

# Working Paper

Research Division EU Integration  
Research Division EU External Relations  
Stiftung Wissenschaft und Politik  
German Institute for International and Security Affairs

*Simon Bulmer*

## Germany and the EU constitutional debate

From launch to salvage operation

SWP  
Stiftung Wissenschaft  
und Politik  
Deutsches Institut für  
Internationale Politik und  
Sicherheit

Ludwigkirchplatz 3-4  
10719 Berlin  
Telefon +49 30 880 07-0  
Fax +49 30 880 07-100  
[www.swp-berlin.org](http://www.swp-berlin.org)  
[swp@swp-berlin.org](mailto:swp@swp-berlin.org)

Working papers are papers in the subject area of a Research Division, which are not officially published by SWP. These papers are either preliminary studies that later become papers published by SWP or papers that are published elsewhere. Your comments are always welcome.

Working Paper FG 1, 2009/ 06 and FG 2,  
2009/ 03  
March 2009, SWP Berlin

# Table of Contents

Introduction .....	3
Germany and constitutional politics.....	4
After re-unification: a new German European policy? .....	5
German voices in the constitutional debate.....	6
<i>The federal government and the launch</i> .....	6
<i>The Länder governments</i> .....	7
German voices in political context .....	8
From the convention to the Constitutional Treaty and ratification.....	8
The salvage operation: brokering agreement towards the Lisbon Treaty.....	9
Germany and constitutional reform: an institutionalist perspective .....	10
Germany and the EU: still a ‘tamed power’? .....	11

This paper will be published as a contribution to Maurizio Carbone (ed.): National Politics and European Integration: From the Constitution to the Lisbon Treaty (Cheltenham, UK; Northampton, MA: Edward Elgar, forthcoming 2009/10)

*Professor Simon Bulmer, Director of the Graduate School in Politics and of the Centre for International Policy Research, University of Sheffield, was visiting scholar at the Stiftung Wissenschaft und Politik in autumn 2007.*

## Introduction<sup>1</sup>

German governments have traditionally been amongst the strongest advocates of deeper European integration and key players in all episodes of institutional constitutional reform. This chapter examines the character of German policy in the constitutional discussions leading to the Lisbon Treaty. It explores whether it is possible to identify any changes or trends in Germany's European diplomacy during the constitutional debate in the period 2000-07. In doing so, it notes first of all that constitutive politics are not always a good guide to Germany's overall pattern of diplomacy. Particularly during the chancellorship of Helmut Kohl (1982-98) very strong pro-European rhetoric was developed regarding integration policy. In other areas of European diplomacy, however, policy was more pragmatic, occasionally less than coherently developed and therefore not always in line with the rhetoric. Of particular salience to the evolution of German policy towards European integration in the time-frame under consideration is the impact of unification. Kohl, the 'Chancellor of German Unity', was a convinced pro-European and determined to allay partners' concerns about unification through deepening integration. Would his successors act in a similar manner? Would continuity prevail? Would the post-Kohl era be characterised by a radical change? Or would there be pragmatic evolution? The constitutional debate spans the era of the Red-Green coalition, led by the Social Democrats (SPD) under Chancellor Schröder (1998-2005), and the Grand Coalition of Christian Democrats (CDU/CSU) and SPD under Angela Merkel (2005- ), thus giving a reasonable time-frame and range of party-political leadership to make an evaluation.

In exploring Germany's evolving European diplomacy it is argued that the Kohl era was set on a particular trajectory, which assured continuity until the end of his chancellorship in 1998. The character of European policy thereafter would likely be determined either by the position adopted by Kohl's successor or by the other potential source of ideas on integration, the foreign minister. In the event Chancellor Schröder's general pronouncements on integration were to emphasise German interests. By contrast, Foreign Minister Joschka Fischer (Greens), was prepared to set out a vision for the future of the EU and did so in a speech given in May 2000. This speech was especially influential in the early phase of the constitutional debate. It represented the launch of the constitutional debate. I examine the ideas enunciated by Fischer, their impact and Germany's effectiveness in contributing to that debate.

The final stage of moving to the Lisbon Treaty reflected a changed situation. The Grand Coalition under Angela Merkel had come to power in November 2005 during the 'period of reflection' on the Constitutional Treaty. Moreover, it was scheduled to take over the presidency of the European Union (EU) in the first half of 2007, at the end of the reflection period. This was not the time for Merkel's government to develop a new European vision but for brokering a solution to the complex political situation of a treaty rejected by two states, approved by many but 'on hold' in some others. The Merkel government was concerned to try and salvage as much as possible and its presidency was successful in achieving that goal. The German government's role was vital to the emergence of the Lisbon Treaty.

In examining the evolving German position in the constitutional debate I shall follow a new institutionalist approach applied at the domestic political level. This framework can help with understanding the fact that Germany may no longer be seen as a unitary actor on matters relating to the European constitutional order due to the powers granted to the Länder at the time of ratifying the Maastricht Treaty. I will also note the differences in emphasis between Foreign Minister Fischer and Chancellor Schröder: views which are associated with different departments in the Berlin government. I also give brief attention to the views of other actors.

In the chapter I argue that the episode shows Germany playing an influential role in launching the constitutional debate and in later helping salvage from the constitutional Treaty what became the Lisbon Treaty. While reiterating the caveat that the evolution of German European policy cannot be

<sup>1</sup> I am grateful to the Stiftung Wissenschaft und Politik Berlin, which hosted my research for this paper during a period as visiting scholar in autumn 2007. I specifically thank Peter Becker, Daniela Kietz, Andreas Maurer, Roderick Parkes and Simone Zander for advice and help of different kinds. I also thank Willie Paterson and the editor for their comments.

judged on constitutional politics alone, it is striking that the 'vision thing' subsided from the federal government's policy after Fischer's speech in 2000. It was rather absent from the Grand Coalition's contribution to the Lisbon Treaty, although the government's effort to be seen as a neutral arbiter was doubtless a contributory factor. I conclude that there is evidence of an evolution in German European policy that results from generational change and evolving preferences in a unified Germany.

