treaty establishing the European Community, Brussels, 23 July 2007, CIG 1/07, pp. 1–145. IGC 2007. Note from the Presidency to the Intergovernmental Conference. Draft Treaty amending the Treaty on European Union and the Treaty establishing the European Community – Protocols, Brussels, 23 July 2007, CIG 2/07, pp. 1–69. IGC 2007.Note from the Presidency to the Intergovernmental Conference. Draft declarations, Brussels, 23 July 2007, CIG/3/07, pp. 1–63. IGC 2007. Note from the Presidency to the Intergovernmental Conference. Draft Treaty amending the Treaty on European Union and the Treaty establishing the European Community – Draft Preamble, Brussels, 24 July 2007, CIG 4/07, pp. 1–2. IGC 2007. Note from the Presidency to the Intergovernmental Conference. Indicative and forward timetable of the Working Group of Legal Experts, Brussels, 24 July 2007, CIG 6/07, pp. 1–2.

normative part of the Treaty.[68] That would undoubtedly mean a significant strengthening of the mechanism in question. In addition, Fotyga reiterated the previous declaration of the Polish party on the possibility of Poland's joining in the Protocol for the United Kingdom on the Charter of Fundamental Rights (the so-called British Protocol). However, the IGC participants would not be officially notified thereof by the Polish party until the completion of the analysis of possible consequences of the Charter provisions for internal law in Poland.[69]

2.2. The Working Group of Legal Experts

Although the Working Group of Legal Experts was to proceed in strict compliance with the IGC mandate, it did not mean that its activities were limited to editorial corrections in the draft Treaty text. As a matter of fact, the Working Group also discussed issues excluded from the mandate but still necessary in the new amending Treaty. These included provisions such as: the Preamble to the Reform Treaty; transitional provisions on the status of legislative acts adopted in the framework 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 the TEU and the TEC under the Amsterdam Treaty) to judicial cooperation in criminal matters and police cooperation and acts constituting a development of the Schengen *acquis*; changes to the institutional framework of the European Union; the clarification of certain provisions on legislative procedures and acts; provisions relating to Union citizenship; the manner of publication of the Charter of Fundamental Rights; provisions for increasing the number of Advocates-General in the Court of Justice.[70]

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[68] Ms Fotyga stated, inter alia, that the transfer of the mechanism provided for in Declaration No 5 annexed to the Final Act of the 2004 IGC, envisaged in point 13 of the mandate, should take place by incorporating it into the Treaty text, cf. IGC 2007. Note from the Polish delegation to the Intergovernmental Conference. Statement by Ms Anna E. Fotyga, Polish Minister of Foreign Affairs, on the occasion of the opening of the Intergovernmental Conference, Brussels, 25 July 2007, CIG 5/07, p. 1.

[69] Ibidem, p. 2.

[70] A. Kremer, op. cit., pp. 33, 36–37. C. Herma, Konferencja Międzyrządowa, op. cit., pp. 17–20, 23.

2.2.1. The Preamble to the Reform Treaty

No preamble to the Reform Treaty was provided for in the IGC mandate; instead, the Preamble to the TEU would be extended to include the recital from the Constitutional Treaty on the cultural, religious and humanist heritage of Europe. Nevertheless, on 24 July 2007, the Portuguese Presidency submitted to the IGC a brief draft Preamble to the Reform Treaty. This caused the dissatisfaction of some delegations, which pointed to the non-compliance of the proposal with the content of the mandate. It was a different issue that after the drafting of the consolidated texts of the TEU and of the TFEU, the Preamble to the Reform Treaty would lose its relevance anyway.

Finally, however, the Working Group accepted the compromise proposal put forward by the Hungarian delegation, i.e. merging the draft text prepared by the Portuguese Presidency with a fragment of point 1 of the IGC mandate. It enabled the Working Group to draw up a Preamble to the Reform Treaty worded as follows: 'DESIRING to complete the process started by the Treaty of Amsterdam and by the Treaty of Nice with a view to enhancing the efficiency and democratic legitimacy of the Union and to improving the coherence of its action, [we] HAVE RESOLVED to amend the Treaty on European Union, the Treaty establishing the European Community and the Treaty establishing the European Atomic Energy Community'.[71]

2.2.2. The Protocol on transitional provisions – the status of legislative acts in judicial cooperation in criminal matters and police cooperation

Neither did the IGC mandate provide for the status of legislative acts adopted in the field of judicial cooperation in criminal matters and police cooperation in the transitional period. During the work of the Working Group, the positions of the various delegations on the issue were widely different from the very beginning. Some agreed to change the status of existing framework decisions, common positions, and conventions upon the entry into force of the Reform Treaty. It would mean that, from this date, those legislative acts would be subject to, *inter alia*, the supervisory powers of the

[71] IGC 2007. Note from the Presidency to the Intergovernmental Conference. Draft Treaty amending the Treaty on European Union and the Treaty establishing the European Community – Draft Preamble, Brussels, 5 October 2007, CIG 4/1/07, REV 1, pp. 1–2.

European Commission and almost full jurisdiction of the Court of Justice of the European Union, and that the direct effectiveness of acts harmonising the laws of the Member States in the two areas would be allowed.[72]

However, such a solution was rejected by the delegations of many Member States, including Poland, the United Kingdom, the Czech Republic and Malta. The compromise finally reached within the Working Group was the establishment of a five-year transitional period, to apply from the date of entry into force of the Reform Treaty. In the period in question, the limited powers of the European Commission and of the Court of Justice of the European Union would remain unchanged with regard to legislative acts adopted in the framework of judicial cooperation in criminal matters and police cooperation before the entry into force of the Reform Treaty (Article 10(1) to (3) of Protocol No 10 – now Protocol No 36).[73] At the same time, it was agreed that these restrictions could cease to apply when existing legislative acts should be replaced by new acts before the expiry of the five-year transitional period (Declaration No 39a – now Declaration No 50).[74]

2.2.3. The Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice

The IGC mandate provided for the extension of the provisions of Protocol No 4 on the position of the United Kingdom and Ireland (annexed to the TEU and to the TEC under the Amsterdam Treaty) to judicial cooperation in criminal matters and police cooperation and to acts constituting a development of the Schengen *acquis*. However, Ireland was supposed to determine in due course

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[72] C. Herma, Konferencja Międzyrządowa, op. cit., p. 20.

[73] IGC 2007. Note from the Presidency to the Intergovernmental Conference. Draft Treaty amending the Treaty on European Union and the Treaty establishing the European Community – Protocols: Protocol No 10 on transitional provisions, Brussels, 5 October 2007, CIG 2/1/07, REV 1, p. 32. The exception would still be the jurisdiction of the Court of Justice of the European Union to give preliminary rulings under Article 35(2) and (3) TEU, that is, if the Member State should make, before the entry into force of the Reform Treaty, a declaration accepting the jurisdiction of the CJEU in that respect. Cf. C. Herma, Konferencja Międzyrządowa, op. cit., p. 20. A. Kremer, op. cit., pp. 36–37.

[74] IGC 2007. Note from the Presidency to the Intergovernmental Conference. Draft declarations: Declaration No 39a concerning Article 10 of Protocol No 10 on transitional provisions, Brussels, 5 October 2007, CIG 3/1/07, REV 1, p. 19.

its position on the matter. At the end of the work of the Working Group, the Irish delegation decided to join in the arrangements negotiated by the United Kingdom. The Amsterdam Protocol allowed the United Kingdom and Ireland to freely choose whether or not to take part in the cooperation provided for in Title IV of the TEC. Under the document in question, the two Member States were excluded from the Schengen system and neither participated in the adoption of, nor were obliged to apply, any acts or measures adopted by the Council of the European Union pursuant to Title IV of the TEC. On the other hand, either of them could notify the Council of its wish to take part in the adoption and application of any such act or to accept any measure already adopted by the Council (Articles 1 to 8 of Protocol No 4).

As a compromise solution agreed within the Working Group in the form of a special Protocol, after the expiry of the above-mentioned five-year transitional period concerning the status of acts relating to the existing third pillar, the United Kingdom and Ireland would be able to refuse to accept a new legislative act (measure) amending any legislative act (measure) adopted before the entry into force of the Reform Treaty and by which the two Member States were bound. However, if the Council of the European Union, acting by a qualified majority on a proposal from the European Commission, should determine that their non-participation would make the application of that act (measure) inoperable for other Member States or in the European Union as a whole, it could urge them to adopt the act (measure). If at the expiry of a period of two months from the Council's determination no notification of adoption should be made by the United Kingdom or Ireland, the Council of the European Union should decide that the relevant act (measure) would no longer be binding upon or applicable to it. The Council of the European Union, acting by a qualified majority on a proposal from the European Commission, could also determine that the United Kingdom or Ireland, or both, should bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in the existing legislative act (measure).[75]

[75] IGC 2007. Note from the Presidency to the Intergovernmental Conference. Draft Treaty amending the Treaty on European Union and the Treaty establishing the European Community – Protocols: Protocol (unnumbered) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, Brussels, 5 October 2007, CIG 2/1/07, REV 1, pp. 60–62.

However, at the very end of the IGC, Ireland added to the Final Act Declaration No 54 (now Declaration No 56) on Article 3 of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice. The Irish Government declared therein its 'firm intention' to take part in the adoption of measures relating to the area of freedom, security and justice 'to the maximum extent it deems possible', in particular 'to the maximum possible extent in measures in the field of police cooperation'. At the same time, Ireland informed that it intended to review the operation of the arrangements of the Protocol within three years of the entry into force of the Reform Treaty.[76]

2.2.4. The institutional framework of the European Union

On 23 July 2007, the Portuguese Presidency submitted to the IGC a draft text of the Reform Treaty, unexpectedly integrating the Court of Auditors and the European Central Bank into the institutional framework of the European Union. Such a solution was not provided for in the draft prepared by the Convention, in the Constitutional Treaty, or even in the negotiating mandate for the Intergovernmental Conference. The inclusion of the Court of Auditors and the European Central Bank in the institutional framework of the European Union was tantamount to giving those institutions a political character since the institutional framework of the Union, in accordance with the provisions of the draft Convention text and of the Constitutional Treaty, as confirmed in the IGC mandate, was aimed to 'promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions'.[77] Whereas the incorporation of the Court of Auditors into the institutional framework of the European Union raised no fundamental doubts during the meetings of the Working Group, especially

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[76] IGC 2007. Corrigendum to the Note from the Presidency to the Intergovernmental Conference. Draft declarations: Declaration by Ireland (Declaration No 54) on Article 3 of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, Brussels, 12 October 2007, CIG 3/1/07, REV 1 COR 1, p. 1.

[77] IGC 2007. Note from the Presidency to the Intergovernmental Conference. Draft Treaty amending the Treaty on European Union and the Treaty establishing the European Community, Brussels, 23 July 2007, CIG 1/07, op. cit. p. 10.

as it had already been part thereof from the entry into force of the Maastricht Treaty, making the European Central Bank a political institution was strongly opposed by the President of the ECB. In his letter to the Portuguese Presidency of 3 September 2007, he called for the ECB to be treated separately in the institutional system of the European Union.[78]

Whereas the position of the ECB President was supported by Germany, Spain, the Netherlands, Denmark and Luxembourg, it met with equally strong opposition from the representatives of the Portuguese Presidency, the European Commission and several other Member States. This last group referred to, *inter alia*, the principle of the institutional balance of the Union, according to which each institution should 'act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures and conditions set out in them'.[79] As a result of further negotiations, the participants finally decided to include both the Court of Auditors and the European Central Bank in the institutional framework of the European Union.[80]

2.2.5. The clarification of provisions on legislative procedures and acts

The IGC mandate did not provide for the clarification of certain provisions on legislative procedures and acts. The Working Group supplemented the provisions defining legislative procedures with the provision that, in the specific cases provided for by the Treaties, legislative acts could also be adopted on the initiative of a group of Member States or of the European Parliament, on a recommendation from the European Central Bank or at the request of the Court of Justice or the European Investment Bank (Article 249a TFEU – now Article 289 TFEU).[81] In addition, it clarified the legal basis for adopting legislative acts. It introduced provisions requiring, in specific cases, the exclusive

[78] IGC 2007. Cover Note from Presidency of the IGC to Delegations. Letter from the European Central Bank, dated 2 August 2007, Brussels, 3 September 2007, CIG 10/07, pp. 1–4.

[79] IGC 2007. Note from the Presidency to the Intergovernmental Conference. Draft Treaty amending the Treaty on European Union and the Treaty establishing the European Community, Brussels, 23 July 2007, CIG 1/07, op. cit. p. 10.

[80] IGC 2007. Note from the Presidency to the Intergovernmental Conference. Draft Treaty amending the Treaty on European Union and the Treaty establishing the European Community, Brussels, 5 October 2007, CIG 1/1/07, REV 1, p. 10.

[81] Ibidem, p. 127.

enactment of regulations or of directives, or allowing the Union institutions to select the type of legislative act to be adopted.[82]

2.2.6. The definition of citizenship of the Union

Neither did the negotiation mandate provide for a debate on the definition of Union citizenship. But there was a discussion within the Working Group as some delegations, notably Italy, Belgium, Spain and Greece, demanded that the definition of citizenship contained in the TFEU be transferred to the TEU, viewed by them as a more important international agreement.[83] However, this request was opposed by other Member States, especially the United Kingdom and the Netherlands. Finally, the compromise reached in this case was that the TFEU retained the existing definition of EU citizenship, whereas it was introduced into the TEU for the first time (Article 17 TFEU – now Article 20 TFEU, Article 8 TEU – now Article 9 TEU).[84]

2.3. From the Gymnich meeting of Foreign Ministers to the signing of the Treaty of Lisbon

The most controversial issues concerning the Reform Treaty and revealed within the Working Group, but also during bilateral diplomatic contacts between the Governments of individual Member States, were discussed at the level of Foreign Ministers at their Gymnich meeting held in Viana do Castelo, Portugal, on 7–8 September 2007.[85] At this meeting, the Portuguese Presidency proposed that the Reform Treaty be adopted by the Heads of State or Government at the Lisbon European Council of 18–19 October 2007 and signed in Portugal's capital city at a later agreed date. The participants also reiterated the principle of compliance with the provisions of the IGC mandate when working on the draft Treaty.

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[82] A. Kremer, op. cit., p. 36.

[83] Ibidem. As reported by C. Herma, the above-mentioned delegations called for a general provision on Union citizenship to be introduced into the TEU, while maintaining the existing provisions of the TFEU, cf. C. Herma, Konferencja Międzyrządowa, op. cit., p. 17.

[84] IGC 2007. Note from the Presidency to the Intergovernmental Conference. Draft Treaty amending, op.cit., CIG 1/1/07, REV 1, p. 8.

[85] For more on Gymnich meetings, cf. EU-Glosar. Centrum für Europäische Politik, p. 1, http://www.cep.eu/eu-glossar/ [accessed: 17 Mai 2024]. Heimatverein-Gymnich. Ereignisse, p. 1, http://www.heimatverein-gymnich.de [accessed: 17 Mai 2024].

The discussion at Viana do Castelo was primarily about the manner of publishing the Charter of Fundamental Rights. Some delegations were in favour of its proclamation by the European Parliament, the European Commission and the Council of the European Union and subsequent publication in the Official Journal of the European Union. The legal value of the Charter, the same as that of the Treaties, would result from Article 6 TEU, as provided for in the negotiation mandate. However, other delegations supported the proposal from the General Secretariat of the Council of the European Union and the Portuguese Presidency to not only proclaim and publish the Charter of Fundamental Rights in the Official Journal of the European Union, but also to include it in the Final Act of the Intergovernmental Conference as a Declaration. Ultimately, the first solution was chosen, although it did not resolve all legal doubts. The literature primarily points to two circumstances. The proclamation of the Charter of Fundamental Rights by only three EU institutions would create an unusual legal situation, namely that the Charter would 'have the same legal value as the Treaties', and become a source of primary law, while simultaneously being an autonomous legal act rather than a classical international agreement, with indirect legal force under Article 6 TEU. On the other hand, the double publication of the Charter raised doubts as to the priority of the two texts and the procedure for their possible revision.[86]

The discussion at the Viana do Castelo meeting also concerned other controversial issues, such as the status of legislative acts on judicial cooperation in criminal matters and police cooperation pointed out by the UK delegation, and the extension of the Amsterdam Protocol to the two areas and to the Schengen *acquis*, or the request made by the Polish delegation to include the Ioannina mechanism in the normative part of the Treaty and to increase the number of Advocates-General in the Court of Justice in accordance with Article 222 TEC. It would open the way for Poland to obtain a permanent Advocate General in the institution. On this occasion, the Polish delegation also informed the other Member States about Poland's joining in with the British Protocol on the Charter of Fundamental Rights. Furthermore, the attention of the participants was absorbed by specific issues such as: the participation of the President of the European Council and of the President of the European Commission in the qualified majority decision-making procedure

[86] A. Kremer, op. cit., p. 38.

in the European Council; the change of the name of the Council of the European Union to the Council of Ministers; the criteria for accession to the European Union; and the name of the euro in various language versions, in particular in Bulgarian (Cyrillic script).[87]

On 5 October 2007, the Portuguese Presidency forwarded to the Governments of the Member States a complete text of the Reform Treaty, together with twelve Protocols and fifty-three Declarations to the Final Act of the Intergovernmental Conference, as agreed and drafted during the deliberations of the Foreign Ministers and of the Working Group of Legal Experts.[88] The text was subsequently discussed by the Foreign Ministers at the General Affairs and External Relations Council meeting held in Luxembourg on 14–15 October 2007. But the main purpose of this meeting was to prepare the next European Council meeting. Nevertheless, many unresolved cases were also discussed there, including the above-mentioned proposals from Poland, i.e. the inclusion of the Ioannina mechanism in primary law (the Treaty or a Protocol),[89] as well as increasing the number of Advocates-General

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[87] Ibidem, pp. 32–33, 37. the Working Group of Legal Experts completed most of its work as early as 14 September 2007. However, until 3 October of that year, it debated the contents of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice and of the Protocol on transitional provisions, in the part concerning the status of legislative acts adopted in the field of judicial cooperation in criminal matters and police cooperation, cf. C. Herma, Konferencja Międzyrządowa, op. cit., pp. 24–25.

[88] IGC 2007. Note from the Presidency to the Intergovernmental Conference. Draft Treaty amending, op.cit., CIG 1/1/07, REV 1, pp. 1–152. IGC 2007. Note from the Presidency to the Intergovernmental Conference. Draft Treaty amending the Treaty on European Union and the Treaty establishing the European Community – Draft Preamble, Brussels, 5 October 2007, CIG 4/1/07, REV 1, pp. 1–2. IGC 2007. Note from the Presidency to the Intergovernmental Conference. Draft Treaty amending the Treaty on European Union and the Treaty establishing the European Community – Protocols, Brussels, 5 October 2007, CIG 2/1/07, REV 1, pp. 1–76. IGC 2007. Note from the Presidency to the Intergovernmental Conference. Draft declarations, Brussels, 5 October 2007, CIG 3/1/07, REV 1, pp. 1–25.

[89] Even though, as early as 5 October 2007, the Working Group proposed to only include it in a Declaration, as provided for in the negotiation mandate, cf. IGC 2007.Note from the Presidency to the Intergovernmental Conference. Draft declarations: Declaration No 4 on Article 9c(4) of the Treaty on European Union and Article 205(2) of the Treaty on the Functioning of the European Union, Brussels, 5 October 2007, CIG 3/1/07, REV 1, pp. 4–7.

in the Court of Justice. However, neither in these two cases nor on the few outstanding issues did the participants manage to arrive at compromise solutions.[90]

All these issues were not resolved until at the informal European Council meeting held in Lisbon on 18–19 October 2007. The position of the Polish delegation was set out in the negotiating Instruction signed by Prime Minister J. Kaczyński on 17 October 2007. Poland again demanded introducing the Ioannina mechanism into primary law and increasing the number of Advocates-General in the Court of Justice. Other delegations even attempted to put forward new proposals. Thus, the Austrian delegation requested a legal restriction on the number of foreign students at the medical faculties of the local universities, which in fact chiefly applied to German students. At the same time, the Italian delegation sharply criticised the draft decision of the European Council on the composition of the European Parliament for the 2009–2014 parliamentary term, set out in the relevant European Parliament resolution of 11 October 2007. It argued that Italy had not only lost six seats in the 2009–2014 term due to the enlargement of the European Union, but above all it had received fewer seats in the draft concerned than France and the United Kingdom, although it had always had the same number of MEPs as these two countries.[91]

Finally, the European Council approved the draft Treaty reforming the European Union as drawn up by the Ministers for Foreign Affairs and the Working Group of Legal Experts, but it also introduced seven amendments thereto. Firstly, it adopted a new Protocol No 9a (now Protocol No 9) on the Ioannina mechanism, stipulating that any amendment to or abrogation of the mechanism in question by the Council of the European Union would require a prior unanimous agreement ('acting by consensus') by the European

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[90] A. Kremer, op. cit., pp. 38–40.

[91] The draft provided for a new allocation of seats in the European Parliament for the 2009–2014 parliamentary term. It took into account the provisions of Article 9a TEU, stipulating that their total number must not exceed 750, but simultaneously allocated, for the first time, to each of the three Member States a different number of seats: to Italy – 72; to the United Kingdom – 73, whereas to France – 74, cf. EP 2004–2009. European Parliament resolution of 11 October 2007 on the composition of the European Parliament, P6_TA(2007)0429, Official Journal of the European Union C, 227E, 11.10.2007, pp. 1–9.

Council.[92] Secondly, the text of Declaration No 4 (now Declaration No 7) concerning the Ioannina Mechanism was slightly changed. As part of the modification, the decision of the Council of the European Union relating to the establishment of the mechanism would be adopted on the date of the signature of the Reform Treaty rather than within six months of that date, as envisaged in the draft prepared by the Working Group.[93] Thirdly, a new Declaration No 39a (now Declaration No 38) regarding the number of Advocates-General in the Court of Justice was adopted; the Declaration provided that if, in accordance with Article 222 TEC (now Article 252 TFEU), the Court should request that the number of Advocates-General be increased by three, the Council would, acting unanimously, agree on such an increase.[94] Fourthly, an amendment was introduced to Article 9a TEU (now Article 14 TEU), whereby the position of the President of the European Parliament was separated from the total number of 750 representatives of the Union's citizens, which in fact meant increasing the maximum number of MEPs from 750 to 751.[95] Fifthly, it entailed adopting two new Declarations on the composition of the European Parliament. Thus, Declaration No 39b (now Declaration No 4) stated that the additional seat in the European Parliament would be

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92 IGC 2007.Corrigendum to the Note from the Presidency to the Intergovernmental Conference. Draft Treaty amending the Treaty on European Union and the Treaty establishing the European Community – Protocols: Protocol (No 9a) on the decision of the Council relating to the implementation of Article 9c(4) of the Treaty on European Union and Article 205(2) of the Treaty on the Functioning of the European Union between 1 November 2014 and 31 March 2017 on the one hand, and as from 1 April 2017 on the other, Brussels, 22 October 2007, CIG 2/1/07, REV 1, COR 2, pp. 1–2.

