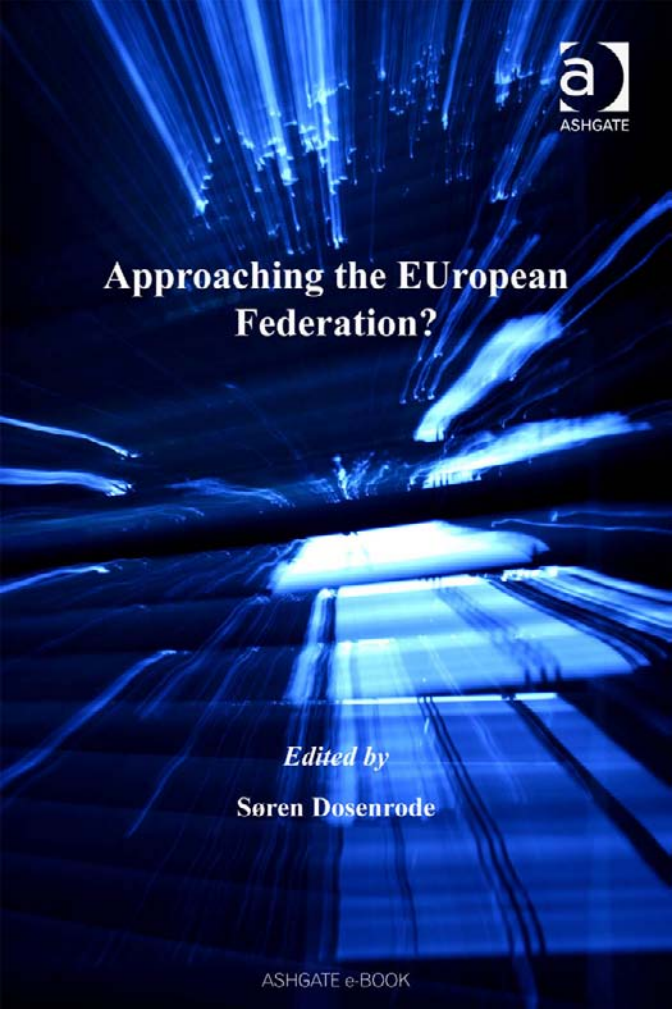
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List of Abbreviations

ASEM	The Asia-Europe Meeting
B-VG	Bundesverfassungsgesetzt (Austrian constitution)
CAP	Common Agricultural Policy
CEC	Commission of the European Communities
CFSP	Common Foreign and Security Policy
CoR	Committee of the Regions
COREPER	Comité des Représentants Permanents (Committee of Permanent Representatives)
CT	Constitutional Treaty (Treaty establishing a constitution for Europe)
EC	European Community
ECB	European Central Bank
ECJ	European Court of Justice
ECOFIN	Council of Ministers comprising of ministers of finance and economics
ECSC	European Coal and Steel Community
EEA	European Economic Area
EMU	Economic and Monetary Union
ESCB	European System of Central Banks
ESPON	European Spatial Planning Observation Network
EU	European Union
GATT	General Agreement on Trade and Tariffs
GDP	Gross Domestic Product
GG	Grundgesetz (German constitution)
GNI	Gross National Income
GNP	Gross National Product
HICP	Harmonized Index of Consumer Prices
ICC	International Criminal Court
IGC	Intergovernmental Conference
ISLM	Investment Saving Liquidity Money
NATO	North Atlantic Treaty Organization
OCA	Optimal Currency Area
OECD	Organization for Economic Cooperation and Development
SEA	Single European Act
SGP	Stability and Growth Pact
TEU	Treaty on the European Union (known as the Maastricht – or Nice – Treaty)
TIA	Territorial Impact Assessment

UN	United Nations
UNPROFOR	United Nations Protection Force
WMD	Weapons of Mass Destruction
WTO	World Trade Organization

Chapter 1

Introduction

Søren Dosenrode

Why this Book?

The European project has, since it was initiated in 1951, had a surprising momentum, and the European Union (EU) has now, according to some authors, approached statehood, although this fact is not always welcomed in northern Europe. A Convention on the Future of Europe handed over a proposal for a constitutional treaty to the heads of state and government of the EU, who used it as a starting-point for a new 'Treaty Establishing a Constitution for Europe' which was signed in Rome in October 2004. This Constitutional Treaty (CT) has not had an easy way when it came to ratification in some of the Member States. This has been ascribed to a number of factors, of which some had nothing to do with the treaty itself (in France, the apparent dislike of the President as well as a realization of the consequences of the Internal Market which was ratified in 1987 were important factors explaining the 'no', and in the Netherlands an important factor was bad communication; a large number of citizens did not understand the CT and its implications and thus voted 'no' – a very rational behavior) and others were 'would-be consequences' of CT (the French and Dutch fear of a Turkish EU membership, which also played an important role among the majority of the voters saying 'no' in Luxembourg). The summer summit of 2005 put the CT 'on the shelf' as some commentators said, but it does not change the fact that the CT is an important contribution to the European integration process, and that it will influence the next decades' development of integration in Europe, be it as fully ratified, as partly incorporated or as inspiration for the Union. That the 'shelving' of the CT is not absolute can be seen from the remarks from the European heads of state and government, that is, the statements of Chancellor Merkel and President Chirac of 6 June 2006, who agreed that the discussion process should be brought to an end in the second half of 2008, under the French EU presidency. Mrs Merkel stated: 'A functioning Europe needs this [the constitutional] treaty.'

One important aspect of the CT is that it represents a common denominator of the heads os state and government in the enlarged EU that is 25 states. Never before have the elites (!) of Europe adopted such an ambitious document and invested such an amount of political energy and prestige. But the French 'non' and the Dutch 'nee' has pointed out the aspect of the 'elite-people relationship', which has occurred several times in EU history (the best-known example was the Danish 'nej' to the Maastricht Treaty and the following French 'justement oui').

But behind the apparent agreement of the governments of the EU Member States remains the big question: which way for Europe; a federal direction or an intergovernmental approach? In this sense it is the hour of truth, but again one has to remember that the present EU is a mix of the two approaches, just as the US was until the end of the Civil War.

As we expect the CT to have a lasting impact on the Union, it is timely to present an integrated analysis of central concepts and questions related to the EU and the CT. But as the CT's concrete future is uncertain, the aim of the book has been to present fundamental analysis which is independent of the destiny of the CT, but which relates to it, for example, the question of the relationship of constitution and legitimacy, constitution and integration, policy-making, the EU's economic and monetary institutional settings, the sub-national regions and the CFSP. On the other hand the CT did introduce new institutional approaches and it would be inappropriate not to discuss, for example, 'the double presidency'.

This book is the result of the last three years' research into the state of the EU and, as indicated in the overview of its structure below, is structured rigidly, to give the anthology strong cohesion.

Why a Federal Approach?

> [...] The French Government proposes [...] to place Franco-German production of coal and steel under a common High Authority, within the framework of an organization open to participation of the other countries of Europe [...] The solidarity in production thus established will make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible [...] this proposal will build the first concrete foundation of a European federation which is indispensable to the preservation of peace [...]

So the words of Robert Schuman in the Paris Declaration of 9 May 1950 issued by the French government.[1] Nearly 50 years later to the day (12 May 2000) the German Foreign Minister Joschka Fischer gave a speech at the Humboldt University titled 'From confederation to federation'. In his speech Fischer pleaded for the creation of a European federation, with strong Member States. It would be an exaggeration to claim that it was Fischer's speech which triggered the renewed discussion on the 'finality' of European integration, but it was definitely an important factor.

Thus the concept of federalism has been called upon throughout the history of the Union.[2] Why is that so? To answer this question one has to remember that it is

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1 In his little book '*Pour l'Europe*' Robert Schuman develops his ideas of a federation.

2 In his analysis of the EC from 1972-1987 Burgess concludes that: 'This study has demonstrated a fundamental continuity of federal ideas, influences and strategies in the political development of the European Community during the years between 1972 and 1987' (p. 218).

important to distinguish between federalism as a theory about how federations arise, are organized and function, and federalism as a normative approach; a political theory of action to follow which aims at creating, for example, a European federation because it is considered to be a good frame for the integration of diverse states and cultures (*E pluribus unum*). Of the advantages ascribed to federalism one can mention the following (Adrian Vatter in Klöti 1999, p. 80):

> As *the central functions* of a federal order one counts the strengthened control of power in a democratic system of governance, the enhanced possibility for the population to participate in the policy process (the territorial principle), the enhanced chances of forcing through the decentralized organized interests, it is easier to secure regional interests than in a unitary state, the relieving of the central decision making authorities of pressure,[3] strengthened protection of minorities, and the larger possibility to experiment and eventually to implement special arrangements (my translation, SD).

In addition, it is sometimes mentioned that a federal system makes it easier for regional and smaller parties to gain power (Braun 2000, p. 8), and that it may also strengthen solidarity among the citizens, as the units are smaller (Wachendorfer-Schmidt 2000, p. 2). In other words, from a *normative* point of view, federalism is considered to be the best approach to organizing such a culturally diverse entity as the European Union. This became clear – should anyone have doubted – in the first drafts from the Convention of the Future of Europe, where the federal principle was explicitly mentioned as a model for the treaty, but it was later removed from the text, as it was considered politically 'too dangerous', that is, for the Northern Europeans who are not accustomed to the term, and sometimes equate it with 'centralism', which is basically a *contradiction in res*.

It is also worth remembering that the former Soviet Union and Ex-Yugoslavia were federations, too, and that most of the advantages mentioned above hardly apply to them. Thus it is important to be aware that the state organizing principle of 'federation' is not 'good' *per se*, but used in a democracy it does contain the above mentioned possibilities, but also that we talk of possibilities, not conditionalities. In that sense the concept of 'federalism' is just like the concept of 'regime'.

As federalism has imbued the history of the EU and directly inspired the new constitution, it will be the theoretical frame of the book. This does *not* indicate that the authors of this book take over the concept uncritically, but it is a concept towards which we play our intellectual ballgame: some embrace it while others will criticize it.

Chapters to Follow

As the book has a federal starting-point, it begins by discussing the federal tradition. The second chapter gives an overview of what constitutes the core of federalism, and contrasts it with the concept of confederation. Then follows a historic overview of the development of federal thought and action, in Europe and

the USA, ending with an attempt to distillate a European federal model. This is followed by a classification of federations, and, ending this chapter, a discussion of how federations are made.

Constitution and legitimacy are central concepts in the discussion of any organized polity. But there seem to be very large differences, for example, in how the population and the elite look at the concepts and their relationship, and there seems to be a larger difference across the EU – with the United Kingdom at one end of a continuum and Austria and Germany at the other end (Abromeit, this book, p. 37):

> How can those different constitutional traditions be reconciled? And how can we explain the wide support the project of 'constitutionalizing Europe' has found among European politicians even though the constitutional cultures they were reared in vary so much? Was it really their primary aim 'to institutionalize legitimate democratic government in the EU', or were they motivated 'rather by the need to shore up popular support for its political system'?

These questions are discussed in Chapter 3.

There may be different opinions as to whether a federal organization of a state has an impact on the policy outcome, but there is, not surprisingly, agreement that a federal organization inevitably has another kind of policy-making process than a unitary state. The aim of Chapter 4 is to analyze the policy *process* within federations, which may roughly be divided into two traditions: the European (cooperative) and the Anglo-Saxon (dual). The working hypothesis being that the Anglo-Saxon federations, here the US, Australia and Canada, differ significantly in their mode of policy-making from the European ones. Then the findings are compared to the Nice-EU and the CT-EU.

The EU needs to be made more effective, as was said already at the outset of the Laeken Process; perhaps because the EU's legitimacy to a high degree depends on its output, its efficiency. Thus a number of institutional changes have been suggested, and written into the CT. A significant novelty is the creation of a 'double-presidency'. It is obvious to analyze this new institution *inter alia* asking the question of a possible new President's legitimacy. In doing so, Chapter 5 will draw upon the experiences with presidential governments in states like Austria, France and Germany.

Chapter 6 deals with economic, monetary and fiscal questions of the EU. It starts out by drawing attention to the 'surprisingly' tranquil development of the EMU, the reform of the stability pact and the CAP, before this is developed in the first main part under the headline 'Current developments of the EU's fiscal and monetary arrangements'. This part is followed by a thorough discussion of the 'puzzle' why 'things are about right', when a substantial part of academia had warned about the instability of an EMU without a full, fiscal union including substantial transfers from the richer to the poorer regions of the EU. In the conclusion the findings are related to the possible CT.

Chapter 7 analyzes the sub-national level in the EU. The regions have hardly been visible in the constitution process, or so it seems. The federalist ideology as it relates to the regional tier, and the political realities of today's integration process will be discussed in part two. However, it is argued that the recent resurgence of regionalist ideas within the constitutional agenda relates more to the debates emerging from the broader governance debates currently ongoing both within the EU and internationally, and will be discussed in part three. The role of the Committee of the Regions in the deliberation and preparatory work in the context of preparing for the European constitution will then be discussed in part four. Later the question of the regionalization of Europe or the Europeanization of regions is discussed, before the impact of the enlargement process is analyzed.

In Chapter 8 the foreign political status of the EU is analyzed. While some contending views are caused by profoundly different analyses of EU foreign policy, other contending views can be explained by the fact that different analysts operate with different subject matters. The chapter begins by illustrating the consequences of applying different approaches. In the second part, four contending images of contemporary EU foreign policy are outlined. The third section analyzes what it takes to constitute a global player, including the question of having a constitution. In general, the chapter traces linkages between foreign policy practice, analytical reflections on practice, and the codification of certain practices.

Finally the question of the EU's nature and institutions is analyzed from a federal perspective. What is the EU today (Nice-EU) and what would it be if the CT was ratified – we expect 'something' to happen, and the CT as the maximum change. Although the chapter is not a 'summing up' of the previous chapters, some of the findings will be included in it.

We let Patrick Riley end this chapter by condensing Leibniz's understanding of a 'good' federation (1987, p. 83): 'Successful federal systems, indeed, seem to rely precisely on the negotiation, discussion and concession which Leibniz recommends, and not just on "mandates" given *ex plenitudio potestatis*.'[3]

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[3] I would like to thank publisher Kirstin Howgate and her team from Ashgate Publishing for their patience as well as the competent handling of the businesses related to converting a manuscript into a book. Also I thank Mrs Marianne Høgsbro and Ms Cirkeline Kappel, Institute for History, International and Social Studies, Aalborg University, for their setting up of the manuscript swiftly and competently.

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Chapter 2

Federalism

Søren Dosenrode[1]

> Federal government is not always and everywhere good government. It is only at the most a means to good government, not a good in itself. (Wheare 1963, p. 34)

Introduction

This chapter should be seen as a short introduction to 'federalism', as this concept plays an important role in the history of the EU, and thus in this book. It starts out by giving a short analysis of the core of federalism, followed by an equally short discussion of the concept 'confederation' to clarify the differences between the two concepts. Then follows a historic overview of the development of federal thought and action, ending with an attempt to distillate a European federal model. This is followed by a classification of federations, and, ending this chapter, a discussion of how federations are made.

The Core of Federalism

What is federalism? The core of federalism is about two things: independence and politics, territorial politics. Creating a federation is about getting the advantages of being a greater entity, while keeping as much independence for the constituent entities as possible (Dosenrode 2003, p. 453). A Member State in a federation does not lose its identity. But federalism is also about the territorial division of power; a sharing of the state's policy-making power between two or more levels.[2] In a unitary state the central government has the ultimate decision-making power within all policy areas; not so in a federation.

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[1] I would like to thank Professor, Dr. Heidrun Abromeit and Jean Monnet Professor Knud Erik Jørgensen for comments on an early version of this chapter, and Associate Professor, Dr. Wolfgang Zank for his comments on this one.

[2] Elazar defines federalism as: '[…] a comprehensive system of political relationships which has to do with the combination of self-rule and shared rule within a matrix of constitutionally dispersed powers' (1987, p. 1). In other words, he expands the concept beyond states, which is a highly debatable step.

A federation has a division of power at two or more levels, with exclusive competencies at the various levels (the central government may not occupy policy areas belonging to the Member States without their consent). Lijphart wrote on the division of power (1999, p. 187): '…the fundamental purpose of guaranteeing a division of power is to ensure that a substantial portion of power will be exercised at the regional level'.

Division of power is obviously not to be confused with 'administrative decentralization', which to a smaller or larger degree occurs in any state[3] – perhaps with micro-states as the exception. Administrative decentralization implies that the parliament or the central administration may delegate some competencies, and then call them back by a unilateral act, as in Denmark, a very decentralized unitary state, where municipalities and counties possess, for example, taxation powers (Dosenrode 2004, pp. 7-32). Riker (1975) mentions the two, logical, extremes: the centralized federation, where all but one competence rests with the federation, and the other, decentralized federation, where all but one competence lay with the Member States. As a matter of principle, as many policy areas as possible are going to lie at the Member State level or below that.

The Member States are the basis for the federation; normally they have concluded a treaty establishing the federation. In that sense making a federation is often a bottom-up process – 'often' because federalism was imposed in the Ex-Soviet Union and in Ex-Yugoslavia. The prefix 'Ex-' indicates that federalism demands a dual loyalty, as the founding fathers of the USA were conscious of, and this double loyalty did not exist in those states mentioned.[4]

The sovereignty of the federation is an amalgam of the sovereignty of the Member States and the federation; together they are sovereign, not alone. In other words, there is a shared sovereignty.

Abromeit (2000, p. 8) sums up federalism's 'mission':

> The common formulation of their raison d'être (…) is that they combine 'unity and diversity'; that is small policies enjoy the advantages of the greater unit (usually defined in terms of military security and economic prosperity) while preserving their identity (mostly defined in socio-cultural terms). Both logically and historically prior (in most cases of 'working' federations) is the existence of those distinct political units coupled with a marked 'provincial loyalty' (Riker, 1975, p.116) of their populace; once the latter gets lost, the federalist nature of the whole set-up will soon change into some unitary kind of government. In a broader perspective, the rationale of federalism consists in the protection of minorities in a territorial segmented society: the object is to allow them to

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3 Leibnitz already noted this (Riley 1987, p. 71).

4 Forsyth (1981, p. 3) makes a similar point: 'However once again there is a difference between a pact of union made directly by political communities which either possesses the *de jure* status of states or are asserting in the very act of union the independence characteristic of states, and a union which is in effect a jointly agreed regroupment of part of an already existing imperial state structure, and which is later recognized by the imperial power as a single independent federal state.'

go on living their lives after their own fashion, and to reconcile their urge for self-determination with the needs of effective if limited governance in the greater unit.

Federalism and Confederalism

As one occasionally finds in some texts the statement that the EC/EU is a confederation (cf. Elazar 1987, p. 112, Ross 1967, p. 34), or 'confederation' and 'federation' are used interchangeably (cf. Forsyth 1981, p.3), it may be worthwhile to take a brief look at the concept of 'confederation' to distinguish it from that of 'federation'. A crude definition of a confederation is that it is a league of independent states designed to last for a longer time, not as an alliance, and has a broader goal, as such one. It has common institutions to represent the confederation, and it is states, not citizens, which participate in the decision-making, which normally, but not exclusively, does not affect the citizens directly. Its members may leave it by a unilateral act. Elazar writes that federations place great emphasis on the rights of the citizens, whereas 'Confederations, on the other hand, are primarily communities of polities, which places greater emphasis on the liberties of the constituent polities' (Elazar 1987, p. 93). This goes well with the classical juridical distinction which tells us that international public law rules the relations among the entities in the confederation, where as public law rules the relations in federations (Bleckmann 1982, p. 53f.).[5]

Wheare defines confederations, shortly (1963, p. 32): 'That form of association between states in which the general government is dependent upon the regional governments has often been described as a "confederation" and the principle of its organization as "the confederate principle".'

Abromeit (2000, p. 6f.) has listed seven questions to help analyze whether a polity is a confederation; of these she considers questions five and six the most important:[6,7]

- Does sovereignty remain with the member states or is it divided?

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5 Bleckmann goes on to criticize this definition.

6 According to Forsyth (1981, pp. 139-142) Louis le Fur also describes a confederation with five characteristics: 1) a confederation does not constitute a new state, 2) it has its own, distinct juridical personality, giving it more than a system of delegated power, 3) the members participate extensively in the decision-making and the implementation of the will of the constitution, 4) it has a triple right of: a) to declare war, b) to receive and send envoys, and c) to conclude treaties, and 5) the members keep the right to secession.

7 In a confederation the sovereignty remains with the Member States as well as the state-quality. The legal basis for the confederation is a treaty, and the *Kompetenz-Kompetenz* rests with the states. Decisions made at the confederated level do not normally have any direct effect on the citizens and will have to be ratified by the states according to the individual rules. The citizens are excluded from the decision-making, and the decision-making procedure at confederated level is exclusively unanimous.

- Does the 'state-like quality' remain solely with the members or does the union acquire this quality, too?
- What is the legal basis: treaty or constitution?
- Where does the *Kompetenz-Kompetenz* rest?
- Do decisions at union level have direct effect on citizens, or do they have to be ratified by member states?
- Do citizens have the opportunity to participate (…) in decision-making at union level?
- What are decision-making procedures at union level like: exclusively unanimous or predominantly (super-) majoritarian?

The whole character or the spirit is very different according to whether one speaks of a federation or a confederation; a federation is a political system in its own right, it is more than the sum of its entities; a confederation is a group of polities coordinating policies, but remains only the sum of the entities. What unites the two is that they create some kind of community creating 'us' and 'them'.

Classical Federal Theory

The Beginnings

This part aims at two things; first it should give a short historical overview of the 'classical' federal idea, focusing on European thinkers but also drawing on the American ones as well as the federal experiences in the USA and Europe, and second, it distills a European 'kind' of federalism, which will be used in the next part.

Looking back at the European history of ideas, the wish for peace and prosperity inside, and strength towards outside threats, has prompted dozens of writers to make plans or grand designs for some kind of a perpetual alliance or a confederation since the 13th century.[8] But the concept of federation first turned up later in Europe, although Elazar (1987, p. 2) contributes the origin of federalism to the Bible and Jewish society:

> […] it is important to recognize the Biblical roots of all federal grand designs. The Biblical vision of the way of the world, the good commonwealth, and the messianic era is the ancient source of a federal principle and its classical expression. […] Indeed, Althusius' teaching is drawn principally from Biblical sources [and later] Biblical thought, on the other hand, is federal from first to last – from God's covenant with Noah establishing the Biblical equivalent of what philosophers were later to term natural law […] to the Jews' reaffirmation of the Sinai covenant under the leadership of *Ezar* and *Nehemia* thereby adopting the Thora as the constitution of their second commonwealth […].

[8] Cf. Dosenrode (1998, chapter 1).

In the debate in the Convention on the Future of Europe, the Greek origin of European democracy was often mentioned, but it was not considered acceptable to mention the cultural indebtedness of Europe to the Jewish-Christian religion. This seems slightly ironic, in the light of Elazar's quoted remark, and also in the light of his statement that: 'Greek philosophy is notably a-, if not anti-federal, in its fundamentals' (1987, p. 2). Below the thoughts of a few, central federal thinkers will be presented.

One of the first to be called a federalist is Johannes Althusius (1557-1638). Althusius' point of departure was the Holy Roman Empire of the German Nation and the United Dutch Provinces. At this time, the idea of the Empire being both *Imperium Mundi* (universal) and *Sacrum Imperium* (Holy, that is Christian) was questioned. Kings and princes questioned the universal power of the Emperor, and it gained momentum. The French, Scandinavian and British princes took a lead towards forming independent states at Europe's rim, but in central Europe the Empire remained as a legal entity for centuries, although the Emperor was *de facto* only a *primus inter pares*.

> This peculiarity of the German Empire, which at the same time adopted a pronounced particularistic character, even as it maintained its legal character as an entity, has been referred to as the beginning of constitutional federalism (Hueglin 1987, p. 19).

Also important is Althusius' insistence on power being checked. That if there is a ruler or a government, there must also be a diet representing the territorial entities (Forsyth 1981, p. 78f).

To me it is hard to decide whether Althusius was in fact an early federalist or some kind of early socialist.[9] But in trying to define a European federal tradition, his 'grand design' is important insofar as he is emphasizing the *dialogue as the essence of politics*. Equally important is his *organic approach*, where all participants are important, and *where power has to be checked*. Together they may be the spiritual fundament of the German-Swiss tradition of cooperative- or deliberative-based federalism.

Patrick Riley (1987, p. 49) has a good point when, overlooking theorizing federalism in the 16th-18th centuries, he states that:

> Influenced by the notion that sovereignty is (by definition) 'indivisible', and that any territorial division of power would involve regression to a 'medieval' fragmentation without centralized authority, political theory in the 16th, 17th and 18th centuries conceived (or rather misconceived) federalism in an odd way.

This was the conception which especially Ludopold Hugo (1630-1704) and Gottfried Wilhelm Leibnitz (1646-1716) were up against, but their advantage was that they did not live in Bodin's France, but in the Empire which did not fit Bodin's thesis of sovereignty.

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9 Forsyth (1981, p. 77) describes Althusius' theory as one of confederations.

As a senior state official Ludopold Hugo knew the Holy Roman Empire German Nation from inside, and he knew Switzerland and the United Dutch Republics. As a practitioner he disagreed with Bodin. To him, both the Empire and its parts had the same political status. Looking at the parts of the Empire, he realizes that some 'by themselves constitute a certain special civil body, which is nevertheless situated within the Empire'. The territories were 'part of the Empire, distinct in place, for the purpose of being governed by special civil rule which is subordinate to the common government' (quoted by Riley 1987, p. 64). What Hugo describes is territorial units with their own legal systems, but subordinated to the imperial law; in other words he describes the classical federal legal principle *Bundesrecht bricht Landesrecht*.[10]

Hugo distilled three basic categories (Riley 1987, p. 65), and made a classification of not unitary states. Confederal leagues and decentralized unitary government were the 'extremes', and in between what he calls 'double government', that is, federal government, that is:

> When the civil power is somehow divided between the highest and the lower governments, so that the higher manages those matters pertaining to the common welfare, the lower those things pertaining to the welfare of the individual regions. [The regional states] lack free and complete power, [but] their power is still universal and wide enough to seem to take something from the highest power. It is, therefore, an analogous sort of the highest power.

Thus he accepts the division of power and gives the regional state 'stateness' in a quite modern way, analogous to what is found in modern federal theory.

Riley (1987, p. 65) is right to emphasize Hugo's contributions as *clearly conceiving a territorial division of power between forms of state*.

The Lutheran Leibnitz's program was to unite the Christian churches under the Pope, and the Empire under the Emperor, with the aim of strengthening Europe. His means were in both cases some kind of federalism (Reinhard 1987, p. 312).

According to Riley (1987, p. 68):

> Leibnitz began by removing the characteristic of supremacy from the idea of sovereignty, and by transferring this supremacy to the Empire, leaving sovereignty, now only a comparative rather than a superlative standard, with national kings and with Imperial princes and cities indifferently. 'Sovereign' said Leibnitz 'is he who is master of a territory', and who is 'powerful enough to make himself considerable in Europe in time of peace and in time of war, by treaties, arms and alliances' […]. This restricted definition of sovereignty allowed Leibnitz to put the rulers of the regions of Germany on a footing with foreign sovereigns, but only because he had reduced sovereignty everywhere to a form of (what the Germans called) 'territorial superiority'.

To Leibnitz it was possible to unite several entities into one body, while keeping the territorial hegemony of each member intact, because there was no such thing as

[10] Federal law is superior to State law.

absolute power. According to Leibnitz every polity has to a certain degree divided power (Riley 1987, p. 70f).

Leibnitz's contribution to federalism lies *inter alia* in his analysis of sovereignty. As already quoted: 'Sovereign [said he] is he who is master of a territory, [and who is] powerful enough to make himself considerable in Europe in time of peace and in time of war, by treaties, arms and alliances.'

This definition restricts sovereignty considerably, and as Riley rightly remarks (1987, p. 68) it allows Leibnitz to put the rulers of the regions on an equal footing with foreign rulers. Sovereignty becomes divisible contrary to Bodin's approach.

USA, the Beginning of Modern Federalism

Considering that the Holy Roman Empire German Nation, the United Dutch Provinces, as well as the Swiss Confederation, did exist and had federal attributes, the upcoming of the United States of America was perhaps not quite as unique as some authors made it (for example, Riley 1987, p. 51f), and 'Publius'[11] frequently draws on the European sources. Still, the debates during the founding years, the development in itself, as well as the persistence of the US, were milestones and an inspiration both theoretically and practically. The accounts of what happened are countless and we shall be brief here.[12] But the constitution of 1788 marks a milestone in federal history. It has, to a larger or smaller degree, inspired all later federations.

A first hint of the 1788 constitution's importance lies in the very first words of the constitution: 'We the people of the United States, […]'. This clearly indicates something new. It is the people of the Member States 'ordaining' the constitution, not only the Member States.

The background was that the first constitution (known as the Articles of Confederation), drafted in 1776 and adopted by the last state, Maryland, in 1781, did not work. It was a confederation among the 13 states, and the power was resting in the individual states (Editor's introduction; Madison et al. 1788/1987, p. 18):

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[11] 'Publius' is the synonym for James Madison (1751-1836; 4th President of the USA), Alexander Hamilton (1755-1804; statesman and soldier) and John Jay (1745-1829; first Chief Justice of the US Supreme Court) who published 85 papers in 1787-88, known as the Federalist Papers. On the front page of the papers one could read: 'The federalist: a collection of essays written in favour of the new constitution as agreed upon by the federal convention, September 17, 1787'.

[12] For example, Isac Kramnick introducing the Penguin version of the Federalist Papers, 1987; Patrick Riley 1987; Murray Forsyth 1981, chapter 5; David McKay 2001, chapter 4. See also Elkins and McKitricks' monumental work on 'The Age of Federalism', 1993. But in my opinion, the most fascinating is to read the contemporaries, which are easily accessible, for example, the Federalist Papers, Hamilton, and so on.

> From 1776 to 1787 America under the Articles was no more than a loose alliance of sovereign and independent states. Article II of this first American constitution declared that 'each state retains its sovereignty, freedom and independence'.