## Germany and constitutional politics

The Federal Republic of Germany has arguably been the most consistent supporter of European integration. Underpinned by a broad political consensus on European integration at elite and mass levels, successive governments have been able to play a consistently positive role in treaty reforms from the Single European Act to the Lisbon Treaty (Bulmer, Jeffery and Paterson 2000, pp. 1-18). In addition, the Franco-German bedrock of integration has served as a vehicle for initiatives on European integration, although with some decline since Maastricht (Bulmer, Jeffery and Paterson 2000, pp. 55-60; more generally on the Franco-German relationship, see Cole 2001). Germany also has a strong record in placing an imprint on the European integration project, for example through the exporting of institutional blue-prints, most notably in relation to the European Central Bank (Bulmer 1997, p. 74). This strong German contribution to the integration project reflected a succession of chancellors and foreign ministers who held a strong commitment to integration. It also reflects a relatively clear responsibility within Germany for integration policy, namely as a matter for the Foreign Office but where the federal chancellor may exercise an override because of his or her authority as government head.

Two developments relating to Germany's integration policy since the end of the Cold War are worth exploring in the context of this study. First, the Länder governments secured new powers in the making of European policy, constitutionally enshrined in Article 23, as a condition of ratifying the Maastricht Treaty (Hrbek 1999). For a period in the negotiations leading to the Amsterdam European Council in June 1997 the Länder governments threatened to veto the ratification of the treaty if their interests were not taken into account (Bösche 2006: pp. 60-8). Secondly, Chancellor Kohl played a leading role in initiatives such as on monetary union and Justice and Home Affairs in the negotiation of the Maastricht Treaty. His objective was to deepen European integration as part of anchoring a unified Germany into the EU. Would Kohl's successors be as prepared to adopt such a strongly pro-integration stance? The omens from the negotiations on treaty reform at Nice in 2000 were not propitious, since there had been an open dispute between Chancellor Schröder and President Jacques Chirac over Germany's representation in the EU institutions. This disagreement was part of Schröder's self-declared position of being prepared to stand up for German interests (see Hyde-Price and Jeffrey 2001: 700-2). The end of the Kohl era and the new powers of the Länder thus raised the possibility of a more circumscribed German commitment to the constitutional debate.

Although a strong contributor to the institutional and policy reform debates, on more day-to-day policy-making German tactics have been rather mixed. A larger set of policy actors becomes involved, resulting in a less coherent approach (see Bulmer, Maurer and Paterson 2001). The German federal government's principle of ministerial autonomy has tended to encourage the development of 'house' European policies and this departmentalism has been accentuated by the persistence of coalition governments. Additionally, Germany has an unusual situation of having two ministries responsible for European policy coordination, with the chancellor having the power to intervene and override. The two coordinating ministers are the Foreign Office and the Federal Ministry of Economics and Technology (BMWT). With the formation of the Grand Coalition in 2005 the BMWT regained coordinating powers held until 1998 by the (then) Federal Economics Ministry.<sup>2</sup> It gives a flavour of the German context to note that this arrangement took into account the need to balance the stakes of the Social and Christian Democrat coalition partners in European policy. Thus, not only do two ministries coordinate European policy but they are led by ministers from different parties. There is clear potential for inconsistencies or lack of coherence in policy in such a system. All this is in addition to the powers possessed by the Länder governments in European policy, especially because they play a large part in its domestic transposition. It is because of this rather complex coordinating system and the lack of a norm of information-sharing between government departments that Germany has been re-

<sup>2</sup> From 1998-2005 the Federal Finance Ministry held this second coordinating function. For details of how the complex system worked during that period, see Bulmer, Maurer and Paterson, 2001.

garded as less than effective at the tactical level. Reflecting the paradox of Germany's success in placing significant imprints on the EU's character despite its cumbersome European policy-making process, Hans-Ulrich Derlien has written of the machinery 'failing successfully' (2000, pp. 54-6).

### **After re-unification: a new German European policy?**

The end of the Cold War prompted questions about whether a new German European policy would develop. In particular three potential scenarios were envisaged (see Schmalz 2001: 62-8). Under the first, policy would be characterised by continuity, with integration remaining a German vocation and national interests being presented as European ones. In other words, Germany would continue to channel its interests through supranational institutions. Under the second variant policy would be characterised by pragmatic evolution, with integration remaining important but no longer an end in its own right. Under this scenario policy would become 'normalised', with the adoption of a more calculating approach. Under the final scenario European policy would be subject to greater change, with an end to Germany's principled commitment to integration, a shift towards the framing of policy in national-interest terms, and the EU being utilised only when it was perceived as the most advantageous policy framework. Under the second and third scenarios, therefore, Germany's contribution to the constitutional debate could be expected to be reduced to greater or lesser degree.

How has the practice of German European policy been understood in the recent past? Peter Katzenstein's *Tamed Power* interpretation of Germany's role in Europe emphasised the utilisation of soft power expressed through multilateral institutions (Katzenstein 1997). It underlined the importance of 'the sociological', that is of norms and identity, in explaining the institutionalised taming of German power. Bulmer, Jeffery and Paterson's evaluation of Germany's European diplomacy offered quite a similar view, observing how Germany shaped the regional milieu in particular through the exporting of institutional solutions to the EU level, thereby creating an arena of multilateral cooperation within which its interests could flourish (Bulmer, Jeffery and Paterson 2000). The most noted example was the German model of monetary policy and central banking, which was enshrined in the European rules surrounding Monetary Union. This explanation drew on institutionalist interpretations to explain Germany's contrasting performance on the strategic and tactical dimensions of European policy noted earlier. Subsequent studies by Sebastian Harnisch and Hanns Maull (2001) and by Volker Rittberger (2001), focusing on foreign policy more broadly, came to similar conclusions about the continuity in German policy norms rather than identifying any major change in policy trajectories.