93 IGC 2007. Corrigendum to the Note from the Presidency to the Intergovernmental Conference. Draft declarations: Declaration on Article 9c(4) of the Treaty on European Union and Article 205(2) of the Treaty on the Functioning of the European Union, Brussels, 22 October 2007, CIG 3/1/07, REV 1, COR 2, pp. 1–3.

94 IGC 2007. Corrigendum to the Note from the Presidency to the Intergovernmental Conference. Draft declarations: Declaration No 39a on Article 222 of the Treaty on the Functioning of the European Union regarding the number of Advocates-General in the Court of Justice, Brussels, 22 October 2007, CIG 3/1/07, REV 1, COR 2, p. 5.

95 IGC 2007. Corrigendum to the Note from the Presidency to the Intergovernmental Conference. Draft Treaty amending the Treaty on European Union and the Treaty establishing the European Community, Brussels, 22 October 2007, CIG 1/1/07, REV 1, COR 1, p. 1.

attributed to Italy.[96] According to Declaration No 39c (now Declaration No 5), the European Council would give its political agreement on the revised draft Decision on the composition of the European Parliament for the 2009–2014 parliamentary term, based on the relevant proposal from the latter.[97] Finally, on 14 December 2007, the day after the signing of the Treaty of Lisbon, the Brussels European Council gave its agreement on the draft Decision on the composition of the European Parliament, as approved by the institution on 11 October 2007, but amended in accordance with Declaration No 39b (now Declaration No 4), annexed to the Final Act of the Intergovernmental Conference 2007. The wording of the second and third recitals of the draft Decision was adapted to the text of Article 9a(2) TEU (now Article 14(2) TEU) and Article 2 of the draft Decision, which meant that Italy was allocated 73 seats in the European Parliament for the 2009–2014 parliamentary term. The decision of the European Council on the matter was to be adopted as soon as possible after the entry into force of the Reform Treaty in accordance with the procedure laid down in the second subparagraph of Article 9a(2) TEU (now the second subparagraph of Article 14(2) TEU).[98] Sixthly, there was a new Declaration No 28 (now Declaration No 18) on competences shared between the EU and the Member States. The Declaration stated that, in accordance with the system of the division of competences between the European Union and the Member States, competences not conferred upon the Union in the Treaties remained with the Member States. When the Treaties conferred on the European Union a competence shared with the Member States in a specific area, the Member States should exercise their competence to the extent that the Union had not exercised, or had decided to cease exercising, its competence. The latter situation could arise in two cases. 1. If the relevant institutions of the European Union decide to repeal the legislative

[96] IGC 2007. Corrigendum to the Note from the Presidency to the Intergovernmental Conference. Draft declarations: Declaration No 39b on the composition of the European Parliament, Brussels, 22 October 2007, CIG 3/1/07, REV 1, COR 2, p. 5.

[97] IGC 2007. Corrigendum to the Note from the Presidency to the Intergovernmental Conference. Draft declarations: Declaration No 39c on the political agreement by the European Council concerning the draft Decision on the composition of the European Parliament, Brussels, 22 October 2007, CIG 3/1/07, REV 1, COR 2, p. 5, cf. A. Kremer, op. cit., pp. 40–41.

[98] Brussels European Council (14 December 2007). Presidency conclusions, Brussels, 16616/1/07, REV 1, p. 1.

act in question, in particular in order to better respect the principles of subsidiarity and proportionality, in accordance with Article 208 TEU (now - Article 241 TFEU), then, on the initiative of one or more Member States, the Council of the European Union could request the European Commission to submit proposals to repeal the legislative act in question. Already during the Intergovernmental Conference, the European Commission had declared that it will treat the procedure provided for in Article 208 TFEU 'with particular attention'; 2. If there were a reduction in the powers conferred on the European Union under the ordinary procedure of revision of the Treaties under Article 33(2) to (5) TEU[99] (now - Article 48(2) to (5) TEU).[100] Seventhly, at the request of the European Parliament, a new Declaration No 38a (now Declaration No 12) was adopted regarding the appointment of the High Representative of the Union for Foreign Affairs and Security Policy. The Declaration contained provisions that could be interpreted as meaning that the term of office of the High Representative of the Union should last as long as the term of office of the European Commission.[101]

The compromise reached at the European Council meeting held on 18–19 October 2007 ended the disputes over the text of the new amending Treaty, but not to the satisfaction of all the delegations. The Polish delegation could undoubtedly be contented with the significant strengthening of the Ioannina mechanism under Protocol No 9, providing that any amendment to or abrogation of the mechanism would require a unanimous agreement of the European Council. However, it had only been able to push through the inclusion of the provisions defining the mechanism in a Declaration rather than in primary law. At the same time, the Polish delegation obtained a guarantee on a permanent Advocate-General in the Court of Justice. If the number of Advocates-General should be increased by three (from eight to

[99] In the version of the draft revision Treaty prepared by the Intergovernmental Conference.

[100] IGC 2007. Corrigendum to the Note from the Presidency to the Intergovernmental Conference. Draft declarations: Declaration in relation to the delimitation of competences, Brussels, 22 October 2007, CIG 3/1/07, REV 1, COR 2, p. 4.

[101] IGC 2007. Corrigendum to the Note from the Presidency to the Intergovernmental Conference. Draft declarations: Declaration No 38a on Article 9e of the Treaty on European Union, Brussels, 22 October 2007, CIG 3/1/07, REV 1, COR 2, p. 4.

eleven), Poland would have a permanent Advocate-General, as was the case for Germany, France, the United Kingdom, Italy and Spain. The remaining two posts would be included in the rotation system for the other Member States. The Italian delegation had managed to push through its demand for an additional seat for the 2009–2014 parliamentary term, but also, as it seemed, permanently, by separating the position of the President of the European Parliament from the total number of 750 MEPs. Simultaneously, the Austrian delegation's request for a legal restriction on the number of foreign students at the medical faculties of the local universities was not accepted. It raised not only legal doubts about a possible violation of the freedom of movement of persons, but it primarily encountered opposition from other delegations because it had not been foreseen in the IGC mandate. The proposal to supplement Article 49 TEU with clear accession criteria, in particular, to grant Treaty status to the Copenhagen criteria, as requested by France and the Netherlands, supported by Germany and Austria, was not accepted either. Shortly after the end of the abovementioned European Council meeting in November 2007, four Member States announced that two more unilateral declarations would be added to the Final Act of the Intergovernmental Conference. Italy stated that it would submit a new Declaration on the composition of the European Parliament, whereas Germany, Spain and Luxembourg announced that they would present a Declaration on the symbols of the European Union.[102] On 3 December 2007, the IGC accepted the final version of the Reform Treaty, together with the Protocols and Annexes thereto, created after the completion of the work of linguistic experts. It was already called the Treaty of Lisbon.[103] The IGC also took note of the above-mentioned Declarations and annexed them to the Final Act. Declaration No 57 by the Italian Republic on the composition of the European Parliament provided that, under Article 9 TEU and Article 20 TFEU, 'every national of a Member State is a citizen of the Union'.[104] According to the interpretation of that provision by the Italian Government,

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[102] C. Herma, Konferencja Międzyrządowa, op. cit., p. 27.

[103] IGC 2007. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, Brussels, 3 December 2007, CIG 14/07.

[104] IGC 2007. Final Act: Declaration by the Italian Republic on the composition of the European Parliament, Brussels, 3 December 2007, CIG 15/07, p. 24.

the representation of a Member State in the European Parliament should concern not only nationals of a Member State resident in its territory, but also its nationals residing in other Member States of the European Union.[105] Declaration No 52 on the symbols of the European Union, signed by Germany, Spain and Luxembourg and twelve other Member States, stated that the Union flag with a circle of twelve golden stars on a blue background, the anthem based on the 'Ode to Joy' from the Ninth Symphony by Ludwig van Beethoven, the motto 'United in diversity', the euro as the currency of the Union, and Europe Day on 9 May, would for them continue as symbols to express the sense of community of the people in the European Union and their allegiance to it.[106] Eventually, a total of thirty-seven Protocols were annexed to the TEU, the TFEU and, where appropriate, to the Euratom Treaty, and sixty-five Declarations were annexed to the Final Act of the Intergovernmental Conference. On 12 December 2007, in Strasbourg, the Presidents of the European Parliament, the European Commission and the Council of the European Union solemnly proclaimed the Charter of Fundamental Rights of the European Union.[107] It was subsequently published in the Official Journal of the European Union. On 13 December 2007, the Heads of State or Government and the Foreign Ministers of the 27 Member States solemnly signed the new revision Treaty in Lisbon. It contains provisions revising the Treaty on European Union and the Treaty establishing the European Community. Protocol No 2 annexed to the Lisbon Treaty, and also amends the Treaty establishing the European Atomic Energy Community. The Treaty of Lisbon was concluded for an unlimited period. It was subject to ratification by all the Member States in accordance with their respective

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[105] C. Herma, Konferencja Międzyrządowa, op. cit., p. 27.

[106] IGC 2007. Final Act: Declaration by the Kingdom of Belgium, the Republic of Bulgaria, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the Italian Republic, the Republic of Cyprus, the Republic of Lithuania, the Grand-Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Republic of Austria, the Portuguese Republic, Romania, the Republic of Slovenia and the Slovak Republic on the symbols of the European Union, Brussels, 3 December 2007, CIG 15/07, p. 21.

[107] Charter of Fundamental Rights of the European Union, Official Journal of the European Union C 303, 14.12.2007, pp. 1–16.

constitutional requirements.[108] The Treaty of Lisbon also marked the end of more than ten years of struggle of the Governments of the Member States and the Community institutions for the direction and shape of the system reform of the European Union, initiated by the 1996–1997 Intergovernmental Conference and concluded by the 2007 IGC.

The Lisbon Treaty consists of a Preamble, seven Articles, thirteen Protocols, two Annexes and the Final Act of the 2007 Intergovernmental Conference. The Preamble to the Lisbon Treaty places the Lisbon Treaty in line with the Amsterdam Treaty and the Nice Treaty rather than referring to the Constitutional Treaty. Whereas all the previous revision Treaties were concluded in the desire (expressed in their respective preambles) to enhance the efficiency and to improve the coherence of action of the European Union, the Preamble to the Lisbon Treaty – in the version proposed by Hungary – also mentions, for the first time, the need to strengthen the democratic legitimacy of the Union. The first part of the Lisbon Treaty, entitled 'Amendments to the Treaty on European Union and to the Treaty establishing the European Community', comprises two articles (Articles 1 to 2). Articles 1 and 2 contain the amendments to the TEU and to the TEC respectively. Article 2 of the Lisbon Treaty is divided into two indents, the first of which contains horizontal (linguistic and grammatical) amendments and the second one – specific (substantive and procedural) amendments to the TEC. The second part of the Lisbon Treaty, entitled 'Final provisions', comprises five articles (Articles 3 to 7). Article 3 provides that the Treaty of Lisbon is concluded for an indefinite period. In accordance with Article 4, Protocol No 1 annexed to the Treaty of Lisbon amends the TEU, the TEC and, where applicable, the Euratom Treaty, whereas Protocol No 2 annexed to the Treaty contains the amendments to the Euratom Treaty. Article 5 contains provisions on the new drafting of the Treaties; Article 6 includes ratification clauses and provisions on the entry into force of the Treaty of Lisbon; and Article 7 lays down provisions relating to the authenticity of the text of the Treaty in the 23 working languages of the Union and the rules and place of its deposit. The last part contains

[108] Treaty of Lisbon (hereafter: the Treaty of Lisbon or the Lisbon Treaty) amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (consolidated versions), Official Journal of the European Union C 115, 9.5.2008. For an analysis of the provisions of the Treaty of Lisbon, cf. J.J. Węc, Traktat Lizboński, op. cit., pp. 111–278.

thirteen Protocols, eleven of which concern the TEU, the TFEU and, where applicable, the Euratom Treaty, whereas two relate to the Treaty of Lisbon itself. The Treaty of Lisbon also comprises two Annexes containing tables of equivalence. In addition, sixty-five Declarations are annexed to the Final Act of the 2007 Intergovernmental Conference, including the Declarations adopted by the IGC as well as the unilateral declarations by certain Member States and noted by the IGC.

The fundamental difference between the Lisbon Treaty and the Constitutional Treaty was that the former strengthened the position of the Member States in the European Union and thus the intergovernmental structure of the EU more than the latter.[109] It laid down rules allowing Member States to again exercise their competence in areas that had previously fallen within the Union's competence, introduced an 'orange card' procedure to reinforce the position of national parliaments in the legislative process in the Union, excluded the flexibility clause from the Union's common foreign and security policy as well as reaffirming the autonomy of the Member States in shaping and implementing foreign, security, defence policy and diplomatic service. Eighteen of the dozens of new provisions contained in the Treaty of Lisbon are worth mentioning. Firstly, in line with the demands of the United Kingdom, the Netherlands, Poland and the Czech Republic, the Lisbon Treaty did not establish a new catalogue of sources of secondary law, as envisaged by the Constitutional Treaty (e.g. European laws and European framework laws), instead maintaining and streamlining existing legal instruments (regulations, directives, decisions) (Article 288 TFEU). For the same reason, in place of the new office of Union Minister for Foreign Affairs provided for in the Constitutional Treaty, the office of High Representative of the Union for Foreign Affairs and Security Policy was introduced (Article 18(1) to (4) TEU). In addition, the new Treaty – under the influence of most delegations – abandoned the term 'constitution' and the symbols of the Union envisaged by the Constitutional Treaty, such as the flag, the anthem, the motto, the currency and Europe Day. Secondly, at

[109] Whereas the Constitutional Treaty reinforced the position of the Member States in comparison with the draft Constitutional Treaty, the Treaty of Lisbon strengthened it even further in relation to the provisions of the Constitutional Treaty. For more on the subject, cf. J.J. Węc, Traktat Lizboński, op. cit., pp. 347–361.

the initiative of France, supported by Germany, the provision on undistorted competition in the internal market (Article 3 TEU) was removed from the list of the European Union's objectives. Instead, Protocol No 27 provides that the internal market as set out in Article 3 TEU 'includes a system ensuring that competition is not distorted' (Protocol No 27). Thirdly, under pressure from primarily the United Kingdom, France, the Netherlands and Poland, the text of the Charter of Fundamental Rights was not incorporated into the new Treaty, although it was made legally binding by a special cross-reference contained in Article 6(1) TEU. Fourthly, at the initiative of the United Kingdom, Protocol No 30 on the application of the Charter of Fundamental Rights to Poland and to the United Kingdom, hereinafter referred to as the British Protocol and annexed to the TEU and the TFEU, was drawn up. Rather than excluding it, the Protocol only modified the application of the Charter to the two Member States. Fifthly, at the request of the Czech Republic, supported mainly by Germany and Poland, the Treaty of Lisbon made it clear that any competence not conferred on the Union by the Treaties remained with the Member States (Article 4(1) TEU) and, in the area of shared competences, '[t]he Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence' (Article 2(2) TFEU). Sixthly, at the initiative of the United Kingdom, the Netherlands, Poland and the Czech Republic, the Treaty of Lisbon abandoned the idea of giving Treaty status to the principle of the primacy of EU law over the law of the Member States, as provided for by the Constitutional Treaty. However, that principle would continue to apply in accordance with and under the conditions laid down by any well-settled case-law of the Court of Justice. Seventhly, as requested by the Italian Government, the number of seats in the European Parliament was increased from 750 to 751 (Article 14(2) TEU). The additional seat in the Parliament was attributed to Italy (Declaration No 4). Eighthly, at the initiative of the Polish Government, the number of Advocates-General in the Court of Justice was increased from 8 to 11, with Poland obtaining its permanent Advocate-General in the institution, as was the case for Germany, France, the United Kingdom, Italy and Spain (Declaration No 38). Ninthly, as a result of a compromise between the Netherlands and the United Kingdom, supported by Poland, the Czech Republic and Romania, and the other Member States, the Lisbon Treaty strengthened the position

of national parliaments in the European Union's legislative process even more than the Constitutional Treaty. Tenthly, at the initiative of Belgium, the Lisbon Treaty lowered the threshold of the number of Member States necessary for establishing enhanced cooperation from one third to nine (Article 20(2) TEU). Eleventhly, as a result of the compromise between the majority of Member States on the one hand and France and the Netherlands, supported by Austria and Germany, on the other hand, it was decided that in the accession procedure '[t]he conditions of eligibility agreed upon by the European Council [*i.e. the Copenhagen criteria*] shall be taken into account' (Article 49 TEU). Twelfthly, under pressure of the United Kingdom, the Treaty of Lisbon introduced into the TEU new provisions, codified in Article 24(1), gathering the main characteristic features of the CFSP and making it subject to specific rules and procedures. In addition, Declarations No 13 and No 14 reaffirmed the autonomy of the Member States in the formulation and conduct of their foreign, security, defence policy and diplomatic service. Thirteenthly, at the request of the United Kingdom, supported by several other EU Member States, the common foreign and security policy was excluded from the scope of the flexibility clause (Article 352(4) TFEU). Fourteenthly, at the initiative of, *inter alia*, Belgium, Luxembourg, Italy and Germany, the Treaty of Lisbon simplified two appeal procedures in judicial cooperation in criminal matters, already provided for in the Constitutional Treaty, and established two new appeal procedures: one in judicial cooperation in criminal matters and the other in police cooperation. Fifteenthly, the Treaty of Lisbon introduced a five-year transitional period in judicial cooperation in criminal matters and police cooperation for the European Commission's right to deliver reasoned opinions (Article 258 TFEU) and for the jurisdiction of the Court of Justice of the European Union (Protocol No 36). Sixteenthly, at the request of the United Kingdom and Ireland, Protocol No 21 extended the provisions of Protocol No 4 to the Amsterdam Treaty to judicial cooperation in criminal matters and police cooperation and to acts constituting a development of the Schengen *acquis*. Seventeenthly, at the initiative of Germany and the Netherlands, the competences of the European Union in the field of services of general economic interest, provided for in the Constitutional Treaty (Protocol No 26), were limited under the Lisbon Treaty. Eighteenthly and lastly, in accordance with the intentions of Poland and Lithuania, the Lisbon Treaty laid down new provisions in energy policy

specifying the rules on the energy security of the European Union (Article 122, Article 194(1) to (3) TFEU).

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The 2007 Intergovernmental Conference was the second such IGC to adopt a new amending Treaty providing for a comprehensive system reform of the European Union. The IGC was mainly convened for intra-Community reasons, namely the rejection of the Constitutional Treaty in the referendums held in France and the Netherlands in 2005. However, the new revision Treaty contained about 90% of the provisions of the rejected Constitutional Treaty. The convening of the next IGC in 2007 confirmed the trend towards the high frequency of treaty amendments in the EU observed from 1990, with an average frequency of 2.8 years.[110] The German Government had the greatest influence on the preparatory phase of the IGC as it used its Presidency of the European Union (1 January to 30 June 2007) to impose its own methodology on the other Member States. It included conducting a confidential bilateral consultation and multilateral talks with the Sherpas in order to sound out the positions of individual Member States on the Treaty reform. In order to preserve the maximum confidentiality of the consultation, the German Presidency deliberately limited not only the exchange of views between the various delegations, but it even provided no progress report, which meant that the German Government was the only one with a monopoly of information on the positions of the other Member States on the planned Treaty reform. As a result, the IGC mandate adopted by the European Council on 23 June 2007 was formulated in such a way that Germany gained the most from it, whereas the only delegations that failed to push through their most important demands were those of the United Kingdom, the Netherlands and Poland.

Little had also changed during the actual deliberations of the IGC from July to December 2007. The Governments of Germany and France primarily cared for maintaining in the new revision Treaty as many of the provisions

[110] This average frequency is obtained by taking into account the time between individual IGCs, counted from the end of one IGC to the beginning of another. In 1990–2007, there were 5 Intergovernmental Conferences, with a total of 14 years in between, excluding their respective preparatory phases, with an average of 2.8 years (5+3+3+3=14; 14:5=2.8).

of the Constitutional Treaty favourable to them as possible. Therefore, they ranked among the Member States which not only submitted the lowest number of proposals for amendments to the Constitutional Treaty, but also acted as the main brakes during the IGC. At the same time, the countries that submitted the largest number of amendments to the Constitutional Treaty were the United Kingdom, Poland and the Netherlands. Nevertheless, the United Kingdom was unsuccessful in pushing through a reduction in the scope of qualified majority voting in CFSP/CSDP or in the area of freedom, security and justice, its proposal for weakening the powers of the High Representative of the Union for Foreign Affairs and Security Policy and the intention to deprive the Charter of Fundamental Rights of legally binding value. The Netherlands failed to introduce in the new revision Treaty a 'red card' procedure, allowing national parliaments to block the European Commission's draft legislation directly if they should consider that such draft acts violated the principle of subsidiarity. Poland remained alone with its demand to modify the double majority in the Council of the EU so as to make it at least 55% of the votes of its members (15 Member States) represented by at least 62% of the EU population, whereas the blocking minority would be constituted by at least 38% of the EU population and by 5 or 6 Member States. In the end, however, the Polish delegation managed to strengthen the Ioannina mechanism in exchange for that lack of success and to obtain for the first time a permanent Advocate General in the Court of Justice. The initiative put forward by the Netherlands to establish a 'red card' procedure ended in a compromise by agreeing on slightly less restrictive provisions, henceforth referred to as the 'orange card' procedure. In return for the IGC to maintain the legally binding force of the Charter of Fundamental Rights, the United Kingdom also obtained the right to a special Protocol to be annexed to the future Treaty, precluding UK citizens from asserting certain rights under the Charter of Fundamental Rights before UK courts (the so-called British Protocol).

The *ad hoc* Intergovernmental Conferences in 2011–2012

The following two *ad hoc* Intergovernmental Conferences were convened due to the need to establish the European Stability Mechanism as a permanent financial stabilisation instrument for euro area Member States affected by the debt crisis (2010–2018) and to conclude with the Irish Government the Protocol on the concerns of the Irish people on the Treaty of Lisbon, to be annexed to the TEU and to the TFEU.