The Articles hardly created a workable constitutional framework. It did set up a 'Continental Congress', as a weak legislative where each of the 13 states had one vote. But the Continental Congress had no executive arm and no judiciary power. The Continental Congress did not have the right to levy taxes, but had to send requisitions to the states; requisitions which were occasionally met. Hamilton wrote on this in the Federalist Papers No. XXX (Hamilton 1788/1982, p. 144):

> It is this which has chiefly contributed to reduce us to a situation which affords ample cause, both of mortification to ourselves, and of triumph to our enemies. […]. What substitute can there be imagined for this *ignis fatuus* in finance, but that of permitting the national government to raise its own revenues by the ordinary methods of taxation, authorised in every well ordered constitution of civil government?

Additionally to the confederation's problems, the states themselves were also in financial crisis after the war of independence. 'As a result of this vacuum of power at the centre the thirteen states were beset by rivalries, general confusion and numerous variations and duplications' (Editor's introduction; Madison et al. 1788/ 1987, p. 20).

And McKay adds (2001, p. 23): 'Most importantly, national security was compromised given the absence of a strong central authority with the power to finance a war effort: a fact forcefully noted by Alexander Hamilton, in the *Federalist Papers* […].'

In 1786 Virginia called for a meeting in Annapolis to discuss financial and commercial problems; only five states sent delegates. But 'Annapolis' proved to be important. James Madison and Alexander Hamilton persuaded the five states to call for a convention in Philadelphia the next year to discuss financial, commercial and political problems, and the convention met in 1787.

The main question of the convention was whether one should create some kind of stronger confederation, with the states as the central units delegating power to the centre, or a kind of a nation-state, to use a modern term, with one central government, and the states as mere subordinate units. The outcome of the negotiations was a compromise between the two. A governmental system of divided sovereignty was decided upon. The states should be sovereign within the policy areas not explicitly given to the union; both states and the union should have legislative, executive and judiciary organs, which would make, interpret and enforce its own laws directly. Alexander Hamilton wrote in the Federalist Paper No. XXXII (Madison et al. 1987, p. 220):

> An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them would be altogether dependent on the general will. But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain

> all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States.

The states would participate in the union's decision-making by sending two senators each to the upper house, and the people would elect their representatives to the lower house; this was going to be an essential characteristic for a federation. James Madison wrote on this arrangement in the Federalist Papers No LXII (Madison et al. 1788/1987, p. 364f):

> It is equally unnecessary to dilate on the appointment of senators by the State legislature. […]. It is recommended by the double advantage of favoring a select appointment, and of giving the State government such an agency in the formation of the federal government as must secure the authority of the former, and may form a convenient link between the two systems, [and later] In this spirit it may be remarked that the equal vote allowed to each State is at once a constitutional recognition of the portion of sovereignty remaining in the individual State and an instrument for preserving that residual sovereignty.

The President of the union would be elected by the people, not the states, and there would be a supreme court. The states would have their agents to carry out their policies, and the union would have its own agents, too.

As mentioned above, one of the serious problems of the Articles was that the union had no right to levy taxes. It had to ask the Member States for the resources it needed, and often it did not get them. Thus the freedom of action of the union was indeed limited.

The final constitution was a compromise between two very different points of view; in today's terms it was confederalists versus federalists. The compromise was worked out by negotiating and discussing each and every article of the constitution. In that way Benjamin Franklin's recommendation of the constitution in Philadelphia on 17 September 1787 is symbolic (The Debate on the constitution 1993 p.3f):

> In these sentiments, Sir, I agree to this Constitution, with all its Faults, if they are such: because I think a General Government necessary for us […]. Thus I consent, Sir, to this Constitution because I expect no better, and because I am not sure that it is not the best.

Hamilton agreed with Franklin in The Federalist No LXXXV: 'A NATION without a NATIONAL GOVERNMENT is, in my view, an awful spectacle.' (Madison et al. 1788/1987, p. 487).

But the question of the relationship between the union and the states was not really settled until the peace after the Civil War, and we shall return to the Southern thinker John Calhoun in the last chapter of this book, as his analysis of the USA has a striking resemblance to that of the EU of today.

Summing up the contributions of the 1788 constitution and the discussions surrounding it, one may mention the following points:

- The constitution per se;
- Division of power: certain powers were given to the union; the rest belonged to the Member States;
- Two full, but parallel, statesystems, each with government, legislative and juridical act. Neither system of government depended on the other concerning the implementation of its laws. The Danish professor of public international law, Alf Ross, stated (1967, p. 114): 'The United States consists of 51 states; 50 member-states and one union';
- The federal level got its legitimacy both from the people (electing the President and the House of Representatives) and from the states (sending the Senators). Thus the people participate in the governing of the federation both at Member State level and at the federal level;
- The federal or union level and the Member State level together gave the federation its sovereignty.

Theorizing Federalism in Europe

Murray Forsyth begins chapter 6 in his 1981 book by asserting: 'Whereas in the first half of the nineteenth century the most significant discussion of federal union took place in America, in the second half of the century it took place in Europe.'[13] But it would be wrong not to mention Alexis de Tocqueville and Henri de Saint-Simon.

Henri comte de Saint-Simon wrote his article 'The Reorganization of the European Community' in 1814. His starting-point is not theorizing on federalism but on 'the best form of government', where he argues for bi-cameral parliamentarism. He makes a pledge for a European Community, with a king, a European Parliament with a house of peers and a house of commons. These institutions shall take care of the common good, at the federal level, whereas national parliaments shall take care of the nation–state's business. There is a division of competencies between the two levels, where both have a right to levy taxes. De Saint-Simon's ideas are interesting seen from a practical point of view, but less from the viewpoint of developing a federal theory. Yet he adds two aspects: the units uniting have to have the same political structure (1952, p. 51), and he argues for a bi-cameral system, to get the best possible treatment of public questions, that is, to ensure quality in the political discourse (1952, pp. 40-42).

Alexis de Tocqueville's (1805-1859) main purpose was not to write on federalism, let alone replanting American federalism in Europe. The title of his most known book shows what interested him: 'De la démocratie en Amérique'. But he did make several observations on the American federation, its history and way of working (especially Book I, chapter VIII). According to McClay (1996) de Tocqueville saw the federal idea as a way in which the Americans would be able to

[13] An important exception is Alexis de Tocqueville, and his 'De la démocratie en Amérique', which comes close to Calhoun's approach.

keep the spirit of republican citizenship and at the same time accept the self-interest dynamism of liberal individualism. And this is due to decentralization. In my opinion de Tocqueville's largest contribution to the development of the federal tradition is his insistence on decentralization in order to prevent centralism and eventually tyranny (de Tocqueville, Book I, chapter 16):

> I have already pointed out the distinction between centralized government and a centralized administration. Centralized administration is nearly unknown in America (in 1830). If the directing power of the American communities had centralized administration at its disposal, freedom would soon be banished from the New World.
>
> In the United States, the majority, which so frequently displays the tastes and propensity of a despot, is still destitute of the most perfect instruments of tyranny. In the American republics, the central government has never as yet busied itself but with a small number of objects, sufficiently prominent to attract its attention. The secondary affairs of society have never been regulated by its authority, and nothing has hitherto betrayed its desire of even interfering with them. The majority has become more and more absolute, but has not increased the powers of the central government. However the predominant party in the nation may be carried away by its passions, however ardent it may be in the pursuit of its projects, it cannot oblige all the citizens to comply with its designs in the same manner, at the same time, throughout the country. When the central government which represents that majority has issued a decree, it must entrust the execution of its will to agents, over whom it frequently has no control, and whom it cannot direct. The townships, municipal bodies, and counties form so many concealed break waters which check or part the tide of popular determination. If an oppressive law were passed, liberty would still be protected by the mode of executing that law.

But Forsyth was not completely wrong, and that can hardly be a surprise, as Europe had witnessed the founding of the Swiss Confederation in 1847/8, the aborted attempt at making a German federation in 1849 and that of the German Empire in 1871. The European debates and theorizing were concerned with defining the differences between a federal state '*Bundesstaat*' and a confederation of states '*Staatenbund*' and linked to this, the question of sovereignty (Forsyth 1981, p. 134).

In his important 1853 article Georg Waitz argued that, in a *Bundesstaat*, there were two sets of parallel, sovereign governments (1853, p. 501): the national or federal government which legislated within certain areas and Member State governments legislating within other policy areas. Together the Member States and the central state form the federation (1853, p. 500; my translation):

> The member-states and the 'total-state' [*Gesamtstaat*] are necessarily complementary; first in their unity will they contain the whole life of the state; both are entitled to a part of it. And to the certain parts, the people has the same relationship; to the member-state and to the total-state: both rest on the national basis.[14]

[14] In German: 'Die Einzelstaaten und der Gesamtstaat sind hier nothwendige Ergänzungen der eine des anderen; erst in ihrer Vereinigung wird das ganze Statsleben umfasst; jedem fällt ein Theil zu. Und für den bestimten Theilen steht das Volk in einem gleichen

This fundamental position was countered by Max von Seydel, who argued that sovereignty could not be divided. Either one had one state possessing the sovereignty undivided, or several states possessing sovereignty, and then one could talk of a confederation. Federations were of the first kind; to von Seydel the Swiss Confederation, the US and the German Empire were all confederations (Forsyth 1981, pp. 136 ff). His argument is initially supported by Louis le Fur (Forsyth 1981, p. 142): 'L'on est forcé de reconnoître que l'Etat fédéral est souverain et que par conséquent les Etats particuliers ont, au moment où il est né, cessé l'être.'

But le Fur also saw sovereignty as a whole, that is, the sovereignty of the Member States and that of the federal level together formed the sovereignty of the federal state (Forsyth 1981, p. 142).

The ill-famed[15] Carl Schmitt took a different point of departure in his *Verfassungslehrer* from 1928. He began with the keyword '*Bund*' (*foedus*) which is central in ***Bundes****staat* and *Staaten****bund***.

A *Bund* is characterized by (Forsyth 1981, p. 148f):

- It includes all Member States as a political totality; a union;
- It is established as a permanent political order;
- Its founding treaty is a constitutional treaty, part of the *Bund's* constitution and part of the Member States' constitution;
- Its main aim is the maintenance of its members' political existence. And thus it protects its members against a threat of war;
- To exist it has to be able to interfere in the affairs of the Member States;
- It can, *per se*, wage war by itself, it possesses the *jus belli*.

A *Bund* only exists, as long as the question of sovereignty is unsettled that is, as long as the *Bund* exists in its own right as well as the Member States do the same. When either prevails, one has a unitary state or an organization of states (Forsyth 1981, p. 151f).

In his *Allgemeine Staatslehre* Thomas Fleiner-Gerster establishes that if the theory of sovereignty and the real, lived political federalism are strongly opposed to each other, then the theory must be wrong (1980, p. 189; my translation). He continues to argue that the legitimacy of state power is divided. The justification for the '*Hochheitsgewalt*' of the Member States comes from the peoples of the individual Member States, they are not derived from the federation (1980, p. 190). He continues (1980, p. 190, my translation):

> Now, if we do not any longer understand sovereignty as the highest power of state ('*Staatsgewalt*'), but assume that the people is the sovereign which gives legitimacy to the power of state within its territory, then we can easily accept a division of the sovereignty. But the precondition is that the people's sovereignty is original and not deviated from the federation.

Verhältniss zu den Einheitsstaat und zu dem Gesamtstaat: jeder von diesen ruht auf der nationale Grundlage.'

[15] In the 1930s he endorsed Nazism.

In accordance with Hamilton, Waitz, le Fur and Fleiner-Gerster, we will go on accepting that both Member States and the federation level possess sovereignty and that united they possess the full sovereignty of the federation.

An Ideal Type Federation

On the basis of the above discussions and analysis, we will now try to construct an ideal type federation. The starting-point is that the *raison d'être* for federations is twofold: to preserve as much independence as possible in a new state, while at the same time benefiting politically from the new, larger unit. The various characteristics dwelled upon previously can be lumped together under six headlines: statehood, founding entities, sovereignty, governmental system, division of power, legitimacy and participation, and resources. Of the following characteristics, the first five are essentials, and the last is an important additional.

Statehood

A federation possesses a certain degree of statehood. The concept of statehood is fairly contested, but Dunleavy and O'Leary (1987, p. 2) have tried to condense five characteristics of what they describe as a modern 'state', seen from an organizational point of departure:

1. The state is a recognizably separate institution or set of institutions, so differentiated from the rest of its society as to create identifiable public and private spheres.
2. The state is sovereign, or the supreme power, within its territory, and by definition the ultimate authority for all law, i.e. binding rules supported by coercive sanctions. Public law is made by state officials and backed by a formal monopoly of force.
3. The state's sovereignty extends to all the individuals within a given territory, and applies equally, even to those in formal positions of government or rule-making. Thus sovereignty is distinct from the personnel who at any given time occupy a particular role within the state.
4. The modern state's personnel are mostly recruited and trained for management in a bureaucratic manner.
5. The state has the capacity to extract monetary revenues (taxation) to finance its activities from its subject population.

One should add three points to this organizational model, the first organizational, and the second and third sociological (Dosenrode 2003, p. 448):

- The state has the official monopoly to conduct foreign relations;

- To secure endurance and stability a modern state must build upon a core culture common to a vast majority if not all citizens. This core culture is the fundament of the values, rules and laws governing the civil society;[16]
- The state is the focal point of the population's loyalty (is a political community).

A last important addition has to be made to the model of Dunleavy and O'Leary. It is a fairly static model, with a certain 'either-or' connotation. But as state formation, as well as the 'living' of a state, can be looked at as a process – some would even look at a state as an organism – it is important to add the dynamic element. Thus one should consider the criteria as continual, where a certain polity can score from high to low.[17] From the analyst's point of view, this is not making things easier as it unfortunately implies that it is getting less clear-cut when a polity is 'a state'. But it creates a possibility to draw a more correct picture of a certain polity at a certain time in history.

The Founding Members

The founding entities are, as a general rule, sovereign states or territories with outspoken self-determination.[18] The Member States are the basis; they conclude the treaty, the federal bargain. It was so in Switzerland (1291), in the United States (1788) and it is also essential for the Austrian federal myth after the First World War. It is this 'fact' which legitimizes the idea of the equality of the Member States and the federal government, and which gives substance to the doctrine of divided sovereignty.

And, due to the *raison d'être* mentioned above, one must expect that the culture and characteristics of these Member States are protected as far as possible (minority rights).

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[16] When discussing the concept of 'culture' it is important to distinguish between the underlying or core culture, and the present, manifest culture. To the former belongs the fundamental world-view and understanding of the human nature; the commonly highest values and so on. The manifest culture includes guiding morals and rules and societal structures (for a thorough discussion, see Gullestrup 1992, pp. 38-49). It is important to remember that, albeit there is a common core culture, it does not imply that the manifest culture is or has been totally identical in all entities (an example is the diversity of the Christian churches in Europe; they share a common core culture, but the manifest culture or form includes such different branches as the Roman Catholic, the Orthodox, the Reformed, and the Protestant churches).

[17] The procedural element is always present, but it is less important as soon as the polity in question has been recognized as 'a state'. When this has happened, the mere recognition bares a conserving element in itself towards the preservation of the obtained status, towards the outside world, although the state may be degenerating inside.

[18] The Soviet Union was an example of the vice-versa process.

The Legal Basis of the Federation

Abromeit (2000, p. 5) mentions – as one of six characteristics of a federation – that the legal basis of a federation must be either a treaty of international law or a 'contractual constitution', that is a social contract between equal partners. This is in line with Elazar (1987, p. 42) stating that '…the desire or will to be federal on the parts of the polity involved. Adopting and maintaining a constitution is […] the first and foremost means of expressing that will'.

Governmental System

Althusius mentioned the importance of a check on the power of the central government (see above), and it follows from the discussion above that both the federal level and the Member State level needs a full system of government that is an executive, a legislative and a judiciary, each possessing the ability to act independently of the other.

But the capability to act alone does not imply that the two levels do not interact; on the contrary. Concerning the legislative there is in all federations a representation of the Member States in the federal legislative in the form of a second chamber. These Member State representatives may be appointed by the Member State legislative, as the senators were until 1913 in the USA (cf. Wheare 1963, p. 2), they may be elected directly by the population of the Member States as they are in Switzerland, or they may be members of the Member State's government, as they are in Germany.

The federal principle also implies that no single state can veto any policy; there may be instances where unanimity is the rule, but in general a majoritarian system is the rule (in Switzerland, a proposal put to referendum has to be approved both by a majority of voters at the national level and by a majority of Member States). It also varies whether the members of the second chamber vote on instruction from their government, as do the German members of the *Bundesrat*, or whether they are only responsible to the electorate of their respective Member State as in the US and Switzerland.[19] The cooperation in the legislative, between the Member States and the federal level, in some cases also takes place through nationwide political parties, as in, for example, Germany and Australia where party affiliation sometimes seems to be more important than Member State affiliation.

[19] The number of persons each Member State sends to the upper house varies. In Switzerland and in the USA, one finds a reminiscence of the intergovernmental character from the founding years, also wasted in the idea that each Member State is an equal, sovereign entity; thus all send the same amount of representatives no matter how large or small the Member State is. In other federations, the amount of representatives each Member State sends to the second chamber varies according to, for example, population in the individual Member State, as in Germany.

At the governmental level one finds various arrangements where cooperation between the governments at the two levels takes place. The Member States may launch legislative initiatives, or either the heads of governments or relevant ministers from the two levels meet. In several federations, for example, Germany and Switzerland, there are a number of permanent 'conferences', where the heads of the Member States or the relevant ministers meet to coordinate their positions before meeting the federal government.

Division of Power

It only makes sense to talk of a federation if at least one policy area is under the sole control of either the federal government or the Member States. If this is not the case one has either a unitary state or a confederation; each level has to have certain powers of their own, powers in which no other may intervene. This is derived from the idea of sovereign members joining on an equal footing. And this is why a constitution is so central to a federation.[20]

The concept of divided powers in its pure sense implies that both levels issue laws which are directly applicable to the citizens. The laws of the federal level do not have to be ratified by the Member States to enter into force.[21] It seems to be a general principle in 'real' federations that the powers not explicitly handed over to the federal level remain with the Member States.[22] Also Member States are allowed to legislate within a 'federal area' as long as the federal government does not use its rights. But when this happens, the Member State will have to accommodate to the federal law, as the central European legal saying '*Bundesrecht bricht Landesrecht*'[23] goes.

But it has already been stated that there are lines of communication and of cooperation between the federal and the Member State systems. These may vary in intensity, but they are always there; a total separation does not work out in praxis.

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20 For a good discussion, see Auer 2005.

21 Several federations have tried to make gradual orders of competencies according to which some laws are purely federal, others are mainly federal but also Member State, some are mainly Member State but also federal and others purely Member State competencies, as in Belgium.

22 For example, Germany, Switzerland, the USA.

23 'Federal law has priority to Member State law', a common principle in federations.

Legitimacy and Participation

In the ideal modern federation,[24] the people are sovereign, and they legitimize the Member State and federal use of power. If one only looks at the concept of 'federation' it is possible to argue that legitimacy and participation are not central or essential parts of the concept of federation. This is true, insofar as neither the Holy Roman Empire German Nation, the United Dutch Republics nor von Bismarck's Empire were democratic in today's understanding.[25] But in all genuine federations the federal level gets its legitimation from the people in one or the other way: the President may be directly elected as in the US, or the members of the first house are directly elected, as in Austria, Germany, Belgium, Switzerland and the US. Thus the people participate in the governing of the federation both at Member State level and at the federal level, contrary to a confederation.[26]

Wheare puts it like this (1963, p. 49): 'That the two loyalties must be there is the prerequisite of federal government, but that one should not overpower the other is also a prerequisite.'

Resources

Hamilton wrote of the bad experiences of the American Confederation concerning its lack of its own resources, and thus motivated why the new union should have a right to levy taxes (quoted above); the situation was similar to Bismarck's who had to fight tough fights after 1871 to get the resources the Empire needed (cf. Taylor 1961, chapters 6 and 7). But this extreme situation, where the congress had to ask the Member States for resources, could also have been opposite in the way that the federal government had the same right, but not the Member States. For a federation to work *well* it is a precondition, that all levels have a secure source of resources.

Wheare remarks on this problem (1963, p. 93):

> The peculiar federal problem is this. The federal principle requires that the general and regional governments of a country shall be independent each of the other within its sphere, shall not subordinate to another but co-ordinate with each other. Now if this principle is to operate not merely as a matter of strict law but also in practice, it follows

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[24] The word 'ideal' in this context is used, as, for example, Ex-Czechoslovakia, Ex-Yugoslavia and the Ex-Soviet Union were characterized or understood themselves, as federations (Elazar 1987), but the Western concept of democracy hardly applies to these states. But basically federations do not *have* to be democratic, just as regimes do not have to be 'good' *per se*.

[25] For example, not all men had a right to vote and no women at all, but they were federations in the broadest sense.

[26] Waitz also argued that participation of the people was important for the working of a federation (1853, p. 507).

> that both general and regional governments must each have under its own independent control financial resources sufficient to perform its exclusive functions.[27]

And Abromeit states that (2000, p. 6):

> The 'sovereignty' of territorial units will be seriously marred when they are financially dependent on the union. Hence fiscal autonomy – of both levels of government – has to be named as the last but certainly not least of the federalist features.

Both Abromeit and Wheare are right, of course, but the question is how much of its own resources the federal or the Member State level needs. It is, however, obvious that each level has to have a certain minimum of resources to be able to fulfill its duties and remain fairly independent.

A European Federal Tradition?[28]

Above we have discussed the historical development of federations, and we have tried to distill an ideal model of a federation. In this part, we will set up a simple frame for categorizing federations and then ask whether there is a special European kind.

As argued elsewhere the categorization in unitary and federal states is too crude to stand alone, and it was suggested as a minimum to add the dimensions 'centralized' and 'decentralized' to indicate that forms of state lay on a continuum (Dosenrode 2003, p. 449). The distinctions between unitary and federal states are of course important in themselves. In the unitary state, the amount of 'veto-points' is considerably smaller than in the federal state, where the amount of political actors is larger (Member State parliaments, bi-cameral federal parliaments, national parties, regional parties, a constitutional court and so on). If we look at the centralized, unitary state as an example, the centre of political gravity lies firmly with the national government. There may be regional authorities but their tasks are solely to implement the policies of the government. The regional authorities and territorial units may be changed or dissolved by the national government. Examples are the United Kingdom or France before the reforms. The political culture in a decentralized federation is likely to have the political centre of gravity with the states, either in the way that they decide a proportionally large part of the legislation or that they are participating, with weight, in federal decision-making.[29]

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[27] The note from the presidium of the European Convention to the members of the Convention on the draft articles 38-40 reveals the importance of the financing of the Union, as well as the disagreements (CONV 602/03).

[28] When discussing a European federal tradition, the focus is on the central European federations, not on the periphery such as Bosnia-Herzegovina, the Ex-Soviet Union or Ex-Yugoslavia.

[29] Thus I consider Germany a decentralized federation in spite of its special status among federations (cf. Abromeit 2000, p. 7).

Switzerland is an obvious example of a decentralized federation. Between these extremes, one finds decentralized, unitary states, like Denmark, where the regional and local level enjoy the right to levy taxes and in general have a high degree of freedom of action, and where the relationship to the national level is characterized by a culture of negotiation and consensus (cf. Dosenrode 2003); and one finds the centralized federations, like Austria where the *Bundesländer* have little political influence at all. The political culture is centralistic. Thus it is important to have a frame of analysis which allows for a certain differentiation but which does not descend to mere description.

It may also be fruitful to look at the way policy implementation is exercised in federal states; in other words, is the federal level responsible for the implementation of 'its' policies and are the Member States responsible for implementation within their areas of competence? Or does cooperation and division of labor exist between the levels? If one looks at Wheare's classical work *Federal Government*, he describes the first model, which is now known under the names 'dual federalism', 'division of jurisdiction', 'inter-state federalism' or 'vertical federalism', in the following way:

> [The constitution of the USA] establishes an association of states so organized that the powers are divided between a general government which in certain matters – [...] – is independent of the governments of the associated states, and on the other hand, state governments which in certain matters are, in their turn, independent of the general government. This involves, as a necessary consequence, that general and regional governments both operate directly upon the people; each citizen is subject to two governments (1963, p. 2).

Braun describes another type of federation, too (2000, p. 4):

> The cooperative type – or 'horizontal federalism' or 'intra-state federalism' – first discussed by Elazar […], stresses the 'division of labour' and the functional relationship between member states and the federal government […]. The functional relationship consists of the attributes of different functions within the same policy area to different territorial levels of government (like policy formulation and policy implementation). At the same time, there is a large number of cooperative arrangements to coordinate this division of labour. In this type of federalism, it is often uneasy to draw lines of competence between territorial authorities.[30]

Ute Wachendorfer-Schmidt adds to the characteristic of dual vs. cooperative federalism that in cooperative federal states, the states influence the federal legislation through the vote of their governments' representatives in the second

[30] Abromeit (2000, p. 8) adds what I consider a sub-category to the cooperative type, the interlocking model: '[…] in interlocking federalism competences and finances are shared by both levels of government which forces them into permanent and close cooperation, and in dual federalism competences and finances (and partly even institutions of government) are "more or less" divided leaving much room for independent action at both levels.'

chamber, whereas the representatives in the second chamber, in the dual mode, are elected by the people directly (2000, p. 7). As shown below, this *could* be seen as a trend, but Switzerland and Canada, for example, do not fit into it.[31] Neither is it possible to make a distinction between cooperative and dual federalism, when one looks at the way the President (or the Prime Minister in monarchies) is elected.

Table 2.1 Ways of elections in dual respective cooperative federations

States	Type of federation	Representation in 2nd chamber	Election of President / Prime Minister
Austria	Cooperative	Indirect election	Direct
Germany	Cooperative	Indirect election	Indirect
Switzerland	Cooperative	Direct election	Indirect
Australia	Dual	Direct election	Indirect
Canada	Dual	Indirect election	Indirect
USA	Dual	Direct election	Direct
Belgium	Dual (in principle, not in practice)	Mixed direct and indirect election	Indirect

If one uses the distinction dual federalism-cooperative federalism, and looks at Australia, Canada and the United States on the one hand, and at Austria, Germany and Switzerland, that is, the older European federations, on the other hand,[32] one realizes that the large Anglo-Saxon federations qualify as 'dual model' states, where there is a fairly strict division of competencies between the federal and the state level. Implementation of federal law is taken care of by federal agencies and implementation of Member State law by Member State agencies. This is a contrast to Germany and Switzerland and partly Austria, where it is the rule, rather than the exception, that the Member States handle the implementation of federal law, with the traditional exceptions of foreign and security policy and monetary policy. Also the contacts are far more intensive in the cooperative, European, federation than in the Anglo-Saxon, dual ones.

[31] Wachendorfer-Schmidt classifies Switzerland as a dual federalism (2000, p. 7). This seems puzzling as a) there is a strong tradition of cooperation between the federal government and the cantonal governments, and b) large parts of the implementation of federal legislation are left to the cantons.

[32] Belgium is, legally, built like a dual model federation, but the decades of cooperation in the old unitary state of Belgium has created a political culture of compromising and of cooperation, making the Belgian federation look more like a 'European' federation than an Anglo-Saxon one.

Table 2.2 Ways of implementation in dual respective cooperative federations

State	Type of federation	Implementation of federal legislation
Austria	Cooperative (in principle, less in practice)	Mainly through the Member States
Germany	Cooperative	Through the Member States
Switzerland	Cooperative	Through the Member States
Australia	Dual	Through federal agencies
Canada	Dual	Through federal agencies
USA	Dual	Through federal agencies
Belgium	Dual (in principle, not in practice)	Mainly through the Member States

In other words, it is possible to conclude that *there is a European federal form* distinctively different from the Anglo-Saxon one. Why this is so is another question, and harder to answer. I will suggest two factors: a) the political history and culture; b) the size of the federation.

If we take a look at the political history and culture first, the three Anglo-Saxon federations all have some kind of Westminster-democracy, or majoritarian-democracy, which normally ensures the winner of an election a comfortable majority. Consensus seeking is not necessary and thus not a part of the political culture. As Lijphart points out this model is 'exclusive, competitive and adversarial' (1999, p. 2). That the three Anglo-Saxon federations all have some kind of Westminster-inspired model is fairly easy to explain; the American colonies already had variations of this system in the individual colonies, and at the time of independence the Westminster model was the only one on the market. As for Australia and Canada, they too as dominions had close links to the United Kingdom and it was natural to adopt the same system as the 'mother country'.

Contrary to the three Anglo-Saxon federations, the three older European federations, as well as Belgium, have all had some kind of consensus culture, most outspoken in Switzerland. According to Lijphart this implies a democracy (1999, p. 2): '[…] characterized by inclusiveness, bargaining and compromise; for this reason, consensus democracy could also be termed "negotiation democracy […]".'

This is due to several reasons. Historically the three 'old' European federations all shared a common historic experience as parts of the Holy Roman Empire German Nation which for centuries formed a loose federation of quasi-autonomous states of various kinds (republics, principalities, ecclesial). Although the formal acceptance of the principle of sovereign states was one of the results of the Westphalian Peace in 1648, the Empire lasted formally until Joseph II assumed the title Emperor of Austria instead. But there are important historic differences between Austria on the one side and Germany and Switzerland on the other. Until 1919 Austria remained a peculiar conglomerate of states, but all ruled by the Emperor in Vienna. To talk of the statehood of Bohemia would be wrong, but it would be right when talking of Hungary. In Germany, principalities and city-states united in the German Empire in 1871 were sovereign states, with a tradition of

self-rule. The same goes for the Swiss cantons; until they changed their confederation into a federation in 1848 after one week of civil war (*Sonderbundkrieg*), the cantons were small, sovereign states. This historical heritage has been an important factor in the development of the federal culture in the three federations mentioned.[33] The federations all consist of territorial units which had sovereignty before they joined or created the federations (Germany and Switzerland) and/or they all had their own distinct history and identity (Austria, Belgium, Germany, Switzerland). This has fostered a certain feeling of equality amongst the Member States,[34] again most outspoken in Switzerland.

Another important factor is that the proportional democracy model adhered to in the four European states rarely gives one party the absolute majority. Thus negotiations must take place to form a coalition government, and even if that works out, it is not certain that the government can command a majority in the upper house, thus further negotiations are necessary. Coalitions and cooperation have become the norm.