Later analyses have suggested change in German behaviour in the EU. Sebastian Harnisch and Siegfried Schieder (2006) argue that German European policy has become 'weaker, leaner and meaner', as a result of three developments (see also Harnisch 2006). First, they draw attention to the changed domestic institutional framework, leading to a 'domestication of Germany's European policy'. These changes comprise the reformed Article 23 giving the Länder governments a stronger voice in the making of German European policy; the emergence of sometimes critical voices adding policy constraints, such as the Bavarian government or the Federal Constitutional Court with its October 1993 *Maas-tricht* ruling; and the effects of the financial constraints arising from the costs to German public finances of re-unification. The consequences drawn from this analysis were that German European policy had become more unwieldy, was less agreed domestically in terms of its content, while Berlin's willingness to conduct 'cheque-book diplomacy' had come to an end.

In a more trenchant contribution Gunther Hellmann and collaborators argue that German European policy has undergone significant changes and has departed from being a 'model European' (Hellmann 2006a). Drawing on illustrative material from asylum and refugee policy as well as security and defence, they offer a thesis called 'de-Europeanization by default'. The argument is that 'when a choice had to be made between narrowly defined "national interests", on the one hand, and state-transcending "European interests", on the other, "Europeanist" instincts seldom prevailed over "nationalist" instincts among German decision-makers' (Hellmann 2006b: ix). This interpretation has been echoed by Beverley Crawford's analysis of Germany's 'embedded hegemony in Europe' (Crawford 2007).

I shall return to these interpretations of Germany's European policy towards the end of this chapter to see what light they shed on Germany diplomacy during the constitutional debate through to the Lisbon Treaty and vice versa.

## German voices in the constitutional debate

### The federal government and the launch

The German contribution to the whole constitutional debate leading on to the Lisbon Treaty has been fundamental. It was Foreign Minister Joschka Fischer who placed on the agenda the whole idea of a 'constitutional future' for the EU. In a speech to the European Parliament on 12 January 1999 Fischer called for a debate on creating a constitution for the European Union (de Witte 2001: 24). Initially, the impact of his speech was limited, although it was a factor behind the federal government's advocacy of the EU Charter of Fundamental Rights. This charter was solemnly proclaimed at the December 2000 Nice European Council but remained on the EU's political agenda during the subsequent constitutional episode because of the wish to give it stronger legal status.

In the meantime, Joschka Fischer had made another, more consequential speech at the Humboldt University in Berlin on 12 May 2000. In this speech, he advocated three reforms:

the solution of the democracy problem and the need for fundamental reordering of competences both horizontally, *i.e.*, among the European institutions, and vertically, *i.e.*, between Europe, the nation-state and the regions.

These reforms could only succeed through the realisation of:

the project of a European constitution centred around basic, human and civil rights, an equal division of powers between the European institutions and a precise delineation between European and nation-state level. The main axis for such a European constitution will be the relationship between the Federation and the nation-state (Fischer 2000).

Fischer's speech, made in a private capacity, called for a 'lean European Federation, but one capable of action, fully sovereign, yet based on self-confident nation-states' (Fischer 2000). As revealed in his autobiography, Fischer had originally sought a Franco-German initiative on the future of Europe with his counterpart, Hubert Védrine. However, the latter's position was complex due to cohabitation between the Socialist government in France and the centre-right presidency of Chirac. Consequently, Fischer decided to 'go it alone' ('Also entschloss ich mich zum Alleingang' Fischer 2007: 302). This *Alleingang* is worth noting, for initiatives of this kind in the past had typically been undertaken bilaterally and suggested a new German self-confidence.

Not all Fischer's ideas were to bear fruit, for example the proposal of a second chamber of the European Parliament, to be comprised of national MPs. None the less, it not only launched, but also defined the nature of the constitutional debate. In concrete terms it was backed up by Germany pushing for the inclusion of Declaration 23 in the 2001 Nice Treaty (Declaration on the future of the Union), calling for a new constitutional debate.<sup>3</sup> Eiko Thielemann (2004: 362-3) points out that the inclusion of references to a 'competence catalogue' (that is, delineating the powers of the EU) and to subsidiarity followed through from an earlier December 1999 meeting of minister presidents of the Länder with Chancellor Schröder. As at Amsterdam, so again in advance of what became the Nice Treaty, the Länder governments were using their new, post-Maastricht powers on European policy-making to influence the institutional reform debate. It is no surprise, therefore, that Peter Norman regarded Declaration 23 to be 'a triumph for German diplomacy', while it also 'got the Länder leaders off Mr Schröder's back' (Norman 2004: 572).

The official start to the constitutional debate began with the Laeken Declaration of 15 December 2001, which set out some sixty issues to be considered in the framework of the Convention on the Future of Europe (Norman 2005; Becker and Leïße 2005). Four broad themes were identified: the divi-

<sup>3</sup> See the Treaty of Nice at: [http://eur-lex.europa.eu/en/treaties/dat/12001C/pdf/12001C\\_EN.pdf](http://eur-lex.europa.eu/en/treaties/dat/12001C/pdf/12001C_EN.pdf), accessed 3 February 2009.

sion and definition of powers, the simplification of the treaties, the institutional set-up, and moving towards a constitution for European citizens. The Convention comprised various German representatives: not just from the federal government but also from the Bundestag, the Länder governments and German MEPs.

During the early period of the Convention Chancellor Schröder's representative was Peter Glotz, a retired politician who had been secretary general of the SPD 1981-87. It was an unusual choice and contributed to Germany punching below its weight in the debates (Norman 2004: 574). After the re-election of the Red-Green coalition of the SPD and Greens in September 2002, Joschka Fischer replaced Glotz. Although he had played an important agenda-setting role in 2000, Fischer had to contend with the pressures of work facing a foreign minister; they did not permit him to take a central role in the Convention. Key components in the federal government's policy were spelt out by Fischer when he joined the Convention (see Norman 2004: 572-3). In addition to progress towards the four broad themes specified in the Laeken Declaration, they included strengthening the status of the EU Charter of Fundamental Rights; increased provision for qualified majority voting (QMV) in the Council in order to facilitate decision-making in an enlarged EU; the practice of QMV through a 'double-majority'; making the Commission president accountable to the European Parliament (EP); and maintaining balance in the institutional triangle of EP, Commission and Council.