1. The Intergovernmental Conference on the establishment of the European Stability Mechanism

The euro area debt crisis exposed the systemic weaknesses of the Economic and Monetary Union, thus pushing the Member States' Governments towards reforming the EMU system. Initially, it seemed sufficient to simply strengthen economic and budgetary governance (2010–2012), but subsequent debt crisis developments made the Member States' Governments decide to implement a comprehensive system reform of the Economic and Monetary Union (2012). The reform was one of the European Union's four instruments aimed at fighting the euro area debt crisis – in addition to financial assistance programmes for the indebted economies, recovery programmes for the Member States affected by the crisis, and Eurosystem projects to enhance economic growth in the euro area. As early as 2010, two new crisis management tools were established: the European Financial Stabilisation Mechanism (2010), and the European Financial Stability Facility (2010). These instruments, of a temporary nature, aimed to reinforce the financial stability of the euro area

Member States experiencing a crisis or economic difficulties. In the face of the deteriorating euro area debt crisis, the effectiveness of the existing temporary stabilisation instruments proved to be limited. Therefore, as early as 2010, the EU institutions started work on establishing a permanent crisis resolution mechanism for the whole euro area as soon as possible. A political decision on its establishment was made by the European Council on 28–29 October 2010. However, it required amending Article 136(3) TFEU. Therefore, on 16 December 2010, the Belgian Government, performing the function of Presidency at the time, submitted to the European Council a proposal for revising the provisions in question, in accordance with a simplified revision procedure laid down in Article 48(6) TEU. Later that day, the European Council requested opinions from the European Parliament, the European Commission and the European Central Bank on the proposal put forward by the Belgian Presidency. Having obtained positive opinions from the three institutions, on 25 March 2011, the European Council unanimously decided to revise Article 136(3) TFEU in accordance with the simplified revision procedure (Article 48(6) TEU), which enabled the establishment of the European Stability Mechanism. The amendment consisted in adding to Article 136 TFEU the following paragraph 3: 'The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality'.[1]

Under the provisions in question, on 11 July 2011, the Finance Ministers of the 17 euro area Member States signed the Treaty establishing the European Stability Mechanism as an international organisation separate from the European Union. But on account of the dynamics of crisis developments, first on 21 July and next on 9 December 2011, the euro area Heads of State or Government needed to agree on revising the Treaty with a view to increasing the effectiveness of the European Stability Mechanism. Subsequently, on 2 February 2012, the representatives (Coreper II) of the euro area Member

[1] European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, Official Journal of the European Union L, 91, 6.4.2011, p. 1–2. Cf. also: Brussels European Council (24–25 March 2011). Presidency conclusions, EUCO 10/1/11/ REV 1. Annex II: Term Sheet on the ESM, pp. 21–34.

States concluded a new Treaty establishing the European Stability Mechanism.[2] Finally, the Treaty entered into force on 27 September 2012, after it had been ratified by the euro area Member States representing at least 90% of the ESM capital.[3] The European Stability Mechanism started operations later that year, on 8 October. The ESM is an international (intergovernmental) organisation established under public international law and based in Luxembourg. Its tasks include lending to the ESM Members, providing financial assistance and precautionary financial assistance where needed, purchasing bonds of beneficiary ESM Members in the primary and secondary markets, and granting loans for the re-capitalisation of financial institutions.

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[2] Treaty establishing the European Stability Mechanism between the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Grand Duchy of Luxembourg, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, pp. 1–62, http://www.european-council.europa.eu/ [accessed: 20 July 2024].

[3] The longest ratification process was that in Germany. Although the Bundestag and the Bundesrat consented to the conclusion of the ESM Treaty and the Fiscal Compact on 29 June 2012, as many as six actions were brought against those acts before the BVerfG. Objections were raised by applicants such as Die Linke, Peter Gauweiler (CSU) and Mehr Demokratie. In such circumstances, President Joachim Gauck postponed ratification until the relevant ruling given by the BVerfG. On 12 September 2012, the Federal Constitutional Court found both Treaties and the European Council Decision of 25 March 2011 amending Article 136 TFEU (by adding paragraph 3) compatible with the German Basic Law. However, the BVerfG also ruled that Germany could only join the ESM Treaty on certain conditions, e.g. the provision of guarantees under international law that if Germany's financial commitments to the ESM should exceed EUR 190 billion, it would always require the German Parliament's consent. It implied that increasing funds for the purposes of the ESM would be impossible without a prior consent given by the Bundestag in every case. On 13 September 2012, President Gauck signed the relevant ratification acts, but with the reservation that the process of ratifying the ESM Treaty would be completed upon the meeting by the Federal Government of the requirements set out by the BVerfG. On the following day, the Finance Ministers of the euro area Member States agreed on a declaration interpreting the provisions of the Treaty addressed by the BVerfG. On 27 September 2012, it was adopted by the Governments of all the euro area Member States. Later that day, President Gauck signed the ratification act and deposited the relevant instruments with the Depositary. Cf. M. Ferber, Verfassungsklagen verzögern den Euro-Rettungsfonds,

It is emphasised in the literature that the provisions of Article 136(3) TFEU did not explicitly establish a European Stability Mechanism; rather, they only stipulated that the euro area Member States had the competence to establish such a mechanism, thus confirming the compatibility of establishing such a mechanism with Union law.[4] The establishment of the European Stability Mechanism as an international organisation separate from the European Union but still to a certain extent involving EU institutions (also) raised controversy with regard to compatibility with EU law. These doubts were called into question by the CJEU in its judgment of 27 November 2012 in Case C-370/12 Thomas Pringle v Government of Ireland and Others, confirming that the European Council had followed the procedure laid down in Article 48(6) TEU in its adoption of Decision 2011/199/EU and declaring the ESM Treaty compatible with EU law. According to Jan Barcz, the establishment of the European Stability Mechanism outside the institutional and legal framework of the EU as a separate international organisation whose members could only be the euro area Member States, in spite of the judgment of the Court of Justice of the European Union, indicated 'walking a tightrope' – with regard to such intergovernmental measures – between the fragmentation of the European Union and the autonomisation of the euro area. Therefore, only a subsequent incorporation of the ESM Treaty into

'Augsburger Allgemeine', 1. Juli 2012, p. 1, https://www.augsburger-allgemeine.de/ [accessed: 20 July 2024]. ESM und Fiskalpakt: Bundesverfassungsgericht entscheidet über Eilklagen, 'Augsburger Allgemeine', 3. Juli 2012, p. 1, https://www.augsburger-allgemeine.de/ [accessed: 20 July 2024]. M. Sievers, Verfassungsgericht vor seiner schwersten Entscheidung, 'Frankfurter Rundschau', 10. Juli 2012, p. 1, https://www.fr.de/ [accessed: 20 July 2024]. Der Europäische Stabilitätsmechanismus und der Fiskalpakt. Übersicht über den Stand der Ratifikation, Stiftung Wissenschaft und Politik. Deutsches Institut für Internationale Politik und Sicherheit, p. 1, http://www.swp-berlin.org/de/ [accessed: 20 July 2024]. Der Bundespräsident. Ausfertigung der Gesetze zum 'Euro-Rettungsschirm', Berlin, 13. September 2012, p. 1. https://www.zeit.de/news/2012-09/13/eu-gauck-unterzeichnet-gesetze-zu-esm-und-fiskalpakt-13180407 [accessed: 22 July 2024]. A.-L. Kirch, D. Schwarzer, Die Ratifizierung des Fiskalpakts und des ESM in den Ländern der Eurozone – rechtliche und politische Rahmenbedingungen, Arbeitspapier der Forschungsgruppe 1, 2012, Nr. 2, p. 4.

[4] Cf. J. Barcz, Główne kierunki, op. cit., p. 137.

European Union law could prevent such a risk and enhance the EU system coherence at the same time.[5]

2. The Intergovernmental Conference on the signing of the Irish Protocol

The Irish Protocol had its origin in the rejection of the Treaty of Lisbon by Ireland's population in the referendum of 12 June 2008. As soon as at the end of July 2008, the Irish Government decided to hold another referendum in the autumn of 2009, but under certain conditions. The European Council of 11–12 December 2008 decided that legal guarantees would be given to Ireland in three areas: taxation, the security and defence policy and the right to life, education and the family.[6] These provisions were further specified by the European Council on 18–19 June 2009. The then agreed negotiation package consisted of the following: the Decision of the Heads of State or Government on the concerns of the Irish people on the Treaty of Lisbon; the Solemn Declaration on Workers' Rights, Social Policy and other issues adopted by the European Council; and the unilateral Declaration by Ireland on the security and defence policy, of which the European Council took cognisance.[7] Of these, the most important act was the Decision of the Heads of State or Government of 19 June 2009 on the concerns of the Irish people. It gave Ireland legal guarantees relating to taxation, the security and defence policy, and the right to life, education and the family. Furthermore, the Heads of State or Government declared that their Decision was legally binding and would take effect on the date of entry into force of the Treaty of Lisbon, and that they would, at the time of the conclusion of the next accession Treaty, set out the provisions of the annexed Decision in a Protocol to be attached to the TEU and the TFEU.[8]

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5 Ibidem, p. 138.

6 Brussels European Council (11–12 December 2008). Presidency conclusions (Annex I), pp. 1–3, 12, https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/esdp/104699.pdf [accessed: 19 May 2024].

7 Brussels European Council (18–19 June 2009). Presidency conclusions, pp. 2–4, https://ec.europa.eu/commission/presscorner/detail/en/doc_09_2 [accessed: 19 May 2024].

8 Ibidem, p. 3.

Following the above-mentioned Decision of the Heads of State or Government, work on the Irish Protocol was launched in mid-2011, on the basis of the ordinary revision procedure (Article 48(2) to (5) TEU). On 20 July 2011, the Irish Government requested the Polish Presidency to add to the TEU and the TFEU a draft Protocol addressing the concerns of the Irish people on the Treaty of Lisbon. On 12 October 2011, the Council of the European Union submitted to the European Council a proposal from the Irish Government and notified the national parliaments thereof. On 23 October of that year, the European Council consulted the European Parliament and the European Commission and decided to ask the Parliament to give its consent not to convene a Convention. Afterwards the Parliament and the Commission, on 18 April and 4 May 2012 respectively, voted in favour of examining the proposed amendments and the Parliament also gave its consent not to convene a Convention; on 11 May 2012, the European Council adopted a decision to convene an IGC without a Convention and defined its terms of reference, identical with the content of the Protocol on the concerns of the Irish people on the Treaty of Lisbon.[9]

The Intergovernmental Conference on the Irish Protocol was only held on one day, namely on 16 May 2012, at Coreper II level, when the procedure for signing the Protocol was opened and the time limit for its completion was set for 30 June of that year.[10] Poland signed it on 30 May 2012 and all the Member States signed it by 13 June 2012; therefore, the latter day is regarded as the date of the signature of the Protocol.[11] The Protocol required ratification by all the Member States in accordance with their respective constitutional requirements. It was to enter into force on 30 June 2013, provided that all the instruments of ratification had been deposited, or, failing that, on the first day of the month following the deposit of the instrument of ratification by

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[9] For the course of work on the Irish Protocol, cf. Sejm Rzeczypospolitej Polskiej [Sejm of the Republic of Poland]. VII kadencja. Prezes Rady Ministrów. RM 10-138-12. Druk nr 1047, Warszawa, 11 January 2013, p. 5. Likewise, the deliberations of the *ad hoc* Intergovernmental Conference on the revision of Protocol No 36 on transitional provisions took one day. Cf. J.J. Węc, Traktat Lizboński, op. cit., pp. 321–324.

[10] Ibidem.

[11] Protocol on the concerns of the Irish people on the Treaty of Lisbon, Official Journal of the European Union L, 60, 2.3.2013, pp. 131–133.

the last Member State to take this step (Article 4 of the Protocol).[12] Poland ratified the Protocol on 22 July 2013. After its approval by the other Member States, the Protocol entered into force on 1 December 2014.[13]

Under the Irish Protocol, only Ireland was given guarantees that '[n]othing in the Treaty of Lisbon attributing legal status to the Charter of Fundamental Rights of the European Union, or in the provisions of that Treaty in the area of Freedom, Security and Justice' would affect 'in any way the scope and applicability of the protection of the right to life …, the protection of the family … and the protection of the rights in respect of education … provided by the Constitution of Ireland' (Article 1 of the Protocol).[14] It also stipulated that '[n]othing in the Treaty of Lisbon makes any change of any kind, for any Member State, to the extent or operation of the competence of the European Union in relation to taxation' (Article 2 of the Protocol).[15] It also specified that the provisions of the Treaty of Lisbon concerning the common security and defence policy in no way affected Ireland's security and defence policy or its obligations in that field. 'The Treaty of Lisbon does not affect or prejudice Ireland's traditional policy of military neutrality'. The Lisbon Treaty did contain an obligation for Member States, acting in a spirit of solidarity, to provide aid or assistance to a Member State being the victim of armed aggression on its territory within the meaning of Article 42(7) TEU and Article 222 TFEU respectively. However,

> [i]t will be for Member States – including Ireland, acting in a spirit of solidarity and without prejudice to its traditional policy of military neutrality – to determine the nature of aid or assistance to be provided to a Member State which is the object of a terrorist attack or the victim of armed aggression on its territory.

In accordance with the provisions of the Lisbon Treaty and any domestic legal requirements, each Member State would also autonomously decide

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[12] Ibidem, pp. 132–133.

[13] Oświadczenie rządowe z dnia 9 lutego 2015 r. w sprawie mocy obowiązującej protokołu w sprawie obaw narodu irlandzkiego co do Traktatu z Lizbony, sporządzonego w Brukseli dnia 13 czerwca 2012 r. [Government statement of 9 February 2015 on the effectiveness of the Protocol on the concerns of the Irish people on the Treaty of Lisbon, done at Brussels on 13 June 2012], Journal of Laws 2015, Item 304.

[14] Protocol on the concerns of the Irish people on the Treaty of Lisbon, op. cit., p. 132.

[15] Ibidem.

whether to participate in permanent structured cooperation or the European Defence Agency. The Treaty:

> does not provide for the creation of a European army or for conscription to any military formation.
>
> It does not affect the right of Ireland or any other Member State to determine the nature and volume of its defence and security expenditure and the nature of its defence capabilities.
>
> It will be a matter for Ireland or any other Member State, to decide, in accordance with any domestic legal requirements, whether or not to participate in any military operation

(Article 3 of the Protocol).[16]

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The Intergovernmental Conference on the revision of Article 136(3) TFEU was essentially convened due to the international situation as the euro area debt crisis was the consequence of the global economic and financial crisis. On the other hand, however, there were also intra-Community factors, namely the structural weakness of the EMU, their having existed from its establishment. As regards the IGC that enabled the adoption of the Irish Protocol, it was convened for internal reasons, specifically, on account of the negative outcome of the referendum on the Lisbon Treaty in Ireland. Whereas the legal basis for convening the IGC on the revision of Article 136(3) TFEU was the simplified procedure for revising Part III of the TFEU codified in Article 48(6) TEU, the IGC on the Irish Protocol was held on the basis of the ordinary procedure for the revision of the Treaties in accordance with Article 48(2) to (5) TEU.

[16] Ibidem.

Prospects for Treaty reform in the European Union

1. The origins of the debate on Treaty reform

Russia's aggression against Ukraine on 24 February 2022 brought new geopolitical, economic, social and humanitarian challenges to the European Union. The aggression led not only to the largest mass exodus of a population after World War II, but also to a humanitarian crisis in Ukraine itself. It mobilised both the European Union and the Governments of its Member States to provide Ukraine with massive financial, economic and military assistance to combat the effects of the Russian aggression.[1] The war also resulted in

[1] Between 24 February 2022 and 31 December 2023, the economic, financial and humanitarian assistance from the European Union, the European Investment Bank and the European Bank for Reconstruction and Development and the EU Member States reached EUR 60.346 billion. The allocation of this amount was as follows: aid to the Ukrainian economy, emergency management and rapid reconstruction – EUR 39.6 billion, refugee support from the EU to the Member States – EUR 17 billion, humanitarian aid to the Ukrainian civilian population and refugees – EUR 3.746 billion. In addition, EUR 28.022 billion was allocated to increase the capacity of the Ukrainian armed forces (mainly in the form of armaments and ammunition), with military support covering funds assigned by individual EU Member States (EUR 22.4 billion) and Norway (EUR 22 million) and the European Peace Facility (EUR 5.6 billion). It means that the total economic, financial, humanitarian and military assistance, whether actually provided or guaranteed, from the European Union, the EU Member States and financial institutions for Ukraine, amounted to as much as EUR 88.368 billion in the period under review. For more on the subject, cf. J.J. Węc, Instrumenty prawne, instytucjonalne i pomocowe Unii Europejskiej oraz UNHCR w walce z kryzysem uchodźczym i humanitarnym na Ukrainie w latach 2022–2023 [The legal, institutional and assistance instruments of the European Union and the UNHCR in the fight against the refugee and humanitarian crisis in Ukraine in 2022–2023], 'Studia Polityczne' 2024, No. 1.

an energy crisis and an increase in inflation in the EU, as well as in financial, economic, technological and political sanctions imposed on Russia by the European Union and other Western countries.

The challenges mentioned above prompted the European Union not only to re-evaluate its current Global Strategy in the field of external security of 28 June 2016, but also to take action to accelerate the reform of the common security and defence policy (CSDP) and internal security policies such as the immigration, visa and asylum policies. These developments were also influenced by new circumstances, in the form of the Conference on the Future of Europe deliberating from 9 May 2021 to 9 May 2022, in all the languages of the Member States. This Conference presented one of the largest public debates in the history of the European Union and resulted, *inter alia*, in recommendations on the implementation of the system reform of the European Union.[2]

On 9 May 2022, the Executive Board of the Conference on the Future of Europe, consisting of the representatives of the European Parliament, the Council of the European Union and the European Commission, put forward a final report ('Report on the final outcome') containing 49 proposals for changes to mainly sectoral components of the European Union system. They concerned topics such as: climate and environmental protection; health protection; the economy, social justice and employment; the role of the European Union in the world; axiology, representative democracy and citizens' initiative; security; digital transformation; migration; education, culture, youth and sport. After 9 May 2022, the European Parliament, the Council of the European Union and the European Commission followed up, within their respective powers and in accordance with the Treaties, with a view to proposing system reforms in the European Union. However, unlike what the participants in the Conference on the Future of Europe had wished, these follow-up activities covered not only sectoral elements (specific EU policies) but also horizontal components of the EU system (broadly understood constitutional and institutional issues), including the revision of the Treaties.[3]

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[2] The Conference on the Future of Europe, Infographic, European Parliament, pp. 1–2, https://www.europarl.europa.eu/RegData/etudes/ATAG/2021/690610/EPRS_ATA(2021)690610_EN.pdf [accessed: 12 May 2024].

[3] Conference on the Future of Europe performance and the ongoing debate on EU reform (after 9 May 2022), pp. 1–2, https://oide.sejm.gov.pl/oide/en/index.php?option=com_content&view=article&id=15089&Itemid=1021 [accessed: 12 May 2024].

In these circumstances, four important proposals for the EU reform were developed or adopted. These were as follows: the report of the Franco-German Working Group of 18 September 2023;[4] the report of the European Parliament's Committee on Constitutional Affairs of 7 November of the same year; the draft revision Treaty; and the accompanying resolution, adopted 15 days later by the European Parliament's Plenary.[5] The report of the Franco-German Working Group was prepared by 12 experts, six from each country (the 'Group of Twelve'), the Rapporteurs being Olivier Costa (France) and Daniela Schwarzer (Germany). Although the experts denied that they represented the views of their respective Governments, they had been appointed by them during a joint meeting of the French and German Governments, and the Working Group was chaired by French Secretary of State for European Affairs Laurence Boone and German Minister of State for Europe and Climate Affairs Anna Lührmann. Nevertheless, the Working Group actually consisted of non-governmental experts from the two countries. In order to 'include a wider European perspective, the working group' was supposed to also 'reach out to other member states and candidates'.[6]

The report of the Committee on Constitutional Affairs of the European Parliament was prepared by 5 rapporteurs, i.e. the Belgian MEP Guy Verhofstadt (Belgium/RE), long known for his aspirations to federalise the European Union, and 4 German MEPs: Sven Simon (Germany/EPP), Gabriele Bischoff (Germany/S&D), Daniel Freund (Germany/G/EFA) and Helmut Scholz (Germany/Left). The draft revision Treaty of the European Parliament was based on, but did not coincide with, the report of the Committee on Constitutional Affairs. In fact, during the vote in the Plenary of the European

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[4] Report of the Franco-German Working Group on EU Institutional Reform. Sailing on High Seas: Reforming and Enlarging the EU for the 21st Century, Paris–Berlin – 18 September 2023, pp. 1–52, https://www.diplomatie.gouv.fr/IMG/pdf/20230919_group_of_twelve_report_updated14.12.2023_cle88fb88.pdf [accessed: 12 May 2024].

[5] Proposals of the European Parliament for the amendment of the Treaties. European Parliament resolution of 22 November 2023 on proposals of the European Parliament for the amendment of the Treaties (2022/2051(INL). Annex to the resolution. Proposals for the amendment of the Treaties, P9_TA(2023)0427, pp. 1–102, https://www.europarl.europa.eu/doceo/document/TA-9-2023-0427_EN.html [accessed: 12 May 2024].

[6] Report of the Franco-German Working Group on EU Institutional Reform, op. cit., p. 43.

Parliament on 22 November 2023, many of the amendments tabled by the Committee were rejected as too radical.

It should be stressed that the report of the EP Committee on Constitutional Affairs, the draft revision Treaty and the European Parliament Resolution differed from the report of the Franco-German Working Group on a number of important systemic issues. The last document did not provide for such a significant strengthening of the position of the European Parliament as was the case for the draft revision Treaty; it maintained the balance in the decision-making triangle of the European Union and saw the Union as a hybrid political system in which the general European interest should be pursued in three ways: by the European Commission, by representatives of EU citizens in the European Parliament, and by Government representatives in the European Council and in the Council of the European Union. These three sources of legitimacy were supposed to correspond to different modes of European action. The Community method would continue to apply to the definition and management of the most communitarised EU policies, in which the European Commission would play a central role and the European Parliament would guarantee democratic control, but key policy decisions in the EU, including those very important to national sovereignty, would still be taken at the intergovernmental level. According to the Franco-German Working Group, this tripartite and hybrid approach should be maintained and thus guarantee the stability and effectiveness of the EU political system, taking into account the current political and geopolitical realities and challenges in Europe.