Whether there is a correlation between the size of a country and its governmental form and its political culture is a disputed question, but the author of this chapter has argued before that there was such a relationship (Dosenrode 1993, Dosenrode and Klöti 1994). Historically both de Montesquieu and Rousseau have noticed that direct democracy only works in a state of a certain size, taking ancient Athens and then modern Geneva as examples, and in the 1970s Dahl and Tufte came to the conclusion that the size of a state was an important variable when analyzing the internal organization of a state (especially when looking at citizen effectiveness and the capacity of the system (1974, p. 40)). Also Peter Katzenstein (1985) has isolated the size of a country as a variable, when explaining why European small states had a strong tendency to be corporatist in the 1970s and 1980s. Thus geographical size and circumstances (long and troublesome lines of communication or short and easy ones) in the formative years do influence the political organization of a country. Concretely, long distances were hard to overcome when the geographically very large federations of Australia, Canada and the US were founded. This prevented such easy and close interaction as was possible when Austria, Germany and Switzerland respectively were founded.

Summing up, this part has suggested looking at two dimensions when attempting to classify federations. First, the basic, territorial organizational: is the state organized as a federation or a unitary state, and which kind – centralized or decentralized? The second dimension classifies federations according to their political structure; is it a dual or a cooperative federation? And we saw that it was possible to distinguish an Anglo-Saxon model, dual type, with a prevailing

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[33] The time of 'departure' from the Holy Roman Empire German Nation is very important; the Swiss cantons and the German states had time to form their own traditions, but that was not to the same extent the case for the Austrian *Bundesländer*.

[34] Although it would be wrong to believe that the power of an individual canton did not mean a thing in the political system of the federation.

Westminster political culture, and a European, prevailing cooperative, consensus model.[35]

The two dimensions give us some rough indicators, helping us to understand the political culture and policy-making of the federal state. Both dimensions are important to get a picture of the state level-federal level relationship.

If one tries to sum up a European federal model, it would be:

- Cooperative: Braun (2000, p. 3) quotes Lijphart saying that 'above all, they [the cooperative federations] contribute to a "kinder, gentler democracy" in terms of equality, developmental aid and ecological considerations';
- Decentralized: the member States participate vigorously in the policy-making process, and they are often in charge of the implementation of the federal level policy decisions. The Member States are strongly involved in the implementation of federal legislation; there is a 'division of labor' between Member States and the federal government;[36]
- Deliberative or dialogue-based: as offspring of a tradition of cooperation, as one political party hardly ever controls a majority in both houses in a European federation due to the proportional electoral systems, as opposed to the 'winner takes it all' system of the Anglo-Saxon countries; as well as to the way, for example, implementation of policies is made (cf. above).

Especially from a European point of view there seems to be a certain wisdom in Patrick Riley's observation that (1987, p. 83): 'Successful federal systems, indeed, seem to rely precisely on the negotiation, discussion and concession which Leibnitz recommends and not just on "mandates" given *ex plenitudio potestatis.*'

Making Federations

First of all, it is important to remember that federalism is a process; once the federation is made, the federal bargain concluded, there are many paths the development may take, just as the road leading to the creation of the federation is a process. But how do federations arise? David McKay sums up two 'normal' approaches (1999, p. 23):

> One school, associated with the work of Karl Deutsch, K. C. Wheare, and R. L. Watts, saw federalism as an appropriate political form, should certain pre-conditions organized

[35] It has to be added that in an increasingly complex world, with increasingly complex societies, the distinction between cooperative and dual federalism is getting smaller, as it is getting increasingly hard to keep up a separation between state powers and federal powers. Joint decisions will be discussed in Chapter 4.

[36] Braun (2003, p. 9) is even clearer: 'While most of the decisions are taken at the federal level where both subgovernments and the federal government have their say, implementation is almost completely in the hands of subgovernments.'

> around the notion of common interest exist. A second school, associated with the work of Thomas M. Franck, conflated the subjective question of the essential desirability of federalism with the objective conditions of the countries involved in the federalizing process. In this sense federalism acquired a distinctive ideological status. 'Federalists', convinced of the intrinsic benefits of federation could, in the right circumstances, bring about the fact of federation.

These approaches speak of federalism as 'common interest' as well as an ideology. McKay discusses these approaches and dismisses them, as they do not give an adequate explanation of the question of how political unions arise (1999, pp. 23-28).[37] But the question is whether there is a substantive contradiction in the first place. Wheare lists the following preconditions (1963, p. 35f.):

1. To begin with, the communities or states concerned must desire to be under a single independent government for some purpose at any rate […]
2. They must desire at the same time to retain or to establish independent regional governments in some matters at least. […] They must desire to be united, but not to be unitary […]
3. Federal government is not appropriate unless the communities concerned have the capacity as well as the desire to form an independent general government and to form independent regional governments.

We shall return to this question shortly.

The third approach, which McKay endorses,[38] was founded by William Riker.[39] According to McKay's interpretation, federalism is understood as a rational bargaining process, and the approach has a realist starting-point (McKay 1999, p. 28):

> At its most elemental this perspective argues that the decision to form federations depends on the costs and benefits to the politicians involved in the process. Two sets of actors contribute to this calculus: politicians representing the national or state governments and politicians (drawn from one or more of the existing national governments) hoping to represent the new supranational (or federal) government. The latter offer the benefits of enlargement and the former concede some independence because they calculate that the benefits of enlargement outweigh the costs.

Riker wrote during the Cold War and his starting-point was that statesmen are always engaged in securing the integrity of their state. If a federation has to be founded, two conditions must be met (Riker 1964, p. 12f):

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37 For another criticism of these approaches, see Dosenrode (1993, pp. 31-38).

38 In the introduction to his book McKay makes the proviso that no one theory can explain everything, but that the realist approach is the one saying the most (1999, p. 4). I adhere to that.

39 Riker is criticized by, for example, Preston King (1982, p. 33). King argues against the necessity for a threat, to spark off the process of integration. To me his arguments are not convincing.

1. A desire on the part of the politicians who offer the bargain in order to expand their territorial control by peaceful means, either to meet an external military or diplomatic threat or to prepare for diplomatic aggrandizement. [...]
2. The politicians who accept the bargain, giving up some independence for the sake of union, are willing to do so, because of some external military-diplomatic threat or opportunity.[...]. And furthermore the desire for either protection or participation outweighs any desire they may have for independence. [...].

Riker later accepted the comment of A. H. Birch, who insisted that the perceived threat could also be caused by factors inside the state (Riker 1975, p. 114). In the same vein, one may add that there is nothing in Riker's model suggesting that one cannot expand the threat to a broader field than the military and diplomatic fields. The main concern must be that the threat is serious. In such a case the threat could also be of an economic, social or political nature (McKay 1999, pp. 29 and 32). The important point in the political consideration is that the statesman *believes* that the threat he *perceives* can be countered by joining or founding a federation.[40] And it also implies that a unitary state may be turned into a federation to save it from total disintegration, as was the case of Belgium and several former British colonies. Federalization has been a device to handle cultural diversity, but here there was a common core culture.

There are several advantages in Riker's model; that is, there are no built-in automatics in the founding of a federation compared to other, liberalistic integration theories.[41] Another advantage in Riker's model is that it delivers an explanation as to how integration can happen under 'realistic' premises and not just under 'liberal' ones. The explanatory power Riker attaches to the statesmen's perception of a given situation is also important; how they believe they can get out of a crisis; but it should be expanded to include the lack of ability to foresee the consequences of actions taken and thus in general take account of the subjectivity and limited rationality of decision-makers.[42]

But Riker and McKay, too, have problems. McKay dismisses preconditions, like Wheare's mentioned above, but basically it is reasonable to try to identify the conditions for an integration process to succeed. If one agrees that a federation is

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[40] Abromeit (2000, p. 8) leans on Riker, but rightly stresses that the reason for coming into being is '[...] that they combine "unity and diversity"; that is: small polities enjoy the advantages of greater units [...] while preserving their identity [...]'.

[41] For example, in spite of several modifications, the concept of spill-over is still important to the neo-functionalists.

[42] Two examples of unforeseen consequences of actions are: 1) Lady Thatcher is said to have commented that if she had realized the impact of the Single European Act on the European integration process, she would have blocked it in 1985; and 2) a former member of the EU's Committee of Central Bank Directors said that when President of the Commission Delors and Professor Niels Thygesen presented their visions of what should become an Economic and Monetary Union for the EC, they all consented, most of them out of a firm belief that it would be impossible to get the political back-up or at least to implement it. History tells us that they were wrong (Dosenrode and Dosenrode 2001, endnote 10).

by nature much more than an alliance, Wheare's conditions are sensible. Also Riker and McKay leave out the cultural variable from their considerations, leaving the analysis incomplete. As already mentioned, one cannot expect a number of polities to form an entity and to *stay together* if they do not share the same core culture as this is the basis of its future laws and rules, which has to be accepted by the ruled. A common core culture is the glue which makes the federation stick together and make the process possible in the first place as, for example, Deutsch mentions (1968, p. 192). Wheare also mentions this (1963, p. 44): 'It will be obvious also that community of race, language, religion and nationality would produce a capacity for union. With so much in common, states could inevitably work easily together.'

Another problem, looking at Riker, is that he *only* focuses on the states, on the decision-maker, the statesman. In this sense Riker's realist point of departure is obvious. And statesmen are important; the progress of the European Union in the 1980s and 1990s owed much to Francois Mitterand, Jacques Delors and Helmut Kohl. Equally the problems of ratifying the CT owe a lot to the lack of committed European statesmen. But it is not enough to look at the statesmen. McKay also includes the elite-population relationship, which is equally important, as the French 'Non' in 2005 clearly showed. What they both lack is discussion of the role of institutions in the integration process. The federal institutions have two especially important tasks: a) they have to prevent the federation from dissolving – and here it is important to find the right balance of strength between the two (or more) levels of government in the federation. The federal institutions are going to be strong enough to prevent the federation from dissolving, but also too weak to hollow out the power of the Member States; and closely related to the former, b) to be guardians of the federal idea. This role is often ascribed to the US Federal Court of Justice,[43] and it also applies to the federal government and bureaucracy, and naturally to the head of state. It is often the small daily decisions which deepen integration, and pave the way to new decisions. But it is important to remember that, although the institutions try to advance integration, they are not able to direct the development of a federation themselves. There are no automatics in the integration process, and it is dependent upon the Member States supporting it. But federal institutions are important as the guardians of the integration project.

Thus it seems reasonable to use an explanation using four elements, when looking at why federations arise; the first two are most important concerning the concrete large decisions, the third and fourth are important concerning durability

[43] Wheare (1963, p. 62): 'The courts, and especially the supreme courts, have a function which extends beyond the mere question of determining disputes about the division of powers between general and regional governments. … Through their interpretation of the whole constitution of the federation and of the ordinary law, so far as they are permitted to do so, they may exercise an integrating influence which, because it is gradual and imperceptible, is of the greatest importance.'

and the preparation of the grand decisions, as well as upholding the process and the vision:

- The wish to counter a perceived threat (be it military, economic, societal and so on) by expanding one's territory by peaceful means;
- The wish to join a federation or territorial entity, to counter a perceived threat, and thus secure the survival of one's own state;
- Homogeneity of the core culture; and
- The importance of a) having federal institutions countering the centripetal forces of the federation, and itself being balanced by the Member States to prevent centralization, and b) being the bearer of the vision, the ideology.

Résumé

This chapter has had as its purpose to encircle 'federalism' as a theoretical concept as well as a way of organizing states. It was argued that federalism is about independence and politics, territorial politics. Creating a federation is about getting the advantages of being a greater entity, while keeping as much independence for the constituent entities as possible. Following this, the historical development of federalism was traced, a scheme of classification for federations was made, and it was argued that there is a distinct European federal tradition based on cooperation and deliberation. Finally, based on Riker, an approach to explaining the process of creating a federation, that is, of integration, has been made. It builds on the wish to counter a perceived threat. But Riker lacked two important elements which were added: to have a certain cultural homogeneity; and to be aware of the importance of the federal institutions both in their role of balancing the centripetal forces of the federation and in their role as guardians of the federal vision.

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Chapter 3

Constitution and Legitimacy[1]

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Introduction

The public expect much of a constitution; more surprisingly, (continental) politicians tend to do the same. The reasons for the high esteem in which constitutions are so generally held differ though: the public believe that the powers that be are domesticated and held in check by constitutional devices; and politicians seem to think that the sheer existence of an agreed constitutional document will enhance the legitimacy of their actions. National constitutional traditions differ, too. The British, on the one hand, live quite happily without a written constitution and would not dream of deeming their government illegitimate. Diceyan tradition will even have it that a written, that is, 'rigid' constitution is detrimental to democratic politics as embodied in 'parliamentary sovereignty' (Dicey 1959, pp. 173 and 175). The Germans, on the other extreme, think neither power nor authority legitimate which has not firmly and explicitly been vested with the constitutional blessing. German constitutional tradition knows no other sovereign than the constitution itself, nor any other source of legitimacy. Small wonder, then, that in the quest for a European constitution German expectations ran highest. To them, the 'constitutional act' seemed desperately needed to render the supranational level of governance legitimate and to provide the proper basis for the emergence of a European collective identity.[2]

How can those different constitutional traditions be reconciled? And how can we explain the wide support the project of 'constitutionalizing Europe' has found among European politicians even though the constitutional cultures they were reared in vary so much? Was it really their primary aim 'to institutionalize legitimate democratic government in the EU', or were they motivated 'rather by the need to shore up popular support for its political system'? (Hurrelmann 2004, p. 10). Allegedly, the common denominator of Western democracies is 'constitutional democracy': a vague notion embracing the complex whole of modern representative government. The model of 'constitutional democracy' is held up against modernizing and transition systems; adherence to it has been made the precondition for membership of the EU. High time then, one should think, that the Union conform itself to the model it propagates; maybe this is why the need for

[1] For an extended version of this article see Abromeit and Wolf 2005.

[2] See, for instance, Fischer 2000 and Rau 2001.

the proper 'constitutional act' was so commonly felt. Yet the notion of constitutional democracy is not without ambiguity. It seems to imply that legitimate government is not to be had without a constitutional document; and to turn the argument on its head, it also seems to promise that the passing of such a document *alone* will by necessity enhance the democratic legitimacy of the respective system of government. This does sound a myth – but, apparently, it is a myth believed in some quarters (see also Weiler and Wind 2003, p. 2).

The major questions to be asked in this context are: 1) What – if there is any – is the 'added value' of a constitutional document in a Union which, according to many experts, has long since possessed a constitution made up by the Treaties and the rulings of its – quasi-constitutional – Court (see Weiler 1996; Pernice 1999; and below)? 2) Which features of constitutionalization and/or of a constitutional document *generally* contribute to the legitimacy of a system of government? 3) What would be the meaning and relevance of a constitution in a *sui generis* polity like the EU which does not want – or is not allowed – to be a 'super-state'? 4) Which major elements ought to mark a constitution of the Union to fit its very specific traits and the heterogeneity of its parts?

I shall deal with these questions by turning first to the functions and benefits of constitutions, generally, and to those features which can be expected to impinge on the legitimacy of the political systems based on them (section 2). Subsequently I shall discuss the method of European constitutionalization and dwell extensively on the evaluation of results: on outlining the legitimizing qualities of the constitutional document (section 3). The concluding section will come back to the questions just listed and summarize the answers.

The Legitimizing Qualities of Constitutions

Why the Need for Constitutions?

1. Basically, constitutions are 'rules about rules': they prescribe the way collective decisions are made within the polity. As such they perform the function of organizational statute or '*power map*': which institutional and other actors participate in collective decision-making; how are conflicts between them solved; which actors possess veto rights; whose is the right of final decision?
2. The second major task of constitutions is that of delimiting spheres of action and of *allocating competences* to different levels of government. This is why no federation can do without a written constitution.
3. Delimiting spheres of action is the major principle guiding the guarantee of *civil liberties*, as well: they circumscribe the spheres which are safe from government interference. At the same time, civil liberties or citizens' rights may constitute specific values both government and societal actors are supposed to adhere to.

4. Political, that is, *participatory rights* of citizens deserve special mentioning since they are of paramount importance in democracies (of whichever type).
5. Constitutions do not only allot powers to (institutional) actors, which implies the (legal) stabilization and protection of authority structures. More significantly, they *provide checks* against the use of power – most prominently against the power of the majority. Such checks can take the shape of minority (veto) rights which are the more relevant the more heterogeneous the society is.
6. In addition to the values embodied in the civil liberties, constitutions can explicitly formulate certain *normative standards* or value systems (such as the social state, or the Christian state) which are not only supposed to guide institutional actors but furthermore to provide citizens with a good reason to identify with the respective political system, thus furthering the formation of a suitable 'collective identity'. Such attempts at 'cultural homogenization' (see Hurrelmann 2004) may, however, backfire in heterogeneous societies where the desired cohesion of beliefs is hard to obtain.
7. Last but not least the constitutional document is supposed to be of some use to make structures of authority visible and understandable and lay open responsibilities *to citizens*.

Constitutions' Contributions to Legitimacy

We would expect any constitution to contain these elements although in varying degrees and with differing weight attached to them, according to different ways of birth and different structures of society. Constitutions may deal with these matters in more or less adequate ways, however, and contribute more or less to the legitimacy of the respective polity.

The notion of legitimacy is a diffuse and complex one, usually combining the aspects of (formal) legality, (normative) acceptability and (empirical) acceptance of a system of government. While constitutions do in fact constitute some sort of legal order, and actual acceptance may vary according to circumstances and quite irrespective of the contents of a constitution, it makes sense to concentrate here on the aspect of acceptability, that is, on the question of whether the constitution constitutes a legal order and system of government which is of a kind that, in the given societal context, can be reasonably expected to be acceptable to all its members as the one that suits their needs and basic values. Hence we have to compile a second list of requirements, resembling the first but specifying the way in which constitutional elements affect legitimacy.

1. First and foremost, and in a purely formal sense, the constitution as a 'power map' and basic legal order contributes to the legitimacy of the authority structures it constitutes by the *explicit consent* it has been given to. In the strictly contractualist view this consent would have to be unanimous. The 'social contract' deserved that name only because it was supposed that each and everyone had agreed to it – if tacitly. In the normal nation-state this is of course

a fiction, to be interpreted in the way that the rules laid down in the document should be of such a nature that every reasonable citizen *could* have consented had he been asked to do so. Assuming, however, that a constitution is *only* about rules and that the partners to the constitutional contract labor under a 'veil of uncertainty' as to who is to benefit from which rule (see Brennan and Buchanan 1985, p. 29), the requirement of unanimous consent sounds less unrealistic than at first hearing. Assuming further that the differences between (groups of) partners to the contract are very great, the stipulation gains in – legitimatory – importance or, in other words, virtual unanimity must come close to actual unanimity, or else those outvoted in the initial contract will feel to be losers and resent the rules imposed upon them. As regards content, the corollary to this formal stipulation is that the partners to the contract – not only in the initial act but thereafter as well – are considered (political) equals; that the 'rules of the game' are fair; and that in the new constitutional order no one must fear to be worse off than before. For were it (foreseeably) otherwise, consent would have been withheld.

2. In federations, in particular, a constitution acquires legitimizing force from its resemblance with an actual contract and from *the contractualist way it is dealt with*. As alluded to under (1) already, the relevance of this requirement increases with the divergence of sub-units and the distinctness of their respective collective identities (see Abromeit and Hitzel-Cassagnes 1999, p. 40). The contractualist way of handling constitutional rules generally shows in the procedures of constitutional amendment and, more particularly, in the treatment of rules delimiting spheres of action and allocating competences to the federal state. Acceptance and legitimacy will grow with the security the may feel that their internal autonomy will not be impinged upon beyond the extent they have assented to beforehand, or not beyond what they are ready to assent to from case to case.
3. Federations (again) can survive only when the principle of supremacy of federal law is upheld; at the same time, legitimate constitutionalization cannot imply that federal law is permanently imposed upon reluctant sub-units. The apparent dilemma can be resolved by firmly sticking to the *principle of compatibility* which, at the constitutional level, means that constitutional rules must not devalue the sub-units' constitutional orders nor undermine their particular value systems and political cultures. This sounds an intricate feat to achieve but becomes plausible once we think of the democratic and participatory rights people in the sub-units are used to enjoy: rob them of those and dissatisfaction will be the result.
4. It is indeed the *participatory rights* granted to citizens, their associations, and sub-units which are of paramount importance for acceptability – yet not only the old ones which people would resent to be taken away from them but also the new ones specific for the new layer of collective decision-making. Identification with and acceptance of a new political regime grow with the

existence and effectiveness of opportunity structures allowing citizens to influence the rules they are subjected to thereafter.

5. People cannot, in the real (modern) world, themselves participate in every decision taken for the community; inevitably and everywhere decisions are taken vicariously. Yet they would want to know *who is responsible* if such decisions turn out to their detriment. Hence legitimacy of government accrues from the clarity with which constitutions allot responsibilities, and from the degree and effectiveness of public accountability and of popular control they prescribe.
6. Yet one might argue that the legitimizing quality of a constitution does not only hinge upon its contents and on the consent it has met. Republican tradition will have it that the truly democratic constitution – as well as genuinely legitimate politics – is based on the public discourse continuously upheld between citizens over the best and most reasonable rules. Hence deliberative democratic theory stresses the relevance of the right *process of constitutionalization*: by way of meaningful participation in the said discourse, citizens can see themselves as authors of the constitutional norms they are afterwards obliged to obey; if they cannot, constitutionalization will provide but the pretence of legitimation (see Asbach 2002, p. 289). This is, of course, a stiff requirement, difficult to be met in polities yet to be formed and, hence, lacking a *demos* and a public (literally) speaking 'in one tongue'; where no (halfway) united society exists no ongoing public debate can be expected.

Instead of concluding that in a certain (that is, diverse) type of federation no genuinely democratic constitutionalization is possible, I suggest that a trade-off exists between process (of birth) and content. Lacking the ideally required modicum of homogeneous public and of cohesion of beliefs, the higher the relevance of contents which 'compensate for problems of integration' (Hurrelmann 2004, p. 7) – meaning: the greater the need for the requirements (1), (2) and (3).

Thus, we have assembled a number of criteria against which the legitimizing qualities of the European Constitutional Treaty can be evaluated.

The 'Constitutional Treaty':A Special Case?

Does a supranational polity which allegedly is no state need a constitution embracing all these features? According to some commentators the European Convention 'broke a taboo' (Schieder 2004, p. 15) when it presented the European Council with a draft constitution. In the first place, in their Laeken Declaration of December 2001 European heads of government had not asked for it but rather asked themselves whether or not – 'ultimately' – the 'reorganization and simplification' of the Treaties they deemed necessary 'might not lead *in the long run* (italics mine, HA) to the adoption of a constitutional text in the Union'. In the second place, the notion of a constitution for a long time was considered a synonym for the European 'super-state' which some members clearly did not want.

This is why the Convention cautiously named its product 'Constitutional Treaty' instead of 'constitution'. The two, or so the baffled public were told, were very different pairs of shoes: a 'treaty between states', 'to be ratified by every national government' like any other international treaty, the one; 'a constitution for a single state' passed by decision of its own *pouvoir constituant*, the other (*The Economist*, 21 June 2003, p. 21; Schieder 2004, p. 15).

The distinction is over-subtle, however. Of course there is no other *pouvoir constituant* in the EU than the whole of its Member States, and if their heads of government come to fundamental decisions, it seems quite logical that those decisions be ratified by their people. Yet, ideally every constitution is a *social contract* formed by representatives of all members of the polity and ratified in the ensuing referendum. No federation could boast of a genuine constitution if there were something in that distinction, since they are all based on contracts between polities thereafter to become sub-units of a greater whole. The very essence of the notion of *all* democratic constitution-making is the normative concept of the mutual consent of equals. Constitutions are (legal) 'meta-contracts laying down the basic rules for further contracting' (Abromeit and Hitzel-Cassagnes 1999, p. 31): 'meta-contracts' agreed upon and explicitly or implicitly ratified by *virtually all* because rules cannot be imposed by one group upon another (Brennan and Buchanan 1985, p. 27).

As mentioned above the unanimity thus presupposed is not what marks actual processes of constitutionalization in nation-states, though; rather, it is a legal (and normative) fiction. Therefore, it has become common to pinpoint the requirement of *actual* unanimity as the decisive difference between constitution on the one hand and contract or treaty on the other (ibid.; Grimm 2003; Weiler 2002, p. 565). It is debatable whether so much stress should be laid on this practical point. More important seems to be that *in essence* no fundamental difference between constitution and constitutional treaty exists.

Another matter to be discussed under the same heading is that of the *need* for a constitutional treaty at the present stage of European integration: is it not sufficiently constitutionalized already? 'The question "Does Europe need a Constitution" is not relevant, because Europe already has a "multilevel constitution": a constitution made up of the constitutions of the Member States bound together by a complementary constitutional body consisting of the European Treaties (*Verfassungsverbund*)' (Pernice 1999, p. 707). Pernice even goes so far as to trace back, in a somewhat heroical construction, this 'multilevel constitution' to a 'European social contract' based 'on the will of the "sovereign" people(s)' having decided in favor (for instance) of the primacy of European law (ibid.: 710, p. 715) – which in actual fact they were never asked to do, nor their governments either, for the respective doctrine was elaborated by the European Court of Justice. Yet many other constitutional experts would agree that the EU, before the Convention went to work, did possess a constitutional order; hence, 'what Europe needs ... is not a constitution but an ethos and a telos to justify, if they can, the constitutional order it has already embraced' (Weiler 1996, p. 518).

The answer to our question derives just from the character of that (quasi-) constitutional order as a *Verfassungsverbund* which forms a complex, inconsistent, unintelligible whole of varied parts. The European citizen cannot be expected to know all those various bits, nor understand the meaning and relevance of each, nor the way they interconnect; he cannot anticipate the ways in which they impinge upon his own life. Hence the need for a European constitution proper arises, first and foremost, from the invisibility of the structures of Europe's constitutional order. What is primarily asked of the constitutional document is to bring about 'clarity and coherence about where [the EU's] powers come from, and how decisions are made' (Jack Straw, in *The Economist*, 10 July 2004, p. 30). A second reason ensues from the prominent part the European Court of Justice (ECJ) has played in the development of the European quasi-constitution. It seems high time its major doctrines – never invested with the explicit consent of anybody – be incorporated in a document which does not only make them visible as an integral part of the constitutional order but exposes them to the consent or dissent of all partners to the constitutional contract. Both reasons apply even in the case that the constitutional document does not alter the contents of the (quasi-) constitutional order so far existing; even 'mere consolidation' would make sense.

A third reason is of course the overdue 'democratic baptism' (Weale 1995, p. 90) of the supranational power structure. A *democratic* constitution is felt to be needed to close the EU's 'legitimacy gap' and make up for its 'democratic deficit'. Yet while most observers would agree with the first two reasons, many would not do so with the third – not least because of divergent views about what the essence of a democratic constitution is. Clarity, visibility, coherence, legal security and so on are all preconditions of public accountability but not sufficient preconditions of democracy. The latter may (in the view of some) entail a 'substantive normative conception' and 'reflect basic ethical choices of a given political community' (Menéndez 2003, pp. 9 and 11) which presupposes a collective identity united by a consensus on fundamental values. This is exactly why some authors argue that it is too early yet for the *democratic* constitutionalization of the EU because Europe so far lacks the respective collective identity or *demos* (see Grimm 1995, p. 297). Does this, in point of fact, lead us back to the difference between constitution and constitutional treaty? In practical life, however, democracy boils down to the right of citizens to participate in the collective decisions they are subjected to, irrespective of common values. And since the status of European citizen has been firmly established already (not least by the ECJ) even a constitutional treaty may be expected to grant the respective rights, thus closing the gap to the 'normal' democratic constitution (which must not be mixed up with its counterfactual ideal, anyway).

The European Constitutional Treaty of 2003/04

The 'Laeken Process'

Allegedly, the 'Laeken Process' was set in motion to foster public debate, Europe-wide, about the need and contents of European constitutionalization. It was officially initiated with Declaration 23 annexed to the Treaty of Nice (of 10 March 2001), which called for a 'deeper and wider debate about the future of the European Union', addressing 'all interested parties' whether they belong to member- (and candidate-) state institutions, to civil society, or to the public in general (for this and the following, see Menéndez 2003, p. 28). Apart from some speeches of leading politicians – commented by other politicians – nothing much seems to have happened in that first 'signaling phase', though. The work of the Convention installed with the Laeken Declaration of 15 December 2001 formed the core of the 'deliberation phase', to be followed by a more comprehensive debate in the national publics on the Convention's recommendations before the Intergovernmental Conference (IGC) was to come to the final decision. As we know it took two Conferences (and some arm-twisting of recalcitrant governments) to decide upon the (revised) draft Constitutional Treaty which makes for a third – if unforeseen – phase of public discourse (as well as behind-the-scenes negotiations). In some quarters the process as a whole triggered enthusiastic comments as to its ideal-type quality, for 'never before in the history of constitutions has the process of constitutionalization been so public, democratic, and transparent' (Kühnhardt 2003, p. 9; translation, HA).

However, there was little response in the wider public(s). If there was debate it was more or less restricted to the 'strong public' of institutional actors (Menéndez 2003, p. 29) and to university circles. Also, the 'convention method' was less ideal than has frequently been given out (for example, Maurer 2003; Schieder 2004, p. 13) although its composition and the rules set for its work were indeed of a kind to suggest a truly deliberative process. The members were predominantly members of parliaments (two of each Member State, 16 MEPs, two of each candidate state, as compared to only one member of each government plus two representatives of the Commission). Delegates of the Economic and Social Committee, of the Committee of the Regions, of the European social partners, as well as the European Ombudsman, were invited to attend as observers. Finally, there was the Forum to allow for intermittent contact with representatives of European civil society (ranging from NGOs to 'academia' to 'the business world') whose contributions were meant 'to serve as input into the debate' – with the laudable aim of preventing conventioneers from losing sight of an ongoing public debate outside. They did not, however, make a marked impact upon results. Nor, we may presume, did the delegates of candidate states who were assigned a kind of second-class status: allowed to participate in debates but not to stand in the way 'of any consensus which may emerge among the Member States'.