In January 2003 Fischer found himself defending Franco-German proposals on the institutions that were not entirely his own preferences (Norman 2004: 575-6). Rather, they stemmed from agreement between Chancellor Schröder and President Chirac. Franco-German cooperation had to balance the French president's preference for strengthening intergovernmental working methods with a more supranational line on the federal government's side, and especially on the part of Fischer and the Foreign Office. Schröder's pragmatism led to concessions being made to Chirac but left Fischer defending a less integrationist position in the Convention than he would have liked. The Franco-German paper, which coincided with the fortieth anniversary of the Elysée Treaty between the two states, was consistent with important parts of German policy. However, the strengthening of political leadership in the European Council represented a policy change. Within the Convention the Franco-German compromises did bring some convergence in the positions of France, Germany and the United Kingdom. This development was important to securing eventual agreement on the draft constitution.

## The Länder governments

The guiding principle of Länder involvement in European policy in the period from the Maastricht Treaty onwards has been captured well by Charlie Jeffery (2004: 606). It represented a transition 'from "let us in!" to "leave us alone!"'. 'Let us in' referred to the success of the Länder governments in securing participation rights in EU policy-making under Article 23. By contrast, 'leave us alone' reflected a view on the part of Länder governments that the EU should stop interfering with their competences. It was especially popular in southern Länder, such as Bavaria and Baden-Württemberg, which sought greater autonomy to pursue their own solutions domestically as well as in the EU context (Jeffery 2004: 608). Wolfgang Clement, the Minister President of North Rhine-Westphalia, had himself made an important contribution to the constitutional debate in a February 2001 speech in the same series at the Humboldt University (Clement 2001; also see Jeffery 2004: 613-5). He criticised intrusive regulation by the European Commission; argued for a classification of the EU's competences (exclusive, framework and complementary competences); and even proposed some repatriation of EU policy, notably on agriculture and the structural funds. The classification of competences bears some relationship to the eventual agreement, which has been carried through to the Lisbon Treaty.

On 31 May 2001 the 16 Europe ministers of the Länder agreed a declaration well ahead of the initiation of the Convention so as to make their position clear to the federal government in a joint working group (see Thielemann 2004: 363). Amongst their priorities were: a review of existing EU competences; that any reform of competences should be based on specific and limited transfers, subsidiarity, proportionality and respect for nation states; a call for the abolition of Article 308, which was seen as in conflict with the principle of subsidiarity, and a call for the Committee of the Regions and for regions with legislative power to have the right to bring forward judicial challenges on competence matters (Thielemann 2004: 363).<sup>4</sup> At the Convention itself the Länder governments were repre-

<sup>4</sup> Article 308 of the Treaty of the European Community Treaty reads as follows: If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this

sented by Erwin Teufel, the Christian Democrat Minister President of Baden-Württemberg. The Länder governments were also represented in a task force organised by the federal government when Joschka Fischer was a member of the Convention, and were thus well positioned in the constitutional debate.

### German voices in political context<sup>5</sup>

The negotiations in the European Convention took place against a generally supportive political debate. The political parties were broadly supportive except for opposition on the part of the Party of Democratic Socialism (the successor party to the East German communists). Unsurprisingly, some deputies from the Bavarian Christian Social Union argued for more federalism and less centralisation, giving expression to views held at the highest levels in their own Land government.<sup>6</sup> The German parliament played two particular roles in contributing to the debate. Its upper chamber, the Bundesrat, comprised of representatives of the Länder governments, served as the forum for providing resolutions which could inform the negotiating position of Erwin Teufel in the Convention. The lower chamber, the Bundestag, held four debates and took two resolutions. There were twenty-five meetings of its European Committee to consider the issues. The Bundestag was represented in the Convention by the SPD deputy, Jürgen Meyer (Becker and Leißle 2005: 204). Various interest groups, notably employers, industrialists, trade unions and local authorities had also produced position papers (Becker and Leißle 2005: 210-4). There was, therefore, wider engagement with the Convention process, and in a broadly positive spirit. Divisive issues were confined to matters of emphasis, detail or to the question of whether God and Europe's roots in Christianity should be included in the constitution.

### From the convention to the Constitutional Treaty and ratification

The federal government drew a positive balance-sheet in evaluating how the Convention's draft constitution matched its preferences (see Cuntz 2003). It had achieved its broad constitutional objectives; had secured a set of specific objectives, for example on Justice and Home Affairs; and had successfully defended the retention of control at the national level of third country nationals' access to the labour market. However, it had not succeeded to secure all goals, for instance provisions for QMV on social policy and as the norm for the Common Foreign and Security Policy. Like the federal government, the Länder governments were also broadly content with the draft constitution (see Becker and Leißle 2005: 209-10; more fully, Hrbek 2003).

The draft constitution was presented to the EU government heads in July 2003. Ahead of the next stage – the Intergovernmental Conference which took up work in October 2003 – the federal government took a clear line. It strongly advocated the draft treaty as the basis for the treaty negotiated in the IGC: *das Paket nicht in Frage stellen* (Cuntz 2003: 355).<sup>7</sup> Indeed, it refused a request on the part of the Länder to push for their outstanding wishes at the IGC (Becker and Leißle 2005: 210). The federal government's main negotiating line, therefore, was defensive. It sought to retain the agreed double majority rules on QMV, to defend some extension of QMV into the Common Foreign and Security Policy and push for a slimmed-down Commission. However, some concessions inevitably had to be granted.

Following agreement on the Constitutional Treaty by the European Council, and its signature on 29 October 2004, the ratification process commenced. This was punctuated by the rejections of the treaty by the French and Dutch electorates in May/June 2005. Within Germany the cabinet approved the treaty on 4 November 2004. Efforts to have a referendum in Germany faded, Bavarian Minister President, Edmund Stoiber, having been a prominent supporter for the idea. Instead the standard treaty-ratification process was followed. Accordingly, the Bundestag and Bundesrat debated the proposals. Both chambers sought to use the ratification process to secure enhanced engagement with the federal

Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

<sup>5</sup> For fuller discussion of the wider debate in parliament, parties and interest groups, see Becker and Leißle 2005: 204-14.