The amendments to the existing Treaties tabled by the European Parliament and by the Franco-German Working Group differed in terms of both quantity and quality. The vast majority of the amendments proposed by the European Parliament required the application of the ordinary Treaty revision procedure (Article 48(2) to (5) TEU), whereas only a few could be made by the EU institutions on the basis of simplified revision procedures (Article 48(6) and (7) TEU) or under EU secondary law. In contrast, the amendments proposed by the Franco-German Working Group provided for a slightly lighter version of the revision of the Treaties, with only sixteen amendments, including nine requiring an ordinary revision of the Treaties and seven to be carried out by the EU institutions in accordance with the *passerelle* procedure or secondary law. The arguments of the authors from both entities, who tried to justify

the need for systemic changes, were sometimes very weak. Thus, the argument to reduce the composition of the European Commission to two thirds of the number of Member States on account of the envisaged enlargement of the European Union was just as weak as the justification for the need to convene an Intergovernmental Conference due to the necessary extension of the scope of qualified majority voting in the Council of the European Union to all EU policies (the Parliament's proposals) or to all policies except for the CSDP (as proposed by the Franco-German Working Group). Whereas the first amendment could be made under the present Article 17(5) TEU, the second one could be carried out by the European Council and the Council of the EU in accordance with the *passerelle* procedure. It would only be impossible for the CSDP, but even in that area an ordinary revision of the TEU would not be needed in all cases. In this context, it is important to mention the possibility of using the *passerelle* procedure to change the method of making decisions by the Council of the EU from unanimity to a qualified majority with regard to the imposition of sanctions on third countries or international organisations or decisions to send civilian missions to post-conflict territories.

2. The draft system changes tabled by the European Parliament and by the Franco-German Working Group. Comparative analysis

This chapter examines three documents of the European Parliament, namely the report of the Committee on Constitutional Affairs of 7 November 2023, the draft revision Treaty and the resolution adopted by the Plenary of the European Parliament on 22 November of the same year, as well as the report of the Franco-German Working Group drawn up just over two months earlier. The benchmark for the comparative analysis is the European Union's system, consisting of the horizontal and sectoral components mentioned above (cf. Introductory remarks). The European Parliament's draft revision Treaty provided for radical and comprehensive systemic changes, concerning as many as nine out of the twelve horizontal and twelve sectoral components of the EU system. In the Parliament's view, only international legal status, the catalogue of legal acts and legislative procedures and enhanced cooperation would remain unchanged. The report of the Franco-German Working Group, on the other hand, was much less comprehensive as the changes proposed

by the Working Group would affect only five out of the twelve horizontal elements of the EU system.

In general, the proposals for systemic changes presented by the European Parliament and the Franco-German Working Group can be divided into two categories: firstly, those relating to the same components of the EU system; secondly, those for systemic changes tabled exclusively by the European Parliament. The first category of proposals put forward by the European Parliament and by the Franco-German Working Group included changes to the following horizontal elements of the EU system: axiology; the EU's institutional system; the EU annual and multiannual budgets; enhanced cooperation; and the ordinary procedure for the revision of the Treaties. The second category comprised the following horizontal and sectoral components of the EU regime: the EU's integration objectives; axiology; representative democracy and citizens' initiative; the division of competences between the European Union and the Member States; the role of national parliaments in the EU's legislative process; the procedure for accession of new countries to the Union; external actions and policies, as well as internal actions and policies of the Union.

2.1. The proposals by the European Parliament and by the Franco-German Working Group regarding the same components of the EU system

2.1.1. Axiology of the European Union

Both the draft revision Treaty of the European Parliament and the report of the Franco-German Working Group contained very important proposals for changes in the axiology of the European Union. However, those amendments would require revising Article 2 TEU, Article 7(1) to (3) TEU and Article 3 of the Charter of Fundamental Rights of the European Union (CFR) by means of an Intergovernmental Conference. The most important of these proposals concerned the procedure laid down in Article 7 TEU, codifying guarantee standards of a repressive nature against Member States violating the values of the European Union. As regards the draft revision Treaty of the European Parliament, it provided for four changes to the procedure under Article 7 TEU. Firstly, it was recommended that qualified majority voting should replace the existing reinforced qualified majority of four fifths of the votes when the Council of the European Union should decide that 'there is

a clear risk of a serious breach' of EU values by a Member State. However, the Council of the European Union would have only six months to make such a determination, acting on a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission (Article 7(1) TEU) (phase I[7]). Secondly, it was proposed to introduce qualified majority for the decision when the Council of the European Union[8] should decide to submit an application to the CJEU on the existence of a serious and persistent breach by a Member State of EU values. It could also do so within six months of receiving a reasoned proposal by one third of the Member States, by the European Parliament, acting by a majority of its component members, or by the European Commission. Thus, for the first time, it was proposed to involve the CJEU in the procedure (Article 7(2) TEU). Thirdly, the CJEU would decide on the application after inviting the Member State in question to submit its observations (Article 7(2) TEU) (phase II). Fourthly, the repressive measures to be adopted by the Council of the European Union within six months of the determination of a serious and persistent breach of EU values would be substantially reinforced. These measures would include 'the suspension of commitments and payments from the Union's budget, or the suspension of certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council and the right of the Member State in question to hold the Presidency of the Council' (Article 7(3) TEU) (phase III).[9]

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[7] The existing provisions set no such time limit.

[8] Under the existing provisions, the European Council, acting by unanimity on a proposal by one third of the Member States or by the European Commission and after obtaining the consent of the European Parliament, could determine the existence of a serious and persistent breach by a Member State of EU values (Article 7(2) TEU).

[9] Under the existing provisions, such a measure was to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights in the Council of the European Union. Cf. Proposals of the European Parliament for the amendment of the Treaties, op. cit., p. 11. It is worth pointing out here that the EP draft also provided for strengthening the EU axiology by extending the catalogue of its objectives to the protection and promotion of the access to free and universal schooling, institutional and individual academic freedom and human rights, as defined in the CFR. Cf. ibidem, pp. 10–11.

The Franco-German Working Group proposed a slightly less stringent amendment to the procedure laid down in Article 7 TEU, calling for the replacement in phase II of unanimity in the European Council by a reinforced qualified majority of four fifths of the votes on the determination of a serious and persistent breach by a Member State of EU values. Like the European Parliament, the Working Group also proposed to specify time limits for the Council of the European Union and the European Council to take a position after the launch of the procedure. In addition, it supported the inclusion of automatic sanctions if the Council of the European Union should take no action for five years in the event of a serious and persistent breach by a Member State of EU values (Article 7(1) to (3) TEU).[10]

In addition to the procedure provided for in Article 7 TEU, the European Parliament's draft revision Treaty proposed to introduce the principle of gender equality in the catalogue of EU values instead of the existing principle of equality between women and men.[11] The draft revision Treaty also stipulated stronger protection of the rights of national minorities by adding to the TFEU provisions specifying that the European Union 'shall protect persons belonging to minorities, in line with the European Charter for Regional or Minority Languages and the Framework Convention for the Protection of National Minorities', to which the European Union should accede. The provisions 'facilitating the exercise of the rights of persons belonging to minorities' would be adopted by the European Parliament together with the Council of the European Union, acting in accordance with the ordinary legislative procedure (Article 24a (new) TFEU).[12] These amendments would require revising Article 2 TEU and Article 24 TFEU respectively by means of an Intergovernmental Conference. Moreover, the European Parliament put forward a very controversial proposal to introduce in Article 3 of the CFR of 7 December 2000 the right to 'bodily autonomy', understood as the right to 'free, informed, full and universal access to sexual and reproductive health and rights, and to all related healthcare services without discrimination, including the access to safe and legal abortion' (Article 3(2a) (new) CFR).[13]

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10 Report of the Franco-German Working Group on EU Institutional Reform, op. cit., p. 8.
11 Proposals of the European Parliament for the amendment of the Treaties, op. cit., p. 6.
12 Ibidem, p. 37.
13 Ibidem, p. 91.

This violated the exclusive competence of Member States in the field of health protection and medical care (Article 168(7) TFEU) and required amending Article 3 CFR by means of an Intergovernmental Conference as well. Table III presents both options for the revision of the EU axiology as proposed by the European Parliament and by the Franco-German Working Group.

Table III: Changes to the axiology of the EU as proposed by the European Parliament and by the Franco-German Working Group

Proposals of the European Parliament	**Proposals of the Franco-German Working Group**
Procedure under Article 7 TEU	
• Phase I of the procedure: the Council of the EU, acting by a qualified majority, determines whether there is a clear risk of a serious breach by a Member State of EU values. The Council makes such a determination within six months of receiving a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission. • Phase II of the procedure: the Council of the EU, acting by a qualified majority, may submit an application to the CJEU on the existence of a serious and persistent breach by a Member State of EU values. The CJEU decides on the application after inviting the Member State in question to submit its observations. The Council makes such a submission within six months of receiving a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission. • Phase III of the procedure: the measures to be taken by the Council of the EU within six months of such a determination of a serious and persistent breach of EU values should be as follows: 'the suspension of commitments and payments from the Union's budget, or the suspension of certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council and the right of the Member State in question to hold the Presidency of the Council' *Modus operandi*: revising Article 7(1) to (3) TUE	• Phase II of the procedure: the European Council, acting by a reinforced qualified majority of four fifths of the votes, determines the existence of a serious and persistent breach by a Member State of EU values. • Phases I to III of the procedure: introducing specific time limits for the Council of the EU and the European Council to take a position after the launch of the procedure. In the event of inaction by those institutions for five years, automatic sanctions will be imposed on such a Member State in a serious and persistent breach of EU values *Modus operandi* for the two amendments: revising Article 7(1) to (3) TUE

(*Continued*)

Table III: (*Continued*)

Proposals of the European Parliament	Proposals of the Franco-German Working Group
Catalogue of the Union's values (Article 2 TEU)	
• Replacement of the principle of equality between women and men with that of gender equality *Modus operandi*: revising Article 2 TUE	No proposal
Right to the integrity of the person (Article 3 CFR)	
• The right to 'bodily autonomy', understood as the right to 'free, informed, full and universal access to sexual and reproductive health and rights, and to all related healthcare services without discrimination, including the access to safe and legal abortion' *Modus operandi*: revising Article 3 CFR	No proposal

Source: prepared by the author on the basis of the Proposals of the European Parliament for the amendment of the Treaties, op. cit., pp. 8–9, 11–12, 37, 42–43, 91, 101–102. Report of the Franco-German Working Group on EU Institutional Reform, op. cit., p. 8.

2.1.2. The institutional system of the EU

The European Parliament and the Franco-German Working Group also put forward very important proposals for changes to the institutional system of the European Union; as regards the documents of the European Parliament, the report of the Committee on Constitutional Affairs of 7 November 2023 went much further than the draft revision Treaty of 22 November of the same year. Additionally, it should be noted that the European Parliament's proposals concerned all the EU institutions except the European Central Bank, whereas those of the Franco-German Working Group excluded the European Council, the Court of Auditors and the ECB. Table IV Part A-F shows both options for the revision of the EU's institutional system as proposed by the European Parliament and by the Franco-German Working Group.

2.1.2.1. The European Council

In its draft revision Treaty of 22 November 2023, the European Parliament advocated strengthening the nominating powers of the European Council and minor modifications to the names of its members. In the procedure of electing the President of the European Commission, the roles of the Parliament and of the European Council would be reversed. The European Parliament, acting

by a majority of its component members, would nominate to the European Council a candidate for President of the European Commission, whereas the European Council would elect them, acting by qualified majority or by a simple majority, but only if the election procedure should be repeated (Article 17(7) TEU). The European Council should consist of the Heads of State or Government, the 'President of the European Union' (President of the Executive, under the existing provisions – of the European Commission) and the Union Secretary for Foreign Affairs and Security Policy (under the existing provisions – the High Representative of the Union for Foreign Affairs and Security Policy) (Article 15(2) TEU).[14] The two amendments would require revising Article 15(2) TEU and Article 7(7) TEU, respectively, by means of an Intergovernmental Conference (cf. Table IV Part A).

Table IV: Changes to the institutional system of the EU as proposed by the European Parliament and by the Franco-German Working Group

A: European Council	
Proposals of the European Parliament	**Proposals of the Franco-German Working Group**
• Composition: the President of the European Council, the Heads of State or Government and the President of the Executive. The Union Secretary for Foreign Affairs and Security Policy takes part in the work of the European Council *Modus operandi:* revising Article 15(2) TEU	None
• Procedure for appointing the President of the Executive: the European Parliament, acting by a majority of its component members, nominates to the European Council a candidate for President. The European Council, rather than the European Parliament as under the existing provisions, gives its consent, acting by a qualified majority in the first round or by a simple majority in a second round (reversal of roles) *Modus operandi:* revising Article 17(7) TEU	None

Source: prepared by the author on the basis of the Proposals of the European Parliament for the amendment of the Treaties, op. cit., pp. 14–16, 18, 19, 20–22, 24–25, 32, 77–78, 85–86, 94–95. Committee on Constitutional Affairs. Proposals of the European Parliament for the amendment of the Treaties, 2022/2051 (INL), op. cit., pp. 21–23. Report of the Franco-German Working Group on EU Institutional Reform, op. cit., p. 9.

[14] Ibidem, pp. 16, 22.

2.1.2.2. The Council of the European Union

Both the European Parliament and the Franco-German Working Group proposed extending the application of qualified majority voting in the Council of the European Union, and thus the extension of the ordinary legislative procedure to new articles and cases. In my view, this was the first of the two most radical proposals of the European Parliament and of the Franco-German Working Group. The European Parliament's draft revision Treaty provided for extending the application of qualified majority voting to 65 new cases, i.e. in fact, to all EU policies requiring unanimity under the existing provisions,[15] and for the extension of the ordinary legislative procedure to 21 new cases. At the same time, the report of the Working Group pointed to the need to extend the application of qualified majority voting and of the ordinary legislative procedure to all EU policies, with the exception of the common foreign and security policy (CFSP) and the CSDP. According to the Working Group, the extension of the application of qualified majority voting to new cases required the automatic introduction of the ordinary legislative procedure.[16] In the absence of agreement between the Governments of the Member States on the issue, the Working Group proposed to introduce safeguards into policies that would be subject to a qualified majority, inspired by the provisions of Article 31(2) TEU, or opt-outs for the Member States opposed to such an amendment.[17]

In addition, the Franco-German Working Group proposed that unanimous decision-making be replaced by qualified majority voting before the EU enlargement, through the *passerelle* procedure (Article 48(7) TEU). Should this prove not possible, a package solution was recommended, i.e. creating three interlinked conditions as a basis for a gradual transition towards qualified majority voting in the following areas: (1) EU enlargement and axiology; (2) CFSP and CSDP; (3) fiscal and tax policy. With regard to the accession of new EU Member States, individual negotiation chapters should be subject to qualified majority voting in order to streamline the process of EU enlargement, but unanimity would still be required for the final ratification

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[15] Ibidem, p. 18.

[16] Report of the Franco-German Working Group on EU Institutional Reform, op. cit., p. 10.

[17] Ibidem.

of the Accession Treaties. Simultaneously, Member States should accept more stringent rules on the enforcement of EU values, allowing sanctions to be imposed for any violation thereof, which would require a majority of four fifths of the votes in the Council of the European Union (determination of the existence of a risk of a breach of EU values) and four fifths of the votes in the European Council (determination of the existence of a breach of EU values). As for the CFSP and the CSDP, decisions on defence initiatives, such as the use of the European Peace Facility or the European Defence Fund, should be taken by a qualified majority (alternatively, by a reinforced qualified majority). However, unanimity should be maintained, *inter alia*, on the contribution of individual Member States to EU military missions and operations. Finally, as regards fiscal and tax policy, the European Union would provide the legal basis for both establishing a larger pool of own resources and for greater tax policy harmonisation for Member States.[18]

With respect to the decision-making mechanism in the Council of the European Union, the draft revision Treaty of the European Parliament provided for three forms of voting: although the Council would act, in principle and as under the existing provisions, by a qualified majority, it could also act by a reinforced qualified majority or by a simple majority where the Treaties so provided.[19] The report of the Committee on Constitutional Affairs of the EP, i.e. the original document, went even further in its demand that the rule of decision-making in the Council of the European Union be a simple majority of the votes [sic!]. With regard to the definition of qualified majority, although the draft revision Treaty of the European Parliament did not provide for its amendment, the authors of the report of the Committee on Constitutional Affairs of the EP proposed that a qualified majority be at least two thirds (66.66%) of the Council members (18 Member States) representing at least 50% of the EU population, a reinforced qualified majority – four fifths (80%) of the Council members representing at least 50% of the EU population, whereas a simple majority – a majority of the Council members

[18] Ibidem, pp. 27–28.

[19] Proposals of the European Parliament for the amendment of the Treaties, op. cit., p. 18.

representing at least 50% of the EU population.[20] The report of the Franco-German Working Group explicitly supported the need to agree on a new definition of qualified majority. It would be constituted by 60% of the component members of the Council (17 Member States), comprising at least 60% of the EU population.[21] However, in all the documents under review, the blocking minority was not clearly defined, which could provide a platform for future negotiations between the Governments of individual Member States. The last amendments proposed by the European Parliament and by the Franco-German Working Group were to introduce provisions abolishing the formations (or configurations) of the Council of the European Union (the draft revision Treaty of the EP)[22] and extending the 'trio' format to a 'quintet' of Presidencies of the Council of the European Union, with each Member State holding the Presidency for six months (the report of the Working Group).[23]

It is worth noting that almost all of the above-mentioned changes regarding the Council of the European Union would require revising Article 16(4) and (6) TEU by means of an Intergovernmental Conference. This concerned, in particular, the new definition of qualified majority, opt-outs, safeguards and the extension of the application of qualified majority voting to the CFSP/CSDP (Article 16(4) TEU) as well as the abolition of the formations of the Council of the European Union (Article 16(6) TEU). Only the replacement of unanimity by a qualified majority, although with the exception of the CFSP/CSDP, could be carried out in accordance with the existing *passerelle* procedure, whereas the extension of the 'trio' format to a 'quintet' of Presidencies of the EU would only require amending the Rules of Procedure of the Council of the European Union (cf. Table IV Part B).

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[20] Committee on Constitutional Affairs. Proposals of the European Parliament for the amendment of the Treaties, 2022/2051 (INL), Annex, pp. 21–23, https://www.europarl.europa.eu/doceo/document/A-9-2023-0337_PL.pdf [accessed: 12 May 2024].

[21] Report of the Franco-German Working Group on EU Institutional Reform, op. cit., pp. 10, 27–29.

[22] Proposals of the European Parliament for the amendment of the Treaties, op. cit., pp. 18–19.

[23] Report of the Franco-German Working Group on EU Institutional Reform, op. cit., p. 9.

Table IV: Changes to the institutional system of the EU as proposed by the European Parliament and by the Franco-German Working Group

B: Council of the European Union	
Proposals of the European Parliament	**Proposals of the Franco-German Working Group**
• Extension of the application of qualified majority voting to 65 new cases, i.e. to almost all EU policies and activities *Modus operandi:* the *passerelle* procedure or Treaty revision in the area of CSDP	• Replacement of unanimity by qualified majority voting in all EU policies except for CFSP/CSDP. *Modus operandi:* the *passerelle* procedure • Alternatively, in the absence of consensus between the Member State Governments, the introduction of safeguards into policies subject to qualified majority voting or of opt-outs only for the Member States opposed to the amendment *Modus operandi:* revising Article 16(4) TEU
• Definition of qualified majority: two thirds (66%) of the votes of the members of the Council of the EU (at least 18 Member States), represented by at least 50% of the EU population • Blocking minority: three Member States represented by 34% of the EU population (a change implied rather than explicitly indicated in the proposal) *Modus operandi:* revising Article 16(4) TEU	• Definition of qualified majority: 60% of the votes of the members of the Council of the EU (at least 17 Member States), represented by at least 60% of the EU population • Blocking minority: four Member States represented by 40% of the EU population (a change implied rather than explicitly indicated in the proposal) *Modus operandi:* revising Article 16(4) TEU
• Definition of reinforced qualified majority: four fifths (80%) of the votes of the members of the Council of the EU (at least 22 Member States), represented by at least 50% of the EU population • Blocking minority: two Member States represented by at least 20% of the EU population (unspecified) *Modus operandi:* revising Article 16(4) TEU	None

(*Continued*)

Table IV: (Continued)

B: Council of the European Union	
Proposals of the European Parliament	**Proposals of the Franco-German Working Group**
• Definition of simple majority: 51% of the members of the Council of the EU (at least 14 Member States) *Modus operandi for all the amendments*: revising Article 16(3) TUE	None
• Elimination of formations of the Council of the EU *Modus operandi*: revising Article 16(6) TEU and Article 236 TFEU	• five-member Presidency held by each Member State for 6 months (a 'quintet' of presidencies) *Modus operandi:* revising the Rules of Procedure of the Council of the EU

Source: prepared by the author on the basis of the Proposals of the European Parliament for the amendment of the Treaties, op. cit., pp. 14–16, 18, 19, 20–22, 24–25, 32, 77–78, 85–86, 94–95. Committee on Constitutional Affairs. Proposals of the European Parliament for the amendment of the Treaties, 2022/2051 (INL), op. cit., pp. 21–23. Report of the Franco-German Working Group on EU Institutional Reform, op. cit., p. 9.

2.1.2.3. The European Commission

Both the draft revision Treaty of the EP and the report of the Franco-German Working Group proposed reducing the composition of the College of the European Commission to two thirds of the number of Member States. However, it was no new proposal; that option is provided for in Article 17(5) TEU, in force since 1 December 2009. Furthermore, these provisions authorised the European Council, acting unanimously, to alter the number of members of the College of the European Commission. It meant that such an amendment required a decision of the European Council rather than revising the Treaties.[24]

In the event of opposition from some Member States, as anticipated by the French and German originators of the amendments,[25] the Working Group

[24] Proposals of the European Parliament for the amendment of the Treaties, op. cit., p. 21. Report of the Franco-German Working Group on EU Institutional Reform, op. cit., p. 25.

[25] Report of the Franco-German Working Group on EU Institutional Reform, op. cit., p. 26.

report also provided for an alternative solution, similar to the proposal of the 2002–2003 Convention, i.e. differentiation between two categories of members of the College of the European Commission: half of them would be 'Lead Commissioners' (senior commissioners) and the other half would be (corresponding) 'Commissioners', with potentially only 'Lead Commissioners' having voting rights. One Lead Commissioner and one Commissioner would form a team responsible for the same area of integration activities ('portfolio') and should not belong to the same parliamentary political group. Thus, Member States would have to accept that they would play a leading role only for half a term or every other term, but they would be physically represented in each Commission term in return. However, should Commissioners be deprived of the right to vote in the College of the European Commission,[26] it would be necessary to amend Article 17(5) and (7) TEU by means of an Intergovernmental Conference.