The proceedings as interpreted by the presidium foresaw no voting, which would seem to make room for relaxed discussions. According to the Laeken Declaration (which was rather vague on that subject) conventioneers were asked to elaborate different options for the future of the Union, hence were not obliged to come to a decision; in case they wanted to issue 'recommendations', these were to be based on 'consensus'. Apparently, the latter was expected to emerge in some mystical fashion; in actual fact, the absence of voting made 'the Praesidium ... the *authoritative interpretor* (sic!) of the common will of the Convention, without any reference to any intersubjective test of such common will' (Menéndez 2003, p. 30). The presidium was, furthermore, to guide proceedings 'by drawing conclusions from the public debate' and to provide the 'initial working basis'. Before the Convention started to work, its EP members voiced their fears 'that the body risks to be marginalized by its Presidium', and 'that the real work is done behind closed doors, by the Presidium, while the plenary will only have to acclaim the result, and thus the public debate will be killed' (Spinant 2002). Even without the President's dominance, plenary debates frequently were far from the deliberative ideal; protocols note that delegates often read out prefabricated statements without any reference to previous contributions of their colleagues (COMECE, EKD and KEK 2003, p. 13). And in the concluding phase (when Part III of the draft constitution was dealt with) Giscard seems to have governed the assembly in a squirely fashion, presenting the plenary with proposals they had not been informed of beforehand and were given little chance to alter or even to discuss (ibid.: 133). Nevertheless one gets the impression that in the end conventioneers were relieved and happy that the President spared them the onerous task of compromising on those last controversial bits and shouldered the job of devising them alone. Thus, without any voting, the draft was completed and passed 'by consensus' and to the sounds of Beethoven's 'Ode an die Freude'.

The Declaration did not only set the rules for the Convention's work but also the agenda: it defined problems and likely 'options' for their solution. As mentioned earlier the drafting of a complete constitution did not figure prominently among these but only as a remote possibility. Instead the agenda opened up a choice of how to tackle the 'Nice left-overs', ranging from the integration, clarification and simplification of the Treaties ('without changing their contents') to suggestions of reform. The headings meant to focus debates were the 'better division and definition of competences in the European Union', the 'simplification of the Union's instruments', and 'more democracy, transparency and efficiency'. Items mentioned under the last heading include the improvement of the efficiency of the Commission, the possible strengthening of the Council, or of the EP, voting rules in both these institutions, the role of national parliaments, the coherence of European foreign policy, and the like. For the most part the list gives the impression that the question of enhanced democratic legitimacy could easily be subsumed under the notion of efficiency. One may conclude that the major object the European heads of government had in view, in Laeken, was the streamlining of the Union.

The Constitutional Elements of the Treaty

At an early stage of their work conventioneers agreed that, instead of merely considering different options, they would produce a complete draft constitution. The surprising unanimity in this basic question may well have rested on the conviction that it is much easier to water down or even ignore single proposals than tear apart a fully and juridically formulated constitutional document in full view of the public eye (see Göler and Marhold 2003, p. 319), in which estimate they were only about half proved right subsequently. In some institutional matters conventioneers were moderately innovative, but for the most part they restricted themselves to the consolidation of Treaty provisions. The final document contains all the elements one would expect to find in a normal constitution (and as listed above) – with the exception of its large Part III which reads like a kind of instructions for the usage of the rest. But it has to be made perfectly clear at the outset that in both Part I and Part III very little is actually *new*; and Part II is not new at all.

1. Part I provides the Union with a 'power map' in enumerating its institutions, roughly sketching their interrelations, and in defining the nature and effects of its legal acts. The few institutional innovations are to be found in this part, such as the invention of a President of the European Council and of a Union Minister of Foreign Affairs, alterations in the composition of the Commission (creating, with the non-voting Commissioner, a 'two-class society' of Commissioners in a – now distant – future), and the new formula of qualified majority voting (QMV) the applicability of which has been extended (though less than originally intended). New is the simplified revision procedure in Art. IV-444 which invests the European Council with the power to extend, by unanimous decision, the range of areas where the Council of Ministers may act by QMV. As for the legal acts, only the nomenclature has been altered but not their number reduced.

   What is missing in Part I is procedures by which to resolve conflicts between the institutions, although the alterations concerning the personnel, powers and composition of the institutions bear the potential of added conflict. Art. I-29 states that the ECJ 'shall ensure that in the interpretation and application of the Constitution the law is observed' but one has to search in Part III where Art. 360-381 specify all the types of legal disputes in which the Court has jurisdiction. Also one has to take recourse to Part III for detailed information on voting rules (as for instance in the case of a motion of censure against the Commission, Art. 340) and on the decision-making procedures which vary from pillar to pillar and from policy area to policy area. Much of what is set out in Part I is modified by the details tucked away somewhere in that lengthy part.
2. The second task of a constitution is to delimit spheres of authority and to allocate competences. This ranked highest on the agenda given by the Laeken

Declaration which draws attention to the danger of 'creeping expansion of competences of the Union' and even considers the option of 'restoring tasks to the Member States'. The Constitutional Treaty does not tackle either of these questions but merely introduces a new nomenclature of 'exclusive' competences of the Union, 'shared competences', and 'supporting, coordinating or complementary action', a typology rounded off by extra mention of the specific Union competences in the coordination of economic and employment policies and in the common foreign and security policy. Under these headings policy areas are listed which barely leave one field of action for Member States exclusively. Furthermore, the 'Flexibility Clause' of Art. I-18 allows the Union to extend its powers provided a respective proposal from the Commission meets with unanimous consent in the Council as well as with the consent of the EP.

This does not sound like a 'delimitation of spheres' proper – were it not for the mention of the 'principle of subsidiarity' in Art. I-11 and the invention of an ex-ante control by national parliaments (ibid., and further elaborated in an attached protocol) whose statements, if opposing a Commission proposal for a new European law deemed to violate the principle of subsidiarity, are not legally binding, however. For ex-post control, Member State governments and/or their parliaments, as well as the Committee of the Regions, may apply to the ECJ if they feel that the Union has overdrawn the line. The Union will then have to prove that 'the objectives of the intended action ... can ... be *better* (italics mine, HA) achieved at Union level' (Art. I-11).

3. As for the protection of civil liberties and the sphere of the individual, the constitution has a lot to offer, both in Titles I and II of Part I and in the extensive Charter of Fundamental Rights passed some years ago and now incorporated in the document as Part II. Art. I-9 and Protocol 32 state that the Union shall accede to the European Convention for the Protection of Human Rights – a major step blocked in the past by the ECJ.
4. Much less is to be found concerning participatory rights, at EU level. Such are rarely mentioned: European citizens have 'the right to vote and to stand as candidates in elections to the European Parliament' as well as the right to petition and to apply to the Ombudsman (Art. I-10); they (and their associations) shall have 'the opportunity to make known and publicly exchange their views in all areas of Union action' (Art. I-47); and they may – perhaps – initiate a legal act of the Union (ibid.) which is the only new element in this respect.
5. The institutional framework circumscribed by the constitution (as by the Treaties before) may be seen as a system of 'checks and balances', *in toto*: all European institutions can – in differing degree and effectiveness – provide checks on each other. With the President of the European Council and the Foreign Minister the Convention appears to have provided additional checks. Yet the constitution is fairly reticent on the specific powers of the 'second head of the Union', apart from the rather trivial ones as a chairperson, while the

Foreign Minister seems to be intended to bind Council and Commission closer together. The draft version definitely aimed at further strengthening the President of the Commission but in this did not find favor with the IGC. The latter did not object to the (moderate) strengthening of the EP, though. Both Commission and EP have traditionally been motors of ever-closer integration and therefore frequently acted in unison; both now obtain (or remain in) strong positions. This leaves (as it did before) the national veto in the Council as the one real check.

We may conclude that provisions for checks on the use of Union power were not what was uppermost in conventioneers' minds. On the contrary, it will be increasingly difficult for European minorities – that is, for instance, small Member States – to find protection against an 'overbearing majority' in Brussels, made up of the Commission, the majority in the EP, and the big Member States – which is the more problematic since the Brussels majority does not find its correlate in European societies. Of course there is the option to apply to the ECJ, but this institution has become known as another powerful actor promoting the 'ever-closer Union' and in all probability will be even more so in the future, now bound by a constitution in which declarations postulating harmonization, coordination, integration and so on abound.

6. For if the constitution provides an overriding normative model it is just that of further integration. The document stresses so much the values on which the Union is based that the reader must come to the conclusion that the EU is in fact and already a community united by common normative standards. At the same time, these values cover so wide a range – humanistic, liberal, social – that one gets the second impression that they are merely instrumental: meant to extend the powers of the Union, for the latter's task is to safeguard *all* of them. Again a look at Part III is helpful because here those numerous normative objectives are translated into the more practical ones of consistency, sustainable development, overall harmonious development and the like, which all point to the overall responsibility of the Union to 'forge a common destiny' (Preamble).
7. Where conventioneers have most signally failed is with respect to visibility and clarity: power and decision-making structures are neither simpler nor clearer than they were before – or if one thinks they are, one has not looked at Part III. The layman will not know, from reading the document, where final responsibilities rest, and in which case, for procedures and decision-making powers vary according to pillar and area. The different procedures of which Wessels counts 48, as compared to 50 before (2003: 289), are not listed in Part I, which might have been helpful, but scattered over the various titles of Part III. Nor is the citizen likely to know when, exactly, a subject matter can rightfully be dealt with by the Member State and when the Union may claim it is in its exclusive – or shared, or supportive...? – competence. Things have been made even worse by the IGC who took some pains to re-introduce complexities conventioneers had meant to streamline (or added new ones, such as the revised formula for the double majority in the Council).

Legitimizing Qualities of the Constitutional Treaty

Many constitutions may be criticized from many angles but can be said to have contributed to the legitimacy of the respective political systems, all the same. That is why we have to complement the above overview and comments with a discussion of those (new or old) traits of the Constitutional Treaty which can be expected to legitimize the complex, intricate, unfinished, quasi-federal and *sui generis* political system of the EU.

1. As stated above, the legitimacy of a federal constitution first and foremost arises from the explicit consent given by all partners to the federal contract, a consent which, in its turn, is based on the mutual acknowledgement of their political equality and on the mutual appreciation of the fairness of the 'rules of the game'. With respect to the 'constitutional act' the principle of political equality is in fact adhered to: all Member State governments consented (albeit with a little arm-twisting) and all national parliaments will have to consent to the Treaty in the process of ratification. This principle is firmly stated in the revised Art. I-5 and also applies to subsequent revisions (Art. IV-443) and the flexibility clauses (Art. I-18, IV-444, 445). But what about the ECJ and its previous role as clandestine *pouvoir constituant* and motor of harmonization (see below)? Doubts are allowed with respect to the new double majority which must be judged a deviation from both the principles of equality and fairness of rules. The weighting of votes in the Council customary *before* constitutionalization was already a violation of the federal maxim of 'one state one vote'. The 'demographic factor' now added has its legitimate place in the representation of the people ('one man one vote'), not in the representation of contracting states. Now the big states get even further advantage vis-à-vis the small ones, thus arousing suspicions of hegemony – or of intentionally choosing the path to the unitary state. The actual shift of power may look marginal, at the moment, but it is the principle that counts. And the conflicts fought over the double majority demonstrate that the legitimizing quality of the constitution must be called into question, in this specific aspect (see also Schieder 2004, p. 19).
2. The second requirement for a federal constitution which is meant to expound legitimizing force is its closeness to the contract or, more precisely, the suitability of certain rules to be dealt with in a contractualist way. This principle applies to the procedures of constitutional amendment, in general, and to the rules governing the allocation of competences as well as the procedural safeguarding of the internal autonomy of sub-units, in particular. In all three respects the Constitutional Treaty is ambiguous, at best. In the first place, there is no reason to expect that the ECJ will lose its leading role in the interpretation of Treaty norms and in the adaptation of these norms to changing circumstances which by necessity places the judges in the position of behind-the-scenes agents of constitutional amendment (see Abromeit and Hitzel-

Cassagnes 1999, p. 33). This holds especially for the rules governing the allocation of competences which – in the second place – are so imprecise that one may lay any odds that the ECJ will get a lot of work to do with their elaboration. Furthermore, the lists of items compiled under the headings of the different types of Union competences (see above) overlap or are difficult to distinguish from each other, and are worded in such a way that lends itself to the suspicion that they are basically meant to be all-embracing. A look at Part III confirms this impression, in stating, in the introductory articles to the titles detailing the Union powers in different policy areas, the norms which should guide the use of these powers: they can all be subsumed under the headings of coherence and harmonization. Inevitably they will minimize the practical relevance of the subsidiarity principle, for if harmonization and coherence are the uppermost objectives, it will not be difficult for the Union to prove that the decisive prerequisite of Union action – that objectives can be 'better' achieved by it – is given. Instead it will be difficult for states and regions to prove the contrary, as well as difficult for the ECJ to judge otherwise because it is itself committed to the same constitutional norms which the Union justifies its actions with.

Part III also clarifies that, contrary to the principles of dual federalism, it is Member State action which requires justification: differences in economic policy, for instance, must be 'of a temporary nature and must cause the least possible disturbance to the functioning of the internal market' (Art. III-130). Via the extensive social rights guaranteed in Part II this rule may, *cum grano salis*, be considered also applicable to social policies; and, in fact, according to Treaty norms hardly one policy area seems to be left where Member States will be allowed to enact policies of their own, without being pressurized by Commission initiatives (at least) fostering coordination.

Of course in many cases it is the Council who decide upon the use of the manifold Union powers, but increasingly they will do so by QMV. This leaves the newly established ex-ante control by national parliaments and the ex-post control via the Court as the only procedural brakes for the dynamics of centralization of actual powers. But, as hinted above, the latter variant may prove toothless if the ECJ does not alter its habits of ruling and its own commitment to accelerated integration; whereas the first variant does not bind the Union's institutions. There is some hope, though, that a protest registered by national parliaments – if coming from more than one as well as from the 'more important' countries – can mobilize sufficient public pressure to turn the ex-ante control, in effect, into a kind of veto.

3. The third prerequisite for legitimizing effects is that the principle of compatibility be upheld. The constitution alludes to it in various places, namely with regard to 'cultural and linguistic diversity' (Art. I-3). National traditions and practices are to be respected, as is mentioned several times where the constitution deals with industrial relations and with social policy; in the latter policy area European laws and policies 'shall not affect the right of Member

States to define the fundamental principles of their social security system' (Art. III-210, 5a) but restrict themselves to the establishment of 'minimum requirements' and to the 'encouragement' of cooperation between Member States (Art. III-210, 2). Here as well as in environment protection the constitution explicitly allows members to pursue higher standards than those set by the Union – provided they do not interfere with the 'functioning of the internal market'. Furthermore, conventioneers were apparently troubled by the accelerated erosion of the role and rights of national parliaments which may have been a major reason for assigning them new powers in the procedural protection of the subsidiarity principle.

What they did not trouble about was the possible erosion of direct-democratic citizens' rights, by firmly stating that the EU be founded on the principle of representative democracy (Art. I-46). Nor did the participatory rights of Member States' sub-units find due consideration: the 'third level' is hardly mentioned, which may frustrate the Belgian sub-units and some *Bundesländer*. Hence the regard paid to the principle of compatibility is not without deficiencies. It is marred, too, by the obvious tendency (described above) to place members under permanent pressure to harmonize and coordinate their policies. Thus, in the teeth of the various references to the desirable maintenance of diversity, in actual politics it will be increasingly difficult for members to stick to their traditions even in those areas which are nearest to their hearts.

4. Acceptability of a political system grows with the amount of participatory rights granted to citizens. While national participatory rights are inevitably weakened to a degree by the European layer of politics, the provision of new and effective opportunity structures gains in importance. The Treaties and European political practice had offered two paths for citizen participation in European politics: the direct elections to the EP and the more indirect way of joining associations of civil society. To these, the constitution does not add much. It did strengthen the EP, though, yet without going the whole hog to full parliamentarization: the EP has acquired equal rights with the Council in an increased number of cases but not in all; it may elect the President of the Commission but not select him; a motion of censure against the Commission as before requires a great coalition (and more resembles impeachment, anyway). It is debatable whether elections to the EP can be classified as 'meaningful elections'. The answer to this question given by European voters is unequivocal: they do not consider them meaningful and abstain in growing numbers, and those who do not, take the opportunity of punishing their national governments for policies carried out at home, or vote for Euro-skeptics.

   To this lamentable state of affairs conventioneers reacted with the strategy of personalization: by providing European politics with additional 'faces' in the shape of the President of the Council and the Foreign Minister. The EP tries its hand at the same strategy by insisting that no President of the Commission shall be confirmed who is not somehow connected to its strongest political group.

Yet since those persons are not selected and presented to the public by the political groups themselves but sort of diced out by national heads of government, do not campaign and are not sufficiently known to the wider public before the elections to the EP, the strategy of personalization cannot render the elections any more meaningful – the less so since the presentation of a candidate (or of alternative candidates) is not coupled with that of the political program he or she means to enact.

One might argue, quite rightly, that this deficiency cannot be laid at the door of constitution-makers (although the originally intended reform of the electoral system might have improved matters, in the long run) and cannot be remedied by a constitution which is restricted to offering a framework to be filled this way or another by political actors. It would be the task of national parties and their European federations, then, to make the interactions of voters, parties, parliament and government work at European level as satisfactorily as it does at national level. Yet the crux of the matter is less that this happy state does seem a long way distant; rather, it is doubtful whether the parliamentary path is the right one to follow at all. The European electorate is much too heterogeneous, its basic interests, values and conceptions of the common good differ too much by half to make majoritarian democracy generally acceptable (see also Scharpf 2003, p. 57). Furthermore, the majoritarian system in existence *in nuce* in the EP already clearly does not operate according to the logic usually ascribed to it. Instead, a permanent 'great coalition' formed by the two big political groups EPP and SPE (and enforced by the voting rules prescribed by the Treaties) tries to hurry the process of integration while condemning the smaller groups to the status of permanent minorities. Increasing electoral success of Euro-skeptics is more than likely to aggravate this – so far latent – problem and trigger growing discontent; and thus the parliamentary path, far from contributing to legitimacy, may end in frustration.

Apparently, conventioneers did not consider alternative paths but firmly stuck to the 'principle of representative democracy'. Strangely enough, though, Title VI of Part I, headlined 'The democratic life of the Union', also mentions the 'principle of participatory democracy'. It sounds a big name for a small thing, for what is meant is nothing more than reference to the civil society and a kind of commitment of the Commission to listen to what 'representative associations and civil society' have to say, even to enter into a 'regular dialogue' with them (Art. I-47). Thus, the second variant of participatory rights of citizens is, via association, to take part in this dialogue. It is made out to be 'open and transparent' but in actual fact it is not. For, in the first place, the 'network governance' (see Kohler-Koch 1999) which the article alludes to is basically non-public and obscures responsibilities instead of achieving transparency; and, in the second, this informal kind of participation is anything but inclusive – or, more precisely, the degree of inclusiveness reached will be that which the Commission thinks useful and adequate. What is more, nobody, apart from the social partners, is legally entitled to be included.

The one new element the constitution has to offer, with regard to citizens' participation, is the citizens' initiative, giving them the right to propose a legal act of the Union. A European law will be required to substantiate the How and How Much ('at least one million' citizens, but from how many Member States?); as likely as not it will not be of a legally binding quality. One may wonder why conventioneers included just this one direct-democratic instrument in the constitution's extremely mottled Title VI of Part I. To grant citizens the right of veto against unloved laws would have seemed to be of higher priority than the opportunity to devise better laws themselves (see Abromeit 1998). At the same time, the veto could be expected to prove more effective, and probably that is the reason why the initiative was preferred.

All in all, we may conclude that, as regards democratic participation, the constitution has chosen the wrong track to enhance the legitimacy of European politics.

5. Legitimacy also grows with the opportunity for citizens effectively to 'take to task' state actors for allegedly acting on their behalf. Constitutions contribute to this not only by bestowing the respective rights – of being properly informed and to vote a government out of office – but by clearly delineating where responsibilities lie. While the Constitutional Treaty does grant informational rights and commits the Union institutions to the principle of transparency, it does not (as shown above) provide citizens with a clear picture of Union power structures, nor of responsibilities, and only to a limited degree allows for public accountability. At best, the picture given in the constitution (Part I) is illusory, for European citizens may vote, but if disenchanted with European politics are not given the chance to alter it. Whom ought they to vote out of office: the Commission? – not really feasible by participating in the EP elections; the Council? – not possible at all; an area-specific policy network...? – not known to the public, anyway. Seemingly, there is nobody actually to be 'taken to task', and nobody who *visibly* assumes responsibility.
6. Finally, the process of public deliberation is assumed to lend (democratic) legitimacy to a constitution as well as to the polity thus formed. As seen above, the public discourse actually accompanying the work of the Convention fell lamentably short of normative requirements. Nor can the discourse going on within the Convention be said to have been truly deliberative and of such a nature as to guarantee fair and reasonable outcomes. For there was no 'veil of uncertainty' about rules and about who might benefit from which: everybody knew perfectly well who would and who would not. One may well argue that without the 'convention method' we would not have got a constitution at all; but there is some reason to doubt that its deliberative elements were sufficiently pronounced to carry any farther, beyond that single act.

Conclusion: The Legitimacy of the European Union – Before and After Constitutionalization

When the Convention had finished and published their draft constitution, even Romano Prodi, the then President of the Commission, lamented that it 'lacks vision and ambition' (see *The Economist*, 31 May 2003, p. 27); *The Economist* was harsh in its critique of a 'lamentable piece of work': 'a text which would worsen the very problems it had been instructed to address' (21 June 2003, p. 11); German academics criticized the 'risk-averse' attitude conventioneers had adopted: so modest were the results that they would not have necessitated the ambitious 'convention method' (Höreth and Janowski 2003, p. 72). On the other hand, the heads of European governments looked very pleased with what they had achieved in the second IGC held over the matter. Even the British government appeared to be content, priding themselves that many of their 'red lines' had found due recognition in the final version, for of the 80 amendments passed by the IGC, 39 had been proposed by Britain (see Jack Straw in *The Economist*, 10 July 2004, p. 30). Thus, even the small-scale improvements suggested by the Convention – restricting themselves to the 'feasible' instead of advocating the desirable – were watered down. In resuming the two perspectives just quoted *The Economist* concluded that the Constitutional Treaty would, in fact, 'bring some real improvements to the EU – for governments. For the people they serve, however, it does not' (26 June 2004, p. 13).

Even if not adopting this scathing view, one has good reason to harbor doubts about the surplus of legitimacy which the new Treaty – if ratified – will bestow upon European integration. Before constitutionalization the legitimacy of European politics used to be seen as resting on its output: on its efficiency in meeting public needs which no longer could be satisfactorily dealt with by national governments acting independently of each other. This output or 'technocratic legitimacy' (see Lord and Magnette 2002) was indirectly coupled with the input legitimacy of its component states whose governments, as leading actors at Union level, were, all of them, democratically legitimized at home. Direct input legitimation – whether parliamentary or otherwise – was regarded as rudimentary at best, the existence of a directly elected European Parliament notwithstanding. Hence the common view that European politics suffered from a legitimacy gap mainly originating in its democratic deficit. The Commission for some time now has attempted partly to close the gap by including corporate actors into its decision-making, that is, in trying to achieve a modicum of 'corporate legitimacy' (ibid.). And the European Court of Justice did their best in generating 'an original normative order that confers new rights and entitlements to citizens' and thus to contribute to 'legal legitimacy' (ibid.).

One might argue that the legitimacy derived from these different sources could be considered sufficient for supranational politics strictly limited to a few areas. But this is just the point: European powers of action are *not* strictly limited but have grown 'out of bounds'. With the completion of the internal market and the

inclusion of the second and third pillar, the Union has acquired state-like powers; its laws increasingly supplant national laws, thus eroding its own indirect or 'derivative legitimacy', for national parliaments are no longer free to act according to their people's wishes, and national governments can no longer be held fully responsible by their people. Hence, it takes more than the surrogate sources of legitimacy named above to close the Union's legitimacy gap. Yet will the Constitutional Treaty do so?

This brings us back now to the questions this essay set out to answer. 1) What is the 'added value' of the constitutional document in the Union's present state – and in view of the fact that the material norms of the previous Treaties have barely been altered? The surplus could simply rest in its readability and in the clarity with which it expounds the formers' intricacies and makes power structures visible and understandable. Unfortunately this is exactly what the Constitutional Treaty does *not* achieve: the complicated nature of Union powers and Union decision-making will be no more intelligible to the general public than it was before, and what little improvement the draft had offered was ruined by the IGC's final version (and, what is more, the new Treaty is somewhat longer than the previous Treaties taken together!). 2) The constitutional features most generally contributing to the legitimacy of a polity are the checks on powers provided, the ways prescribed to hold those powers responsible and accountable to citizens. Again, the Constitutional Treaty fails to offer adequate provisions. Conventioneers were concerned less with making governance accountable than with making it easier (and, hopefully, more efficient). 3) *If* there is a definite need for an actual or quasi-constitution in a *sui generis* and multi-level polity, it is to demarcate levels of responsibility as well as to protect spheres of autonomy of Member States where they are safe from unwanted and unforeseeable interference by the Union, thus providing an optimum of legal security both for the constituent units and their citizens. Once more, conventioneers barely troubled with the question. On the contrary, by defining Union competences as vaguely as they did, and by reiterating, in various places, the overriding norms of coherence and ever-closer integration, the constitution obviously aims at security mainly for the Union. Its members are referred to the goodwill of Union institutions and to the ECJ who, bound by the constitution, may be somewhat at a loss about what to rule in cases of conflict. They may decide this way in one case and that way in the next, which amounts to the opposite of legal security – in more than one respect: having to rely upon varying Court rulings implies that the general public will never be sure about where actual responsibilities rest.

4) Finally, which constitutional elements could democratically legitimize politics in a Union composed of extremely heterogeneous parts? Full parliamentarization and majoritarian democracy cannot be considered the adequate and sufficient way of 'input legitimation' but the Constitutional Treaty does not offer plausible alternatives, pointing to consensus democracy. The national veto in the Council – gradually losing relevance, anyway – does not make for *democratic* legitimation; for that, it would have to be complemented with the right of people to

contradict (see Abromeit 1998). A constitution normatively binding together divergent units should also contain elements facilitating the formation of a collective identity. Arguably the most plausible way to achieve this objective is to offer citizens sufficient means of effective participation at all levels of the polity, and not rob them of their respective rights at unit level. The second (complementary) way is to grant citizens fundamental rights, enforceable at all levels. While the Treaty does not bother much with the first requirement, it does not fail with respect to the second – although the British took some pains to have 'explanations' added to the final version stating that fundamental rights were applicable to Member States only when they were implementing EU law (see Art. II-111 and Declaration 12), and that the ECJ was held to pay 'due regard' to this restriction. All the same, 'European citizenship' may, in fact, gain some – normative and emotional – relevance in the future. Hence, as regards enhanced legitimacy, the overall picture, albeit somewhat daunting, is not altogether bleak.

Epilogue

The No of the French and the Dutch electorates in the referendums held over the Constitutional Treaty indicates that my criticism has not been too far-fetched. Not many of those voters will have read the Treaty; but those who did will have been as baffled and irritated by its complicated nature and illegibility as I was; it is definitely not the kind of text which makes it easy to 'put two and two together'. Their No cannot be explained away by their disenchantment with the government of the day. At least as much it was caused by growing discontent with the state of European integration: by a feeling that the twin processes of 'deepening and widening' the Union have gone too far and are growing out of bounds; that the referendums might be the last opportunity to halt their dynamics; and that it is high time to tell 'those in Brussels' not to lose the peoples of Europe out of sight.

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Chapter 4

Policy-making in Federations and in the EU

Søren Dosenrode

The aim of this chapter is to analyze the federal policy process within a number of federations;[1] how federal laws are made and the degree of state involvement in the process.[2] This topic is rarely treated on a systematic, comparative basis, and needs further analysis to gain insight into the policy process of federations as a starting-point for further comparisons with non-federal states.[3] The policy process may roughly be divided into two traditions: the European (cooperative) and the Anglo-Saxon (dual), as discussed in Chapter 2.[4] The working hypothesis being that the Anglo-Saxon federations, in this context the US, Australia and Canada, differ significantly in their mode of policy-making from that of the European ones.[5] The space available in this chapter, as well as the purpose of finding a few 'archetypes',

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1 Although there seem to be different opinions as to whether a federal organization of a state has an impact on the policy outcome, there is, not surprisingly, agreement that a federal organization inevitably has another kind of policy-making process than a unitary state. Arend Lijphart, for example, mentions that federal states' institutions of government are different from unitary ones, and that federal states – generally speaking – have several constraints for policy-making (1999). On the other hand Braun (2000, p. 2) rightly points out that quantitative analysis has not yet clearly proven that there is a clear difference in policy output between federal and unitary states; some analysis suggests there is, other that there is not. If we turn to international relations theory (IR) one claim of the neo- or structural realist approach is that states tend to copy the leading states in order to survive. Thus it will not surprise if policy outcomes tend to look alike.

2 This implies that this chapter analyzes how federal legislation is made and implemented, and not inter-state cooperation, although this kind of cooperation has a large impact on the federal system (Bowman 2004). At EU-level this implies that the chapter concentrates on supranational legislation.

3 To my knowledge only a few comparative studies of policy-making in federations exist. Ute Wachendorfer-Schmidt (2000) and Dietmar Braun (2000 and 2003) have made such analysis, and Braun has used a strict frame of analysis (2003).

4 Agranoff and McGuire claim that the US never was a dual federation (2004, p. 500); this is contested by many, for example, Pierson (1995, p. 464).

5 It is clear from the outset that the federations within the two groups vary, for example, the US does not seriously try to introduce fiscal equalization whereas Canada does (Pierson 1995, pp. 463-473).

does not allow to go into details, but it is the hope that it will be able to isolate central features of the policy process in federations and in the EU.[6]

When one is going to analyze the Constitution Treaty (CT) or a possible 'Constitution Treaty Light (CT-Light)', it is of a certain interest whether it is possible to find, to distill, some kind of European federal policy model, which may have been the – tacit – model of the CT, and which suits the European political culture, thus giving it better chances of survival and development. If there is such a European culture, how does it correspond to the decision-making in the EU of today and in the CT? This is the topic of this chapter.

This chapter starts out by introducing the policy cycle as a heuristic tool to understand the policy-making process in general. It will be used to structure the analysis of the federation in question and the EU. Then follows an analysis of the decision-making process federations and in the (Nice- and CT-) EU. In the conclusion we try to answer the initial question.[7]

The Policy Cycle

As mentioned the concept of the policy cycle is a heuristic tool, which illustrates the making of policies in modern democratic states. It builds on the assumptions that a) policy-making is a process; b) it is a process that begins long before a policy proposal is presented in a parliament; and c) the process can be divided in stages or phases. It also assumes that the policy process once begun continues, thus the metaphor of a 'policy cycle'. The policy cycle approach has been criticized for giving the impression that the policy process is straightforward, moving swiftly from one phase to the next (Sabatier and Jenkins-Smith 1993, pp. 1-4, Sabatier 1993, pp. 116-148). And that criticism is of course true; the policy process can be very muddy and far from straightforward, moving neatly from one phase to another. Also the approach may indicate a rationality not necessarily present in policy-making[8] but when one has recognized this, and taken care of it in the concrete analysis, the policy-analysis approach is a useful tool for its division of the process in a number of phases. Wayne Parsons (1995, p. 80) has put it like this:

> If we put aside the stagiest model [the policy cycle and the like, SD] the choice is either a bewildering array of ideas, frameworks and theories, or the acceptance of another

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6 It follows that a lot of details and the existing complexity will not be done full justice, for example Hanf and Toonen (eds) (1985) will most likely be critical of this approach.