<sup>6</sup> CSU Minister President Edmund Stoiber also held a speech at the Humboldt University (Stoiber 2001).

<sup>7</sup> 'Do not question the package' (my translation).

government in the domestic process of European policy-making. However, the view of the federal government was that such reforms could wait until a later stage. Both chambers ratified the treaty in May 2005 (see Maurer 2007: 21-22).<sup>8</sup> Final ratification in Germany was postponed by the Federal President pending a challenge to the Federal Constitutional Court (FCC) by the CSU politician Peter Gauweiler, who sought a referendum on ratification. The FCC took the view that the issue was not a priority after the referendum results in France and the Netherlands and did not respond. In consequence, 'Germany unexpectedly found itself no longer among those states which backed the [Constitutional Treaty] unconditionally' (Maurer 2008: 26). After a two-year period of reflection Germany would find itself with the task of proposing a way out of the impasse.

### **The salvage operation: brokering agreement towards the Lisbon Treaty<sup>9</sup>**

At the June 2006 European Council it had become clear that the task of reviving the Constitutional Treaty (CT) would fall to the German presidency, with a view to finding the basis for final agreement by the end of 2007 in the succeeding, Portuguese presidency. Two key resources were at Germany's disposal. First, as a large member state it had the necessary diplomatic resources to deploy in the intensive bilateral and multilateral negotiation of a way forward. In addition, it did not have to be attentive to hostility to the CT in domestic public opinion, in the two parliamentary chambers. Chancellor Merkel and Foreign Minister Frank-Walter Steinmeier played a role in pressing for a mandate to be agreed during the Austrian Presidency on resuming the constitutional debate in 2007. They both dampened down expectations (on this phase see Church and Phinnemore 2008 for more details). Nevertheless, they both committed to devising a roadmap for decision at the June 2007 European Council.

The federal government can be seen as playing three roles: those of 'pioneer', 'manager of expectations' (Maurer 2008: 26) but also that of defending its own substantive position. The last of these was relatively straightforward: to maintain as much of the CT as possible. As regards its other two roles, it proceeded through intensive diplomacy. However, it was backed up by a quiet self-confidence on the part of Chancellor Merkel that an agreement could be reached, even given the uncertainties presented by presidential elections in France. The government recognised that there were three groups of states that had to be brought on board in an eventual agreement: France and the Netherlands, where the rejection by referendum had occurred; the critics of the treaty (Britain, Poland and the Czech Republic) and the remaining states which had ratified or were favourably disposed to do so. This last group had met in January 2007 in Madrid as 'Friends of the Constitutional Treaty'. Their support for a 'maxi-treaty' coincided with Germany's own preferences. Chancellor Merkel sought to mobilise negotiations between heads of state and government with every member state plus the Commission and the EP appointing up to two so-called 'focal points' for the specific bargaining.

At first the focal points worked on a separate agenda item, namely the contents of the Berlin Declaration of 25 March 2007, which marked 50 years since the signing of the Treaty of Rome (Schwarzer 2008). This set of negotiations was designed to generate momentum towards finding a way out of the constitutional impasse through essentially the same procedure. Turning back to the fate of the CT the Chancellor's Office then circulated twelve questions to each member state in order to establish the basis on which bilateral negotiations with the focal points should be conducted in late April and early May. Merkel followed up with a round of bilateral diplomacy with other EU leaders. From these negotiations a list emerged of the key areas where negotiations would be necessary at the June European Council. At this summit a precise mandate could be agreed to form the basis of an IGC to be held under the Portuguese presidency. It was here that Chancellor Merkel had to deploy all her skills to broker an agreement, for instance making concessions on the CT's proposed European foreign minister to satisfy Britain. The summit brought the new French President, Nicolas Sarkozy, into the foreground. He had a key role to play in both the negotiations, notably in brokering agreement with the Polish government (see below). He also had to mollify domestic opinion (see Drake and Lequesne in this volume), in particular since, as Interior Minister, he had advocated a 'mini-treaty' to replace the

<sup>8</sup> In the Bundestag ratification was secured by a vote of 568 to 23, with two abstentions. In the Bundesrat the vote was in favour but the government of Mecklenburg-Vorpommern abstained.

<sup>9</sup> For a well-informed account of the presidency's handling of the constitutional issue during the German presidency, see Maurer (2008), on which the next section draws. Also see Dinan (2008) and Church and Phinnemore (2008).

CT. Polish demands for revisiting the arrangements for QMV in the Council proved to be particularly tricky. Chancellor Merkel had to take a firm line with Polish negotiators – threatening to go ahead without them – and there was short-term damage to bilateral relations. As a compromise it was agreed that the double majority system would be deferred to 2014: a concession which the German government could accept as broker of an agreement, although it meant the deferral of a system that best matched its own interests.

The German government had performed a vital salvage operation during its presidency. It had no specific demands of its own regarding the way forward, other than that there should be one and that it should be as close to the CT as possible. Chancellor Angela Merkel had also played a key role in acting as broker, drawing upon her more pragmatic approach. Merkel is not a European visionary in the style of Helmut Kohl. In the opinion of Josef Janning, her clever brokerage and flexibility was well suited to the pragmatism demanded by the circumstances (Janning 2008: 322). By taking a lead and bypassing standard practice, which would have centred on the Foreign Office, she had taken a calculated risk. It had paid off, at least for the time being. But it would depend on the Portuguese presidency being able to follow it through into an agreed treaty. This was successfully achieved, albeit after resolving some issues that were advocated by other states, such as Britain and Poland, and the Lisbon Treaty was signed on 13 December 2007.