Unlike the report of the Franco-German Working Group, the European Parliament documents provided for renaming the European Commission as the European Executive (EP resolution) or the Executive (draft revision Treaty of the EP), which corresponded to the above-mentioned federal perspective of changes in the EU system and required amending Article 17(1) to (4) and (6) to (8) TEU by means of an Intergovernmental Conference. The Executive would be composed of the President, Commissioners and the two Union Secretaries: the Union Secretary for Foreign Affairs and Security Policy, and the Union Secretary for Economic Governance.[27] In addition, the draft revision Treaty provided for a change in the procedure for appointing the President of the European Commission, by 'reversing the roles' of the European Parliament and of the European Council in that appointment[28] (cf. Table IV Part C).

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[26] Ibidem, pp. 25–26.

[27] Ibidem. The latter amendment was partly in line with the European Commission's proposal of 6 December 2017 to create the post of a European Minister of Economy and Finance, to combine the existing functions of the Commissioner in charge of economy and finance and of the President of the Eurogroup. Such an amendment could be made under Article 2 of Protocol No 14 on the Euro Group, that is, without the need to revise the Treaties. For more on the subject, cf. J.J. Węc, The System Reform of the Economic and Monetary Union, op. cit., pp. 171–172, 179–180.

[28] Proposals of the European Parliament for the amendment of the Treaties, op. cit., pp. 20–22.

Table IV: Changes to the institutional system of the EU as proposed by the European Parliament and by the Franco-German Working Group

C: European Commission	
Proposals of the European Parliament	**Proposals of the Franco-German Working Group**
• Composition: the President of the Executive, its members, the Union Secretary for Foreign Affairs and Security Policy and the Union Secretary for Economic Governance *Modus operandi*: revising Article 17(1) to (4) and (6) to (8) TEU	• Limiting the composition of the European Commission to two thirds of the Member States *Modus operandi:* European Council Decision pursuant to Article 17(5) TEU
• New composition: two thirds of the Member States *Modus operandi:* European Council Decision pursuant to Article 17(5) TEU	• Alternatively, introducing a hierarchy in the European Commission: half the College – Lead Commissioners with voting rights, the other half – (corresponding) Commissioners with or without voting rights. The Lead Commissioner and the Commissioner (in a team) should not belong to the same political family (parliamentary group) *Modus operandi:* European Council Decision pursuant to Article 17(5) TEU. If Commissioners should have no voting rights, revising Article 17(5) and (7) TEU
• Procedure for appointing the President of the Executive: President elected by the European Parliament and approved by the European Council (reversal of roles) *Modus operandi:* revising 17(7) TEU	None

Source: prepared by the author on the basis of the Proposals of the European Parliament for the amendment of the Treaties, op. cit., pp. 14–16, 18, 19, 20–22, 24–25, 32, 77–78, 85–86, 94–95. Committee on Constitutional Affairs. Proposals of the European Parliament for the amendment of the Treaties, 2022/2051 (INL), op. cit., pp. 21–23. Report of the Franco-German Working Group on EU Institutional Reform, op. cit., p. 9.

2.1.2.4. The European Parliament

Both the draft revision Treaty of the EP and the report of the Franco-German Working Group included demands for strengthening the powers of the

European Parliament. However, quite predictably, the EP draft called for far-reaching changes, whereas the Working Group report was much more moderate in this respect. Thus, the draft revision Treaty included, *inter alia*, provisions giving the European Parliament: (1) the right of initiative in the ordinary legislative procedure, i.e. with regard to 95% of draft legal acts; (2) the right to propose a legal act based on any valid citizens' initiative; (3) the right to vote on a motion of individual censure of a Commissioner in the College of the European Commission;[29] (4) the right to adopt, together with the Council of the European Union and acting in accordance with the ordinary legislative procedure, a regulation laying down the multiannual financial framework; (5) the right to lay down jointly with the Council of the EU, the latter acting by a reinforced qualified majority, in accordance with a special legislative procedure, implementing measures for the Union's own resources system;[30] (6) the right to consent to decisions of the European Council and of the Council of the European Union, acting by a qualified majority, with regard to the definition and implementation of the CFSP; and (7) the right to give its consent 'to the amendments to the Treaties' in accordance with the ordinary revision procedure 'when a majority of its component Members vote to do so'.[31] It is worth noting that the adoption of the first six proposals would upset the existing balance in the decision-making triangle as it would severely restrict the powers of the Commission and of the Council of the European Union. In contrast, the report of the Working Group only demanded that the role of the European Parliament be strengthened by giving it the right to consent to the opening of a procedure for granting financial assistance to a Member State in the event of a natural disaster or exceptional occurrences.[32] It must be stressed that the implementation of all the proposed amendments would require revising Articles 11(4) TEU, Articles 225, 234, 294, 311 and 312(1) and (2) TFEU (the EP's draft), and Article 122 TFEU (the report of the Working Group), by means of an Intergovernmental Conference.

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29 Under the existing provisions, the Court of Justice of the European Union has such powers.

30 Proposals of the European Parliament for the amendment of the Treaties, op. cit., pp. 14, 77–78, 85–86, 94–95.

31 Ibidem, pp. 24–25, 32.

32 Report of the Franco-German Working Group on EU Institutional Reform, op. cit., pp. 10, 36–37.

In addition, the European Parliament called for a 'reversal of roles' in determining its composition. The composition of the European Parliament would be established by the Parliament itself, with the consent of the Council of the European Union, acting by a reinforced qualified majority, rather than by the European Council, acting by unanimity, but with the consent of the Parliament.[33] However, this amendment would also involve revising Article 14(2) TEU by means of an Intergovernmental Conference. Further, both documents also referred to the EP electoral law. The European Parliament demanded that the EP itself, acting by a majority of its component members in accordance with a special legislative procedure and after obtaining the consent of the Council of the EU, acting by a reinforced qualified majority,[34] draw up a proposal for and adopt a regulation to lay down the provisions necessary for the election of its members by direct universal suffrage in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States;[35] the Working Group only advocated further harmonisation of national electoral laws (by 2029).[36] Whereas the EP's proposals required a revision of Article 223(1) TFEU by means of an Intergovernmental Conference, the amendments tabled by the Working Party could be made under secondary law. The latter also called for a new system of the allocation of seats in the European Parliament in connection with the envisaged enlargement of the European Union, which would only involve the adoption of a decision by the European Council, acting on a proposal from the EP, on the basis of secondary law as well[37] (cf. Table IV Part D).

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[33] Proposals of the European Parliament for the amendment of the Treaties, op. cit., p. 15.

[34] Under the existing provisions, this power belongs to the Council of the European Union, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the EP (Article 223(1) TFEU).

[35] Proposals of the European Parliament for the amendment of the Treaties, op. cit., p. 76.

[36] Report of the Franco-German Working Group on EU Institutional Reform, op. cit., pp. 30–31.

[37] Ibidem, pp. 9, 24.

Table IV: Changes to the institutional system of the EU as proposed by the European Parliament and by the Franco-German Working Group

D: European Parliament	
Proposals of the European Parliament	**Proposals of the Franco-German Working Group**
• Legislative initiative of the European Parliament in the ordinary legislative procedure *Modus operandi:* revising Articles 225 and 294 TFEU • The right to propose a legal act based on any valid citizens' initiative *Modus operandi*: revising Article 11(3) and (4) TUE	• Strengthening the position of the European Parliament: consent to adopting measures for granting financial assistance to a Member State in the event of a natural disaster or exceptional occurrences *Modus operandi*: revising Article 122 TFEU
• European Parliament Regulation on the uniform electoral law *Modus operandi:* secondary law	• Harmonisation of national electoral laws for elections to the European Parliament (from 2029) *Modus operandi:* secondary law
• The European Parliament will establish its composition, subject to the consent of the Council of the EU, acting by a reinforced qualified majority *Modus operandi:* revising Article 14(2) TEU	• Maintaining or reducing the existing number of seats *Modus operandi:* Decision of the European Council, acting on a proposal from the European Parliament • A new system for seat allocation to the Member States in the context of EU enlargement *Modus operandi:* Decision of the European Council, acting on a proposal from the European Parliament
• A motion of individual censure of a member of the Executive or a motion of collective censure of the Executive to be carried by the European Parliament, acting by a simple majority *Modus operandi:* revising Article 234(2) TFEU	None

Source: prepared by the author on the basis of the Proposals of the European Parliament for the amendment of the Treaties, op. cit., pp. 14–16, 18, 19, 20–22, 24–25, 32, 77–78, 85–86, 94–95. Committee on Constitutional Affairs. Proposals of the European Parliament for the amendment of the Treaties, 2022/2051 (INL), op. cit., pp. 21–23. Report of the Franco-German Working Group on EU Institutional Reform, op. cit., p. 9.

2.1.2.5. The Court of Justice of the European Union

The draft revision Treaty adopted by the European Parliament called for the extension of the jurisdiction of the Court of Justice of the European Union to the common foreign and security policy, the area in which the existing provisions only stipulated procedural functions for it (Article 24 TEU),[38] as well as for strengthening its powers to monitor compliance with the principle of subsidiarity by conferring on it the right to give preliminary rulings on the abuse or misuse of EU competences ('whether the Union has acted *ultra vires*') and to address actions brought under Article 263 TFEU on the grounds of infringement of the principle of subsidiarity (Article 19(3a) (new) TEU).[39] However, the two amendments would require revising Articles 19 and 24 TEU and Article 263 TFEU by means of an Intergovernmental Conference.

The Franco-German Working Group proposed the creation of a 'Joint Chamber of the Highest Courts and Tribunals of the EU' to institutionalise dialogue between European courts and the courts of the Member States. Thus, the existing and rather numerous informal contacts between these courts would be placed in a 'more formal setting, but without the authority to take binding decisions', which would in turn strengthen mutual understanding between them[40] (cf. Table IV Part E). The rationale for the proposed change was the long-standing dispute between the CJEU and the constitutional courts of the Member States over 'who is the ultimate arbiter of the reach and the limits of EU competence'. The CJEU regarded itself as the 'court of competence', whereas the constitutional courts of a number of EU Member States, such as Germany, the Czech Republic, Denmark, France, Spain, Romania and Italy, believed that they were the 'ultimate arbiters' of the limits of the competence of the European Union.

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[38] Proposals of the European Parliament for the amendment of the Treaties, op. cit., p. 25.

[39] Ibidem, p. 24.

[40] Report of the Franco-German Working Group on EU Institutional Reform, op. cit., pp. 9, 24, 37.

Table IV: Changes to the institutional system of the EU as proposed by the European Parliament and by the Franco-German Working Group

E: Court of Justice of the EU	
Proposals of the European Parliament	**Proposals of the Franco-German Working Group**
• Strengthening the powers of the CJEU to monitor compliance with the principle of subsidiarity	None
• Giving preliminary rulings on whether the Union has acted *ultra vires* (abuse of powers by the EU institutions) *Modus operandi:* revising Article 19(3) TEU	• Creation of a 'Joint Chamber of the Highest Courts and Tribunals of the EU' *Modus operandi:* secondary law • Non-binding dialogue between the European courts and the courts of the Member States *Modus operandi:* secondary law
• The CJEU has jurisdiction with respect to the CFSP *Modus operandi:* revising Article 24(1) TEU	None

Source: prepared by the author on the basis of the Proposals of the European Parliament for the amendment of the Treaties, op. cit., pp. 14–16, 18, 19, 20–22, 24–25, 32, 77–78, 85–86, 94–95. Committee on Constitutional Affairs. Proposals of the European Parliament for the amendment of the Treaties, 2022/2051 (INL), op. cit., pp. 21–23. Report of the Franco-German Working Group on EU Institutional Reform, op. cit., p. 9.

Further in the analysis, for the sake of transparency, the focus is on the case-law of the Constitutional Court of the Republic of Poland and of the Federal Constitutional Court in Germany (BVerfG).

As far as the Constitutional Court of the Republic of Poland is concerned, in the grounds of its judgment of 11 May 2005 on the constitutionality of the Accession Treaty of 16 April 2003, it ruled that the principle of the primacy of Community law was contrary to the provisions of Article 91(3) of the Constitution of the Republic of Poland, allowing of the primacy of the law established by an international organisation over Polish law, but only – at most – over a statutory law and not over the Constitution. Further on the grounds of the judgment, the Polish Constitutional Court stated that no conflict between a constitutional norm and a norm of Community law could in any case be resolved in the Polish legal system by recognising the primacy

of a Community norm in relation to a constitutional norm. It could neither lead to the loss of binding force of any existing constitutional norm and its replacement by a Community norm nor to the limitation of its application to an area not covered by Community law.[41] The same line of case-law was reiterated by the Polish Constitutional Court in its subsequent judgments. Thus, on the grounds of its judgment of 19 December 2006, the Constitutional Court stated that, due to the provisions of Article 8(1) of the Constitution, it was obliged to understand its position in such a way that in fundamental matters of a constitutional and systemic nature it would retain the position of the 'ultimate arbiter'. The Court of Justice and the Constitutional Court of the Republic of Poland could not be treated as competing courts. It is not only about eliminating the phenomenon of duplication of the two Courts or of a double-track adjudication of the same legal problems, but also about removing the dysfunctionality in the relations of the Community and domestic legal orders. According to the Polish Constitutional Court, the different roles of the two Courts must be pointed out.[42]

In its judgement of 24 November 2010 on the constitutionality of the Treaty of Lisbon of 13 December 2007, the Polish Constitutional Court held that, according to the prevailing view in the literature on international law, the concept of absolute, unlimited sovereignty was a thing of the past. Further, it stated that there was a distinction between restrictions on sovereignty, based on the will of the State, in accordance with international law, and violations of sovereignty, contrary to the will of the State and incompatible with international law. The Constitutional Court expressed its belief that the assumption and performance of international obligations did not lead to the loss of or limitation on the sovereignty of the State, being the confirmation thereof instead; the membership of European structures in fact constituted an expression of national sovereignty rather than restricting it. The guarantee of the preservation of the constitutional identity of the

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[41] Judgment of the Constitutional Court of 11 May 2005, file ref. K 18/04. Poland's Membership in the European Union (the accession Treaty). Grounds of the judgement of the Constitutional Court of 11 May 2005, file ref. K 18/04, pp. 6, 43, https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20050860744/T/D20050744TK.pdf [accessed: 11 July 2024].

[42] Decision of the Constitutional Court of 19 December 2006, file ref. P 37/05, p. 6, https://www.saos.org.pl/judgements/107651 [accessed: 11 July 2024].

Republic of Poland would remain Article 90 of the Constitution and the limits of the conferral of powers specified therein.[43] On the grounds of its judgment of 16 November 2011 (file ref. SK 45/09), the same Court stated that in the event of a conflict between the decisions of the Constitutional Court of the Republic of Poland and of the CJEU, pursuant to Article 8(1) of the Constitution of the Republic of Poland, the Constitutional Court was obliged to understand its position in such matters of principle, of a constitutional dimension, as that of the 'ultimate arbiter'.[44] Finally, in its judgment of 14 July 2021, sharing the view of the BVerfG in Germany, expressed on the grounds of its judgment of 5 May 2020 as discussed below, the Polish Constitutional Court held that Article 4(3) TEU in conjunction with Article 279 TFEU, insofar as the CJEU should impose *ultra vires* obligations on the Republic of Poland as a Member State of the European Union by issuing provisional measures relating to the system and jurisdiction of the Polish courts and the procedure before the Polish courts, was incompatible with Article 2, Article 7, Article 8(1) and Article 90(1) in conjunction with Article 4(1) of the Constitution of the Republic of Poland and, in this respect, was not subject to the principles of primacy and direct application specified in Article 91(1) to (3) of the Constitution. However, on the grounds of that judgment, the Constitutional Court stated that the principle of the conferral on the European Union of the power to adopt legislation directly applicable in the Member States led to a situation of a permanent conflict-of-law. It was apparent, to the Constitutional Court, that the European Union only had the powers conferred on it by the Member States acting on the basis of their respective constitutions (basic laws). Therefore, the European Union acted *ultra vires* where it violated the limits of those powers as conferred by the Treaties. In addition, the Constitutional Court stated that, within its constitutional powers and in order to protect Poland's constitutional identity, it had the right and duty to examine, as an *ultra vires* review, the constitutionality not only of the Community's primary law, but also of the norms of secondary law and supplementary law of the Community. To adopt

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[43] Judgment of the Constitutional Court of 24 November 2010, file ref. K 32/09, pp. 17–19, https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20102291506/T/D20101506TK.pdf [accessed: 11 July 2024].

[44] Ibidem, p. 14.

a different position, according to which the Constitutional Court would have the right to review acts of primary law, but without the right to perform a basic review of the norms of secondary or supplementary law, would be contrary to the principles of logic and of rational reasoning.[45]

As regards the German Federal Constitutional Court, in its ruling of 30 June 2009 on the compatibility of the Treaty of Lisbon with the Basic Law of the Federal Republic of Germany, it reserved the right to double-check EU legislation. It was to check that such provisions complied with the principle of conferral and the principle of subsidiarity (*ultra vires* review) and that they did not threaten the 'inviolable core of German constitutional identity' within the meaning of Article 23(1), third sentence, in conjunction with Article 79(3) of the Basic Law (constitutional identity review). In its view, both the *ultra vires* review and the constitutional identity review could, in the future, lead to acts of Union law being declared inapplicable by the Federal Constitutional Court. Their inapplicability could be declared if the principle of the primacy of EU law should lack the constitutive grounds for application (*konstitütiver Rechtsanwendungsbefehl*). The constitutional courts of the Member States of the European Union and, in any case, the German Federal Constitutional Court – as apparent from the Basic Law – could not be deprived of the responsibility for guaranteeing the constitutional limits on the integration authorisation and the non-conferrable constitutional identity. After all, as argued by the Federal Constitutional Court, German law was the source of the principle of the primacy of EU law, whereas the jurisdiction of the BVerfG was derived from the sovereignty of Germany as a Member State of the European Union.[46] It is worth noting that the 'sensational' redefinition of the German Federal Constitutional Court's own role as the guardian of 'constitutional identity' could and in fact did lead in the future to conflicts of its case-law with that of the CJEU. This was also the context for understanding the ruling of the BVerfG of 5 May

[45] Judgment of the Constitutional Court of 14 July 2021, file ref. P 7/20. Grounds of the judgment of the Constitutional Court of 14 July 2021, file ref. P 7/20, pp. 42–43, https://bip.brpo.gov.pl/sites/default/files/2021-09/Wyrok_uzasadnienie_TK_14.07.2021.pdf [accessed: 11 July 2024].

[46] BVerfG, Vertrag von Lissabon, op.cit., pp. 1, 66–67.

2020 on the public sector asset purchase programme, in which it held that Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme, amended by Decision (EU) 2017/100 of the ECB of 11 January 2017,[47] as well as the judgment of the Court of Justice of the European Union (CJEU) of 11 December 2018 accepting quantitative easing by the ECB,[48] were acts issued outside the scope of its competence, i.e. amounting to *ultra vires* acts, regarding them as partly contrary to EU law. The BVerfG thus opposed the judgment, given by the CJEU in Luxembourg in December 2018, accepting the ECB's action.[49] The ruling of the German Federal Constitutional Court of 5 May 2020 also established a very important precedent as for the first time in the history of the European Union the BVerfG so explicitly objected to a judgment of the CJEU and even found that the judgment concerned did not bind the Federal Republic of Germany.

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47 Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme (ECB/2015/10), Official Journal of the European Union L, 121, 14.5.2015, p. 20–24. Decision (EU) 2017/100 of the European Central Bank of 11 January 2017 amending Decision (EU) 2015/774 on a secondary markets public sector asset purchase programme (ECB/2017/1), Official Journal of the European Union L, 16, 20.1.2017, p. 51–52.

48 The judgment of the Court of Justice of the EU was given on 11 December 2018, as a preliminary ruling requested by the BVerfG with regard to quantitative easing in 2017. The Grand Chamber of the Court of Justice of the EU then ruled, inter alia, that the PSPP did not exceed the ECB's mandate as the programme concerned the area of the Union's exclusive competence for the euro area Member States and did not infringe the principle of proportionality, cf. Judgment of the Court (Grand Chamber) of 11 December 2018, Case C-493/17, ECLI:EU:C:2018:1000, https://curia.europa.eu/juris/document/ [accessed: 25 September 2024]. Court of Justice of the European Union. Press release No 192/18, Luxembourg, 11 December 2018, Judgment in Case C-493/17. Heinrich Weiss and Others, p. 2), https://curia.europa.eu/jcms/ [accessed: 27 September 2024].

49 BVerfG. 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16. Leitsätze zum Urteil vom 5. Mai 2020, pp. 1–3, https://www.Bundesverfassungsgericht.de/ [accessed: 25 September 2024]. BVerfG. 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16. Urteil vom 5. Mai 2020, pp. 86–88, https://www.Bundesverfassungsgericht.de/ [accessed: 25 September 2024].

2.1.2.6. The Court of Auditors

The draft revision Treaty of the European Parliament also proposed limiting the composition of the Court to two thirds of the number of Member States, including its President. Its members would be appointed by the Council of the European Union by a qualified majority for a six-year term, renewable, on the basis of a rotation system and after obtaining the consent of the European Parliament, rather than after consulting the European Parliament, as stipulated by the existing provisions (Article 285, paragraph 2a (new), TFEU). The rotation system would be established by a qualified majority by the European Council in accordance with Article 244 TFEU (Article 286(2), subparagraph 1, TFEU). However, both amendments would require amending Article 285 TFEU (new paragraph 2a) and Article 286(2) TFEU in accordance with the ordinary revision procedure (cf. Table IV Part F).

Table IV: Changes to the institutional system of the EU as proposed by the European Parliament and by the Franco-German Working Group

F: Court of Auditors	
Proposals of the European Parliament	**Proposals of the Franco-German Working Group**
• The number of members limited to two thirds of the number of Member States, to be chosen on the basis of a system of rotation *Modus operandi*: revising Article 285 TFEU	None
• The Auditors are appointed by the Council of the EU, acting by a qualified majority after obtaining the consent of the European Parliament (under the existing provisions, after consulting the European Parliament), for a term of six years *Modus operandi:* revising Article 286(2) TFEU	None

Source: prepared by the author on the basis of the Proposals of the European Parliament for the amendment of the Treaties, op. cit., pp. 14–16, 18, 19, 20–22, 24–25, 32, 77–78, 85–86, 94–95. Committee on Constitutional Affairs. Proposals of the European Parliament for the amendment of the Treaties, 2022/2051 (INL), op. cit., pp. 21–23. Report of the Franco-German Working Group on EU Institutional Reform, op. cit., p. 9.