7 For short but good introductions to the federations analyzed in this chapter, see Ann L. Griffith (2002).

8 Everett (2003) has discussed and criticized the 'rationality' of the approach, as well as what she saw as a 'mechanic' 'how to make efficient policies' approach to policy-making. I agree with her basic criticism that the policy cycle is an analytical tool, but find that she is exaggerating the actual belief in those concepts by authors such as Edwards.

> alternative model. In broad terms, therefore, the stagiest framework does allow us to analyse complexities of the real world, with the proviso that, when we deploy it as a heuristic device, we must remember that it has all the limitations of any map or metaphor.

Besides, the policy-cycle approach does not only highlight the phase traditionally scrutinized by lawyers and political scientists, the decision-making phase, but also draws attention to the other very important phases in the whole policy process. It also reminds us that actors may be different at the different stages, and that the importance of the various policy arenas varies during the process.

The next question to be answered is how many phases or stages does the policy process have. Various authors have various stages, but the author of this chapter has in previous works leaned on Adrienne Windhoff-Héritier's five phases model (Dosenrode 1997 and 2002). My argument in supporting this number is purely pragmatic: fewer phases will make the analysis too crude and more too detailed to keep an overview, especially in comparative studies. Thus Windhoff-Héritier's model (1987) will be applied here, too.

The five phases are: Problem-definition, Agenda-setting, Decision-making, Implementation and Evaluation. The problem-definition phase is muddy. No institution is responsible for generating and defining policy problems. Thus it is hardly tangible and difficult to analyze. A policy problem has to be perceived by someone as a problem and it must be possible to solve it politically. The potential policy problem may come up in many ways, but it is certain that mass-media, political groups as well as grass-root movements are essential and, adding to this, the resources (understood broadly) which they are willing to invest in promoting an issue as a 'policy problem'.

When the problem is established, the next step is to have it placed on the political agenda and that is by no means an easy task. The agenda-setting phase (second phase) is, in Windhoff-Héritier's words, the bridge between the problem-definition and the decision-making (1987, p. 69). As for the content of the agenda, Héritier reminds us that the majority of issues on the agenda are old issues or routine questions, and that only a small part are actually new questions (1993, p. 87). This is so because it takes power and resources to place a new issue on the political agenda. There will be actors who are not interested in the policy problem being set on the agenda at all, and others who would like to reformulate it, to suit their purposes. The decision-making phase (third phase) is the one normally looked at with the greatest interest by scholars. It is the phase where a policy decision is negotiated and made in the formal political setting. It is followed by the implementation phase,[9] in which the policy decision is supposed to be put to work. After a while, a policy is sometimes evaluated. This last phase may lead to changes

[9] The term 'implementation' or 'implementation studies', which had its heyday in the 1970s and 1980s, was mixed up with 'regulation' and 'innovation' in the 1990s, and is now back in its own right (cf. Schofield and Sausman (2004), Hill (2003), Riccucci (2005)).

in the policy, no changes or the termination of the policy. Demand for changes may set off the policy cycle anew.[10]

The Policy Cycle in Federations and in the EU

The following analysis of the federal respectively the supranational policy-making processes in federations and in the EU is meant to construct archetypes; thus it will be possible to find many derivations, when looking at one specific polity. But the point is to see whether there are general characteristics which may help to analyze, classify and thus understand decision-making in federations.[11]

It goes without saying that policy-making in federations is more complex than in unitary states: not one government with its bureaucracy but governments with their bureaucracies; not one parliament but several; not only national parties, but also territorial parties with their own territorial logic and so forth. In other words, the amount of veto points, possibilities of making alliances and by-passing in federations is much larger than in unitary states. Braun (2000, p. 8) points in this direction when stating that: 'Without any doubt, federal systems create more opportunities for smaller and regional parties [...] to find an access to political power.'

Problem-definition Phase

When policies in *Anglo-Saxon*-type federations are characterized, *grosso modo*, by segregation, understood as policy-making on the federal level including mainly federal actors, and policy-making on the Member State level including primarily Member State actors, one has two, theoretically separate, policy cycles. This is the result of a fairly strict division of labor. But when this is said, the nature of the problem-definition phase, being open and 'muddy', allows for actors from both the federal and the Member State level to be active. As mentioned above this phase ishard to analyze, but important actors are mass-media, political groups (nationally based or Member State-based), federal- or Member State bureaucracies as well as grass-root movements. An important asset in this, and the other phases, is energy,

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[10] Implementation, and especially evaluation, of federal laws will be the topic of this author's next project; thus it will be treated in a more rudimentary way in this chapter as it seems to form a lacuna in comparative federalism studies.

[11] It might also be fruitful to extend this analysis to include a comparative analysis of the influence of the parties and the electorate in the decision-making process; for example, in Germany the party system is more important than the territorial, understood as the governments of the Bundesländer. Self (1985) stresses the importance of the parties and the electorate in the policy-making process. Equally interesting would be to include an analysis of which levels (federal or Member State) the different kinds of policies (distributive, regulatory, re-distributive) were placed at in European style federations and in Anglo-Saxon style. But unfortunately this goes beyond the limits of this chapter.

understood as resources. It is essential, if something understood as an issue is going to be accepted as a 'policy problem'. The same can be said for *European*-style federations, only that the tendencies are more outspoken, due to the tradition of cooperation between the federal and the Member State level.

The *Nice- and CT-EU* are different in this respect. The nature of the EU itself is disputed; it ranges from those who ascribe state-quality to the EU (McKay 2001, Dosenrode 2003a), to those who consider the EU some kind of multi-level polity (Hix 1999), to those still regarding the EU as primarily an international and intergovernmental arrangement (Moravcsik 1998). This is not the place to answer the question of the nature of the EU; this question will be touched upon in the last chapter of this book.[12] In the problem-definition phase there is not the same degree of public opinion Union-wide as there is in the Member States. There is an overwhelming lack of common media, which could facilitate the creation of a common frame of discussion. Only rarely do the populations of the Member sStates discuss the same issues at the same time; examples of this sporadic European opinion were the discussions of participation in the Iraq war, of the French and Dutch 'no' to the CT, and Danish newspaper cartoons of the Islamic prophet Mohammed. Thus potential policy issues will 'arise' in or around the Commission, which is very open to ideas. This openness is used by lobbyists, Member State governments and the European Parliament. It is worth remembering

[12] It may be useful to remember a few characteristics of the Nice-EU. The most striking feature of the EU is the handing over of national sovereignty from the Member States to the EU, that is, the establishment of a supranational polity, which enacts binding legislation for the Member States. Under the supranational level, there is still a national level, consisting of 25 states, all of liberal democratic character. Below the state level there is an increasingly important sub-national level of regions (Dosenrode 1995, Dosenrode and Halkier 2003, Lähteenmäki-Smith, Chapter 7). This creates a hyper-complex decision making process. The Nice-EU consists of three kinds of cooperation among the Member States and the Union: a) a supranational one, where the Member States have handed over their competencies to the Union and its institutions (for example, foreign trade, and – for some states – economic and monetary policy); b) a quasi-intergovernmental area (Common Foreign and Security Policy), where certain rules limit the sovereignty of the Member States; and c) a purely intergovernmental area, where the role of the Union is to be facilitator (Justice and Home Affairs). In other words, a system where some competencies rest with the Union, some are mixed, and some rest with the Member States, much like in a federation. If one looks at the primary institutions, one sees the European Commission, which initiates Union legislation; a European Council where the heads of state and government meet to consult, coordinate and also launch initiatives for the Union and make decisions, which may result in legislation, thus being a strong second chamber; there is a Council of Ministers where government members of the Member States decide on the initiatives of the Commission, mostly by majority voting; and the European Parliament, which within certain policy areas has a veto-right towards the Council of Ministers, and within others has a right to advise the Council. Also there is a European Court of Justice, which is a supreme court within certain areas, and there is an independent European Central Bank. For an in-depth analysis I refer to Chapter 9.

that no 'extra-Commission' not-state actor has a *right* to deliver an opinion in this phase. If the Commission is interested in a proposal, an idea, it will either ask an already existing consultative committee or, more seldom, an expert committee to sound the idea. The work in this and the next phase is characterized by an outspoken lack of rules and transparency (for example, meetings are not recorded, and the public is not informed which actors were present at the meeting).

The only new incitement the CT would bring is the explicit mentioning of the existing idea of promoting 'Europe-wide' political parties, with the explicit aim of creating a European political consciousness (Art. I-46.4).[13]

If one should compare the federations and the EU in this phase, the largest difference is the lack of an all-European arena for discussions of common interest, that is, a European opinion. This implies a tendency of particularistic issues being brought up, at the cost of common European issues developing. This is attempted to be solved by giving one institution the right and duty to initiate ideas designed to strengthen the development of all the Union. In this work the Commission depends on input from its environment: lobbyists, grass-roots movements, Member State governments, the other institutions.

The fairly clear-cut original monopoly of the Commission as 'integration motor' has been eroded by the growing power of the European Council as well as the Council of Ministers which may also make input to the legislative process, not unlike a second chamber in a federation.[14] In this way a kind of 'parallel' policy cycle 'interferes' as the request of the Council implies that a problem-definition phase, an agenda-setting phase and a decision-making phase have already taken place, for the Council to be able to formulate its request. The CT in its original form does not change the present, complex situation, and the EP still lacks the right to take an initiative itself. In all cases it is the elites, understood as governments, bureaucracies, political parties, lobbyists and so on who play important roles. For an American Mid-West farmer, the distance from Iowa to Washington DC is not much shorter than for a Danish farmer to Brussels, perhaps even the contrary.

The Agenda-setting Phase

When an issue has been recognized as a *political* issue the next step is to make sure that it is placed on the political agenda. This is by no means an automatic process, as some groups will be just as interested in keeping a certain issue away from the agenda as others are eager to place it there. Thus resources and stubbornness are paramount assets in this phase, too. This phase is also characterized by the fact that it is the preparation to the decision-making phase; the issue is now recognized as a policy problem, and it is being discussed with the purpose of making a policy out of it – or exactly not. Thus when an issue has been placed on the political agenda,

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13 Thorlakson (2005) presents an interesting analysis of the European party system.

14 Concerning the specific role under co-decision, Burns (2004) argues that the Commission still exercises agenda-setting and gate-keeping.

it constitutes a qualitative leap compared to the problem-definition phase, where the problem can be discussed in a rather informal way. It goes for the Nice-EU, the CT-EU, as well as for the federations, that what there may have been of 'spontaneity' in the upcoming of an issue disappears in this phase. If the political parties have not been active previously, they will join the process now. The increased formality of the process gives various political institutions (federal parliament/European Parliament, Member State parliaments, Member State governments/Council of Ministers, political parties, interest organizations and so on) an important role.

Theoretically there is no difference between the federal states and the EU (Nice and CT) concerning the ways one secures the placing of an issue on the agenda.[15] There are at least three obvious ways to ensure that an issue is placed and remains on the political agenda: 1) a good way for an interest organization or a political party is to commit the Member State government to a political issue.[16] Apart from the status which the promotion of a Member State government gives a proposal, one may expect the issue to have been prepared and looked at by the governmental bureaucracy; 2) The interested actors may also try to use the federal parliament/the European Parliament to secure an issue's place on the agenda; and then 3) the actors may try to convince the state bureaucracy (on either levels) of the issue's importance. In all cases it helps if one is able to formulate the issue in such a way that it looks as if a policy decision would benefit the public. These three ways are open to actors in EU Member States as well as in federations. But looked at in reality, it turns out that for EU actors, the European Parliament, in spite of its right to suggest that the Commission look into a matter, in this phase, is less influential than a federal parliament in a nation-state. Thus whereas actors in national federations have three channels of access, the actors from the EU Member States prefer going via the Member State's political system, ending with its government or lobbying the Commission directly. A special, fourth way of seeking influence is by popular initiative. Of the federations looked at it is only a popular right in Switzerland, where the signatures of 100,000 citizens with a right to vote places upon the government the obligation to arrange for a referendum on the issue, and in the CT, where one million citizens with a right to vote: '(…) may take the initiative of inviting the Commission, within its framework of its powers, to submit any appropriate proposal […]' (CT, Art I-47, 4).[17]

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15 For a discussion of lobbyism in the EU, see, for example, Dosenrode and Sidenius (1999), Eising (2003) or the classical work Mazey and Richardson (1993).

16 Article 208 Nice Treaty, and Article III-345 of the CT, gives the right to the Council to invite the Commission to undertake investigations into a policy problem, with the aim of proposing means to reach a common goal. This is a *de facto* right to initiate a policy initiative from the Commission.

17 In Switzerland, the majority of such popular proposals for referendums on the national level have been defeated in the following voting, but their influence should not be underestimated, as all important legislation is passed with an eye to a possible referendum, thus ensuring most legislation is passed in a form perceived acceptable to a

Table 4.1 Channels of influence in the agenda-setting phase/important arenas

	Anglo-Saxon-style federation	European-style federation	1970s-EEC	Nice-EU	CT-EU
Via Member State government	yes	yes	yes	yes	yes
Via federal parliament/ European Parliament	yes	yes	no	partly	yes
Via the federal bureaucracy/EU Commission	yes	yes	yes	yes	yes

Summing up, the agenda-setting phase links the problem-definition phase and the decision-making phase; it initiates and prepares an issue for the decision-making phase. It is characterized by an increasing formalization, but the process is still fairly open to actors who are not members of the formal decision-making institutions. This is the case both in Anglo-Saxon and European-style federations, as well as in the Nice- and CT-EU. But the 'federal parliament' in the Nice-EU (European Parliament) lacks the powers of a normal parliament, especially the right to initiate legislation. The Member States, in the Council of Ministers, as well as the Commission are the important actors here. This is also the case in the CT-EU parliament, but to a lesser degree, as more policy questions now demand the use of the cooperation procedure, thus giving the EP a right to veto and (re)negotiate the majority of the legislative proposals. In the two kinds of federations, European and Anglo-Saxon style, analyzed here the federal parliament is equally important.

Braun (2000, p. 9) stated that:

> Federalism does not only serve as an opportunity structure for interest groups and political parties. It also creates new groups of political actors with a 'territorial logic' who enter the political game, these groups being sub-governments, regional parliaments and bureaucracies. […] It is worthwhile, nevertheless, to stress the different logic these actors have in fulfilling their roles in the federal arena. Territorially bound political actors at member state level each pursue particularistic interests while sharing a common one in the economic affluence and in the reputation of their region, in stable resources, in a relevant influence on political decisions as well as in a relatively high degree of autonomy relatively to the management of their own affairs.

majority of citizens and cantons. In the same way the CT's rather weak formulation 'inviting the Commission' would possibly be fairly strong in praxis.

Such 'territorial' tendencies as Braun refers to are found both in the EP and in the Council.

Decision-making Phase

This is the phase which we all know both from all analysis of states, including the federal states and the EU,[18] where the media 'break news', and on which scholars and journalists have traditionally concentrated their attention. The government/the Commission have made a formal proposal and handed it over to the legislative – the federal parliaments with their two chambers and the EU with the Council of Ministers and the European Parliament. This implies serious work in parliamentary commissions in federations and in the EU, and in the COREPER[19] and parliamentary committees of the Member States of the EU.

The dual system of the Anglo-Saxon federations, principally segregation of federal and Member State tasks, as well as the Westminster model of government in Canada and Australia, has fostered a tradition of confrontation, instead of cooperation; Canada is perhaps the best example of this (Pierson 1995, p. 464). The provinces are strong, and look for their rights. Problems come up when new policy areas have to be placed: is it a federal or a provincial matter? In Canada it is right to talk of 'intergovernmental' and not 'interlocking' or 'cooperative' federalism; the provincial governments represent themselves in negotiations with the federal government (Pierson 1995, p. 465; McKay 2001, p. 62). As there are no constitutional institutions where federal and Member State politicians meet, thus the frequent meetings of the First Ministers Conference are very important links between the two levels (the political arena does not play this role); the same goes for the other permanent intergovernmental conferences such as the Conference of Ministers of Finance and Provincial Treasurers (McKay 2001, pp. 51, 56-57; Painter 1991, p. 282). Compared to the US, Canada is more centralized, building on the principle that all powers not explicitly vested in the Member States rest with the federation, contrary to the US and European style of federations, but it is still a

[18] The EU constellation differs, compared to the two federal types looked at here, insofar as it is the Council of Ministers, in its role as 'second chamber', which is the decisive actor. The European Parliament, as first chamber, lacks the power of the Council of Ministers. But (!) strong second chambers are not unique in federations, for example,the Senate in the US and the German *Bundesrat*. What constitutes a difference is the strong territorial dimension in the Council of Ministers. It is also present in the Senate of the US but not at all as outspoken. And concerning Germany, it may be claimed that it is party policy interests which are predominant in the second chamber. This is only the case in the Council of Ministers to a minor extent.

[19] COREPER, the Committee of Permanent Representatives of the EU Member States in Brussels. COREPER is basically a coordination committee, where the Commission's proposals are prepared among the Member States' representatives at ambassadorial level, before they are finally negotiated in the Council of Ministers.

fairly decentralized federation (McKay 2001, p. 47). The US is also of dual character, but the states are less strong and much less coordinated than in Canada; also the state governments do not have a genuine possibility of participating in federal legislation, as the representatives of the states, the senators, are elected by the voters of the individual states, and are not responsible to the state governments (Pierson 1995, pp. 464-5). McKay (2001, p. 43) goes so far as to say that: 'Federal and state decision making processes are essentially separated. As a result, most of the conflicts between the two levels of government have been brokered through the courts.' The territorial dimension has *de facto* vanished.[20] As a consequence of the lack of official representation, the National Governors' Association tries to influence the federal legislation like an ordinary lobby group, and it has its 'Office of State-Federal Relations' in Washington DC (Grant 2004, p. 265). According to Grant (2004, p. 267), the former executive director of the US Advisory Commission on Inter-governmental Relations, John Shannon, has described federalism after Ronald Reagan as a return to the 'fend-for-yourself' federalism of the old-fashioned kind. This is bound to create confrontation.

The Australian Senate was designed as a house of the states, where the interests of the states could be looked after, but it turned out to be a partisan chamber without any genuine territorial affiliation. But there are a number of fora, where the federal government meets the Member State governments. The oldest still existing is the annual premiers' conference, where federal and other questions of common interest are discussed. But after launching 'Collaborative Federalism' the federal government has created a 'Special Premiers' Conference in 1990, a 'Council of State Governments' in 1992, and a 'Treaties Council' in 1996. But according to McKay (2001, pp. 73-75) these fora are places to exchange information and to consult, not to take decisions, and Prime Minister Howard preferred to bypass these fora by (McKay 2001, p. 75). Thus it is no surprise that the relationship between the two levels at times has been very confrontative.

Although the dual systems thrive there is a tendency towards more joint decisions between the federal and the Member State level in the Anglo-Saxon federations.[21] This may over time lead to a decision-making culture more like the European style.

Policy-making in the European Union is, in the first and decisive phases (problem-definition, agenda-setting), dominated by the European Commission, with its legally founded quest for promoting the unification process. In the later phases of the policy process (decision-making, implementation) the Member States are domineering, but depending on the conditions in the individual Member State, the following implementation phase again opens up possibilities for various actors.

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[20] But the federal government respects the jurisdiction of the states within the federation (Agranoff and McGuire 2004, p. 497).

[21] Cf. Agranoff and McGuire (2004), Saunders (2002), Selway (2001). Peter Beattie, Premier of Queensland, denies this development (2002).

What is important in our case is to emphasize the hyper complexity of the decision-making, the constitutional fights among the European institutions on the one side and the Member States on the other side, and that the regions play their part in this game often as allies of the Commission in its fight for power.[22]

Until the Single European Act (SEA), all decisions were taken by unanimity; one negotiated until consensus was reached. It changed with the SEA in 1987, where Qualified Majority Votes (QMV) was (re)introduced as a means of making decisions. The Nice-EU is still characterized by the attempt to reach compromises, and making package deals compensating a Member State in one field if it was disadvantaged in another. But the use of QMV in the Council, as well as the cooperation procedure in the Council–EP relationship, has steadily increased, and the CT-EU proposes an increase of policy areas where QMV is foreseen in such a way that 80 per cent of the policy areas are under that. A CT-Light Union would be likely to follow the same trend due to the high number of Member States, and with more applicants waiting to join. But what characterizes both Nice- and CT-EU in the decision-making phase, as a general rule, is cooperation. Cooperation as the arrangement is permanent, thus allowing the states to go for absolute gains and not only relative ones.

In the European-style federations, cooperation also seems to be the rule, although to different degrees. Swiss federalism is decentralized and of a cooperative nature; the cantons are strong, and they cooperate among themselves and with the government in many ways, for example, in the Conference of the Cantonal Governments (*Konferenz der Kantonsregierungen*), in the various 'directors conferences',[23] where they try to reach a consensus when replying to the government's law proposals, or through the many inter-cantonal agreements (*Konkordate*).[24] At the federal level the cantons are represented in the State Council, *Ständerat*, with two representatives from each canton. But the members of the State Council are elected by public vote in the individual cantons, and are not subject to instructions from the cantonal government. These members of the *Ständerat* are of course cantonal representatives, and do have an eye on the interests of their respective cantons but votes are primarily cast in compliance with ideological and national considerations. In all matters concerning the cantons, the federal government, *Bundesrat*, has to consult the cantons, *Vernehmlassungsverfahren*, before proposing legislation, and in all larger matters, for example, taxation, a law can first enter into force when it has been subject to a referendum, in which a majority of citizens and of cantons have voted in favor.

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22 For a detailed discussion of the EU decision-making system, see Dosenrode 1997.

23 The 'directors' are members of the cantonal governments in their dual capacity as ministers and administrative heads ('directors'). They meet according to topic, like the EU Council of Ministers. They can meet in politically/geographically determined groups or all of them. The purpose is to discuss problems of common interest including responses to federal law proposals.

24 Switzerland is a cooperative, that is, European-style federalism (Frenkel 1984, p. 112; Kriesi 1995, p. 56; Wältli and Bullinger 2000, p. 78).

Thus the cantons are protected against a strong executive by a variety of veto points and this forces the federal government to seek cooperation. Additionally, the cantons may themselves initiate federal law by sending a proposal to the parliament. The territorial aspect of the decision-making process is present and visible (for example, the French-speaking cantons and the German-speaking cantons often have different interests).

In Germany and Austria one can also see a pattern of cooperation, but on a different basis. German federalism has been called 'centralized cooperative federalism' (cf. McKay 2001, p. 93), and it is characterized by close cooperation between the two levels. The German members of the second chamber of the federal parliament, the *Bundesrat*, are members of the governments of the *Bundesländer*. Thus the Member State governments participate directly in the legislative process in Berlin and the second chamber has a veto power towards the first chamber.[25] But the second chamber behaves according to an ideological logic, not – or seldom – out of a territorial logic. This implies that cooperation is less outspoken, when the first chamber, *Bundestag*, and second chamber are ruled by different parties (cf. Lehmbruch 1978, p. 151). As mentioned the *Bundesrat* does have a veto right, but this right is used scarcely. A lot of coordination between the two levels takes place at the federal government level, and the *Bundesländer* have considerable influence on the policy outcome (one talks of *Politikverflechtung* or 'interlocking federalism' – Scharpf et al. 1976 and 1977; McKay 2001, p. 92). The problem being that the policy results are sub-optimal (Scharpf et al. 1976, p. 236).[26] Concretely the Prime Ministers, *Ministerpräsidenten*, meet four times a year to coordinate positions, and on a rotating basis one *Bundesland* after the other has the presidency and acts as secretariat. Twice a year the Prime Ministers meet the *Bundeskanzler* after their own meeting. Additionally the ministers in charge meet, for example, to discuss traffic or environmental questions. As the members of the state governments also meet in the second chamber of the parliament, the coordination works well.

Austria is a strongly centralized federation (Drummond 2002, p. 43).[27] The Member State parliaments elect representatives to the second chamber, the *Bundesrat*, but contrary to Germany, the opposition parties must be represented too (B-VG Art. 35). This implies that the second chamber has always been divided ideologically and has not been able to be a strong opponent to the first chamber. Also the heads of the Member State governments, the *Landeshauptmänner*, have a right to participate in all the negotiations of the second chamber (B-VG Art. 36). The territorial aspect may be detected, but the main variable is party affiliation, and the second chamber is fairly weak. As in Switzerland and Germany the Member States coordinate their positions towards law proposals from the government.

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25 In other words the second chamber mixes legislative and executive powers.

26 Wachendorfer-Schmidt (2000, p. 8) acknowledges the influence of Scharpf et al. in theory, but contrasts it with the theory of dynamic federalism of Hesse and Benz.

27 A trend against centralization began with the preparation for an Austrian EU membership, see below.

Coordination takes place at governmental level in various permanent conferences (the most important being that of the *Landeshauptläute*) and at civil servant level. A very important institution is the *Verbindungsstelle der Bundesländer* (Agency of the Member States) which maintains contact with the federal government and conducts the practical coordination of the Member States' opinions (Klöti and Dosenrode 1994). In spite of this excellent system of coordination, the influence of the Member States on the decision-making at the federal level is limited. The main actors are the national, political parties and the arena is the first chamber of the federal parliament. But still cooperation is the hallmark both in Germany and Austria.

The Participation of the Second Level in the Federal EU Decision-making

A special case for Austria and Germany is the increased participation of the Member State level in the formulation of federal EU policy (cf. Klöti and Dosenrode 1994; Dosenrode 1995). Germany is the oldest federal member of the EU, and the question of the *Bundesländer*s participation in foreign policy has been discussed since the Lindauer Agreement of 1957, but until the Mastricht Treaty the influence of the Member States on the shaping of Germany's EU policy was small (cf. Müller 1993; Zuleeg 1992). The European Single Act (ESA) had given the Member States the right to give a binding recommendation to the federal government on EC proposals falling solely within the competences of the second level, and the federal government would have to follow it. With Maastricht this right was incorporated into the German constitution, together with the right that new EC treaties would have to pass the second chamber with a two thirds majority to be ratified (Art 23 GG). As with Austria and Belgium, the Member States send representatives to the Council of the Regions. During the negotiations for Austrian EU membership the federal government needed to change parts of the constitution, and that could only be done with the acceptance of the Member States. This was the opportunity the second level had waited for in the centralized federation. An agreement was eventually struck, but a senior civil servant in the Prime Minister's office called the behavior of the Member States 'pure blackmail'.[28] The Austrian *Länder* got an agreement very much like the German one, but they also managed to get rid of an institution, the intermediate federal administration *Mittelbare Bundesverwaltung*, at the same time. The heads of the *Länder* had had to act as the federal authority in certain situations, which often led to uncertainty and definitely undermined the independence of the Member States. In the German agreement, which was a model for the Austrian, concerning the participation of the second level in the federal level's EU policy-making, it was the Member State governments and the federal governments who should cooperate. The Austrian Member State governments expected the same to be the case in Austria, but not so the Member State parliaments. After a long and heated discussion, a compromise

[28] In conversation with the author.

was reached that both parliament and government should participate in the discussions, and that it was the head of the state government who should present eventual decisions (Dosenrode 1995, p. 152). This model corresponds to the Danish EU decision-making model, where the parliament has a strong say before the government negotiates in Brussels (Dosenrode 2003b). The federal government is bound to follow the recommendation of the states unless vital national interests are at stake (Dosenrode 1995, p. 153).

Although Switzerland is not a member of the EU, the preparations for membership of the European Economic Area (EEA) gave the cantons new rights. Foreign policy is basically a federal prerogative in Switzerland as in most states.[29] But as the EEA in many ways would interfere with the competences of the cantons, the cantonal governments demanded a right of participation. The federal government suggested a right to be informed (Botschaft 1992), but that was unacceptable. The federal parliament intervened on the side of the cantons, and the federal government was instructed a) to inform the cantons early and in depth, and b) to include the cantons in the preparation of the negotiations and the decision-making (Hänni 1993, p. 28). The Swiss people and a majority of cantons eventually voted 'no' to membership of the EEA. As a consequence the cantons created the Conference of the Cantonal Governments' to strengthen their position towards the federal government, and the result was that the rights of the cantons to be informed and included in the foreign policy of Switzerland was laid down in the new constitutions (articles 54 and 55). Thus the EU has strengthened the cantonal cooperation in general. But talks with federal authorities in Bern and Vienna in July 2006 indicated that the new powers were of a symbolic kind more than substantial. The problem of the cantons and the *Bundesländer* is basically the same as that of the EU: it is hard to find a common denominator among that many actors.

The European integration process has strengthened the position of the Member States in the federations both due to constitutional rights, but also because the Member States are included officially in the EU decision-making process (through the Council of Regions), through the regional policy of the EU, and because many Member States maintain 'representations' in Brussels with the task of gathering relevant information and of lobbying (this is also the case for the regions in the centralized states, cf. Dosenrode and Halkier 2003). But it has also added a European dimension to the governance of the Member States, giving it a broader, less provincial style.

Summing up, the decision-making culture and processes are distinctively different when looking at the Anglo-Saxon-style federations on the one hand and the European-style federations including the EU on the other hand (see Table 4.2).

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[29] But '*Volk und Stände*' (people and cantons) must be heard in a referendum before Switzerland can ratify certain international treaties, and the cantons have a limited foreign political activity.