Within Germany there was broad satisfaction with the resultant treaty (Institut für Europäische Politik 2008a: 36-9). Foreign Minister Steinmeier called for rapid ratification of the treaty. The cabinet approved the Lisbon Treaty on 19 December and it was presented to parliament. Ratification there was completed with an overwhelming majority in May 2008.<sup>10</sup> In the Bundestag the principal opposition came from the Left Party, which has variously criticised the treaty as undemocratic, neo-liberal, anti-welfare and militaristic. Unfortunately, Steinmeier's call was not successful because of two challenges to the FCC. One is again from the CSU deputy Peter Gauweiler on an argument that the Lisbon Treaty is incompatible with the German Basic Law.<sup>11</sup> The other is from the Left Party. German President Horst Köhler suspended ratification pending a ruling from the FCC. This step somewhat weakened the German government's authority in calling for other states to continue with ratification in light of the Irish public's rejection of the Lisbon Treaty in a referendum in June 2008. The referendum result also briefly opened up some divisions (Institut für Europäische Politik 2008b: 36-8). Chancellor Merkel argued that there should be no enlargement without the Lisbon Treaty, although the Bavarian Minister President Gunther Beckstein (CSU) argued that Croatia should be allowed to join swiftly. Foreign Minister Frank-Walter Steinmeier suggested that Ireland should be able to opt out for a period. However, Chancellor Merkel countered that there could be no two-speed Europe. In view of the German government's continued use of smaller fora to advance integration in Justice and Home Affairs (Bulmer 2009 forthcoming), her position seemed at odds with her own government's practice. Doubtless, she was conscious of how Steinmeier's remarks might be interpreted in Ireland.

## Germany and constitutional reform: an institutionalist perspective

How can we bring some analytical order to the empirical account outlined above? The period examined (1999-2009) has clearly been characterised by a two-level game. One set of negotiations has taken place at EU level, whereas another set has been located in each of the member states. The chancellor and foreign minister (of both, the Red-Green coalition under Gerhard Schröder and of Angela Merkel's Grand Coalition), together with the participants at the Convention, have been positioned at the interface of these two 'games'. The interpretation that I offer is that the institutional arrangements of European policy have mattered to the conduct of German policy especially in the Convention but also at other stages of the constitutional process.

A key institutional feature is Article 23 of the Basic Law. It was introduced in this form with a view to mollifying the concerns of Länder governments at the EU's impact on their powers. It has now become an important route for exporting the concerns of the Länder governments into EU-level constitutional debates. The listing of the EU's competences is doubtless welcome in many states of the EU:

<sup>10</sup> The Bundestag voted in favour on 24 April 2008 with an overwhelming majority of 515 to 58 votes, with one abstention. The Bundesrat voted in favour, with one Land government abstaining.

<sup>11</sup> More details at Gauweiler's website: <http://www.peter-gauweiler.de/>, accessed 5 February 2009.

those with a constitutional tradition of having such a catalogue in their domestic political arrangements; and those where this issue is framed in terms of sovereignty. However, the leverage exerted by the Länder on the federal government's policy ahead of the Nice negotiations cannot be overlooked. Article 23 has enabled the Länder governments wish for a catalogue of EU competences to play a prominent role and the outcome is reflected in the Lisbon Treaty itself. Other concerns, such as on subsidiarity and the powers of the Committee of the Regions were also facilitated. Of course, it can be argued that even prior to the article's introduction, the Länder governments were able to exert influence, notably upon the Maastricht Treaty itself. This earlier influence derived from the earlier 'nuclear option' whereby the Länder could threaten to block ratification in the Bundesrat. I argue, therefore, that the institutional provisions within Germany have had a significant impact on the nature of the preferences articulated at the EU level, in the constitutional debate.

Divergence between different ministries is an occasional feature of German European policy, although rarely so on matters of integration policy. When the Länder opposed the introduction of QMV on comunitarised aspects of asylum and immigration policy in the Amsterdam Treaty negotiations, they were joined by the Federal Interior Ministry (see Bösch 2006: pp. 60-8). No such divergences were noticeable during the episode covered in this chapter. Nevertheless, there were some institutional oddities. For instance, in the early phase of the Convention Peter Glotz was not plugged in to European policy-making in Berlin. When Foreign Minister Joschka Fischer joined the Convention, the Foreign Office's coordination and task force activity provided a stronger foundation for his interventions. However, Chancellor Schröder still possessed an override. The fiftieth anniversary of the Elysée Treaty demanded a symbolic Franco-German initiative in the European sphere and the bilateral institutional paper was noticeably driven by the institutional dynamics of bilateralism overlaid upon the preferences of the Foreign Office and Fischer.<sup>12</sup>

A final institutional actor which has become a potential voice in constitutional reform is the FCC. After its 1993 Maastricht ruling it has become a target for appeals. The legal logics of the German Basic Law and the EU treaties are potentially at odds with each other. This situation has led to an additional problem. Could the FCC conceivably raise an objection to a treaty that has been passed with such an overwhelming majority as 515 votes to 58? Elmar Brok and Martin Selmayr (2008) argue that political arguments should be considered in the Bundestag and not in the FCC.<sup>13</sup>

For the reasons outlined above I argue that German diplomacy during the constitutional debate 1999-2009 was structured in significant ways by the domestic machinery of governance. Hence an institutionalist perspective is important for understanding German preferences and the conduct of its diplomacy.

## Germany and the EU: still a 'tamed power'?

Finally, what light does German behaviour during this constitutional episode shed on its wider role in European integration? Is Germany still channelling its power through the European Union? Has it moved to a more national-interest focused diplomacy as argued by Hellmann (2006b) in particular? As noted earlier, constitutional politics are not a representative example of European policy.<sup>14</sup> Hence, whilst I see no significant departure from the tamed power thesis (Katzenstein 1997) or from Germany 'shaping the regional milieu', I recognise that this is scarcely a representative case. If we need evidence of Germany shaping the regional milieu, we need look no further than the impact of Fischer's original Humboldt speech. To be sure, as a result of the need to tone down the CT, no 'constituent treaty' has actually emerged. But some of the component parts of such a treaty remain (in more 'orthodox' treaty form) in the Lisbon Treaty. Fischer's impact is still discernible in the Lisbon Treaty.