2.1.3. The annual budget and the multiannual financial framework of the EU

Both the draft revision Treaty of the European Parliament and the report of the Franco-German Working Group contained proposals for amendments to the EU's annual budget and multiannual financial framework (multiannual budget). As regards the annual budget, the change concerned the system of own resources. Whereas the European Parliament proposed, as mentioned before, that the EP and the Council of the European Union, the latter acting by a reinforced qualified majority, in accordance with a special legislative procedure, jointly lay down implementing measures for the categories of own resources, which would require amending Article 311 TFEU by means of an Intergovernmental Conference,[50] the Working Group put forward the proposal for introducing new categories of own resources under secondary law in order 'to limit tax optimisation, avoidance and competition within the EU'.[51] As regards the multiannual budget, the changes were to concern the legislative procedure, the timeframe and the possibility of issuing common debt. Thus, as mentioned above, the European Parliament demanded for itself the right to adopt, together with the Council of the European Union and acting in accordance with the ordinary legislative procedure, a regulation laying down the multiannual financial framework (which under the existing provisions, should be done unanimously by the Council in accordance with a special legislative procedure and after obtaining the consent of the EP).[52] Such an amendment would also require revising Article 312(1) and (2) TFEU by means of an Intergovernmental Conference. The Franco-German Working Group, on the other hand, opposed this by proposing to maintain the *status quo*, including unanimity in the procedure for establishing the multiannual

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[50] Proposals of the European Parliament for the amendment of the Treaties, op. cit., p. 94.

[51] Report of the Franco-German Working Group on EU Institutional Reform, op. cit., p. 9.

[52] Proposals of the European Parliament for the amendment of the Treaties, op. cit., p. 95.

financial framework, and to consider the possibility of moving budget decisions towards qualified majority voting in the future, but with regard to spending only, which would be particularly beneficial for Germany as the EU's largest net payer.[53] Whereas the European Parliament proposed that the multiannual financial framework be adopted for a period of five to seven years, the Working Group called for its adoption for five years in order to link it to the institutional cycle in the EU (EP and EC term). It also demanded an increase in expenditure 'in the coming budgetary period' both in nominal terms and in relation to the GDP of the European Union. However, the Working Group did not specify to what level the current ceiling of 1% of EU GNI should be increased.[54] In addition, it put forward a rather bold, but rather tactical, proposal for introducing in the European Union provisions to allow issuing common debt, quite surprisingly, especially given the opposition expressed before by successive coalition Governments in Germany.[55] Both amendments would require a revision of the TFEU by means of an Intergovernmental Conference, whereby changes to the procedure for adopting the multiannual budget and its timeframe would involve amending Article 312(1) and (2) TFEU, and laying down rules providing for the possibility of issuing common debt which would necessarily entail inserting a new Article in the TFEU. Only the proposal for increasing the budget in the following financial perspective in nominal terms and in relation to the EU's GDP could be carried out under secondary legislation. Table V shows both options for amendments to the EU's annual budget and multiannual financial framework proposed by the European Parliament and by the Franco-German Working Group.

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[53] Report of the Franco-German Working Group on EU Institutional Reform, op. cit., p. 11.

[54] Proposals of the European Parliament for the amendment of the Treaties, op. cit., p. 94. Report of the Franco-German Working Group on EU Institutional Reform, op. cit., p. 11.

[55] Report of the Franco-German Working Group on EU Institutional Reform, op. cit., p. 11. The Working Group also proposed an increase in EU budget expenditure in the coming multiannual financial framework, both in nominal terms and as a proportion of GDP. Cf. ibidem.

Table V: Changes to the EU's annual budget and multiannual financial framework as proposed by the European Parliament and by the Franco-German working group

	Proposals of the European Parliament	**Proposals of the Franco-German Working Group**
Annual budget/Own resources system	• The European Parliament and the Council, the latter acting by a reinforced qualified majority, in accordance with a special legislative procedure (which under the existing provisions, should be the Council of the EU acting in accordance with a special legislative procedure) should jointly lay down implementing measures for the Union's own resources system *Modus operandi*: revising Article 311 TFEU	• New own resources *Modus operandi:* secondary law (own resources system)
Multiannual budget	• Multiannual financial framework: adopted for a period of five or seven years by the Council of the EU and the European Parliament in accordance with the ordinary legislative procedure (under the existing provisions: adopted for at least five years, by the Council of the EU, acting in accordance with a special legislative procedure, after obtaining the consent of the Parliament) *Modus operandi*: revising Article 312(1) and (2) TFEU	• Multiannual financial framework: adopted – as under the existing provisions – for five years by the Council of the EU, acting unanimously, but expenditure adopted by the Council by qualified majority (to be considered) *Modus operandi*: revising Article 312(1) and (2) TFEU • Increase in budget spending in nominal terms and in relation to GDP *Modus operandi:* secondary law (multiannual financial framework) • Issuing common debt by the EU in the future *Modus operandi*: Treaty revision (inserting a new Article in the TFEU)

Source: prepared by the author on the basis of the Proposals of the European Parliament for the amendment of the Treaties, op. cit., pp. 94–95. Report of the Franco-German Working Group on EU Institutional Reform, op. cit., p. 11.

2.1.4. Enhanced cooperation

The draft revision Treaty introduced only one significant amendment to the area of enhanced cooperation, namely in the scope of the authorisation to launch it in the CFSP. Such an authorisation would be granted by a decision of the Council of the European Union acting by a qualified majority rather than unanimously, as under the existing provisions (Article 329(2), subparagraph 2, TFEU). However, it would not apply to decisions on initiating military missions with an executive mandate,[56] to be adopted by the Council acting by a qualified majority, but after obtaining the consent of the European Parliament, acting by a majority of its component members.[57]

In contrast to the European Parliament, in its report the Franco-German Working Group proposed the use of a much wider range of differentiated integration instruments in the European integration process to establish 'concentric circles' in the European Union. Apart from enhanced cooperation, differentiated integration would be implemented through opt-ins, opt-outs and permanently structured cooperation. In essence, the conditions for differentiation would remain unchanged. It would still be subject to the existing flexibility principles: (1) respect for the *acquis communautaire* and the integrity of the EU's policies and legal instruments; (2) the use of differentiated integration instruments should take place within the institutional system of the European Union rather than outside the EU; (3) differentiated integration

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[56] Petersberg missions are divided into civilian and military ones. Civilian missions and operations, primarily providing advice and assistance, are responsible for promoting European experience and standards with the security or judicial authorities of the countries to which they are sent. Military missions and operations comprise those with an executive or non-executive mandate. Examples of the implementation of an executive mandate include: supporting the armed forces of a country in crisis in maintaining security; dismantling networks of migrant smuggling and trafficking in human beings; rescuing people at sea; combating piracy; protecting merchant ships. Examples of the implementation of a non-executive mandate include: training operations (e.g. training of the armed forces and security forces); post-conflict stabilisation; protection of civilians, including refugees; humanitarian aid; protection of the personnel of the UN, the EU or other international organisations.

[57] Proposals of the European Parliament for the amendment of the Treaties, op. cit., pp. 29, 96.

should be open to all the EU Member States, even if they should wish to join at a later stage; (4) respect for the principle of sharing decision-making powers, costs and benefits, which meant that only the Member States participating in differentiated integration should have the corresponding decision-making powers (e.g. in the Council of the EU) and access to funds from separate EU budgets or budget lines; (5) the provision of legal guarantees that if any EU Member State participating in differentiated integration should suddenly cease to subscribe to its objectives, it should not hinder the achievement of those objectives or limit such a pioneer group in its capacity to act. Therefore, it would involve the creation of a legal mechanism whereby such a Member State could exit from differentiated integration while retaining its membership of the EU.[58]

On the other hand, the Franco-German Working Group proposed, for the first time, the use of differentiation in the revision of the Treaties. Any unwilling States should be offered opt-outs under Article 48 TEU, a substitute previously used in integration practice, but without the possibility of introducing exemptions from the existing *acquis communautaire* or other general principles of EU law and axiology.[59] However, the granting of such an opt-out should only be allowed if the relevant constituting or amending Treaty should deepen integration either by conferring new powers on the EU or by further extending the scope of qualified majority voting (e.g. making it a general rule in the CSDP). In the future, the introduction of the euro in the acceding countries should be seen as part of the non-negotiable elements of European integration. It could be more practical to exempt Member States from participating in such new areas of EU competences if the prospect of using enhanced cooperation (Article 20(1) to (4) TEU) should not be sufficient. Those rejecting the extension of qualified majority voting in enhanced cooperation could be offered an exemption from the policy areas concerned. With regard to budgetary matters, it should be possible to

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[58] Report of the Franco-German Working Group on EU Institutional Reform, op. cit., pp. 11, 45–46.

[59] Ibidem.

build fiscal capacities through enhanced cooperation, by developing new own resources, and budgets/funds based on Member States' contributions and/or borrowing capacities.[60]

Therefore, the Franco-German Working Group proposed that in the future the European Union should be based on four 'tiers', or 'dimensions of integration', called concentric circles, with the first two being 'inner tiers' and the next two – 'outer tiers'.[61] The first (inner) circle would be formed by the Eurozone and any 'coalition of the willing' EU Member States, i.e. those wishing to cooperate more closely with the Eurozone.[62] The second circle would be the European Union, composed of all the Member States, bound by the same integration objectives and the same axiology.[63] The third circle would be the Member States of the European Economic Area as well as Switzerland and the United Kingdom as associate members. They would not be bound to an 'ever closer Union' or participate in deeper integration in other policy areas such as justice and home affairs or citizenship. The EU's associate members would not be represented in the European Parliament or in the European Commission. However, they would have the right to speak in the Council of the European Union, albeit without voting rights. They would be offered associate membership of certain EU agencies. Further, they would fall under the jurisdiction of the CJEU, pay contributions to the general budget of the EU, albeit at levels lower than those of the Member States (e.g. for common institutional costs). However, they would have no access to the EU's Structural and Investment Funds (e.g. the Cohesion Fund and the Agricultural Funds).[64] The fourth circle would include the Member States participating in the recently established European Political

[60] Ibidem, p. 46.
[61] Ibidem, pp. 12, 48.
[62] Such 'closer' or 'deeper' cooperation (opt-in arrangement) with the euro area is already possible within the Banking Union. Cf. J.J. Węc, The System Reform of the Economic and Monetary Union, op. cit., pp. 119.
[63] Report of the Franco-German Working Group on EU Institutional Reform, op. cit., pp. 12, 47.
[64] Ibidem.

Community,[65] based on the geopolitical cooperation of the European Union with 20 other countries of Europe and Asia under bilateral treaties.[66] Its participants would not be bound by the *acquis communautaire* or the axiology of the European Union, but they would therefore have no access to the EU's internal market. Instead, the focus would be on geopolitical convergence and cooperation in policy areas such as security, energy or the environment and climate. The European Political Community would have to be transformed from its current loose form of cooperation into an arrangement with stronger institutional links so that the European Commission could play a greater coordinating role. Economic relations between the participants in the European Political Community could be structured through free trade agreements and, in some areas, such as energy and defence, under other international agreements. The common basis for the European Union and the European Political Community should be membership of the Council of Europe and the signature of the European Convention on Human Rights.[67] The third and fourth concentric circles would include countries that, out of their own political will, either withdrew from the EU or never intended to join the EU, whereby the highest benefits would be retained by full EU

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[65] The European Political Community is a sui generis international organisation set up in Prague on 6 October 2022, at the initiative of French President Emmanuel Macron, who proposed its creation at the Conference on the Future of Europe on 9 May 2022. The main reason for its establishment was Russia's aggression against Ukraine. The organisation currently consists of 47 participating states, including all the EU Member States and 20 other European and Asian countries (Albania, Andorra, Armenia, Azerbaijan, Bosnia and Herzegovina, Georgia, Iceland, Kosovo, Liechtenstein, Moldova, Monaco, Montenegro, North Macedonia, Norway, San Marino, Serbia, Switzerland, Turkey, Ukraine and the United Kingdom). The first four meetings of the representatives of the organisation were held in Prague on 6 October 2022, in Chișinău on 1 June 2023, in Granada on 5 October 2023 and at the Blenheim Palace near Oxford on 18 July 2024. Russia and Belarus were deliberately excluded from participation. The aim of the organisation is to coordinate cooperation in foreign and security policy in Europe. It has no bodies, budget or staff of its own. Cf. J. Szymanek, Europejska Wspólnota Polityczna [The European Political Community], 'Infos. Biuro Analiz Sejmowych' 2023, No. 3, pp. 1–4, https://orka.sejm.gov.pl/wydbas.nsf/0/2CAE2D0403032A35C125896A0041296B/%24File/Infos_305.pdf [accessed: 18 July 2024].

[66] Report of the Franco-German Working Group on EU Institutional Reform, op. cit., pp. 12, 47.

[67] Ibidem, pp. 12, 47–48.

Member States. It must be stressed that the establishment of the first three concentric circles would require a revision of the EU Treaties by means of an Intergovernmental Conference. Diagram I presents the four tiers of European integration.



Diagram I: The concentric circles as proposed by the Franco-German Working Group.

Source: Report of the Franco-German Working Group on EU institutional Reform, op. cit., p. 36.

2.1.5. The Treaty revision procedures

Both the European Parliament and the Franco-German Working Group proposed sweeping changes to the ordinary procedure for revising the Treaties. In my view, it was the second most radical proposal for either of the two entities in question, after the abandonment of unanimity in all policies (the EP) or in all policies except for the CSDP (the Working Group). All the amendments to the Treaty revision procedure proposed by the European Parliament and

most of those put forward by the Franco-German Working Group required revising the Treaty on European Union, in particular Article 48(4) and (5) and (7) TEU and Article 54(2) TEU (the European Parliament), or concluding additional protocols to the TEU (the Working Group).

The European Parliament called for three major changes to the ordinary revision procedure. The first and most radical proposal was to give up the unanimous ratification of the Treaties by the Member States and to replace it by a reinforced qualified majority of four fifths of the Member States (Article 54(2) TEU). Abandoning the unanimous ratification of the Treaties would significantly weaken the existing principle of conferral, according to which the Member States are the 'masters of the Treaties' and the only entities with authority to confer new powers on the European Union on the basis of the unanimous ratification of the relevant founding and amending Treaties. According to the second amendment, if, two years after the signature of a treaty amending the Treaties, fewer than four fifths of the Member States should have ratified it, the matter of Treaty reform would be referred to the European Council (Article 48(5) TEU). The third amendment was that the Parliament should be given the right, in the ordinary revision procedure, to give its consent 'to the amendments to the Treaties when a majority of its component Members vote to do so' (Article 48(4), subparagraph 1a (new), TEU).[68] At the same time, the European Parliament proposed making one major amendment to the simplified revision procedure regarding the TEU and the TFEU. It was to consist in the replacement of unanimity by a qualified majority if the European Council should adopt a decision on changing unanimous voting to qualified majority voting and the special legislative procedure to the ordinary legislative procedure (the *passerelle* procedure) (Article 48(7) TEU).

Although the Franco-German Working Group did not propose to abandon the unanimous ratification of the founding and amending Treaties, it nevertheless put forward a rather controversial, even if known from integration practice, solution, namely that opt-outs should be granted to the Member States uninterested in revising the Treaties, but with no exemptions from the existing *acquis* or from the fundamental general principles of law and

[68] Proposals of the European Parliament for the amendment of the Treaties, op. cit., pp. 32–34.

axiology of the European Union.[69] The Working Group also pointed to six options for the revision of the Treaties. These were as follows: 1. the ordinary revision procedure (a Convention and an IGC – Article 48(2) to (5) TEU); 2. the simplified revision procedure (*ad hoc* IGC – Article 48(6) TEU); 3. revision as part of the accession treaties (Article 49 TEU); 4. Treaty changes within a 'framework enlargement and reform treaty', drawn up by the Governments of the Member States without a Convention, 'containing all the changes needed for the EU's functioning in the future, decoupled from accession treaties'; 5. Treaty changes under a 'framework enlargement and reform treaty' drafted by a Convention; 6. in the event of a deadlock on options 1 to 5, a 'supplementary reform treaty' between willing Member States.[70] It is worth noting that options 1 to 3 could be implemented under the existing provisions of Articles 48 and 49 TEU, whereas options 4 to 6 were completely new, with option 6 allowing for revising the Treaties by selected Member States in accordance with the differentiated integration method.[71] Table VI presents both versions of the proposed amendments to the procedures for the revision of the Treaties.

Table VI: Changes to the Treaty revision procedures as proposed by the European Parliament and by the Franco-German Working Group

	Proposals of the European Parliament	**Proposals of the Franco-German Working Group**
ORP*	• The founding or amending treaty enters into force after ratification by four fifths of the Member States *Modus operandi*: revising Article 48(4) and Article 54(2) TEU	• Member States uninterested in revising the Treaties are granted opt-outs in EU primary law, but with no exemptions from the existing *acquis* or from the EU's fundamental principles and core values *Modus operandi*: revising Article 48(4) and Article 54(2) TEU

(*Continued*)

[69] Report of the Franco-German Working Group on EU Institutional Reform, op. cit., p. 11.

[70] Ibidem.

[71] For more on the subject, cf. Chapter IX.2.1.4.

Table VI: (*Continued*)

	Proposals of the European Parliament	**Proposals of the Franco-German Working Group**
	• If, two years after the signature of an amending treaty, fewer than four-fifths of the Member States have ratified it, the matter is referred to the European Council *Modus operandi:* revising Article 48(5) TEU	No proposal
The *passerelle* procedure	• In accordance with the *passerelle* procedure, decisions of the European Council are adopted by a qualified majority *Modus operandi:* revising Article 48(7) TEU	No proposal

*****ORP – the ordinary revision procedure

Source: prepared by the author on the basis of the Proposals of the European Parliament for the amendment of the Treaties, op. cit., pp. 32–34. Report of the Franco-German Working Group on EU Institutional Reform, op. cit., p. 11.

2.2. Proposals for systemic changes submitted exclusively by the European Parliament

2.2.1. The EU's integration objectives

The draft revision Treaty of the European Parliament also provided for the extension of the catalogue of the European Union's integration objectives. The first new objective of the EU would be to strengthen the Union's common external border protection policy. Since, as mentioned below, the external border protection policy as part of the area of freedom, security and justice of the EU was included in the competences shared between the EU and the Member States, an amendment was introduced in Article 77(2) of the TFEU, according to which the European Parliament and the Council of the European Union could, in accordance with the ordinary legislative procedure, adopt 'any measure necessary and proportionate to ensure the efficient monitoring, securing and effective control of the Union's external borders, as well as the effective return of those who do not have the right to remain

on the territory of the Union' (Article 77(2)(da) (new) TFEU).[72] The second objective envisaged EU action to reduce global warming and to safeguard biodiversity in line with international agreements. Since the conclusion of international agreements 'in the context of global negotiations on climate change', as mentioned below, was indicated as the exclusive competence of the European Union, a new Article 191a was also added to the TFEU, whereunder the Union should 'pursue efforts to limit the global temperature increase and adhere to the objective of balancing Union-wide greenhouse gas emissions and removals to achieve negative emissions' (Article 191a (new) TFEU).[73] The third objective of the EU would be to protect and promote access to free and universal schooling, institutional and individual academic freedom as well as human rights, as defined in the Charter of Fundamental Rights of the European Union. As education in its transnational dimension was included in the competences shared between the EU and the Member States, three amendments were proposed for Article 165(2) and Article 166(2) TFEU. The first amendment was that Union action should be aimed at 'developing common objectives and standards of an education that promotes democratic values and the rule of law as well as digital and economic literacy' (Article 165(2), indent 1 (new), TFEU).[74] The second amendment called for 'promoting cooperation and coherence between educational systems while guaranteeing cultural traditions and regional diversity' (Article 165(2), indent 3, TFEU).[75] The third amendment concerned, *inter alia*, the development by the EU of common standards for vocational training (Article 166(2), indent 2, TFEU).[76] As regards academic freedom, the amendment to Article 179(1) TFEU stated that the EU should have the objective of 'respecting and promoting academic freedom and the freedom to conduct scientific research and teaching' (Article 179(1) TFEU).[77] The fourth and last new objective of the EU would be to promote 'gender equality', in place of the existing wording of 'equality

[72] Proposals of the European Parliament for the amendment of the Treaties, op. cit., pp. 9, 45.
[73] Ibidem, pp. 9–10, 66.
[74] Ibidem, pp. 60–61.
[75] Ibidem, p. 61.
[76] Ibidem.
[77] Ibidem, pp. 10–11, 64–65.

between women and men'.[78] It must be emphasised that each of the proposed amendments required revising the Treaties by means of an Intergovernmental Conference, in particular Article 3(3) to (5) TEU, Article 77(2) TFEU, Article 165(2) TFEU, Article 166(2) TFEU, Article 179(1) TFEU and the introduction of a new Article 191a TFEU.

2.2.2. The democratic principles

In its draft revision Treaty, the European Parliament also provided for strengthening representative democracy in the European Union by (1) introducing 'instruments that enable citizens to exercise' the right to participate in 'democratic life' (Article 10(3) TEU); (2) giving political parties at European level the right to promote, support and finance activities aimed to contribute 'to forming European political awareness and to expressing the will of citizens of the Union' (Article 10(4) TEU); and (3) announcing that any initiatives 'in the areas of social, employment and economic policy' would be prepared in consultation with social partners (Article 10(4a) (new) TEU).[79] The draft also envisaged changes to the procedure for adopting citizens' initiatives, stating that not only the European Commission but also the European Parliament could 'propose a legal act based on any valid citizens' initiative' (Article 11(4), subparagraph 1a (new), TEU). Furthermore, the draft revision Treaty gave the European Parliament and the Council of the European Union, acting in accordance with the ordinary legislative procedure, the power to 'adopt provisions to guarantee their decision-making and the adherence to the principles set out in Articles 10 and 11' TEU.[80]

It is worth noting here that the report of the Committee on Constitutional Affairs of the European Parliament of 7 November 2023 went even further towards strengthening representative democracy. In addition to the above-mentioned proposals, it envisaged the introduction of a European referendum. According to the report, the European Parliament could, by a majority of its component members, submit to the European Council a proposal for a European referendum, in accordance with the European values as laid down in Article 2 TEU. If the European Council should adopt, by a

78 Ibidem, p. 10.
79 Ibidem, pp. 12–13.
80 Ibidem, p. 14.

majority, a decision in favour of the referendum proposed by the European Parliament, the European Commission would organise one. However, any European referendum would have to be organised 'on the same day throughout the Union' and would be 'deemed to have been approved when a majority of voters at EU level, and at national level in a majority of Member States, vote in favour' of it.[81] It must be stressed that the amendments proposed both in the draft revision Treaty and in the report of the Committee on Constitutional Affairs would involve revising Article 10(3) and (4) TEU and Article 11(4) TEU by means of an Intergovernmental Conference.