Table 4.2 Style of cooperation

	Anglo-Saxon-style federation	European-style federation	Nice-EU	CT-EU
Cooperation style	Confrontation	Cooperation	Cooperation	Cooperation

In the Anglo-Saxon federations it is appropriate to talk of intergovernmental relations between the two levels. Especially in Canada and Australia, but also in the US, the Member States are basically excluded from federal decision-making; there are more or less formal committees with representatives from both levels but they are of an advisory character. Disagreements are taken to the federal court. The European federations, including both the Nice- and the CT-EU, are characterized by state involvement in the decision-making phase (the strongest in the EU and Germany, the weakest in Austria). Traditionally one tries to avoid taking disagreements to the federal court/European Court of Justice, and there is a tradition of compromise and cooperation. But if disagreements cannot be solved they are taken to the court.[30]

Implementation Phase

The parliament has decided upon a policy, and now it has to be implemented. As has been noted implementation is not a simple thing, as Pressmand and Wildavsky made clear already in the sub-title of their 1973 book, 'How big expectations in Washington are dashed in Oakland'.[31] No public policy is implemented by itself, there always has to be a responsible institution, and all institutions have interests. If one adds that implementation is fairly uninteresting for politicians – unless the implementation goes wrong and the media finds out – and that implementation in reality involves many actors from the public and private sphere, it is obvious that this phase leaves ample space for 'adjustments' and 'corrections' for the agent who implements the policy (Dosenrode 2003b, p. 396).[32]

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30 But of course the EC/EU has had its crises too; one only has to think of President de Gaulle in the late 1960s, and the split over support of the US led invasion of Iraq 2003. After all, politics is about sharing limited resources.

31 This is not the place to discuss the problems of implementation. In the vast literature on the topic, one can recommend a few classics: Windhof-Héritier (1987); Parsons (1995); Sabatier (1986). Kenneth Hanf and Theo Toonen (1985) explicitly discuss the complexity of implementation, and the involvement of various actors.

32 To be fair one has to say that if politicians spent time supervising implementation and evaluation, a very large extra burden would be placed on them.

The Anglo-Saxon dual-system style implies that in principle the laws decided upon by the federal parliament are implemented by federal agencies without an intermediary between the federation and the addressee, be that citizens, firms or organizations. The states are not involved in the process. Reality looks a bit different. The two tiers of government do exist, each with their agencies responsible for the implementation of respectively federal and state legislation. But in all federations there exists a number of concurrent and joint policy areas or programs; Painter (2000, p. 135) puts it like this: 'Australia, like Canada, is a "mixed" system, where co-ordinate parliamentary governments share overlapping functions, and are forced to co-operate while seeking to preserve arm's length existence.' According to Selway (2001, pp. 117-119) the fiscal imbalance, where the states depend economically upon the Commonwealth (the Australian federation), has made them very dependent; the Commonwealth has become the primary source of policy-making. And the Commonwealth has supported this development. Not surprisingly the Commonwealth has used its own agents to implement federal legislation, but not very successfully (Selway 2001, p. 121):

> It is now clear that those arrangements [federal agencies, SD] do not provide sufficient policy oversight. They also fragment the overall role of government in delivering services. It is also clear that the use of statutory authorities does not ensure efficiency.

The same is the case in the US (Chun and Rainey 2005, p. 23). The demand for cooperation often comes from the federal state; sometimes in the way that the Congress passes a bill obliging the states to implement (and pay for) a certain policy. This procedure of course creates friction between the two levels (Grant 2004, p. 269). Grant refers to federal 'blackmail' concerning implementation, for example, the federal government under Reagan (who otherwise tried to strengthen the states) decided to demand from the states that persons under 21 should not be allowed to purchase alcohol, as a way to stop drunk driving among young people. The states not complying would lose their highway grants from the federal government (2004, p. 270). In this way the federal government is fairly sure of state cooperation. But it is worth noting that the federal government in the US has not been allowed to expand like the one in Australia. According to Agranoff and McGuire (2004, pp. 498-9) the Congress has always been careful not to let the executive accumulate power, and: 'The United States has never had a prefectural tradition, with the use of *tutelage* or priori approval power by the central state administration over local decisions' (ibid., p. 499).

Canada may be the federation closest to the archetype Anglo-Saxon-style federation (Painter 1991, p. 274):

> The principles underlying the Canadian division of power are based on jurisdictional distinctions between various subject matters. The result is a system of parallel rather than interlocking governments with each government each asserting the right of unilateral action in its separate jurisdictions.

Concerning implementation, Painter mentions that when the federal government is dependent on the provinces' cooperation, they may be badly off (1991, p. 282): '[…] a recalcitrant provincial government may be able to nullify the implementation in question', and 'It [the provincial government, SD] might deliberately ignore grant conditions, or make reductions in provincial allocations to programs which new grants are aiming to augment'. But the federal government is not dependent on the provinces as it has its federal agencies too (Skogstad 2000, p. 63). But implementation by the federal agencies is not perfect, as Skogstad shows (2000, pp. 72-75).

The Anglo-Saxon federations have, in principle, opted for implementation of federal law through federal agencies occasionally creating parallel systems of implementation, for example, of courts and police forces as in the US. This gives the federal government direct control of the implementation, in principle, and preserves its independence from the states. It also implies the danger of waste of resources as two organizations treat nearly the same cases; there is a risk of rivalries over competencies, and the risk that the central government does not know what actually happens at street level, due to the distance.

In European-style federations, the states are involved closely in the decision-making process, and thus are expected to share the aim of a policy. This is important when a policy has to be implemented. Scharpf (quoted in Braun 2003, p. 13) puts it thus:

> This is why the 'capacity to coordinate' is likewise important in order to understand the degree of constraint federal structures are causing in federal policy-making. If member states are integrated into federal fiscal policy decisions, the likelihood of effective implementation rises. The potential of coordination depends on two variables: on the one hand on the availability of institutions for coordination and, on the other hand, on the 'interaction orientation' of actors when 'playing the game', i.e. if actors resort to a more competitive or a more consensus orientation.

Discretion given to the states in the implementation will in the ideal world ensure, that the policy is implemented optimally though not alike in each state; in a less ideal world discretion or delegation implies a lot of opportunities for the state to circumvent the federal government's policy aim, when implementing the policy.

The German Constitution contains a general implementation clause in Article 30 GG in which the *Bundesländer* are responsible for the implementation of federal legislation – and the *Bundesländer* were directly involved in the making of this legislation through the *Bundesrat*. Thus it is reasonable to expect a certain loyalty in the implementation, unless of course a Member State is ruled by a government which is in opposition in the upper house of the federal parliament. But it is possible for the federal government to issue 'general administrative rules' (*allgemeine Verwaltungsvorschriften*) to ensure either uniform implementation or implementation at all. But the federal government may only issue those with the acceptance of the upper house (Weber 1980, p. 113).

Contrary to Germany, the Swiss constitution does not have a general implementation clause. The decision on which level should implement legislation is laid down in the law itself. But Kissling-Näf and Wälti (1999, p. 655) go so far as to claim that in reality one may speak of an institutionalized praxis, where the federal level (*Bundesversamlung*) legislates, and the cantonal level implements; this is what is meant when describing Swiss federalism as 'implementation-federalism'(Kissling-Näf and Wälti 1999, p. 655):

> The logic of the implementation-federalism to-day, guarantees not only that the cantons are leading during the implementation, but also that they legitimate it and have an important word to speak already during the policy formulation.

Austrian federalism is, as mentioned, rather centralized. But the constitution, the *Bundesverfassungsgesetz* (Art. 11, B-VG, and partly Art. 12), does give the *Länder* a right of implementation and administration.[33] The federation (*Bund*) only has a limited right of supervision over the implementation (Weber 1980, p. 115).

Whereas the European Commission plays the central role in the two first stages of the European Union's policy-making cycle, and an important role in the third, its role in the fourth phase, implementation, is minimal.[34] 'Implementation' in EU language differs a bit from the common usage. In EU terms 'implementation' means that the directive has been transformed into national (Member State) law, whereas it normally implies that the policy has been put into effect, which is something quite different. The vast majority of the implementation is done by the states, and that is no coincidence. First of all the implementation is a source of influence; second, it is reasonable to let the national administrations, which know the national circumstances best, be in charge of the implementation of European directives; and third, it would demand a lot of resources to build up EU implementation agencies – an expense there was and is no political will to accommodate. This implementation principle is laid down in the treaties: the Nice- and CT-EU Treaties (Art. 249 and Art. I-33 respectively) place the responsibility for the implementation of directives (in CT terminology 'a European frame law', Art. I-33) with the Member States. Thus the European Commission relies heavily on the Member States when directives have to be implemented (From and Stava, in Andersen and Eliassen 1993).[35, 36]

The right to implement and to control the implementation means influence to the one doing it. All together, the state level has strong means of influence concerning the actual way federal legislation is working – or not working – in the

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33 The catalogue of competencies in the Austrian constitution, including the question of who implements what, is a frightful mess.

34 Exceptions are rules concerning the internal market (competition), fisheries and agriculture.

35 A good, short, introduction is Cini 2003, pp. 364-384.

36 A short look through the sparse literature on implementation in the EU, from Siedentopf and Ziller (1988), to From and Stava (1993), to Peters (2000) tells the same story.

European style of federalism, contrary to the Anglo-Saxon one. But implementation is more than a question of power; it is also a question of practicality. If the starting-point is an agreement on the end result between the federal government and the state governments, decentralized implementation may ensure the working of the policy in occasionally very different environments like Hamburg and Bavaria in Germany, because the state governments know how things work in their part of the country. But when this is said, one also has to remember that the implementation phase is dull, seen through a politician's eyes; the battle is fought, the bargain is made and new things are waiting. Thus the executive of the states, the civil servants and interest organizations, are left with rather free hands. This is even more so within the EU. The Union hardly has any implementing agencies, and it is laid down in the present treaty, as well as in the CT, that implementation is the responsibility of the states. Discussions with representatives of the EU Member States in Brussels have confirmed to the author that the role of implementer is considered crucial for the Member States, not only to secure the best possible implementation, but also due to the power perspective. The Union's Member States are the essential and constituting units in the EU, and they are not interested in changing the 'balance of power' between the states and the institutions. In this respect, there is a clear parallel to the US Congress' attitude towards the American presidency, as mentioned above. But this parallel does not reach far, as the logic of the Anglo-Saxon style calls for the creation of federal agencies to implement federal laws, and state agencies to implement state law. The two federal styles clearly create different institutions and processes.[37]

Table 4.3 Implementation agencies

	Anglo-Saxon ideal style federation	European ideal style federation	Nice-EU	CT-EU
Who implements federal legislation?	Dual systems; each level has its own agencies	Cooperative system: the Member States implement for the federal level	Cooperative system: the Member States implement for the EU level	Cooperative system: the Member States implement for the EU level

[37] But one may expect the Anglo-Saxon style of implementation to change towards the European one as the complexity of the policy processes grow and uncertainty concerning at which level to place a new policy area arises too.

Evaluation, Reformulation, Termination

Although one could expect the fifth phase, the policy evaluation[38] and perhaps reformulation or termination, to be a very busy phase, this is rarely the case.[39]

The stagiest concept may imply policy-making to be rational, and one could foresee the following to happen: a thorough policy evaluation and, depending on its results, a policy adaptation, a policy change or a policy termination. But that is not the norm. There are a number of factors influencing a policy evaluation and reformulation: a) the federal government needs information on how the policy works to be able to act; b) there must be a political will to make a change if necessary; c) the possibilities for change depend on the style of federation; and d) it is an advantage if the involved bureaucracy is willing to make a change if necessary.[40] One could expect a court of auditors to be of value in this case, but they rarely look into the subject matter itself.

In the typical Anglo-Saxon federation, the federal government is responsible for the implementation of federal legislation through its agencies. Thus from a top-down perspective the federal government should be able to find out how its policies are working at the street level, simply by using its agencies, but it also has secondary sources such as mass-media, unsatisfied citizens and interest organizations. Should it turn out that changes are necessary and that the federal government is willing to suggest it, it will be a federal matter involving the federal government and parliament. The weak spot of course is the collaboration between the federal government and parliament on the one hand, and the federal bureaucracy on the other, as it is in all states. The bureaucracies may work against a change a) due to a loss of prestige, b) it will mean extra work but not necessarily extra resources, c) unwillingness to change and so on.

In the European-style federations things are not as apparently easy as in the Anglo-Saxon ones. To begin with, the federal government does not have its own agencies with civil servants to report back to it. The federal government is dependent on the states' reports, mass-media, unsatisfied citizens and interest organizations to get an idea of how a policy is working. In other words its sources for feedback or evaluation are limited compared to the Anglo-Saxon federation. Should it turn out that a policy reformulation or termination would be advisable and that the federal government indented to do so, it may encounter more difficulties than a federal government in an Anglo-Saxon federation. This is due to the fact that the states have a number of veto-points, beginning in the second chamber of the federal parliament. The piece of legislation which needs reformulation or termination may be the result of a larger deal, involving

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38 In 'real life' evaluation in some cases runs parallel to policy implementation.

39 To this author's knowledge empirical analysis of this policy phase is lacking, thus this part has a sketchy character. A comparative project on the topic is planned by this author for 2006-2007.

40 Bureaucratic politics theory as well as principal-agent theory points to this problem.

compromising over several issues, implying that a change of one policy issue may demand the change of other issues as well. If one then considers the possibility of a changed representation in the second chamber, it becomes obvious that policy changes are difficult. But the states are acting within a fairly coherent political culture negotiating on a national basis.

The European Union could be seen as an archetype European federation concerning policy reformulation. Reformulation of policy brings up the permanent problem of finding a new compromise for the 25 Member States, as in the European-style federations, just more extreme, as a common political culture as well as common identity is not as developed as in the federations; territorial or national interests still play an important role. In addition, the not unimportant bureaucratic resistance to changing an already implemented procedure has to be overcome in the Commission's bureaucracy. The experience of national civil servants from Denmark, the Netherlands and Germany is that due to the Commission's very rigid understanding of rules, correction of regulations seldom takes place (interview November 1995, and December 2004).[41] This all speaks against radical changes. Thus one can consider the reformulation of EU policy a rather challenging exercise unless a dramatic occurrence happens, such as the disgraceful departure of the Santer Commission, which led to evaluation and reformulation of several EU policies and practices.

Table 4.4 Policy evaluation and reformulation

	Anglo-Saxon ideal style federation	European ideal style federation	Nice-EU	CT-EU
Responsible for Evaluation/ Policy reformulation	The federal government and parliament	The federal government and parliament, and the states' governments and parliaments	The European Commission, the EP, the Council of Ministers, the Member States' governments and parliaments	The European Commission, the EP, the Council of Ministers, the Member States' governments and parliaments

If the above mentioned sounds pessimistic, concerning rational evaluation, eventual reformulation or termination, it fits neatly into the findings of the policy-analysis approach. The evaluation theory has a whole range of instruments and approaches at its disposal in theory (Parsons 1995, pp. 542-568), but as sketched

[41] Professor John Toy, University of Sussex, stressed the same observation, stating on Danish Radio (P1), 27 February 1996, 18.10, that the rigidity of the EU system prevented changes, although one recognized that the procedures were unsatisfactory.

above there are a number of difficulties applying them. And if a result should be produced, the chances that it will carry great importance in a policy reformulation are small. Parsons quotes Rossi and Freeman (1995, p. 569) for writing:

> An evaluation is only one ingredient in a political process of balancing interests and coming to decisions. The evaluator's role is close to that of an expert witness, furnishing the best information possible under the circumstances; it is not the role of the judge and jury.

This does not of course imply that evaluations are unnecessary or even impossible, but simply that their role is limited and that changes are difficult. And as already indicated a policy change or even termination may be a tough matter. Policies, once made, tend to go on for ever. Prestige and energy has been invested in promoting, deciding and later implementing them. When implemented, a policy program rests with a certain agency which often develops ownership towards it, all of this ensuring a long life for the policy. But this does not of course mean that policies do not change at all; they do, as already indicated. First of all, most policies leave the bureaucracy – from the top to street-level bureaucrat – space for adjusting it, and this happens, recalling Pressman and Wildavsky's subtitle quoted above, just not always in the way the legislator intended.[42]

But there is an important way of changing, reformulating or terminating policies: through the Supreme Court and the European Court of Justice respectively.

The Supreme Court has the possibility, either by itself or when complained to, of scrutinizing a legal act to see if it is in accordance with the federal constitution or is implemented correctly. If it is not, the federal or state parliament will have to change it or its praxis respectively. It does not look as if there is a dividing line between the European-style and the Anglo-Saxon-style federations as to the activity of their Supreme Courts in the law-making or law-revising process; the American Supreme Court, the Australian High Court[43] and the European Court of Justice are all very active, whereas the Austrian, the Canadian, the German and the Swiss Supreme Courts seem more reluctant in comparison.

A general characteristic of all the federations analyzed here is that evaluation happens, to a smaller or larger extent, but that politically decided reformulation or termination are hard to make happen under normal political circumstances, but internal or external pressure facilitates such changes. Still, policy change or termination is easier done in Anglo-Saxon federations than in European-style federations, and is very hard in the EU (the CT or a CT-Light are not likely to change this).

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42 This is not the place to discuss the important question of legitimacy.

43 See Selway and Williams (2005) for an interesting analysis of the Australian High Court's role in building the federation.

Table 4.5 Principal actors/level in the various phases of the federal policy-making process

	Anglo-Saxon-style federations	European-style federations	Nice-EU	CT-EU
Problem-definition	All incl. Member State level	All incl. federal level	All incl. Member State level, but emphasis on federal level (EU-Commission)	All incl. Member State level, but emphasis on federal level (EU-Commission)
Agenda-setting	All incl. Member State level, but emphasis on federal level actors	All incl. federal actors, but emphasis on Member State level	EU-Commission, Member States through the European Council Council of Ministers	EU-Commission, Member States through the European Council Council of Ministers
Decision-making	Federal level actors	Federal and Member State level, but emphasis on federal level	Federal and Member States, but emphasis on Member States	Federal and Member States, but emphasis on Member States
Implementation	Federal level	Member State level	Member State level	Member State level
Policy Evaluation/ Reformulation/ Termination	Federal level	Federal and Member State level	Federal level and Member State level (low activity)	Federal level and Member State level (low activity)

Making Policy in Federations

Using the policy cycle approach, though taking it with a grain of salt, has structured our way through the policy-making process in a number of European and Anglo-Saxon federations.[44] The main conclusion can be summarized in three points: first, there are distinct, different styles of the federal policy processes in

[44] This is not the place to evaluate the approach, but in this author's opinion, it has been useful.

European federations vs. the Anglo-Saxon ones; not so much in the problem-definition phase as in the following phases, where the amount of actors, as well as the inclusion of the state level varies considerably. The amount of actors is considerably smaller in the Anglo-Saxon federations than in the European ones. Also the degree of inclusion of the states in federal decision-making is higher in the European-style federations.[45] The main explanation of the differences between the Anglo-Saxon-style federations and the European style including the EU is the institutional set-up and the working habits they lead to. And this must be looked at in a historic and cultural context. In the table above one does see the clear difference between the two kinds of federations; but what does that matter? Braun (2003, p. 13) asks the same question:

> One can hypothesise that the power sharing type of federalism [European style, SD] will show a large capacity to coordinate but a low capacity to act on the part of the federal government while the power separating type [the Anglo-Saxon style, SD] grants sufficient freedom to federal governments, though of limited scope, but with a possibly underdeveloped capacity to coordinate.

The analysis in this chapter shows that this is exactly the case. This raises the question of efficiency, which again has to be related to the question of legitimacy. But that discussion must wait. The important conclusions here are that there are significant differences between the Anglo-Saxon-style federations on the one side, and the European style on the other, and that the EU in its Nice form, as well as in the CT form, constitutes a variation of the European style.

Secondly, the policy process in the European Union does resemble that of the European-style federations, especially in the later policy phases where the Member States are to a very high degree included in the process. This is hardly a surprise, as the EU (ECSC) was envisaged by its founding fathers as a federation in being on the one hand, and as the Union consists of Member States who share a common core culture but each have their own history which speaks against a unitary 'construction' on the other hand. The states are important actors in the European-style federation (with Austria as a possible exception), but not as important as the Member States in the EU, where, for example, one Member State is able to block changes in the 'constitution',[46] as one saw with Denmark and the Maastricht Treaty in 1992, and with France and the Netherlands with the CT in 2005. The EU Member States play a central role, especially in the decision-making phase compared to 'traditional' European states in federations. This is enhanced by the

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[45] It is tempting to hypothesize that the quality of legislation made in a system with many veto-points is lower than in systems with few veto-points. On the other hand large inclusion may give legislation a higher degree of legitimation than in a system with a lower degree of inclusion.

[46] It has been argued that the *acquis communautaire* constitutes a *de facto* constitution for the EU. A paper called 'constitution' is not necessary in itself; the United Kingdom is a good example.

growing role of the European Parliament as the 'first chamber', although its role hardly matches that of a traditional first chamber in European federations (but see below).[47] The compatibility of the policy-making style of the EU and the European-style federation must be assumed to give the EU sustainability, as it does not constitute an alien element to the Member States' governmental culture.

Thirdly, the CT or a possible CT-Light would strengthen the federal character already present in the Nice-EU insofar as they would add new policy areas to the area covered by the co-decision procedure. The co-decision procedure grants the EP a number of possibilities to influence EU legislation by either rejecting it, by a majority of its members, and thus stopping it, or by proposing amendments. The latter opens up a series of possibilities for the EP to amend and change the original proposal which it does frequently. Also the CT itself was inspired by the federal idea, as one could read in the earlier versions from the European Convention, before it was removed from the final text: one could also mention the listing of competencies, the (weak) presidency of the European Council, the EU Foreign Minister and so on. In general, the CT would remove the question of the nature of the EU, as its already existing statehood would be clear to anyone (cf. Chapter 9).

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[47] Having said that, this chapter also clearly indicates that systematic comparative studies are needed within this field.

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Chapter 5

The Presidencies – One Too Many?

Anna-Maija Kasanen

Introduction

With the object to make the European Union (EU) more effective and democratic, the European Convention drafted a Constitutional Treaty for the European Union. In this treaty, among other things, a new institution, the permanent presidency for the European Council, was established. It is expected that the presidency will contribute to more effective decision-making and therefore to improved workability of the EU, and to an increased visibility of the EU abroad. The main tasks of the President, worded in the Constitutional Treaty, will be to chair the meetings of the European Council, to represent the EU abroad and to act as a mediator between the interests of the Member States in the European Council.

However, this new institution raises a number of questions, which have not been answered in the Constitutional Treaty. First of all, it is not quite clear which specific powers the President will possess in decision-making. For example, does the representation of the EU abroad include decision-making powers in this field? Also, the division of the competencies between the President of the European Council, the President of the Commission and the – also new – Foreign Secretary of the EU is far from clear, above all in matters of foreign policy. Not least due to those uncertain competencies, the normative basis and thus the political legitimacy of the presidency is called into doubt. Consequently, most of the smaller Member States have strong reservations about the permanent presidency. Many of them argue that this new institution would increase the gap between the bigger and the smaller Member States, regarding the distribution of the decision-making powers in the EU.

This debate about the future institutional framework of the EU and its normative basis is crucial due to the well-known deficits of the EU in terms of its openness, accountability and legitimacy. The complex and non-transparent structures of its decision-making system produce a huge gap between the citizens and the EU. Some authors even state that '[…] the surprise is not the distance of the EU from its citizens but that it functions at all' (Hughes 2003a, p. 1). Analyzing issues of European constitutional choice requires, therefore, recourse to normative political theory, on the one hand, and approaches of institutional and comparative politics, on the other (Weale and Nentwich 1998, p. 1). The intention of this chapter is to combine both aspects.

In the normative political theory, political legitimacy as one of the main bases for the governability of the EU plays an important part. The main criterion for the evaluation of the new presidency in this chapter will therefore be political legitimacy, interpreted here as the amalgamation of both the input legitimacy, that is, the representativeness, and the output legitimacy, that is, the efficiency. The second relevant approach of this chapter is the institutional approach and particularly the historical and the so-called rational choice institutionalism. With regard to the rational choice institutionalism, the actor and interaction-oriented approach of Fritz Scharpf plays an important part in this chapter.[1] The central questions of these two institutional approaches, related to the subject of this chapter, are: what is the historical context of the decision to establish a permanent presidency for the European Council? And: what does the establishment of this new institution mean for the policy of the EU? In order to understand the context of the decision to establish the permanent presidency, political development of the EU will be briefly looked at. Hereby, the respective theory of integration influencing the periods of integration will be taken into account. When analyzing the historical development of the EU, a specific attention will be directed to the European Council and its presidency, as well as to the interaction of this institution with other EU bodies.

The presidency as an institution and its potential impact on the policy of the EU will also be scrutinized on the basis of comparative politics. In doing this, three different models of presidency will be analyzed: Austria, Finland and France. The core questions of this part are defined as: which powers – in comparison with his or her national colleagues – will the permanent President of the European Council potentially possess in the decision-making system of the EU? How will the political constellation and the decision-making system of the EU be influenced by the presidency? And: what will this mean for the policy of the EU?

The answers to these questions will naturally be dependent on various indicators, such as the personality of the first incumbent, party constellations and much more. Therefore, it is not the intention of this chapter to make definite predictions about the powers of the future President of the European Council but rather to demonstrate some possibilities that the Constitutional Treaty for the European Union offers the new permanent presidency.

Institutional Approach and Political Legitimacy

The object of the institutional approach is to understand how institutions affect the behavior of governments and the political decisions they make. The focus of an institutional study is on the connection between the polity and the policy. Political institutions determine the ability of democratic systems to meet fundamental policy challenges (Haggard and Shugart 2001, p. 65). Some authors also define this

[1] Compare, for example, Scharpf (1997) and Scharpf (2001), pp. 93-208.

connection in terms of dependent variables and independent variables (Haggard and McCubbins 2001, p. 10). Dependent variables in this case are policy indicators, such as representativeness, efficiency, and governmental stability (Haggard and McCubbins 2001, p. 17). The independent variable is the framework, in which the decisions are made: the institutions of the decision-making system. This connection is what this chapter examines: the impact of the changed polity – the establishment of the permanent presidency of the European Council – to policy – the decision-making of the EU. Which – if any – is the impact of the permanent presidency of the European Council on the decision-making of the EU?

Hence, the aim here is to analyze the institution 'presidency' with the assistance of the institutional approach and to assess this institution with regard to the criteria of political legitimacy. There are different variants of institutionalism that stress different aspects of institutions' impact to policy outcomes. Two of these play an important role for this analysis of the new presidency of the European Council. The first is so-called historical institutionalism, which stresses the meaning of the context in which institutions occur. According to this approach, political decisions are always embedded in long-term policy developments (Kaiser 2001, p. 263). Therefore, when analyzing and explaining the establishment of a new institution like the presidency of the European Council, the aspect of the previous political and institutional development is vital. What led to the establishment of the permanent presidency of the European Council? What was the institutional context in which this decision was taken? Is the establishment of this institution a logical consequence of the previous political and institutional development of the EU?

The second variant of the institutionalism considered relevant for this analysis is the actor and interaction-centered institutionalism of Fritz Scharpf. His game theoretical approach to political system analyses comes in useful when analyzing the interaction between the institutions of the European Union. This approach focuses on the opportunities and restraints which institutions open up for and place on political actors. Thus, Scharpf proposes a double perspective for the analysis of the connection between polity and policy: 'The approach proceeds from the assumption that social phenomena are to be explained as the outcome of interactions among intentional actors [...] but that these interactions are structured, and the outcomes shaped, by the characteristics of the institutional settings within which they occur'.[2] Therefore, when analyzing the impact of the new presidency of the European Council for the policy of the EU, the role and the function of other EU institutions in the decision-making process, as well as the interaction between the other EU institutions and this new institution, are crucial. What are the interests of the political actors and institutions within the EU and which institutional powers do they possess in order to satisfy these interests? Which institutional restrictions do they have? How will the *balance of power* of the institutional framework of the EU be influenced by the new permanent presidency?

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[2] Scharpf 1997, p. 1; quotation from Kaiser 2001, p. 267.

With respect to normative aspects, the most important one is that of political legitimacy. In political science, there is a consensus about the connection between the governability of a unit and its political legitimacy. Governability implies consensus about and acceptance of the common values, social structures and government activities, as well as of policy procedures within a society. In this context, legitimacy is defined both as input and as output legitimacy. Input legitimacy refers to the political process of a system, above all to the participation of the citizens in the decision-making. Output legitimacy centers on the efficiency of the system. Both aspects of legitimacy contribute to the acceptability and to the acceptance of a political system by citizens, and both of these aspects are dependent on each other.

Classical approaches to political legitimacy, like those of Niklas Luhmann and Max Weber, define political legitimacy as the 'recognition of the government' (Luhmann 1983, p. 30). Jürgen Habermas focuses on the 'worthiness of a government to recognition' (Habermas 1977, p. 144). According to the traditional theory of political legitimacy, the basis of political legitimacy is common identity. Yet, in the EU, the debate on European identity is still very controversial and the only consensus that has been achieved so far is that this identity does not yet exist.[3] Its formation – or so it seems – would require acceptability and actual acceptance of the political system of the EU on the part of its citizens – and this means legitimacy. Hence, European identity would rather have to be regarded as the result of the legitimacy than as an integral part of it.[4]

The main problem with regard to the legitimacy of the EU is that the continuous expansion of the competencies of the EU has not been accompanied by institutional reform enhancing the input legitimacy. The EU increasingly influences the daily life of its citizens and takes over more and more tasks of national governments. Currently, over 70 per cent of the decisions at national and local level are traceable to EU decisions. Due to the strong positions of the European Council and the Council of Ministers in the decision-making system of the EU, most of the EU decisions are still legitimized by a long legitimacy chain that begins with national elections leading to the formation of national governments who, in the end, represent their Member States in the Council that decides over political matters binding for all citizens of the EU. Yet, the 'typical way'[5] of decision-making in the European Council as well as in the Council of

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[3] A large number of authors use the term 'European demos' with different meanings and it seems to be obvious that a consensus about the definition of this term has not been reached yet. However, the definition of the European identity shall not be discussed in this chapter.

[4] Other authors, like Wolfgang Merkel, regard the sources of political legitimacy as: 1) the identity of the citizens; 2) the democratic procedure in the decision-making system; and 3) the efficiency of the decision-making system and of its implementation (Merkel 2000, p. 28).

[5] Most of the decisions are results of closed-doors-bargaining and 'corridor talks', which are not comprehensible to the citizens. In the Council of Ministers, only the official

Ministers is neither transparent nor comprehensible to the citizens, and the only directly elected body of the EU, the European Parliament (EP), has far too little influence on the work of the other EU institutions. The increased decision-making power of the EU requires, therefore, more – and more direct – legitimacy.