<sup>12</sup> It is perhaps worth recalling that another very strong symbolic Franco-German display took place in September, later that same year. Due to the need for their attendance in Berlin for an important Bundestag vote on domestic reforms, Chancellor Schröder and Foreign Minister Fischer allowed President Chirac to represent German interests at a session of the European Council (Becker and Leiß, 169-170).

<sup>13</sup> In February 2009 the FCC was considering the cases referred to above.

<sup>14</sup> It can be argued, incidentally, that the cases examined by Hellmann and others (2006a) are also unrepresentative of the full range of European policy.

Helmut Kohl's view of European integration was one of a common destiny (*Schicksalsgemeinschaft*). It is unlikely that such a commitment to integration will be exhibited by a senior German politician in the future. Joschka Fischer might be one of the last idealist German politicians with an integrationist vocation. German re-unification, the decline of the shadow of the past (Nazism, political instability under the Weimar Republic), and generational change amongst German politicians is likely to lead to a change in values. Even so, much of the EU's day-to-day policy is deeply embedded in supranational procedures. One noticeable aspect to Fischer's interventions needs underlining, though. They were made without French 'cover': a departure from typical past practice of bilateral agenda-setting initiatives. Whilst it is possible Fischer's *Alleingang* was the product of the special circumstances of cohabitation in France (1997-2002), an alternative argument is that Germany has become more self-confident in the post-unification period.

It is the possible fall of the Lisbon Treaty which might bring about more significant change in German European policy. And the fate of the treaty is now outside German government's hands. Under such circumstances the prospect of a 'core Europe' pressing ahead of the pack might emerge in the fashion floated by Wolfgang Schäuble (now the CDU Federal Minister of the Interior) and Karl Lamers back in 1994 (see Schäuble and Lamers 1994). Germany would likely be at the core of the core. As noted earlier (see Bulmer 2009 forthcoming), there are signs of this approach in the conduct of German policy on Justice and Home Affairs. If it were to become more widespread across the full range of EU policy, then that would mark a distinct shift from the 'tamed power' interpretation. German European policy would move away from advocating that the EU should sail as a convoy, towards a greater preparedness to see smaller flotillas, with Germany prominent, proceed in advance. Under this latter scenario Germany's European vocation would become more utilitarian in approach, searching for venues favourable for the pursuit of its national interests in specific policy areas. The traditional pattern of bilateral – usually Franco-German – initiatives for multilateral EU solutions might also give way to a new one of greater national self-confidence of the kind displayed by Fischer's *Alleingang* at the launch of the constitutional episode and displayed by Merkel during the salvage operation.

## REFERENCES

- Becker, P. and Leißle, O. (2005), *Die Zukunft Europas. Der Konvent zur Zukunft der Europäischen Union*, Wiesbaden, VS-Verlag für Sozialwissenschaften.
- Bösche, M. (2006), 'Trapped Inside the European Fortress? Germany and European Union Asylum and Refugee Policy', in G. Hellmann (ed.) (2006), *Germany's EU Policy on Asylum and Defence*, Basingstoke, Palgrave Macmillan, pp. 29-90.
- Brok, E. and Selmayr, M. (2008), 'Der "Vertrag der Parlamente" als Gefahr für die Demokratie? Zu den offensichtlich unbegründeten Verfassungsklagen gegen den Vertrag von Lissabon', *Integration*, **31** (3), 217-34.
- Bulmer, S. (1997), 'Shaping the Rules? The Constitutive Politics of the European Union and German Power', in P. Katzenstein (ed.) (1997), *Tamed Power: Germany in Europe*, Ithaca NY, Cornell University Press, pp. 49-79.
- Bulmer, S. (2009 forthcoming) 'Shop till you drop? The German executive as venue-shopper in Justice and Home Affairs', in P. Bendel, A. Ette and R. Parkes (eds) (2009 forthcoming), Münster, Lit Verlag.
- Bulmer, S., Jeffery, C. and Paterson, W. (2000), *Germany's European diplomacy: Shaping the regional milieu*, Manchester, Manchester University Press.
- Bulmer, S., Maurer, A. and Paterson, W. (2001), 'The European Policy-Making Machinery in the Berlin Republic: hindrance or hand-maiden?', *German Politics*, **10** (1), 177-206.
- Church, C. and Phinnemore, D. (2008), 'Shackled by the Mandate: negotiating and Ratifying the Treaty of Lisbon', unpublished manuscript.
- Clement, W. (2001), 'Europa gestalten - nicht verwalten. Die Kompetenzordnung der Europäischen Union nach Nizza', speech by Wolfgang Clement, Humboldt University Berlin, 12 February, at: <http://www.rewi.hu-berlin.de/WHI/english/fce/fce301/index.htm>, accessed 3 February 2009.
- Cole, A. (2001), *Franco-German Relations*, Harlow, Pearson Education Ltd.
- Cuntz, E. (2003), 'Ein ausgewogener Kompromiss: Die Ergebnisse des Konvents aus Sicht der Bundesregierung', *Integration*, **26** (4), 351-356.
- Crawford, B. (2007), *Power and German Foreign Policy*, Basingstoke, Palgrave Macmillan.
- Derlien, H.-U. (2000), 'Germany', in H. Kassim, B. G. Peters and V. Wright (eds) (2000), *The National Coordination of EU Policy: The Domestic Level*, Oxford, Oxford University Press, pp. 54-78.
- Dinan, D. (2008), 'Governance and Institutional Developments: Ending the Constitutional Impasse', *Journal of Common Market Studies*, **46** (annual review), 71-90.
- de Witte, B. (2001), 'The Nice Declaration: Time for a Constitutional Treaty of the European Union?', *The International Spectator*, **36** (1), 21-30.
- Fischer, J. (2007), *Die rot-grünen Jahre. Deutsche Außenpolitik - vom Kosovo bis zum 11. September: Deutsche Außenpolitik - vom Kosovo bis zum Irak*, Köln: Kiepenheuer & Witsch Verlag.
- Fischer, J. (2000), 'From Confederacy to Federation: Thoughts on the Finality of European Integration', speech by Joschka Fischer, Humboldt University Berlin, 12 May, at: [http://www.jeanmonnetprogram.org/papers/00/joschka\\_fischer\\_en.rtf](http://www.jeanmonnetprogram.org/papers/00/joschka_fischer_en.rtf), accessed 3<sup>rd</sup> February 2009.
- Harnisch, S. (2006), *Internationale Politik und Verfassung. Die Domestizierung der deutschen Sicherheits- und Europapolitik*, Baden-Baden, Nomos.
- Harnisch, S. and Maull, H. (2001), *Germany as a Civilian Power*, Manchester, Manchester University Press.
- Harnisch, S. and Schieder, S. (2006), 'Germany's New European Policy: Weaker, Leaner, Meaner', in H. Maull (ed.) (2006), *Germany's Uncertain Power: Foreign Policy of the Berlin Republic*, Basingstoke, Palgrave Macmillan, pp. 95-108.
- Hellmann, G. (ed.) (2006a), *Germany's EU Policy on Asylum and Defence. De-Europeanization by Default?* Basingstoke, Palgrave Macmillan, 2006.
- Hellmann, G. (2006b), 'Preface', in Hellmann (2006a), pp. viii-x.