2.2.3. The division of competences between the Union and the Member States

The draft revision Treaty of the European Parliament also provided for two very important changes to the categories of the division of competences between the European Union and the Member States, established by the Treaty of Lisbon. The catalogue of the European Union's exclusive competences was to be extended to the EU's right to conclude international agreements 'in the context of global negotiations on climate change'.[82] Additionally, the draft envisaged moving to competences shared between the European Union and the Member States as many as seven policy areas falling within the category of supporting, coordinating or complementary action of the Union under the existing provisions. These were as follows: (1) public health matters, understood as the protection and improvement of human health, especially cross-border health threats, universal and full access to sexual and reproductive health and rights; (2) cross-border infrastructure in transport, included in transport, a shared competence under the existing provisions; (3) the external border protection policy as part of the area of freedom, security and justice; (4) foreign affairs, external security and defence;

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[81] Committee on Constitutional Affairs. Proposals of the European Parliament for the amendment of the Treaties, 2022/2051 (INL), Annex, pp. 16–17.

[82] Proposals of the European Parliament for the amendment of the Treaties, op. cit., p. 35. The report of the Committee on Constitutional Affairs of 7 November 2023 went even further as it extended the areas in which the Union should have exclusive competence to the environment (including climate) and biodiversity. Cf. Committee on Constitutional Affairs. Proposals of the European Parliament for the amendment of the Treaties, 2022/2051 (INL), Annex, p. 42.

(5) civil protection; (6) industry; and (7) education, especially with regard to transnational issues such as the mutual recognition of degrees, grades, skills and qualifications.[83] All the proposed amendments would require revising Article 3(2) TFEU and Article 4(2) TFEU by means of an Intergovernmental Conference. Table VII shows changes to the division of competences between the EU and the Member States.

Table VII: Changes to the division of competences between the EU and the Member States as proposed by the European Parliament

Proposals of the European Parliament
Division of competences between the EU and the Member States
• Inclusion of the right to conclude international agreements in the context of climate change in the category of the EU's exclusive competences • Inclusion in the category of shared competences of the following: (1) public health matters, understood as the protection and improvement of human health, especially cross-border health threats, universal and full access to sexual and reproductive health and rights; (2) cross-border infrastructure as a component of transport, a shared competence under the existing provisions; (3) the external border protection policy as part of the area of freedom, security and justice; (4) foreign affairs, external security and defence; (5) civil protection; (6) industry; (7) education, especially when it concerns transnational issues such as the mutual recognition of degrees, grades, skills and qualifications
Modus operandi for all the amendments: revising Article 3(2) TFEU and Article 4(2) TFEU

Source: prepared by the author on the basis of the Proposals of the European Parliament for the amendment of the Treaties, op. cit., pp. 35–38. Committee on Constitutional Affairs. Proposals of the European Parliament for the amendment of the Treaties, 2022/2051 (INL), op. cit., p. 42.

2.2.4. The role of national parliaments in the legislative process in the EU

The draft revision Treaty of the European Parliament proposed that the powers of national parliaments be extended in the legislative process in the

[83] Proposals of the European Parliament for the amendment of the Treaties, op. cit., pp. 36–38. Thus, the areas of supporting, coordinating or complementary action of the Union would only comprise culture, tourism, vocational training, youth and sport, as well as administrative cooperation.

European Union by means of three Treaty changes. One amendment would consist in revising and incorporating Protocol No 2 on the application of the principles of subsidiarity and proportionality into the TFEU. The Protocol, to be inserted in the TFEU, Part Six, Title I, Chapter 2a (new), would be entitled: *The application of the principles of subsidiarity and proportionality* (Articles 299a to 299j (new) TFEU).[84] Another amendment would extend from eight to twelve weeks the time limit for any national parliament or any chamber of a national parliament to prepare and send a reasoned opinion on the compliance with the principle of subsidiarity of a draft legislative act originating from the European Commission, the European Parliament, the Court of Justice, the European Central Bank and the European Investment Bank (Article 299f (new) TFEU). Furthermore, the European Commission should reply to such an opinion within twelve weeks (Article 299f (new) TFEU).[85] The third and last amendment would be to give any national parliament or any chamber of a national parliament the right to request the European Parliament or the European Commission to 'submit any appropriate proposal concerning matters on which it considers that a Union act is required for the purpose of implementing the Treaties'. Should any of those institutions fail to submit a proposal within six months, that institution should inform the 'national Parliament, the Committee of the Regions and, if relevant, the European Parliament of its reasons for not doing so' (Article 299g (new) TFEU).

For the first time, the draft revision Treaty also conferred on regional parliaments with legislative powers the right to participate directly in the EU's legislative process. In accordance with the procedure, the European Commission and the European Parliament should forward to such regional parliaments their 'draft legislative acts' and their 'amended drafts' 'at the same time as to the Union legislator'. The Council of the European Union, on the other hand, was to forward to those parliaments draft legislative acts and amended drafts originating from a group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank. Furthermore, the European Parliament and the Council of the European

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[84] Proposals of the European Parliament for the amendment of the Treaties, op. cit., pp. 86–94.

[85] Ibidem, p. 90.

Union would be required to forward to regional parliaments legislative resolutions (the EP) and positions (the Council of the EU), on the adoption thereof (Article 299d (new) TFEU). Each national parliament or each chamber of a national parliament would have to include the opinion of regional parliaments with legislative powers to its reasoned opinion when regional exclusive competences could be affected.[86] The European Commission should reply to such an opinion within twelve weeks (Article 299f (new) TFEU). It should also take account of reasoned opinions received from regional parliaments with legislative powers in its annual reports on the principles of subsidiarity and proportionality (Article 299f (new) TFEU). In addition, the European Commission would submit to regional parliaments with legislative powers a report on the application of Article 5 of the Treaty on European Union (Article 299j (new) TFEU).[87]

2.2.5. The procedure for the accession of new states to the Union

The draft revision Treaty of the European Parliament also included a proposal, requiring a revision of Article 49 TEU by means of an Intergovernmental Conference, to strengthen the protection of the EU's core values, as laid down in Article 2 TEU. Therefore, the following sentence would be inserted into Article 49 TEU: 'Member States must continue to respect the values referred to in Article 2 after their accession to the Union'. In addition, the draft revision Treaty maintained in the procedure of the accession of new states to the EU the requirement for all the Member States to ratify the relevant Treaties of Accession by unanimity in accordance with their respective constitutional requirements.[88]

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[86] Under the existing provisions, each national parliament or each chamber of a national parliament should consult, where appropriate, regional parliaments with legislative powers (Article 6 of Protocol No 2).

[87] Proposals of the European Parliament for the amendment of the Treaties, op. cit., pp. 88, 90, 94. It should be noted here that the European Parliament resolution of 22 November 2023 also proposed the establishment of a 'green card mechanism' whereby national parliaments or regional parliaments with legislative powers would have the right of legislative initiative of their own, that is, they would gain influence on the decision-making process in the EU already at the preparatory stage of the work of the European Commission. Cf. ibidem, pp. 3–4.

[88] Ibidem, p. 33.

2.2.6. External actions and policies

In its draft revision Treaty, the European Parliament also envisaged significant changes to the EU's external actions and policies. The first amendment, to be introduced in Article 21(2) TEU, was to add a new objective to the list of those to be pursued in external actions, namely the 'strategic autonomy' of the EU (Article 21(2)(a) TUE).[89] The second amendment concerned the solidarity clause relating to all EU external actions. The draft revision Treaty of the EP provided for the introduction in Article 222 TFEU of a procedure for the European Commission to declare an emergency in the European Union. In accordance with the procedure, in the event of an emergency affecting the European Union or one or more Member States, the European Parliament and the Council of the European Union could decide to grant the European Commission extraordinary powers, including those to enable it to mobilise all necessary instruments. To take such a decision, the European Parliament should act by a majority of its component members and the Council should act by a qualified majority, but on a proposal from the European Parliament or the Commission. That decision should not only grant extraordinary powers to the Commission, but also define their scope, the detailed governance arrangements and the period during which they should apply; the European Parliament or the Council of the EU, acting by a simple majority, could revoke, review or renew the decision at any time (Article 222(1) (new) TFEU).[90] It must be emphasised that both amendments would require revising, respectively, Article 21(2) TEU and Article 222 TFEU by means of an Intergovernmental Conference.

The draft revision Treaty of the EP also envisaged four major changes to the EU's common foreign and security policy. Firstly, while the European Council and the Council of the European Union should continue to be responsible for defining and implementing the CFSP, they would not act unanimously, as under the existing provisions, but by a qualified majority and after obtaining the consent of the European Parliament (Article 24(1), subparagraph 2, TEU). Secondly, the common foreign and security policy should be put into effect by the Union Secretary for Foreign Affairs and Security Policy and by Member States (Article 24(1), subparagraph 2, TEU). Thirdly, where the

[89] Ibidem, p. 24.
[90] Ibidem, pp. 75–76.

Council of the European Union should decide on the imposition of sanctions on a third country or another international organisation, it should act by a qualified majority rather than by unanimity (Article 29 TEU). Fourthly and lastly, the mechanism of constructive abstention would be abolished and replaced by a appeal procedure. This procedure would provide that a Member State opposing the adoption of a decision of the Council of the European Union to be taken by a qualified majority could request that, 'for vital and stated reasons of national policy', the matter be referred to the European Council, which would also act by a qualified majority (Article 31(1) and (2) TEU).[91] Whereas the amendments to the procedures for decision-making in the European Council and the Council of the European Union concerning the definition and implementation of the tasks and objectives of the CFSP and the imposition of sanctions on a third country or other international organisation would require revising Article 24(1), subparagraph 2, TEU, as well as Article 29 and Article 31(1), subparagraph 1, TEU, in accordance with the *passerelle* procedure, the new powers of the European Parliament and the introduction of the office of the Union Secretary in place of the High Representative of the Union could only be carried out by amending Article 24(1) TEU by means of an Intergovernmental Conference.

The draft revision Treaty of the European Parliament also envisaged introducing as many as eight major changes to the EU's common security and defence policy. The first – and probably the most important – of these would be the establishment of a Defence Union with civilian and military capabilities. The draft thus legitimised the reform of the CSDP, in process from 2016, and the setting up of a Defence Union within its framework. The new structure should consist of military units, including a permanent rapid deployment capacity, under the operational command of the EU, which thus far were non-existent as national operational commands were used. Nevertheless, the EU Member States, including those with multinational forces as remnants of the Western European Union, could 'provide additional capabilities' to make them available to the Defence Union (Article 42(3) TEU). The second amendment was to replace unanimity by qualified majority voting when the Council of the European Union should decide on the common security and defence policy, including decisions initiating

[91] Until now, in appeal procedures, the European Council has acted unanimously.

Petersberg missions. Decisions of the Council of the EU should be adopted on a proposal from the Union Secretary for Foreign Affairs and Security Policy or an initiative of a Member State, but – which was a novelty – after obtaining the consent of the European Parliament, acting by a majority of its component members (Article 42(4) TEU). The third amendment provided for the creation of five new Petersberg tasks and missions, i.e. combating hybrid threats and warfare, energy blackmail, cyberthreats (cybersecurity), disinformation campaigns and economic coercion by third countries (Article 43(1) TEU).[92] The fourth amendment was to strengthen the EU's alliance (or 'mutual defence') clause. From its entry into force, common defence against an armed attack from outside the EU would be the responsibility of not only the EU Member States, as under the existing provisions, but also of a newly established Defence Union, whereas '[a]n armed attack on one Member State' would be 'considered to be an attack on all Member States' (Article 42(7) TEU). The fifth amendment would involve the creation of a new dedicated budget in the EU's common security and defence policy, to finance all operational activities and the 'procurement and development of armaments'. The European Parliament would exercise scrutiny in respect of this budget, whereas decisions of the Council of the EU and of the Parliament on the sources of funding and expenditure from the budget should be taken in accordance with the ordinary legislative procedure (Article 42(1) and (3) TEU). The sixth amendment provided for extending the powers of the European Defence Agency; in addition to its existing responsibilities, the EDA should 'procure armaments for the Defence Union and on behalf of the Union and its Member States' (Article 45(1)(b) TEU) and 'take any measure needed to strengthen the industrial and technological base of the defence

[92] Until the entry into force of the Treaty of Lisbon on 1 December 2009, there were three types of Petersberg missions: humanitarian and rescue tasks, peace-keeping tasks, and tasks of combat forces in crisis management, including peace-making. The Treaty of Lisbon extended the list of Petersberg missions from three to six and added conflict prevention to peace-keeping tasks. Thus, since the entry into force of the Treaty of Lisbon, there have been six types of Petersberg missions: (1) humanitarian and rescue tasks; (2) conflict prevention and peace-keeping tasks; (3) tasks of combat forces in crisis management, including peace-making; (4) joint disarmament operations; (5) military advice and assistance tasks; and (6) post-conflict stabilisation.

sector' (Article 42(3) TEU). The seventh amendment provided for extending the application of qualified majority voting to all aspects of the permanent structured cooperation (Article 46(6) TEU). The eighth and last amendment was to replace a special legislative procedure with the ordinary legislative procedure for the European Parliament and the Council of the European Union to adopt a decision defining the statute, seat and operational rules of the EDA (Article 45(2) TEU). However, each of the above-mentioned amendments required a revision of the TEU by means of an Intergovernmental Conference, in particular amending Article 42(1) and (3) TEU (a new dedicated budget, the Defence Union), Article 42(4) TEU (decision-making in the Council), Article 42(7) TEU (the alliance clause) and Article 43(1) TEU (Petersberg missions), Article 45(1) (armaments procurement), Article 45(2) TEU (the EDA's statute, seat and operational rules) and Article 46(6) TEU (permanent structured cooperation).[93] Table VIII presents changes to the EU's external actions and policies.

Table VIII: Changes to the EU's external actions and policies as proposed by the European Parliament

Proposals of the European Parliament	
External actions and policies of the EU	
CFSP	• Strategic autonomy of the EU is a new objective of external actions *Modus operandi:* revising Article 21(2) TEU
	• The CFSP is defined and implemented by the European Council and the Council of the EU acting by a qualified majority, after obtaining the consent of the European Parliament *Modus operandi*: revising Article 24(1) TEU in accordance with the *passerelle* procedure
	• The Council of the EU should act by a qualified majority on economic and financial sanctions in relations with one or more third countries *Modus operandi:* the *passerelle* procedure

(*Continued*)

[93] Proposals of the European Parliament for the amendment of the Treaties, op. cit., pp. 28–31.

Table VIII: (Continued)

Proposals of the European Parliament	
External actions and policies of the EU	
	• The constructive abstention mechanism is abolished but replaced by a safeguard clause: if a Member State should intend to oppose the adoption of a decision to be taken by qualified majority, the Member State could request that, for vital and stated reasons of national policy, the matter be referred to the European Council, to act by a qualified majority *Modus operandi*: revising Article 31(1) and (2) TUE
CSDP	• Establishment of a Defence Union *Modus operandi:* revising Article 42(3) TEU
	• Decisions of the Council of the EU, including decisions initiating Petersberg tasks, should be adopted by a qualified majority *Modus operandi*: revising Article 42(4) and Article 43(1) TEU
	• Adding new Petersberg tasks, i.e. combating: (1) hybrid threats and warfare; (2) energy blackmail; (3) cyberthreats; (4) disinformation campaigns; and (5) economic coercion by third countries *Modus operandi:* revising Article 43(1) TEU
	• Amendments to the alliance clause: (1) aid and assistance should be provided not only by the Member States but also by the Defence Union; (2) an armed attack on one Member State should be considered to be an attack on all Member States *Modus operandi:* revising Article 42(7) TEU
	• The CSDP would be financed from a dedicated defence budget, to be adopted in accordance with the ordinary legislative procedure *Modus operandi:* revising Article 42(1) TEU

Source: prepared by the author on the basis of the Proposals of the European Parliament for the amendment of the Treaties, op. cit., pp. 24, 28–31, 75–76.

2.2.7. Internal actions and policies of the EU

The draft revision Treaty of the European Parliament also contained proposals for major changes to the EU's internal actions and policies. These concerned EU citizenship, energy policy, immigration policy, visa policy, asylum policy,

judicial cooperation in criminal matters, employment policy and health protection. However, the most important of the proposed changes was the announcement of creating the framework of a European energy union, understood as a system 'based on energy efficiency, [and] renewable energies', as well as the introduction in the catalogue of the objectives of the 'common energy policy'[94] of three new obligations: (1) ensuring 'affordability of the energy supply' for each Member State of the EU; (2) ensuring the interconnection of the energy networks of the Member States; and (3) designing 'the overall energy system in line with international agreements to mitigate climate change' (Article 194(1) TFEU). At the same time, a Member State would be deprived of its existing right to determine 'its choice between different energy sources and the general structure of its energy supply' (Article 194(2) TFEU).[95]

As regards EU citizenship, the draft prepared by the European Parliament proposed the establishment of common minimum standards (e.g. to prevent abuses) for third-country nationals seeking to acquire citizenship of the Union. The European Parliament and the Council of the European Union could, 'in accordance with the ordinary legislative procedure, adopt common provisions on preventing the sale of passports, or other abuses regarding the acquisition and loss of citizenship of the Union by third country nationals, with a view to approximating the conditions under which such citizenship can be acquired' (Article 20(2a) (new) TFEU).[96]

With regard to immigration, visa and asylum policies, the EP draft called for common minimum standards for long-term visas and residence permits in the EU. The European Parliament and the Council of the European Union, acting in accordance with the ordinary legislative procedure, would adopt 'any measure necessary and proportionate to ensure the efficient monitoring, securing and effective control of the Union's external borders, as well as the effective return of those who do not have the right to remain on the territory of the Union' (Article 77(2)(da) (new) TFEU). In addition, the European

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[94] Renaming 'policy on energy' as the 'common energy policy' symbolised closer cooperation between Member States rather than policy unification.

[95] Proposals of the European Parliament for the amendment of the Treaties, op. cit., pp. 67–69.

[96] Ibidem, pp. 40–41.

Parliament and the Council of the European Union, acting in accordance with the ordinary legislative procedure, should adopt 'the minimum conditions for entry, residence and minimum standards for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification' (Article 79(2)(a) TFEU). If Union action 'should prove necessary to facilitate the exercise of the right referred to in Article 20(2)(a)' TFEU, 'and if the Treaties have not provided the necessary powers', the European Parliament and the Council of the European Union, acting in accordance with the ordinary legislative procedure, rather than the Council of the EU, acting in accordance with a special legislative procedure, as under the existing provisions, could adopt rules on passports, identity cards, residence permits or any other such document (Article 77(3) TFEU). The draft revision of the Treaty of the European Parliament also expanded the catalogue of immigration policy objectives. In addition to the existing goals of the efficient management of migration flows, fair treatment of third-country nationals legally residing in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings, the common immigration policy should also take into account 'the economic and social stability of Member States' and be 'aimed at ensuring, at all stages, the ability to meet labour demands of the single market in support of the economic situation in the Member States' (Article 79(1) TFEU).[97]

With regard to judicial cooperation in criminal matters, the draft of the European Parliament proposed giving Treaty status to the European Public Prosecutor's Office established on 1 June 2021 under Council Regulation (EU) 2017/1939 of 12 October 2017 (Article 86(1) TFEU).[98] To date, 22 EU Member States have joined the European Public Prosecutor's Office in accordance with the enhanced cooperation procedure.[99] With regard to employment policy, the draft revision Treaty of the EP stipulated that the employment policy guidelines, drawn up annually by the European Parliament and the Council of the European Union for the EU Member States, should take into account and ensure the implementation of the principles and rights

[97] Ibidem, pp. 45–46.

[98] Ibidem, p. 48.

[99] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), Official Journal of the European Union L, 283, 31.10.2017, pp. 1–71.

included in the European Pillar of Social Rights proclaimed by the European Parliament, the Council and the Commission at the Gothenburg Summit on 17 November 2017 (Article 148(2) TFEU).[100] Furthermore, the draft prepared by the European Parliament added the European Pillar of Social Rights to the catalogue of employment policy guidelines for the EU Member States,[101] with the following objectives: 'the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion' (Article 151(1) TFEU).[102]

As regards health protection, which – as mentioned before – should be included in the category of competences shared between the EU and the Member States, three amendments would be made to Article 168(4) TFEU. Thus, the European Parliament and the Council of the European Union, acting in accordance with the ordinary legislative procedure, should adopt: (1) 'measures setting common indicators on universal and equal access to affordable and high-quality health care services, including sexual and reproductive health and rights'; (2) 'measures for the early notification, monitoring and management of serious cross-border threats to health, in particular in the event of pandemics'; however, those measures should not 'prevent Member States from maintaining or adopting reinforced protective measures where these are imperative'; and (3) 'measures for monitoring and coordinating access to common diagnostics, information and the treatment of

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[100] Proposals of the European Parliament for the amendment of the Treaties, op. cit., p. 55.

[101] The existing provisions specified the following documents as those defining employment policy guidelines for the EU Member States: the European Social Charter of the Council of Europe as signed in 1996, the 1989 Community Charter of the Fundamental Social Rights of Workers, and the Charter of Fundamental Rights of the European Union as adapted in 2007.

[102] Proposals of the European Parliament for the amendment of the Treaties, op. cit., pp. 56–57. Specific provisions on the definition and implementation of social progress and the relation between fundamental social rights and other European Union policies would be laid down in a protocol on social progress in the European Union annexed to the Treaties (Article 151(1a) (new) TFEU), cf. ibidem, p. 57.

communicable and non-communicable diseases, including rare diseases' (Article 168(4)(ca) to (cc) (new) TFEU).[103]

It should be stressed here that the changes concerning EU citizenship required amending Article 20 by means of an Intergovernmental Conference. In contrast, proposals relating to energy, immigration, visa and asylum policies, judicial cooperation in criminal matters, employment policy and health protection, required revising, respectively: Article 77(2) and (3) TFEU, Article 79(1) and (2) TFEU, Article 86(1) TFEU, Article 148(2) TFEU, Article 151(1) TFEU, Article 168(4) TFEU, Article 194(1) and (2) TFEU – in accordance with a simplified procedure for the revision of the provisions of Part Three of the TFEU under Article 48(6) TEU. Table IX presents changes to the EU's internal actions and policies.