The following section deals with the question 'why the presidency?' The decision to establish the new institution will be analyzed on the basis of historical institutionalism. What was the institutional and political constellation behind the decision? How can the legitimacy of this decision be assessed? What is the greater context of the decision, that is, the historical development of the institutions of the EU? As already stressed above, the development of the European Council and its presidency as well as its role in the decision-making of the EU will be scrutinized in more detail.

The second section will explore the potential powers of the permanent President of the European Council. The context and the institutional setting of the presidency of the EU – determined in Constitution – on the one hand, and examples of European presidential systems on the other hand, will be scrutinized. The object of this comparative study is to find out whether the President of the European Council is comparable to his national colleagues and, if yes, how, and what does this mean?

The Decision to Establish a Permanent Presidency for the European Council – Context and History

The specific problems with regard to the political legitimacy of the EU have much to do with its history. The competencies of the EU have consistently increased, especially since the mid 1980s, but the structure of its institutions – and therefore the input legitimacy of the whole body – has remained unchanged. In spite of the great political powers of the EU, the EP as the only directly elected body of the EU has still relatively little influence on the politics of the EU. The missing increase in mandate by the citizens that has not accompanied the increase in powers of the EU corresponds to the legitimacy gap of the EU (Höreth 1999, p. 11).

Until the mid 1980s, the European Community was regarded as a functional administrative organization. Since the integration was strictly limited to a few policy areas related mainly to economics and trade, on which the Community decided mostly unanimously, the Community of that time could be considered adequately legitimized by the Member States and their parliaments (Höreth 1999, p. 36). Monnet's assumption that the best way to legitimize the powers of the European institutions was to obtain the highest possible efficiency was therefore

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voting and the legislation are transparent. However, the lacking transparency is a problem above all in the European Council due to the lack of an official decision-making procedure.

generally accepted (Höreth 1999, p. 30). The focus on output legitimacy seemed justifiable due to the intergovernmental nature of the community.

This intergovernmental nature was strengthened by the Luxembourg Compromise, signed in 1966. In this agreement the Member States decided that in Council, in controversial questions of European policy, a Member State strongly disagreeing on grounds of major national interests would dispose of a veto. The background to this was the previous behavior of the French President Charles de Gaulle, who opposed plans of the Community to switch from unanimity to qualified majority voting in Council decision-making. De Gaulle made his point clear by not attending the meetings of the Council any longer. Yet, since decisions on future decision-making required unanimity, the heads of the states were not able to decide without de Gaulle. Consequently, the reform failed (Weidenfeld 2002, p. 24). The later compromise shows the basic conflict between national sovereignty and European integration – still discernible today. Until 1982, decision-making of the Council was unanimous (Höreth 1999, p. 34).

This power of one single Member State to obstruct the decision-making so enormously and to paralyze the whole decision-making of the EU was one of the objects of the various Intergovernmental Conferences (IGC) since the mid 1990s. Also the increased field of political activity of the Union required more effective decision-making and therefore more legitimacy. These Conferences had the task of revising the existing Treaties and making the EU more effective and – due to the weak democratic nature of the Union – more democratic, above all by making the EP more powerful in decision-making. These concerns were somewhat urgent because of the approaching enlargement of the EU. A series of Intergovernmental Conferences followed. The first of these was the Conference of Maastricht followed by the Conferences of Amsterdam and Nizza. The Conferences extended somewhat the powers of the EP and increased the qualified majority voting (QMV) in Council (if only marginally) and determined the number of EP members as 732 (Giering 2003b, p. 5). These modifications to the existing Treaties did not, however, correspond with the expectations of making the Union more effective and democratic, nor did they prepare the EU to meet the huge challenges of enlargement. Some of the major issues of enlargement, like the size of the future Commission, remained unresolved. Recapitulating, the results of those numerous Conferences and meetings were deflating, to say the least.

The way of bargaining between the Member States during the IGC was also disillusioning. The meager outcome of the Conferences is attributable to the domination of the national interests of the Member States over the common concern of the Union. It seems that when it comes to core matters of distribution of power and institutional settlements, the common interests of the Union are still replaced with national interests. Also in matters of less political consequence, national interests of the Member States and thus the bilateral and intergovernmental bargaining dominate the work. These general matters fall more and more within the competence of the European Council, and in respect of the increased agenda of the European Council and its increased competencies in the

field of general issues, informal and intergovernmental decision-making becomes critical.

The role that the European Council has in the decision-making of the Union has turned out to be very specific. Originally, the idea of a regular meeting – initiated by the later President of the European Convention, Valéry Giscard d'Estaing, and Helmut Schmidt in 1974 – was planned to be a small fireside chat, in which the heads of states and governments of EU Member States informally discussed European political affairs. But the European Council continually strengthened its position and has now become one of the main authorities of the EU (Giering 2003a, p. 60). Therefore, this college of statesmen is currently regarded as the Union's supreme political authority (de Schoutheete and Wallace 2002, p. 1) with the main task of giving strategic direction to the Union's policy agenda. And according to the constitution, the European Council gives the Union the needed impulses and defines its general political goals (CONV 477/03). Yet, its real work has degenerated to last-minute bargaining over political details, undertaken with the help of huge delegations and surrounded by a media circus, like in the case of the IGCs.[6] The problem of the increased competencies of the European Council, however, is the lack of political legitimacy. Due to the fact that the actual powers of the European Council are not sufficiently defined in the Treaties but rather determined by the factual and ever widening work, the work of the European Council is still characterized by informal and intergovernmental decision-making, and the possibilities for the citizens or those of other EU institutions to survey these activities are very narrow.[7] Therefore, the accountability of this intergovernmental and thoroughly powerful body does not really exist.

After the discontenting IGCs, the establishment of a committee imbued with the task of preparing a Constitutional Treaty for the European Union was decided by the Laeken Declaration. This committee, established subsequently, embraced 105 members from national governments and parliaments, from the EP and the Commission, both from current Member States and from candidate countries. The Convention began its work on 28 February 2002. The 'hot period' of the Convention, however, did not begin until 15 January 2003 when the German-French initiative concerning the future institutional framework of the Union was published. In this paper, both governments made numerous recommendations concerning both the structural nature of the EU and some policy areas. The recommendation contained, for example, the election of the President of the Commission through the EP, the creation of a Foreign Secretary of the Union and

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6 Gros (2002), p. 1 (for a dissenting opinion, see Dosenrode 2003).

7 The European Council is free to set its agenda and rules of procedures. Due to the original intention to make the European Council as informal as possible, the normal Council rules of procedure did not apply; the composition was free; nor did it have a legal basis in the Treaties until the Single European Act. 'This was a place where power was exercised and not one where legal procedures were implemented' (de Schoutheete and Wallace 2002, p. 6).

the establishment of the permanent presidency of the European Council (Giering 2003a, p. 50). The Convention followed for the most part the proposals of this initiative. The Convention also adopted the proposed permanent presidency of the European Council, which is meant to increase the continuity, visibility and efficiency of the politics of the EU abroad (Giering 2003a, p. 61). The permanent President is supposed to be the number one in terms of foreign politics, at least when it comes to representative matters.

With the same object in view, the Convention also adopted the proposal to establish a Foreign Minister of the Union. This Foreign Secretary will be elected by the European Council with the acceptance of the President of the Commission. He or she will make proposals concerning foreign and defense policy and implement these proposals on behalf of the Council of Ministers. At the same time, he or she is the chairperson of the Foreign Affairs Council and the Vice President of the Commission.[8] This is meant to increase the coherence and the continuity of the foreign and security policy of the EU. The former tasks of the High Representative for the Common Foreign and Security Policy and of the Commissioner for Foreign Affairs will be integrated in this one office (Giering 2003a, p. 57).

However, these decisions were not made unanimously in the Convention. A group of smaller Member States opposed the establishment of the permanent presidency of the European Council. As a matter of fact, the majority of the Convention members were against this institution.[9] The main arguments against it were the unclearly defined tasks of the President and therefore the freedom of the first incumbent of the office to define his or her duties by him or herself. A powerful President, however, would be very problematic due to the missing input legitimacy of this body. The rotating presidency was considered among the smaller Member States as the surety for the equality of the Member States.[10] The opposers of the presidency stressed their reservations by pointing out the fact that the future presidency will be a full-time job and just chairing the meetings of the European Council and representing the Union abroad without a decision-making power is not keeping the President occupied enough.

Supporters of the presidency equate the contribution of the presidency to efficiency of the Union. Yet, this conclusion causes among the opponents the disquiet that the future presidency – in the case that it will be effective and therefore not powerless – could strengthen the intergovernmental nature of the

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8 This is the so-called 'double-hatted' solution (see Article I-27, The EU Constitution).

9 'The Presidency of the Council is an integral part of the overall institutional balance within the union. (...) It ensures political control of the Council (...) It is a symbol of the equality of the Member States and is a bridge between their peoples and the Union (...) we are guided by the following principles: the retention of rotation as the predominant aspect of a new system; the preservation of the equality of all Member States; and respect for the overall institutional balance' (CONV 646/03, p. 5; the position of Finland: CONV 514/03, p. 8).

10 See above.

Union. The objectors to the presidency, mainly smaller Member States, are further concerned that in the European Council, in which the informal and confident, and casual bilateral, discussions between the heads of states dominate political decision-making, it will be far too easy to pass the smaller states over and to decide alone amongst a few – probably the largest – Member States. Therefore, most of the smaller Member States proposed in the Convention the strengthening of the roles of the EP and the Commission as the institutions with fixed and transparent decision-making rules, rather than those of the intergovernmental institutions.

One of the most criticized issues of the work of the Convention was the role of the presidency – or more precisely of the President – in decision-making. Originally, the task of the presidency was to act as a mediator between the two positions struggling over European politics: supranationalist – or federalist – and intergovernmentalist. However, the way the President worked was often criticized as lopsided, meddling, and sometimes even autocratic. The lack of understanding and communication between members of the Convention on the one side and its President on the other was obvious – not only to the members of the Convention.[11] During the work of the Convention it became was once again plain that interests of the Member States – and not those of the Union – dominated the process of decision-making. Furthermore, all attempts to integrate the public in the decision-making of the Convention were in vain. Common public discourse about the future of the EU was rare and the national politicians of the Convention were perceived in the public of their home countries as the defenders of national interests against the interests of the EU (Raik 2003).

The results of the Convention's work were very controversial. In the IGC of Brussels in December 2003, the Member States were unable to reach a consensus about the Constitutional Treaty. The controversial issues were the same as they had been since the IGC of Amsterdam (for example, the qualified majority voting in the Council and the size of the Commission). However, finally, the heads of states and governments reached an agreement on a new Constitutional Treaty for Europe at the European Council in Brussels on 17 and 18 June 2004.

In conclusion one can say that the attempt to integrate all relevant groups of society in the decision-making of the Convention was very laudable. The design of the Convention and its intended way of working can be assessed as very worthwhile. Yet, in reality it turned out that it is still very difficult for the Member States to work together for common interests of the EU. The decision-making was therefore rather similar to the IGC's and not, as originally intended, to the famous Philadelphia Convention.[12] The political legitimacy of the decisions of the Convention – later confirmed or modified by the IGC of Brussels – can be regarded as somewhat more legitimated by the citizens than the IGCs, due to the

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[11] Elmar Brok defined the working method of the President as 'autistic' (EPP-ED Group Press Release 2003).

[12] During the Convention, it became clear that the divergences of national interests dominated the discussions and one could not discover 'a European interest'.

large participation of the parliaments. However, considering the initial goals of the Convention, one can conclude that this is the right direction; there is still a fairly long way to go.

The Presidency and its Role in Political Decision-making

The object of this brief comparative survey is to elaborate the similarities and differences of the role of the presidency of the European Council in the decision-making system with those of national presidencies. The central concern here is the powers and competencies of the President, his dependence on other institutions and the legitimacy.

In order to compare the powers of the President of the European Council with the powers of national presidencies, three presidential models will be looked at: Austria, Finland and France. These three countries represent three different types of presidency. Austria is generally regarded as a parliamentarian rather than as a semi-presidential system due to the quite weak position of the President (Müller 1999, p. 22); Finland, until the constitutional reform of 2000, had a very powerful President; after the reform, however, it can also be regarded as a parliamentarian rather than as a semi-presidential system – yet, with a still relatively strong President. Only in France is the presidency the most powerful institution within the national decision-making system, above all in matters of foreign politics. Does the President of the European Council possess powers similar to those of his national colleagues? Is it possible, with the help of these comparisons, to speculate about future constellations of the decision-making system of the EU? What is the relation of the President of the European Council and the President of the Commission? And which role will the Foreign Minister have with respect to both of these institutions?

In presidential regimes, policy-making is by definition characterized by the separation of powers (Haggard and Shugart 2001, p. 64). The central characteristic of a presidential government is also the separate election of the executive and the legislative for fixed terms (von Mettenheim 1997, p. 2). Presidential systems vary in accordance with the powers of the President between the purely presidential, in which the President possesses the executive powers, and the so-called semi-presidential system, in which the President shares these powers with the Prime Minister. According to this distinction, most of the European presidential regimes are semi-presidential systems. According to Maurice Duverger, three characteristics are typical for a semi-presidential system: the President of the republic is elected by universal suffrage; the President possesses considerable powers; and the Prime Minister and ministers possess executive and governmental power and are accountable to parliament.[13] According to him, semi-presidential systems can be defined as: 'Executive systems where (1) executive power is

[13] Duverger (1980), p. 166; adopted from Elgie (1999b), p. 3.

divided between a prime minister as head of government and a president as head of state, and where (2) substantial executive power resides with the presidency' (Elgie 1999b, p. 4); Robert Elgie gives the definition of a: '… situation where a popularly elected fixed-term president exists alongside a prime minister and cabinet who are responsible to parliament' (Elgie 1999b, p. 4).

There are – at first glance – some similarities in the presidency of the European Council to the semi-presidential model. One of the similarities is the separate election of the executive and the legislative: though the President will not be elected by universal suffrage, the election is independent of the election of the EP and of the national elections, which indirectly lead to the formation of the Council. The President of the European Council will be elected by its members 'by qualified majority, for a term of two and a half years, renewable once' (Article I-21, The EU Constitution). The role and the tasks of the President of the European Council, and his institutional embedding, are defined in the EU Constitution. Accordingly, she or he is the head of an institution that 'shall provide the Union with the necessary impetus for its development, and shall define the general political directions and priorities thereof' (Article I-20, The EU Constitution). Furthermore, this institution 'shall define the general guidelines for the common foreign and security policy, including for matters with defence implications' (Article III-196, The EU Constitution). The President 'shall chair and drive forward its [The European Council's] work, shall ensure proper preparation and continuity in cooperation with the President of the Commission, and on the basis of the work of the General Affairs Council'. Furthermore, the President of the European Council 'shall endeavour to facilitate cohesion and consensus within the European Council' (Article I-21, The EU Constitution).

The tasks of the President with regard to foreign policy of the EU are further elaborated in Article I-21 of the EU Constitution: 'The President of the European Council shall at his or her level and in that capacity ensure, the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the Union Minister for Foreign Affairs.' A little confusing in this context appears the circumscription of the tasks of the Foreign Minister of the EU: 'The Minister for Foreign Affairs shall represent the Union for matters relating to the common foreign and security policy. He or she shall conduct political dialogue with third parties on the Union's behalf and shall express the Union's position in international organisations and at international conferences' (Article III-197, The EU Constitution). The division of labor between these two officials is not defined in the EU Constitution. Nor is that between the President of the European Council and that of the Commission who has not only far-reaching executive powers but, furthermore, legislative powers (the right of initiative), which his rival has not (Hughes 2003a).

The fact that the President of the European Council will have to share his executive powers with other executive bodies – above all with the President of the Commission and the Foreign Minister of the EU – resembles the EU with semi-presidential systems. The same applies to the accountability of the EU Commission

and its President to the EP, which is analogous to semi-presidential systems, in which the government and the premier minister are accountable to the parliament.

The future President of the European Council seems not to be very dependent on other EU bodies in his political activities; the only controlling instance is the European Council itself and its members. This is a great difference to the offices of most of his national colleagues, among others the Austrian President. Since the constitutional reform of 1929, Austria is defined by most political observers as a semi-presidential system. Alongside the Chancellor (Prime Minister), who is fully responsible to parliament, there is a directly elected President, who appoints the government and can also dismiss it. While the President can, on the government's proposal, dissolve parliament, he himself enjoys an office with, in practical terms, very limited accountability (Müller 1999, p. 22). According to Article 67 of the Austrian Constitution, all acts of the President require a proposal by the cabinet or a cabinet minister. Furthermore, all acts of the President need to be countersigned by the Chancellor or the minister in charge (Müller 1999, p. 28f). Thus, the President is not allowed to initiate foreign policy but he/she has to wait for a proposal, which he/she can only accept or reject (Müller 1999, p. 35).[14] In contrast to that, the President of the European Council does not need any countersignature for his policy – neither regarding the Common Foreign and Security Policy (CFSP) nor with regard to decisions that are made within the European Council – apart from the consent of the other members of the European Council who decide unanimously.

The role of the Austrian President in legislation is also rather limited. The President verifies the constitutional enactment of federal laws; his signature completes the legislative process and is a necessary requirement for laws to come into force after passing the parliament (Müller 1999, p. 37). By comparison, the European Council and its President have no formal legislation powers at all. Yet, the European Council is often regarded as the 'Super-legislator' of the Union (Decker 2003, p. 19) due to the competencies when defining the major policy lines of the EU. Thus, many legislative initiatives of the Commission have their base in decisions of the European Council.

The strongest powers of the Austrian President are those of the dissolution of parliament and of the dismissal of the government. However, these have never been made use of in the post-war period (Müller 1999, p. 44). The President has never been the decisive force in the formation of Austrian governments, and this has given him the cognomen 'authority in reserve' (Müller 1999, p. 46). Again, the President of the European Council does not have the possibility of interfering with the composition of the EP at all. With regard to the members of the Commission, the European Council has only the right to propose but the ultimate decision is

[14] At the time around Austrian EU membership President Klestil tried to promote himself as the Austrian representative in the European Council, but this was blocked by the federal Chancellor (interview with Søren Dosenrode).

made by the parliament,[15] and only the parliament has the possibility to dismiss the Commission.[16]

In 1978 the French policy analyst Maurice Duverger published a study, 'Echec au roi', about the presidential systems in Europe. In this study, he analyzed the roles of different presidencies in decision-making systems and made a ranking of the strongest Presidents in Europe, differentiating between the powers of the President as defined in the Constitution and the actual powers the President wielded. According to him, in the first category Finland was in first place; in the second category in second place – after France (Nousiainen 2002, p. 35). Over eight decades, it was, according to the Constitution, possible for the Finnish President to decide alone about matters of political affairs, even against the consensus of the government. However, since the constitutional reform of 2000, Finland has become very similar to other European parliamentary systems.

The main object of the reform of the Finnish Constitution was to narrow the competencies of the President and to make the competencies that were left dependent on the cooperation of other political actors, above all of the government (Nousiainen 2002, p. 32). The most important single change concerned the formation of the government. The Finnish premier minister is not determined by the President anymore but elected by the parliament. The other ministers are proposed by the premier minister and appointed by the President. The powers of the President in decision-making were also narrowed. The basis for any decision of the President is now a proposal of the government. In the Constitution, it has been made more difficult for the President to deviate from this proposal; the Finnish President is not able, apart from a few exceptions, to decide without the proposal of the government (The Finnish Constitution, § 58).

However, since the constitutional reform of Finland the division of competencies between the government and the President seems to be somewhat unclear. Recent debates about the strategy of the nation in terms of security policy carried out between the Finnish government and some political parties on the one hand and the President on the other have raised the question: who decides? The President proposes the 'old way' – this is neutrality – but the majority of the government prefers the stronger integration of military alliances, some even membership of NATO. The legal position and the role of the President in this discussion still seem to be very open and this situation currently leads to ambiguousness and to freedom of interpretation.

The Fifth Republic of France is also an amalgamation of both presidential and prime ministerial responsibilities (Elgie 1999a, p. 70). For the most part, the political balance has been on the side of the presidency. In this respect, the most

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15 However, the EP can only accept or reject the proposal of the European Council, but does not have the right to propose.

16 Again, the right of the EP to dismiss the Commission is narrowed by the fact that the body can be dismissed only as a unit, but it is not possible to dismiss a single Commissioner.

powerful Presidents are generally to be found in the early years of the Fifth Republic (Elgie 1999a, p. 71). The French Constitution was amended in 1962 to allow the direct election of the President by universal suffrage, after which the Fifth Republic is regarded as a semi-presidential regime (Elgie 1999a, p. 67). Due to the personal characteristics of the first incumbent of the office, President Charles de Gaulle, the President was also a major political actor prior to the 1962 reform. However, after the 1962 reform the *presidency* – independent of the personal characteristics of the President – became a major political actor due to the increased significance that was produced by universal suffrage.

The French President is a powerful political actor, particularly in the domain of 'high' politics (Elgie 1999a, p. 68). However, the Prime Minister also has remarkable powers. Therefore, an interesting situation in the French twin-headed executive is the so-called 'cohabitation'. This is the situation in which the Prime Minister and the President are from opposing parties. During cohabitation, the balance of power tilts towards the Prime Minister. This is because presidential control is at least partly based on the support of a loyal parliamentary majority (Elgie 1999a, p. 73). During cohabitation there is in general terms a relatively clear division of responsibilities between the President and the Prime Minister. In the domain of domestic policy, it is the Prime Minister who takes the lead. In the domain of foreign, defense and European policy, the President maintains a certain degree of control (Elgie 1999a, p. 73).

Although the powers of the President and the Prime Minister are distinct, they are not separate. They have to act in collaboration. This collaboration, however, has usually worked in favor of the pre-eminence of the President (Hayward 1993, p. 47). The collaboration of the President and the Prime Minister is defined by Vincent Wright (Wright 1993, p. 118f):

> Any method of determining the distribution of power between the two [the president and the prime minister] would highlight collaboration, however tense, and complementarity, however conflictual. Both president and prime minister are leaders, bargainers, jugglers and symbols, locked into complex and constant cooperation, which has a constitutional base, an institutionalised structure (weekly meetings, interdepartmental councils and committees) and a political logic. Whether the outcome is one of subordination, symbiosis or mutual parasitism hinges on the interplay of political circumstance and personal chemistry.

It is apparent that under the 1958 Constitution the executive is expected to be leading, and both the President and the Prime Minister are required to perform key leadership functions. However: 'The central question of any constitution – who rules? – is fudged.'[17]

[17] Wright (1989), p. 12; quotation adopted from Elgie (1999a), p. 77.

Conclusion

Considering the presidency in historical context, the increased competencies and the enlarged field of political activities of the Union on the one side and the enlargement on the other seem to justify the strengthening of the executive as the way to strengthen the efficiency of the EU, carried out among others through the establishment of the presidency. This figure could indeed increase the visibility and the efficiency of the Union. However, despite several attempts, this increase in efficiency has not been accompanied enough with an increase in the input legitimacy of the EU.

One further problem might originate from the fact that Member States and the EU institutions were not unanimous in their support of this one single figure to speak for Europe. This might produce controversies between the bigger and the smaller Member States, which were in favor of creating a stronger Commission and maintaining the rotating presidency of the European Council as the guarantee for the equality of the Member States (Sutherland 2002/2003). Also the Commission preferred the strengthening of the community institutions. The smaller Member States felt the lack of democracy in the decision to establish the presidency could also lead to difficulties in the implementation of the decisions of this institution and thus to diminished efficiency.

Yet, the actual competencies of the President appear to be quite unclear due to the rather vague and general definitions in the Constitution, above all with regard both to the tasks of this institution and to the division of labor with other EU institutions. The most momentous uncertainty seems to be the division of labor between the President of the Commission, the Foreign Minister and the President of the European Council. It is not predictable what will happen in the situation where the Commission and the European Council follow different interests. An effective collaboration will probably be dependent on the personal characteristics of the respective incumbents and a delicate situation might occur when all of the three incumbents follow different interests. Comparing this situation with experiences of national 'cohabitation', it will be most likely that the one with more perseverance will prevail (Giering 2003a, p. 60). This would be a situation similar to French cohabitation and the current Finnish situation. In both cases, policy outcomes are influenced to a large extent by the personalities of the President and the premier minister.[18]

The President of the European Council will not have the powers of the national Presidents to influence the composition of other EU bodies. Also the powers in legislation are limited to the role of the European Council as the 'super-legislator' and do not exist in traditional legislation. The President will presumably have the most powers in the field of Foreign Affairs, and in this field, the President's

[18] If one, as Dosenrode (2003), considers the EU to be a developing, weak state with strong federal characters, that is, a process, a certain unclearness is natural but inconvenient in a transition period.

powers will – due to the ambiguousness of the legal position of the President – be dependent, again, on the personality of the first incumbent. Personality will, to a large extent, also define the role in the decision-making of the European Council. This also influences the future way of decision-making with regard to transparency, accountability and not least the intergovernmental nature of this body. Also this aspect resembles national presidencies. However, the most remarkable distinction between the national and the European presidency is the input legitimacy of the office. The President will not be dependent on any political institutions in decision-making: the President will not be accountable to the EP, and the decision-making of the European Council and its President will remain behind closed doors. The President is only accountable to the European leaders and even then only 'in private' (Hughes 2003a, p. 2). Furthermore, all of the national Presidents mentioned above are elected by universal suffrage – the President of the European Council will be appointed behind closed doors by the leaders themselves. Proceeding on the assumption that the future permanent presidency will have some powers in decision-making, the lacking input legitimacy of this institution might endanger the democratic nature of the whole Union.

However, it is not only the input legitimacy of this institution which is shady. The lacking in definition of the role of the President and of the division of competencies could lead to substantial confusion instead of efficiency (Hughes 2003b).

Considering the work of the Convention and the later IGC, the aspect of efficiency rather than that of democracy was taken into account. The establishment of the presidency and of the Foreign Minister of the Union will strengthen the intergovernmental nature of the Union. This is because the establishment of the President of the European Council influences the institutional balance of power by stressing the role of the European Council in decision-making. Thus, the intergovernmental nature of the EU seems to increase with the presidency. The European Council will therefore presumably maintain its position as the most influential body of the EU, and, through the presidency, even strengthen this position (Sutherland 2002/2003).

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Chapter 6

EMU and the Budget: The Unusual but Rather Stable Monetary and Fiscal Arrangements of a Federation Sui Generis[1]

Wolfgang Zank

A 'Genuine Puzzle' which Disappeared

Routine performances are often seen as something dull. But when it comes to monetary and fiscal policy in the European Union, for many the real sensation must have been that so little has changed in recent years. Nor are big changes to be expected in the foreseeable future. As the Nice Treaty before, the Constitutional Treaty leaves the main institutions and their competences, the basic characteristics of EMU, the budget or the coordination between monetary and fiscal policy basically unaltered.

Of course, things are not completely static. For instance, the guidelines for the Common Agricultural Policy (CAP) are under slow but substantial reform, and so is the Regional Policy. The European Central Bank (ECB) policy is evolving, and its statute will be changed when there are more than 15 EMU members. The emergence of the Eurogroup as a new deliberation forum for the Finance Ministers of the Euro zone might improve the coordination between fiscal and monetary policy, and it might even have important consequences for global diplomacy. Also the Stability and Growth Pact became reformulated. But all this can be seen as developments within a rather stable frame.

More specifically as to the discussions about the EU budget, Neil Nugent wrote in 2003: '[t]he relative peace has reflected a growing consensus amongst policy actors that the EU spending patterns are about right, or at least acceptable' (Nugent 2003, p. 384). In 2005, during the tough negotiations of the new financial perspective for 2007-2013, one might have doubted whether Nugent's characterization of a 'relative peace' was appropriate. But as it turned out, the final results of the Brussels summit of 15/16 December 2005 brought comparatively modest changes (see below). In my view, Nugent's view can even be generalized: the basic EU constructions on economic and fiscal policy are 'about right'. There

[1] I thank Poul Thøis Madsen and Henrik Plaschke, both Aalborg University, for careful criticism of a previous draft.

are problems and inconsistencies, but they are not very grave. On balance, the burden of the problems is *much* less than under the previous nation-based arrangements.

The 'about-rightness' of monetary and fiscal policy, as the smooth launch of the euro before,[2] must have come as a surprise to many academic observers. In an abundance of academic contributions EMU was presented as a high-risk enterprise. In 2002, Sverker Gustavsson, of Uppsala University, formulated the problem as follows (Gustavsson, 2002, p. 87):

> From the point of view of comparative federalism, monetary union without fiscal union constitutes a genuine puzzle. As far as federal experience goes, the suprastate is either limited to foreign and trade policy or fully-fledged in the sense that it includes a common currency and – as a consequence – a strong element of revenue sharing. One option is to have no monetary union at all. Another option is to have monetary union with a parallel fiscal union. In theory, there is no third alternative.

As many others before, he expressed considerable concerns about the future and saw the EMU as a 'full-scale experiment without precedence', designed as a 'pressure cooker without any safety valve' (Gustavsson, 2002, pp. 87 and 101). In his view, EMU implies heavy social strains. Consequently, as one scenario (not the most likely one, but possible), he discusses a development where democracy will be replaced by authoritarianism: 'Populist parties, strike waves, and an aggressive climate of debate drive politicians to desperate measures' (Gustavsson, 2002, p. 106). As will be explained below, these concerns are fortunately unfounded.

Numerous authors have pointed out that in the US inter-state transfers are of a magnitude of roughly 20 per cent of GDP, whereas in the EU they represent only about one per cent. This made the EMU, in the views of many, an inherently unstable construction. Loukas Tsoukalis, for instance, wrote: 'The pressure for a less decentralized system of fiscal policy is therefore bound to grow with EMU' (Tsoukalis 1997, p. 186). Recently, the top American economist Irwin M. Stelzer, director of the Hudson Institute, declared more transfers to be 'indispensable', and as long as they are not in place, EMU would remain a system which is viable only with difficulties.[3]

David McKay went a step further, claiming that EMU must collapse, unless substantially altered. Drawing on an impressive range of economic and political-science literature, he concluded (McKay 1999, p. 173):

> Ultimately, it will be the willingness of some states and regions to subsidize others and/or the extent to which mass publics will tolerate centrally induced welfare state retrenchment that will determine whether the union stands or falls.

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[2] As Giancarlo Corsetti and Paolo Pesenti formulated it: 'The euro's birth was almost a nonevent. Even ECB President Wim Duisenberg felt compelled to observe that the decision "turned out to be almost a formality – different from what many of us might have expected barely a year ago"' (Corsetti and Pesenti 1999, pp. 295-372).