- Hrbek, R. (1999), 'The Effects of EU Integration on German Federalism', in C. Jeffery (ed.) (1999), *Recasting German Federalism. The Legacies of Unification*, London, Pinter Publishers, pp. 217-33.
- Hrbek, R. (2003), 'Die deutschen Länder und der Verfassungsentwurf des Konvents', *Integration*, **26** (4), pp. 357-370.
- Hyde-Price, A. and Jeffery, C. (2001), 'Germany in the European Union: Constructing Normality', *Journal of Common Market Studies*, **39** (4), 689-717.
- Institut für Europäische Politik (ed.) (2008a), *EU 25/27-Watch*, no. 6, Berlin, Institut für Europäische Politik, March, at: [http://www.iep-berlin.de/fileadmin/website/09\\_Publikationen/EU\\_Watch/EU-27\\_Watch\\_No\\_6.pdf](http://www.iep-berlin.de/fileadmin/website/09_Publikationen/EU_Watch/EU-27_Watch_No_6.pdf), accessed 5 February 2009.
- Institut für Europäische Politik (ed.) (2008b), *EU 25/27-Watch*, no. 7, Berlin, Institut für Europäische Politik, September, at: [http://www.iep-berlin.de/fileadmin/website/09\\_Publikationen/EU\\_Watch/EU-27\\_Watch\\_No\\_7.pdf](http://www.iep-berlin.de/fileadmin/website/09_Publikationen/EU_Watch/EU-27_Watch_No_7.pdf), accessed 5 February 2009.
- Janning, J. (2008), 'Bundesrepublik Deutschland' in W. Weidenfeld and W. Wessels (eds) (2008), *Jahrbuch der Europäischen Integration 2007*, Baden-Baden, Nomos, pp. 317-24.
- Jeffery, C. (2004), 'Regions and the Constitution for Europe: German and British Impacts', *German Politics*, **13** (4), 605-24.
- Katzenstein, P. (1997), 'United Germany in an Integrating Europe', in P. Katzenstein (ed.) (1997), *Tamed Power Germany in Europe*, Ithaca NY, Cornell University Press, pp. 1-48.
- Kietz, D. and Perthes, V. (eds) (2008), *The Potential of the Council Presidency. An Analysis of the German Chairmanship of the EU, 2007*, Research Paper 1, Berlin, Stiftung Wissenschaft und Politik, pp. 25-31. Available at: [http://www.swp-berlin.org/en/common/get\\_document.php?asset\\_id=4656](http://www.swp-berlin.org/en/common/get_document.php?asset_id=4656), accessed 5 February 2009.
- Maurer, A. (2007), 'Vom Verfassungs- zum Reformvertrag', Forschungsgruppe 1, Diskussionspapier 8, Berlin, Stiftung Wissenschaft und Politik, at: [http://www.swp-berlin.org/common/get\\_document.php?asset\\_id=4205](http://www.swp-berlin.org/common/get_document.php?asset_id=4205), accessed 5 February 2009.
- Maurer, A. (2008), 'Pruning, Plundering and Reconstructing. Work on the Constitutional Treaty', in Kietz and Perthes (2008), pp. 25-31.
- Norman, P. (2004), 'Germany and the UK from Convention to the IGC', *German Politics*, **13** (4), 569-80.
- Norman, P. (2005), *The Accidental Constitution: The Making of Europe's Constitutional Treaty*, 2<sup>nd</sup> edn, Brussels, Eurocomment.
- Rittberger, V. (ed.) (2001), *German Foreign Policy since Unification: an Analysis of Foreign Policy Continuity and Change*, Manchester, Manchester University Press.
- Schäuble, W. and Lamers, K. (1994), 'Überlegungen zur europäischen Politik', Bonn, CDU/CSU Fraktion im deutschen Bundestag, at: <http://www.cducsu.de/upload/schaeublelamers94.pdf>, accessed 5 February 2009.
- Schmalz, U. (2001), 'Deutsche Europapolitik nach 1989/90: Die Frage von Kontinuität und Wandel', in H. Schneider, M. Jopp und U. Schmalz (eds) (2001), *Eine neue deutsche Europapolitik? Rahmenbedingungen – Problemfelder – Optionen*, Bonn, Europa Union Verlag, pp. 15-68.
- Schwarzer, D. 'The "Berlin Declaration" – Trial Run for Negotiations on the Constitutional Treaty', in Kietz and Perthes (2008), pp. 19-24.
- Stoiber, E. (2001), 'Eckpunkte der Europäischen Zukunftsdebatte', speech by Edmund Stoiber, Humboldt University Berlin, 8 November, at: <http://whi-berlin.de/documents/stoiber.pdf>, accessed 5 February 2009.
- Thielemann, E. (2004), 'Dividing Competences: Germany's Vision(s) for Europe's Federal Future', *Comparative European Politics*, **2** (3), 358-74.