Table IX: Changes to the EU's internal actions and policies as proposed by the European Parliament

Proposals of the European Parliament	
Internal actions and policies of the EU	
Area of freedom, security and justice	• Establishing common minimum standards for the acquisition of EU citizenship by third-country nationals (including to prevent abuses) *Modus operandi*: revising Article 20 TFEU
	• Establishing common minimum standards for long-term visas and residence permits in the EU *Modus operandi*: revising Article 77(2) and (3) TFEU on the basis of Article 48(6) TEU
EU energy policy	• Establishing a European energy union understood as the Union's energy system based on energy efficiency and renewable energies (Energy Policy, paragraph 33 of the EP resolution) *Modus operandi*: revising Article 194(1) TFEU on the basis of Article 48(6) TEU

Source: prepared by the author on the basis of the Proposals of the European Parliament for the amendment of the Treaties, op. cit., pp. 40–41, 45–46, 48, 55, 57, 62–63, 67–69.

[103] Ibidem, pp. 55–56.

3. Evaluation of the proposals by the European Parliament and by the Franco-German Working Group

The report of the Franco-German Working Group, the report of the Committee on Constitutional Affairs of the European Parliament, and the draft revision Treaty together with the accompanying resolution adopted by the Plenary of the European Parliament, have raised not only consternation but also much controversy in the Member States of the European Union, due to the far-reaching reform demands and their connection with the prospect of the enlargement of the European Union to nine new Member States, including six Western Balkan countries (Serbia, North Macedonia, Montenegro, Bosnia-Herzegovina, Albania, and Kosovo) and three Eastern European countries (Ukraine, Moldova, and Georgia). At this point it should be stressed that the controversies surrounding the reform proposals of the European Union were not new, but had a history dating back to at least the time of the Convention on the Future of Europe of 2002–2003 and the Intergovernmental Conference of 2003–2004.[104] They could be observed mainly in the political parties, academic circles and societies of EU Member States. These controversies arose around differences of views on the future of the Union and the ultimate model of European integration *(finalité politique*). Supporters of deep political reform saw the European Union as a hybrid political system with the characteristics of a parliamentary democracy, evolving towards a federal state. In the last decades, that perspective was supported by both the majority of the members of the Convention on the Future of Europe (2002–2003) and the participants in the Conference on the Future of Europe (2021–2022). According to this approach, the European Parliament should be further strengthened as a legislative institution and, in the future, even transformed into the lower chamber of the European Union, whereas the Council of the EU would become the upper chamber and the European Commission – the political executive of the EU. Therefore, from this perspective, a deep

[104] Cf. J.J.Węc, Spór o kształt ustrojowy, op.cit., pp. 337–542. On the theoretical justification of the divergence of views between supporters and opponents of deep EU system reform, cf. V.A., Schmidt, The 'new' EU governance: 'new' intergovernmentalism versus 'new' supranationalism plus 'new' parliamentarism, "Les Cahiers du Cevipol" 2016, N° 5, pp. 5–31.

system reform of the European Union was perceived as something positive; moving away from unanimity should – according to its supporters – improve the effectiveness of the European Union's actions and democratic decision-making should replace the existing technocracy and eliminate the democratic deficit in the EU. What they failed to notice was that the abandonment of unanimity would, rather than increase efficiency, only make the decision-making process more flexible and, most importantly, weaken the influence of medium-sized and small Member States in the decision-making process, unless their interests should be protected by a favourable definition of a blocking minority. Critics of a deep system reform saw the European Union as one of many international organisations and argued that it had already extended its competences too far at the expense of the Member States. This argument led them to the conclusion that the EU should no longer limit the national sovereignty of the Member States and directly involve its citizens, because it did not meet 'classic' conditions of democracy such as a common *demos* or a common language. From this perspective, the role of the representatives of the Member States in the decision-making process in the European Union remained crucial and should be implemented through the European Council, the Council of the European Union, and national parliaments. On the other hand, the decision-making process in the EU should be significantly influenced by supranational institutions such as: the European Parliament, the European Commission, the Court of Justice of the European Union, the Court of Auditors, or the European Central Bank, as that would be in line with the existing philosophy of European integration, applicable from the entry into force of the Treaties of Rome on 1 January 1958, according to which the system of European Communities and, subsequently, of the European Union was based on an approximate balance between the intergovernmental and supranational architectures, that is, on the balance between the Union and the Member States; the Union itself, since the entry into force of the Treaty of Lisbon in 2009, has become the world's only *par excellence* international organisation of a supranational nature.[105]

[105] For more on the approximate balance between the intergovernmental and supranational architectures of the European Communities and, subsequently, of the European Union, cf. J.J. Węc, Traktat Lizboński, op. cit., pp. 207–209, 358–359. J.J. Węc, The European Union Debate, op.cit., pp. 7–30. J.J. Węc, Die politische Debatte, op.cit., pp. 201–208.

If we were to evaluate the European Parliament's drafts and the report of the Franco-German Working Group from their two points of view, these proposals should be generally placed in a federal perspective, that is, it should be concluded that they were aimed at a profound system reform of the European Union. The implementation of each of these drafts could upset the approximate balance between the supranational and intergovernmental architectures existing since 1958 in favour of the former, mainly due to the total or radical deprivation of the right of veto in primary and secondary law (all the three drafts), the strengthening of the powers of the European Parliament, the European Commission and the Court of Justice of the European Union (all the three drafts), and the extension of the exclusive competences of the European Union and of the competences shared between the EU and the Member States (the EP drafts only).[106] It meant that the European Parliament's drafts and the report of the Franco-German Working Group largely referred to the proposals of the Convention on the Future of Europe of 2002–2003, rejected by the 2003–2004 IGC, and some of them went even further than the draft Treaty establishing a Constitution for Europe elaborated by the Convention.

At this point, it should be noted that the internal situation in the European Union was not very favourable for the planned system reform, for four reasons. Firstly, as many as three reforms had been underway in the EU for several years, i.e. the system reform of the Economic and Monetary Union (from 2010), the reform of the CSDP (from 2016), and the reform of immigration, visa and asylum policies (from 2015). Whereas the last one had been completed, at least formally,[107] the first two were still in progress. Secondly, the enlargement of the European Union to include up to the

[106] It is worth noting here that none of the three drafts provided for the transformation of the European Union into a federation or a 'superstate', although its main intergovernmental attribute protecting the sovereignty of the Member States, i.e. the principle of conferral, would be significantly weakened.

[107] Although the so-called Pact on Migration and Asylum, consisting of eight regulations and two directives, was adopted by the European Parliament on 10 April 2024 and by the Council of the European Union on 14 May of the same year, it did not solve all the problems associated with the mass influx of migrants into the European Union, in particular the problems faced by the EU Member States bordering Belarus and Russia, which were under constant and significant pressure caused by the two countries' opening artificial migration routes.

nine above-mentioned candidate countries did not fully justify the need for convening an Intergovernmental Conference, especially as most of those countries still failed to meet the accession criteria set out in Article 49 TEU. Moreover, the admission of new Member States to the EU by no means justified such a radical reform of the EU system as the European Parliament would like to carry out by proposing as many as 245 amendments to the existing Treaties. Thirdly, many of the proposals for Treaty changes could be introduced under the existing provisions of the Lisbon Treaty of 13 December 2007; some of them could be implemented in accordance with the *passerelle* procedure (e.g. extending the scope of qualified majority voting and replacing a special legislative procedure with the ordinary legislative procedure in many policies, with the exception of the CSDP), whereas other amendments could be made under secondary law (e.g. the European Council decision to limit the number of Commissioners, the European Parliament regulation on uniform electoral law or the harmonisation of national electoral laws, the Decision of the Council of the European Union on the establishment of new own resources) or even by revising the Rules of Procedure of the Council of the European Union (the Council Decision on a quintet of presidencies of the EU). Fourthly and lastly, the introduction of the proposed Treaty changes, especially the amendments put forward by the European Parliament, was so controversial that their implementation could even lead to the reinforcement of populism and increasing the strength of anti-European political groups throughout the European Union and turn against the Treaty reform itself.

The above assessments by the author of the monograph were largely confirmed in the Communication from the European Commission to the European Parliament, the European Council and the Council of the European Union on pre-enlargement reforms and policy reviews, dated 20 March 2024. It was also the first such strong reaction of the Commission to the documents of the European Parliament and of the Franco-German Working Group discussed here. Although the Commission expressed its general support for Treaty change 'if and where it is needed', it also pointed to the very wide scope for improving the efficiency of the functioning of the European Union on the basis of the present provisions of the Treaty of Lisbon, more specifically, by using the *passerelle* procedure (Article 48(7) TEU). Since its application would require a unanimous decision of the European Council, the consent of the European Parliament acting by a majority of its component members

and the unanimous consent of all national parliaments, the Commission indicated that it should be activated where possible. However, if that should prove impossible, the European Commission proposed the use of safeguards or of the constructive abstention mechanism. 'In practice, this would mean that the Council or European Council decision activating the *passerelle* could be accompanied by European Council conclusions that provide for the possibility for one or several Member States to invoke exceptional national interest grounds to continue discussions to reach a satisfactory solution, or to seize the European Council to deliberate on the matter'. In this context, the European Commission pointed out that in 2018 and 2019 it had already put forward concrete proposals to replace unanimity by qualified majority voting in the common foreign and security policy, tax policy, social policy, as well as in energy and climate policy. However, these solutions were rejected by most Member States. In addition to the changes in the decision-making system in the Council of the European Union and the European Council, the European Commission also proposed using the method of differentiated integration, more specifically, enhanced cooperation, opt-ins and opt-outs, as well as permanent structured cooperation. Such differentiation could 'be part of the equation within a larger Union at 30+ Member States, using the range of tools and mechanisms available under the current EU legal framework'. However, compliance with the EU axiology would be the prerequisite for launching any of the differentiated integration methods.[108] The proposal to gradually involve the candidate countries in various forms of cooperation with the European Union at different levels of integration showed that the European Commission considered economic integration and the harmonisation of regulations with the candidate countries to be a more realistic prospect, while suggesting that the issue of full accession to the EU be postponed or at least extended in time for the period after 2029, i.e. until the next institutional cycle. Simultaneously, the focus on the existing Treaty provisions as a basis for improving the efficiency of the functioning of the European Union institutions reflected a temporary or medium-term abandonment of the idea of revising the Treaties.

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[108] European Commission. Communication from the Commission to the European Parliament, the European Council and the Council on pre-enlargement reforms and policy reviews, Brussels, 20 March 2024, COM(2024) 146 final, pp. 1–22.

Conclusions

With reference to the research hypotheses formulated in the introductory remarks, it should be stated that the first hypothesis only conditionally found confirmation in the analysed source material. Whereas in 1950–1957 and then in 1990–2007 the European Union was essentially in the process of continuous system changes, between 1965 and 1985 and between 2007 and 2012 Intergovernmental Conferences were convened less frequently and on a rather *ad hoc* basis. This thesis is supported by the following statistics: these IGCs were held with an average frequency of about every 10.5 months in the period of 1950–1957 and every 2.8 years in the period 1990–2007, every 4.5 years in the period 1957–1985 and every 1.6 years in the 2007–2012 period. In this latter period, however, their convening was greatly facilitated by two simplified treaty amendment procedures introduced by the Lisbon Treaty. In other words, over the years and decades, the Intergovernmental Conference actually became an institutional model of the multilateral diplomacy of the European Union, but without acquiring the characteristics of a kind of permanent IGC. As regards the second, third and fourth research hypotheses, they were fully confirmed by the source material under review. The reforms of Treaty law in the European Communities and subsequently in the European Union were the scene of numerous controversies and disputes between supporters of supranational and intergovernmental solutions. Therefore, any review of most Treaty reforms must generally be ambivalent since the IGCs, soon becoming a forum for the participating States to play their national interests, were very often doomed to make difficult compromises. The changes introduced by the Lisbon Treaty to the EU's revision procedures have largely enabled a new typology of intergovernmental conferences to be formulated.

In answering the first research question [What were the reasons for the systemic changes in the European Union, leading to the frequent convening of Intergovernmental Conferences, and what were the determinants of the *ad hoc* organisation of such IGCs?], it should be noted that the fundamental reasons for almost continuous system changes in the European Union in 1996–2012, leading to the frequent convening of Intergovernmental Conferences in this period, were the controversial issues that had not been resolved at the previous IGCs. However, in the case of the Intergovernmental Conferences held in 1996–1997 and 2000, the accession negotiations with the Central and Eastern European countries contributed as an additional factor. As regards the Intergovernmental Conferences in 2007–2012, the main reasons for convening them were, respectively, the rejection of the Treaty establishing a Constitution for Europe in the referendums in France and the Netherlands (the 2007 IGC), the euro area debt crisis (the 2011 IGC), and the negative outcome of the Irish referendum on the Lisbon Treaty (the 2012 IGC). The Intergovernmental Conferences organised between 1950 and 1991 were also held as responses of the Governments of the Member States of the European Communities and subsequently of the European Union to ongoing intra-Community or international events. Whereas the three IGCs convened in 1950–1952 were mostly influenced by the East–West conflict and the Marshall Plan, the main reasons for the convening of the 1956–1957 Intergovernmental Conference were the failed projects for the creation of a Western European federation in 1954 and the decision of the Governments of the ECSC Member States to limit integration to economic issues. The Intergovernmental Conferences of 1965, 1970, and 1975 were the first IGCs to revise the Treaties establishing the European Communities because of the deepening process of economic integration and the consequent need for necessary system reforms. These included the consolidation of the Community institutions, of the Community administration and of the budget of the European Communities, and the conferral of budgetary powers on the European Parliament in view of the need to establish a Community system of own resources. The main reasons for the convening of the 1985 Intergovernmental Conference were as follows: the economic crisis caused by the collapse of the Bretton Woods monetary system (1971–1973); the so-called oil shock caused by the decisions of the OPEC countries to drastically increase oil prices (1973–1974); the political debate on the establishment of the European Union taking place in the European

Communities in 1972–1984; the need to legitimise the non-treaty changes introduced to the system of the European Communities in the 1970s and the 1980s and to improve the efficiency of the functioning of supranational institutions, as well as the necessity to amend the rules on the European single market. The basic premises for convening the two Intergovernmental Conferences in 1990–1991 included the reunification of Germany in 1990 and efforts to establish a European Union after eighteen years of political debate on the subject.

To answer the second research question [Which Member States were most likely to advocate supranational solutions, and which were equally as often in favour of intergovernmental solutions, and why?], it should be pointed out that supranational solutions were basically advocated by the Governments of Germany, France, Italy, the Benelux countries and Austria, because they wanted to deepen the integration process and strengthen the supranational architecture in the EU. In contrast to this, however, the Governments of the United Kingdom, Ireland, Denmark, Sweden and Finland as well as, after their EU accession, the Governments of Poland, the Czech Republic, Hungary and several other newly-admitted Member States, supported intergovernmental arrangements as they were fundamentally opposed to the weakening of the sovereignty of nation states in the EU. That dividing line often caused controversy between the delegations of individual Member States. Further, there was almost always a conflict between large, medium-sized and small Member States. Most frequently, it concerned the reform of the EU's institutional system, e.g. during the IGCs held in 1996–1997, 2000, 2003–2004 and 2007, or enhanced cooperation, as at the 1996–1997 IGC.

In answering the third research question [Which Member States initiated the Treaty reforms and which had the greatest impact on those reforms, and how did they push through their proposals?], it must be noted that the originators of the Treaty reforms in the framework of subsequent constitutional Intergovernmental Conferences were as follows: France (1950–1952); the Netherlands and Belgium (1956–1957); West Germany, France, the United Kingdom, Italy and Ireland (1985); France (1990–1991); France and Germany (1996–1997); France and Germany (2000); and France and Germany (2003–2004 and 2007). Whereas France had the greatest influence on the proceedings of the Intergovernmental Conferences in 1950–1952 and the Netherlands and Belgium were most active in 1956–1957,

from the mid-1980s an informal 'triumvirate' of West Germany/Germany, France and the United Kingdom was formed, setting the tone for the dynamics of individual IGCs in 1985–2007. Thus, West Germany, France, the United Kingdom, Italy and Ireland played the most important roles as participants in the 1985 IGC; France, Germany and the United Kingdom in 1990–1991; the United Kingdom, France and Germany in 1996–1997; France, Germany and the United Kingdom in 2000; and Germany, France, the United Kingdom, Poland and the Netherlands in 2002–2004 and 2007. It must be emphasised, however, that whereas Germany and France were mainly active in the preparatory phases of the Intergovernmental Conferences of 2002–2004 and 2007 and subsequently acted as the main brakes during the actual deliberations, the United Kingdom, Poland and the Netherlands submitted the most proposals both in the preparatory phase and during the proceedings of the two IGCs. The tactics of Germany and France were based on their intention to maintain at all costs the favourable (for them) provisions of the draft Convention text of 10 July 2003 (including the definition of double, or 'dual', majority) and the equally advantageous proposals contained in the IGC mandate of 23 June 2007. It is worth stressing here that during the Intergovernmental Conferences, Germany and France, in addition to the Monnet method mentioned above, very often used the bilateral consultation mechanism created by the Élysée Treaty of 22 January 1963 and, subsequently, the Aachen Agreement of 22 January 2019, which complemented it.[1] Thus, the two countries agreed not only on common negotiating positions, but even on common draft Treaty changes; such arrangements made it much easier for them to push through their proposals. This mechanism was primarily used in 1990–1991 (despite initial controversies), 1996–1997, 2003–2004 and 2007. Only the 2000 IGC revealed a serious diplomatic dispute between Germany and France, concerning the German proposal for the definition of double majority in the Council of the European Union, opposed by the French Government (cf. Table X).

[1] A recent example of such cooperation was the establishment of the Franco-German Working Group, which published the aforementioned report on the institutional reform of the European Union on 18 September 2023.

Table X: The influence of Member States on the decisions to convene and the dynamics of the constitutional Intergovernmental Conferences in the period 1950–2007

Years	Originators of the IGC	Member States having the greatest influence on the IGC
1950–1952	France	France
1956–1957	Netherlands, Belgium	Netherlands, Belgium, West Germany
1985	West Germany, France, United Kingdom, Italy, Ireland	West Germany, France, United Kingdom, Italy, Ireland
1990–1991	France	France, Germany, United Kingdom
1996–1997	France, Germany	United Kingdom, France, Germany
2000	France, Germany	France, Germany, United Kingdom
2002–2004	France, Germany	Germany*, France*, United Kingdom, Poland, Netherlands
2007	France, Germany	Germany*, France*, United Kingdom, Poland, Netherlands

* Member States active mainly in the preparatory phase of the conference, but acting as a brake during the actual deliberations.

Source: prepared by the author.

In answering the fourth research question [What were the most important successes and failures of subsequent system reforms of the European Communities and then of the European Union?], it should be highlighted that the most important successes of subsequent system reforms of the European Communities and then of the European Union were as follows: firstly, the establishment of the European single market (the SEA) and an incomplete Economic and Monetary Union (the Maastricht Treaty); secondly, the integration of the Schengen agreements into EU law (the Amsterdam Treaty); thirdly, giving the European Union its legal personality and thus the status of an international organisation within the meaning of international law (the Lisbon Treaty); fourthly, the introduction and strengthening of the axiological foundations of the EU (the Amsterdam Treaty and the Lisbon Treaty); fifthly, the establishment of a rigid division of competences between the Union and the Member States (the Lisbon Treaty); sixthly, the involvement

of national parliaments in the EU legislative process (the Lisbon Treaty); seventhly, the reform of the procedures for revising the EU Treaties (the Lisbon Treaty); eighthly and last, the communitarisation of the vast majority of EU policies, with the exception of the most sensitive areas such as the common foreign and security policy, including the common security and defence policy, and judicial cooperation in criminal matters and police cooperation (the Lisbon Treaty). On the other hand, the most significant failures of the Intergovernmental Conferences held to date included the following: firstly, the compromise solutions on the construction of the Economic and Monetary Union in the Maastricht Treaty, which caused the global financial and economic crisis of 2007–2008 to expose all the structural weaknesses of the EMU, contributing to the euro area debt crisis (under the provisions of that Treaty, the supervision of the financial sector would remain the responsibility of the central banks of the Member States participating in the Monetary Union, whereas fiscal policies would be supervised by the Governments of those Member States); secondly, ineffective provisions in the immigration, visa and asylum policies, which made the EU unable to cope with the migration crisis, especially with its culmination in 2015–2016 (the Amsterdam Treaty and the Lisbon Treaty); thirdly, the imprecise provisions laying down the principle of solidarity in the EU (Article 4(3) TEU), which meant that it was practically instrumentalised by Member States in accordance with their respective national interests; fourthly, the compromise arrangements for the inclusion of national parliaments in the EU legislative process, which resulted, *inter alia*, in the fact that the 'yellow card' procedure proved to be completely ineffective (the Lisbon Treaty).

In response to the fifth research question [According to what criteria has the new typology of intergovernmental conferences been defined?], it should be pointed out that the basic criteria for dividing intergovernmental conferences into constitutional and *ad hoc* conferences were: the purpose and scope of the proposed treaty changes and the duration of the conference. While constitutional conferences were generally devoted to the creation of new international organisations or to the profound constitutional reform of existing organisations, *ad hoc* conferences were limited to just a few constitutional changes in the latter organisations. While constitutional conferences lasted from several months to a year or even a little longer, the *ad hoc* conferences lasted for a short period of time, sometimes even only one day.

The proposals for Treaty reform tabled in 2023 by the European Parliament and by the Franco-German Working Group should be viewed with scepticism; their implementation in the current form could shake the approximate balance between the supranational and intergovernmental architectures in the European Union, existing since 1958, in favour of the former, mainly because of the almost complete deprivation of the Member States of the right of veto in primary and secondary law, the strengthening of the powers of supranational institutions (the drafts of the EP and of the Working Group), the upset interinstitutional balance in the decision-making triangle and the extension of the Union's exclusive competences and of the competences shared between the EU and the Member States (the EP draft only). If either of these drafts should enter into force in their present form, the European Union would also be 'fragmented' as the ratification of the Treaties would no longer be unanimous; instead, it would be carried out by a reinforced qualified majority of four fifths of the votes (the EP draft) or made possible without the consent of all the Member States in exchange for relevant opt-outs offered to them (the Working Group's draft). However, it must also be pointed out that even if the drafts under review should be implemented, the European Union would become neither a federation nor a superstate, although one of the main attributes safeguarding the sovereignty of the Member States, namely the principle of conferral, would be weakened.

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