[3] 'Ces transfers sont indispensables … Si l'UE ne se réforme pas dans ce sens, la monnaie unique restera un système difficilement viable' (Stelzer 2005).

In my view, McKay, and the vast literature on which he draws, is erroneous on both aspects. Neither are more subsidies necessary, nor does EMU implicate any 'welfare state retrenchment'. The authors, who reached such conclusions, profoundly miscalculated the burdens and benefits of EMU. I will discuss in more detail the arguments which these authors forwarded below.

Before, however, I will give an overview of the current trends of the economic and social arrangements of the Union.

Current Developments of the EU's Fiscal and Monetary Arrangements

The Budget

Given the point that numerous authors saw fiscal centralization as a condition for the survival of the Union, it might be appropriate to have a closer look at factual developments.

Since 1988, the yearly EC/EU budgets have been enshrined in multi-annual financial frameworks. The current one, Agenda 2000, covers the period from 2000 to 2006. It was agreed upon in March 1999 at the Berlin Summit and formalized in May 1999 in a so-called Interinstitutional Agreement between the European Parliament, the Council and the Commission.[4] The Agenda 2000 established maximum limits ('ceilings') for broad categories of expenditure ('headings') such as 'agriculture' or 'structural operations' for each year. All in all, in no year was the total expenditure of the EU to exceed 1.24 per cent of the Gross National Income (GNI) of the Community.[5]

The limits are binding, but the specification of the actual expenditure within the headings has still to be done at yearly budget procedures. The maximum ceilings limit the actual spending within that year (payment appropriations), and the commitment appropriations, which might generate spending in a later year. The planning contains a substantial reserve margin for unforeseen expenditure. Thus, the planned payments for 2004 (about 111 billion euros) corresponded to only 1.08 per cent of the Community GNI, so there was a buffer of 0.16 per cent GNI, roughly 17 billion euros.[6] The degree of fiscal discipline has been high; in each year the actual expenditures have remained at about one per cent of GNI, that is, well below the allowed 1.24 per cent threshold.

In recent years, the multi-annual framework has smoothed the budget process considerably, compared with the tough annual bargains before. Due to these positive experiences, it became incorporated in the Constitutional Treaty.

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4 'The European Union's financial framework', http://europa.eu.int/comm/budget/financialfrwk/index_en.htm., as retrieved on 7 January 2005, especially p. 2.

5 Originally specified as 1.27 per cent of the Gross National Product, GNP. For technical reasons, the GNI is higher than the GNP, therefore the maximum allowance falls to 1.24 per cent.

6 'The European Union's financial framework', op. cit., Table 2a.

According to article I-55, the Council shall pass, by unanimity, a European law containing the framework. The Parliament must give its consent, by a majority of its members. The European Council can, by unanimity, authorize the Council [of Ministers] to act by qualified majority.

The potential transition to majority voting might change the rules of the game. Presumably it will only be a simpler way of reaching decisions; the current formal power of veto is rather restrained. In case no agreement can be reached, the ceilings of the old framework remain in place, and this creates a strong pressure for consensus. Majority voting will be possible only as regards the distribution of expenditure. The resources remain under strict limitation by the Member States (unanimity in the Council and only consultation of the Parliament, article I-54). Here the Constitutional Treaty does not open up for the transition to majority voting, and the veto power is a real one.

In essence, in case of its ratification the Constitutional Treaty would only codify decisions and procedures which were already introduced many years ago. And it would not give more resources to the federal level. It would not even make it easier in the future to decide to transfer more money to the Union level. Seen from the perspective of those who see more fiscal centralization and higher cross-border transfers as indispensable for the survival of the Union, the members of the Convention and the participants at the then-following Intergovernmental Conference must have been woefully unaware of the dangers ahead.

When it comes to the next financial perspective, 2007-2013, things turn even 'worse'. A short review of the controversies during the negotiations which led to the agreement of December 2005 can shed some additional light on the problems discussed here.

In December 2003 six net contributor countries (Austria, France, Germany, the Netherlands, Sweden and the United Kingdom) sent a letter to the Commission and demanded that the EU factual expenses should remain at the one per cent level. Officials in the Commission remarked that demands for savings should be accompanied by proposals where to reduce commitments (Weise, 2004, pp. 177-195). Nevertheless, France and Germany, two of the letter writers, pioneered in October 2002 an agreement by the European Council to keep agricultural spending at a rather high level in 2007-2013.[7]

In February 2004 the Commission published a proposal for the new multi-annual framework 2007-2013 (COM 2004 101 final). It envisaged retaining the 1.24 per cent maximum of the Union resources, and the actual payment appropriations should on average correspond to a level of 1.14 per cent. This would again imply a considerable reserve margin, but the actual spending appropriations would be higher than currently, in absolute terms and in relation to the GNI. Instead of the old headings, the Commission proposed to restructure the budget into only five main positions: 1. Sustainable growth; 2. Preservation and management of natural resources; 3. Citizenship, freedom, security and justice; 4. The EU as a global partner; 5. Administration. Fewer headings would make it

[7] The expenses for the CAP will nominally increase by one per cent a year, which implies a slight reduction in real terms, if inflation remains at about two per cent.

easier to shift money from one field to another, according to shifting priorities. The new structure also reflects the aim of the Commission to spend more money for addressing future challenges. It mentioned three top priorities: Sustainable development (basically the Lisbon agenda, cohesion and environment), European citizenship (immigration, asylum and the fight against crime) and the EU's role as a global coherent partner (COM 2004 101 final, p. 6).

The Brussels Summit on 16/17 June 2005 produced some dramatic headlines because the EU leaders did not reach an agreement. The proposal which Jean-Claude Juncker as Council President tabled implied a freezing of the British payment rebate, whereas the current rules imply an automatic increase. Prime Minister Tony Blair refused this, unless the expenditure on agriculture was also cut substantially. Actually, Juncker's proposal contained such a provision,[8] but it was insufficient in Blair's view. The French President Jacques Chirac, however, opposed any reductions and pointed at the agreement of 2002, which already determined the size of the expenditure until 2013 (and which Blair accepted at that time).

Finally, at the Brussels summit of 15/16 December 2005 the European Council settled for a sum total of 862 billion euros, corresponding to a level of 1.045 per cent of GNI (European Council 2005, paragraph 4).[9] This was right in the middle between the figures which Juncker (1.06) and Blair (1.03) previously proposed, but clearly lower than the Commission wanted. Modifying the Commission proposal, the European Council decided on new headings for the budget. If we concentrate on the corner years of 2007 and 2013, the spending pattern will evolve the following way:

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8 The expenditure on agriculture should be increased from 293 to 295 billion euros, but this sum should also cover the expenses for Bulgaria and Romania. This would mean a reduction of six billion euros for the current EU members (Hausmann 2005).

9 At the time of writing, the final settlement between Council, Commission and European Parliament was not yet reached. The lines in this chapter, Table 6.1 included, therefore only refer to the agreement of the European Council of December 2005.

Table 6.1 The EU budget 2007 and 2013, in million euros, 2004 prices

		2007	2013
1a:	Competitiveness for Growth and Employment	8,230	12,600
1b:	Cohesion for Growth and Employment	42,911	45,312
2:	Preservation and Management of Natural Resources of which agriculture, market related expenditure and direct payments[10]	43,120	40,645
3a:	Freedom, Security and Justice	600	1,390
3b:	Other Internal Policies	520	520
4:	The EU as a Global Partner	6,280	8,070
5:	Administration	6,720	7,680

Source: European Council (2005)

As becomes apparent, under a rather stable ceiling of overall expenditure, some not-unimportant changes will take place. Agriculture will slightly decline in real terms and cede its position as the biggest expenditure post to cohesion policy. In absolute terms, there will be some more money for the Structural Funds. However, this money will be distributed to more new members, apart from Bulgaria and Romania presumably Croatia, perhaps also Macedonia (which was granted the status of candidate country at this Brussels summit). Furthermore, the sum for cohesion policy will presumably grow slower than the EU GNI. Consequently, in relative terms, the amount for intra-EU solidarity (if the cohesion policy is this) will diminish.

The commitments under heading 1a, basically measures to support the Lisbon strategy, will be the third-largest heading and even experience a real annual growth rate of 7.5 per cent from 2006 to 2013. Here we see a clear political will to upgrade spending. The matter is similar as regards the fourth-heaviest heading, 'EU as a Global Partner'. The increase corresponds to a real annual growth rate of 4.5 per cent. 'Freedom, Security and Justice' is a rather small entry, but it will grow by 15 per cent annually, the highest growth rate among the headings.

All in all, the budget reflects the will to concentrate the money on new political priorities. As many observers commented: it does so in an insufficient way, not the least due to the weight of agriculture expenditure. But as was also agreed in Brussels, in 2008/2009 the European Council will undertake a thorough review of the whole budget, on the basis of a paper prepared by the Commission. As to the British rebate, there was some movement: Blair accepted that from 2011 onwards, the UK will contribute fully to financing the enlargement expenditures – hardly unjust, given that the UK, in particular, has been an ardent advocate of enlarging the EU. On the other hand, Blair could retain the rebate as regards all other

[10] The whole of heading 2 also includes money from funds under subheading 1b and could therefore not be exactly specified. The European Council therefore decided only on the expenditure for agriculture, confirming explicitly the decisions of October 2002, European Council (2005), paragraph 61.

expenditure. In absolute terms, the value of the rebate will even increase. However, the euroskeptic press in the UK highlighted that Blair 'gave away' some eight billion pounds of British taxpayers' money.

It should also be noted that many things will happen underneath the expenditure ceilings of the budget headings. For instance, the CAP is undergoing a substantial change. The traditional price support covers only a small fraction now; instead the bulk of the money is spent on direct income support. And the money for agriculture, as listed in Table 6.1, is not completely safe for the farmers. According to previous 'modulation agreements', up to 20 per cent can be transferred to rural development spending (European Council 2005, paragraph 61; Minder and Williams 2005). Export subsidies for agricultural exports, rightly blamed for distorting the world markets and harming producers in poor countries, will diminish. And as was agreed at the WTO meeting in Hong Kong, shortly after the Brussels summit, the EU will completely abolish export subsidies by 2013. Also, not least due to WTO pressure, the EU decided to reform its sugar regime in November 2005. The guarantee prices will be cut by 36 per cent, from 632 euros per ton down to about 400 euros per ton. This is still above the world market prices (at about 212 euros per ton), but it will imply a reduction of EU production by 5 million tons. Perhaps as many as 120,000 cultivators of sugar beats and 80 sugar refineries will be driven out of business, mainly in Italy, Spain and Ireland (Ricard 2005b). Also the Cohesion Policy is changing. According to the new financial perspective, the money will be much more concentrated on the poorer regions.[11]

But when it comes to the overall picture: the EU budget will remain comparatively small; also in 2013 about 99 per cent of the public expenses will be provided by the Member States. The 'puzzle' of monetary centralization and fiscal decentralization will remain in place. As quoted above, Tsoukalis predicted a growing 'pressure for a less decentralized system of fiscal policy', but nothing of this is to be seen. McKay even saw it as a condition for the survival of the Union, but it will not be fulfilled. Apparently none of the leading political actors sees any reason, let alone necessity, to increase the budget and cross-border transfers substantially. It is as if political practitioners on the one side, and many academics on the other, live in different mental worlds.

The European Central Bank and the Euro

Also the construction of the European Central Bank (ECB) and the European System of Central Banks (ESCB) has often been deemed to be unsustainable, or at

[11] Technically speaking, the Structural Funds will transfer money in order to fulfill three objectives, 'convergence', 'regional competitiveness' and 'territorial cooperation'. The 'convergence' objective is by far the most important; 82 per cent of the allocations under heading 1b will be directed towards this goal. Only regions with a GDP under 75 per cent of the EU average or countries with a GDP level of under 90 per cent can apply for this money. Expenditure for 'regional competitiveness', which will benefit regions in the whole EU, will receive only 16 per cent of the Structural Fund spending. 'Territorial cooperation' will get two per cent (European Council 2005, paragraphs 19-25).

least highly inappropriate. The criticism has been particularly concentrated on the overall aim of price stability and on the political independence of the ECB. Central bank autonomy was seen as problematic from a democratic point of view: very important decisions have been left to a body which allegedly is not democratically accountable, not to say untouchable.

For the adherents of this criticism, the EU Constitution Treaty must have been a failure of historic dimensions. The provisions of the Maastricht Treaty have remained practically unaltered. They did not even play an important role during the deliberations of the Convention or the following Intergovernmental Conference.[12] The status of price stability was the object of some discussion. The existing treaty mentions 'non-inflationary growth' in Article 2, as one of the general aims of the Union. In addition, under the heading of 'Monetary Policy', Article 105 states: 'The primary aim of the ECB shall be to maintain price stability.' According to the Draft Treaty, as proposed by the Convention, price stability should only be mentioned as a specific goal for monetary policy, and not as a general Union aim (Döhrn and Kösters 2004, p. 212). The Irish presidency, however, inserted price stability again among the general objectives of the Union (Article I-3.3), and so it was accepted. This was an exercise in avoiding misunderstandings.

For those who have deemed the ECB construction to be undemocratic, the disappointment must have already started with the 'Laeken Declaration on the future of the European Union', endorsed by the European Council on 14/15 December 2001, which set the Constitution process in motion. Catchwords such as 'more democracy' figured prominently in the text, but as regards the ECB, there was a conspicuous blind spot, for instance when it said (European Council Laeken 2001, p. 35):

> The first question is how we can increase the democratic legitimacy and transparency of the present institutions, a question which is valid for the three institutions.

These three institutions were the Commission, the Council and the Parliament. The 'democratic problem of the ECB' was not even mentioned. Of course, also in the field of monetary policy, and its coordination with fiscal policy, things do not remain static. We review these changes in more detail.

The Maastricht Treaty made price stability the overall goal of monetary policy, but it did not specify this term. In 1998 the ECB itself decided that it would aim, over the medium term, at an inflation rate below two per cent, as measured by the Harmonized Index of Consumer Prices (HICP), which is produced by Eurostat. The Governing Council of the ECB specified in May 2003 that the inflation rate

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[12] 'On the big issue of competences, the group [that is, Working Group of the Convention on Economic Governance, WZ] backed the status quo, leaving the monetary policy of the euro to be exercised by the ECB as a competence of the Union and economic policy the responsibility of member states …The Convention ignored the efforts of a small minority of left wing members to have the ECB take account of economic conditions such as growth or employment alongside its "primary objective" of price stability when setting monetary policy' (Norman 2003, pp. 124 and 151).

should be 'below, but close to' two per cent. This was a mere clarification and did not imply a policy change, nor was it understood as such by the actors in the financial markets (ECB 2003, p. 79f). These seemingly technical decisions have had a highly political content: it was, on the one hand, a clear message to the markets what the ECB intended to aim at. In order to be as clear as possible, this aim had to be quantified and the measuring instrument to be specified. Furthermore, everyone became equipped with a rather precise benchmark to measure the performance of the ECB. Seen in this perspective, the ECB is highly accountable. The 'medium-term' perspective, allowing for temporary deviations from the close-to-two-per cent goal, can be a source of some ambiguity. But none of the relevant actors seems to have seen this as a substantial problem.

At any rate, the ECB has been successful, both at keeping the factual euro inflation close to the mark,[13] and at anchoring the long-term inflation expectations at this mark. In fact, right from the start of the EMU in 1999, the actors in the markets expected long-term inflation to remain within a range of 1.7 to 1.9 per cent (ECB 2003, p. 81). This has been crucial, given the point that inflation expectations steer the important long-term interest rates. These are set by borrowers and lenders on the financial markets, no central bank can steer them directly. The perceptions of the actors on the financial markets are therefore crucially important: if they, rightly or wrongly, fear that inflation will go up, then they lend money only at disproportionally high interest rates. Disproportionally, because the rates not only have to cover the actual inflation rate, but often contain a hefty risk premium too. Conversely, if a government wants lower interest rates, it must ban the specter of inflation. As regards the euro area: due to the credibility of the low-inflation commitment of EMU/ECB, the long-term interest rates became practically free of risk-premia and fell at historically low levels. In June 2005, they were almost down to three per cent; the US rate was almost a percentage point higher.[14] This means that all EMU members, countries which previously also had relatively low interest rates, such as Germany, experienced a considerable *easing* of their monetary conditions.

Why did the ECB choose an inflation aim at two per cent? As it explains, on the one hand inflation should be as low as possible because it entails substantial costs (ECB 2003, p. 83), the most important one perhaps being that inflation produces uncertainty and therefore risk premia on, for example, interest rates. It also distorts the signaling role of relative prices (and thus implies substantial waste), and it has substantial effects on distribution; usually the weakest groups suffer most. On the other hand, the ECB sees arguments in favor of tolerating small amounts of inflation: it is advisable to keep a safety margin against the risk of deflation. Furthermore, the HICP might slightly overstate the inflation rate. There

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[13] To be precise, inflation was below two per cent in 1999 and 2000, and between 2.0 and 2.5 for most of the time in 2001-04. For a short instance in 2001 it was slightly above three per cent. Currently, the latest available figure, of May 2005, is at 1.9 per cent. The ECB projections for 2005 are in the range of 1.8 to 2.2 per cent.

[14] In the Euro zone, the rate of the ten-year Bund note was at 3,159; the corresponding US Treasury rate was at 3.96 (IHT 2005).

are, furthermore, some structural regional differences between the inflation rates, about 0.5 per cent. In order to avoid deflation for some regions, a safety margin can be advisable. Finally, there are presumably some downward rigidities of wages, so a positive inflation can 'grease' the adaptation of relative wages; the last point is, however, according to the ECB not a great problem, and accommodating to wage rigidities could in itself make the problem worse. In striking the balance, the ECB concluded that two per cent was a reasonable benchmark.

When it comes to assessing the risk to price stability, the ECB has applied a 'two-pillar approach'. In principle, all relevant indicators are used, both economic and monetary ones. Many economic indicators exhibit a type of Phillips-curve behavior (ECB 2003, p. 90), that is, they signal inflationary pressure when the economy is close to full capacity, whereas substantial output gaps indicate that there is no inflationary pressure, or even a deflation risk. The ECB cross-checks this analysis of economic indicators with monetary ones. The quantity of money was singled out as being particularly important, given the point that 'monetary growth and inflation are closely related in the medium to long-run' (ECB 2003, p. 89). In this respect the 'broad' money supply (M3) is the most important aggregate. However, numerous other factors also impact on inflation and furthermore, the development of M3 itself is subject to considerable volatility.[15] Therefore the ECB refused to accept any mechanical binding of its decision to the growth of money.

It is perhaps important to underline this aspect of the ECB policy because many authors glued the label of 'monetarism' upon the ECB (and on EMU as a whole). If there is any analytical meaning to be connected with the term 'monetarism', then the ECB does not follow a monetarist policy. Monetarists, first and foremost Milton Friedman, demanded that economic policy should refrain as much as possible from interfering in markets, and monetary policy should *only* be linked to the growth of money. The ECB, as, for example, the Bundesbank before, has not obeyed this kind of prescription.[16]

The basic philosophy underlying the ECB policy seems to be reasonable and pragmatic. Many details and many models lying behind are easily accessible for the interested observer. However, the minutes of the meetings of the Governing Council are not published. It is therefore not clear how the ECB leadership assesses the inflationary risks. In this respect one might see a democratic deficit.

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[15] To give an example: M3 was growing exceptionally in 2002 due to some portfolio shifts. After some asset price volatility, investors regarded long-term assets as being too risky, and therefore they shifted to more liquid assets. These in turn were counted as part of M3, which grew correspondingly. But this M3 growth was seen as being temporary, not implying a higher inflation risk. Therefore the ECB did not see any reason to make monetary policy more restrictive.

[16] At its policy review in 2003, the ECB clarified this point further: from then onwards at press conferences the economic developments should be discussed first, and monetary indicators thereafter. The ECB also decided not to publish a reference value of M3 on an annual basis any more. Although it was said before that this reference value was not a monetary policy target, it was sometimes misunderstood this way.

The euro is currently undergoing a process of expansion (Tumpel-Gugerell 2005). The new member countries of the EU, which acceded by May 2004, have all signed that they will introduce the euro, and the same will be the case with future members such as Bulgaria, Romania, Croatia or Turkey. There is, however, no fixed date for joining. The new members can do so once they fulfill the convergence criteria.[17] Currently, none of them does so. By 27 June 2004 three countries, Estonia, Lithuania and Slovenia, pegged their currency to the euro and entered the Exchange Rate Mechanism (ERM II). Formally this allows for variations of the exchange rate at an interval of 15 per cent, but because Estonia and Lithuania have a currency-board system, their exchange rate is completely fixed to the euro.[18] As in the case of Denmark, their monetary policy is thereby dependent on ECB decisions. By entering the ERM II and keeping the fluctuations within a narrow band of 2.25 per cent, these countries will gain the possibility of joining the euro after two years, that means 2006. Lithuania has already declared its intention to do so.

On 29 April 2005 another group (Latvia, Cyprus and Malta) joined the ERM II. Latvia and Malta want to introduce the euro in 2007, Cyprus in 2008 (Ricard 2005a). The next country was Slovakia, entering the ERM II on 26 November 2005. The Dzurinda government declared its intention of becoming an EMU member in spring 2008 (T.K. 2005). Other countries aim at 2009. Hungary plans joining in 2010.

Also the international standing of the euro is gradually expanding. Currently, about 31 per cent of all international debt titles are nominated in euros, ten percentage points more than five years ago (Tumpel-Gugerell 2005, p. 4). By the end of 2003, 20 per cent of all foreign currency reserves were euro-nominated, 2.5 percentage points more than 2000. All in all about 50 countries use the euro as anchor or reference currency; outside Europe this is mainly the CFA-franc countries in West- and Central Africa. In March 2005, the Russian central bank decided to raise the share of the euro in the currency basket, according to which it determines the ruble exchange rate, from ten to 20 per cent (Delhommais 2005). The international role of the euro is mainly concentrated on the neighborhood of the EU, whereas in Asia or Latin America the dollar still dominates the scene. However, even there things are changing. For instance, the Chinese central bank increased the share of the euro in its currency reserve from ten to 20 percent within

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[17] As the Maastricht Treaty stipulated, EMU member countries must bring inflation down to a level at most 1.5 per cent-points higher than the three member countries with the lowest inflation; the ten-year interest rate must at most be 2.0 per cent higher. Furthermore, public deficit must be below a sum corresponding to three per cent of GDP, and accumulated public deficit at most at 60 per cent, unless the dynamics of this debt are satisfactory. Finally, the country must not have devaluated its currency in the last two years.

[18] In a currency board system, the Estonian central bank, for example, guarantees that it will buy whatever quantity of domestic money at a given exchange rate; it can do so because there are foreign reserves to back the whole amount of domestic money circulation. The interest rate of the central bank must be used to stabilize the exchange rate towards the euro and cannot be used for other internal policy aims.

two years, and oil and commodity exporters have been discussing giving the euro a greater weight in their transactions (Prudhomme 2005).

As the ECB declared, it does not follow a policy of promoting or restricting the international use of the euro. But by keeping the euro stable, it makes it more attractive to use the euro internationally.

Hardly noticed by the public at large, prior to the EU enlargement the European Council has introduced a change of the statute of the ECB which will strengthen the position of the bigger countries. Currently, the Governing Council is composed of 18 persons, the six members of the Directorate and the twelve presidents of the national banks. According to the new statute the principle of one vote per country will be broken as soon as the number of members exceeds fifteen. We omit the transitional scheme (in place with 16 to 21 members) and concentrate on the full scheme: all member countries will be ranked according to the size of their economy[19] and then placed in three groups. The biggest five form a group on their own, and among them four voting rights will rotate. If we assume 27 members, the second group will be composed of 14 members,[20] and they have to share only eight voting rights. The eight members in the residual groups have to be content with three votes.

This scheme implies a substantial diminishing of the role of small countries, in particular of the future EMU members in Eastern and Central Europe. Such a change can be justified on the grounds that it would be inappropriate if coalitions of economic dwarfs, which together represent only a small part of the euro area, could dominate ECB decisions. Nevertheless, the departure from the principle of equality of the member countries might seem rather drastic.

Something similar happened as regards the Directorate, not by an official revision of the statute, but by implicit agreement: it looks as if the four bigger countries, France, Germany, Italy and Spain, can claim to be permanently represented at the Directorate. At least, in 2004, it was accepted that a Spaniard replaced another Spaniard whose term expired. In 2005, when Tommaso Padoa-Schioppa left, Italy nominated Lorenzo Bini Smaghi as his successor without meeting resistance, and in 2006 Jürgen Stark will take over the 'German' seat, until then held by Otmar Issing (Dougherty 2005).

In a way, the picture of the ECB is similar to the EU budget: there are some changes and dynamisms, but the basic characteristics are stable. The reason is perhaps very simple: the introduction of the euro has generated historically low interest rates for everyone, the end of exchange rate volatility inside the euro area, and a stop for disastrous speculative capital stampedes. Measured by these yardsticks, the euro has been a tremendous success. Small wonder that EU politicians have become very conservative as to this point.

Some authors have given a much more pessimistic assessment, pointing, for example, at the low economic growth rates in the Euro zone, if compared, for

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19 To be precise, the countries become ranked according to two criteria, the GDP and the aggregated balance sheet of their monetary financial institutions. The first criterion gets a weight of 5/6, the latter one of 1/6 (European Council 2003).

20 The middle group consists of half of the members, rounding the number upwards.

example, with the US. This criticism overlooks the positive effects of the euro on the financial markets. Because of the falling interest rates (and the abolition of exchange rate volatility), the euro introduction has been the equivalent of a great monetary stimulus for the European economies, Germany included. If currently (2005) Germany and Italy experience slow growth rates, this is not because of the euro, but in spite of it. Germany's problems today are still not the least due to the enormous financial losses which the mishandling of the economic aspects of unification generated (Zank 1997). Stiff labor-market regulations which, for instance, strongly protect those who are employed, but make employers very reluctant when it comes to hiring more people, are another factor. It does not seem to be appropriate to blame the euro for that.

Also the development of public debt has been forwarded as an argument for pessimistic assessments. Measured as a percentage of the GDP of the Member States, it has been stable or even falling in 1996-2001, but rising again in recent years. This was sometimes seen as the effect of the slow growth, which again became attributed to the euro. This argument I see as being doubly erroneous: the euro has meant low interests and thereby stimulated growth; and in addition the low interest rates have made it much easier to serve the existing debt. How would the debt have developed, if, for example, Italy still had to pay interest of ten per cent on her public debt, instead of four?

As we have seen, critics can point at the fact that the way in which the ECB assesses inflationary risks is not very transparent. But when it comes to measuring the final outcome of the ECB's activity, the ECB is almost exemplarily transparent. Much more so than most other public institutions, for example, universities. And until now, the ECB has fulfilled the task which democratically elected leaders have set it to solve, namely delivering price stability. In this perspective, the ECB simply represents democratic normality in a complex society: when it comes to technically highly complex questions, elected leaders formulate the overall aims, but leave the technicalities of how to reach these aims to specialized institutions. This use of specialized semi-autonomous institutions has been a key feature behind the success of Western society. Small wonder that few members of the Convention saw any democratic necessity to reduce the independence of the ECB.

When it comes to democracy and the overall aim of price stability: only a low-inflation environment is compatible with a democratic society because only at low inflation rates can financial burdens and benefits be assessed properly.[21] By contrast, higher inflation entails numerous hidden financial transfers between the groups of society, mainly from low-income groups to higher income groups. It is marvelous that many activists on the political left have been indifferent as to this elementary point.

[21] A low-inflation environment is thus a necessary, but in itself, of course, not a sufficient, condition for transparency.

The Eurogroup and the Stability and Growth Pact

In 2005 a new institution came to light, the Eurogroup, an institutionalized forum of the Finance Ministers of the EMU members' countries. Jean-Claude Juncker, Luxembourg's Prime and Finance Minister, became the first president, for a two-year term. In the future, the Eurogroup will presumably be an important deliberation forum, easing coordination and finding consensus. But it is not, at least not yet, a decision-making body.

As Juncker explained (2005, p. 2):

> …I mostly see my role as a more discreet force, nurturing trust among the members of the Eurogroup, promoting the use of common language and fostering awareness of ministers that public statements – even if they pertain to national issues – may have repercussions on the Eurozone as whole.

The Eurogroup should become 'the unquestioned forum for fostering the debate leading to the common definition of common message' and the 'privileged place for information exchange'. Some Finance Ministers might fear 'peer pressure', but Juncker sees more 'peer support': the 'debate in the Eurogroup should help its members to strengthen their position at the national government level' (Juncker 2005, p. 3).

The president of the Eurogroup and the ECB president will represent the Euro zone at G-7/G-8 meetings and in other international monetary institutions. This 'allows the Euro zone to influence exchange rate policy in those forums where it matters most. This may not be as publicly visible as (possibly uncoordinated) public statements. But it might have a much larger effect than sound bites …' (Juncker 2005, p.4). The potential political implications are presumably even more far-reaching than Juncker depicted it, given the point that a more united Euro zone presence at G-8 or IMF meetings could substantially alter the picture of financial diplomacy, and thereby of international relations in general. Of all changes and dynamics we discuss in this chapter, this is perhaps the most important one. And it is perfectly in line with the intentions of François Mitterrand, Helmut Kohl and other EMU architects, who saw the euro first and foremost as a political project.

Also a more intensified dialogue with the ECB is on Junckers agenda. But the Eurogroup will hardly become a body which will be capable of dominating the ECB. At least Juncker would be the wrong man for this: 'I have not fought for the independence of the ECB during the negotiations of the Maastricht Treaty in order to put it into the slightest of doubt as president of the Eurogroup.'

When it comes to the coordination of fiscal and monetary policy, the Stability and Growth Pact has been an essential instrument. It has been controversially discussed right from the start. Its most important rule said that public deficits of the member countries should, in principle, be below a threshold corresponding to three per cent of GDP. In case of 'excessive deficits' the ECOFIN council could impose fines. In the case of France and Germany, the ECOFIN council had actually declared that they were running 'excessive deficits', but when in November 2003 the Commission proposed starting the fine procedure, there was not the necessary

qualified majority in the council. The Commission went to the European Court of Justice, who strengthened the position of the Commission, but basically confirmed the legality of the ECOFIN decision. Finally on 20 March 2005 the Finance Ministers, again under Juncker's presidency, reached an agreement for the reformulation of the Pact.

To get a proper assessment of the development, we should step back a bit: by establishing the EMU, fiscal policy remained basically the prerogative of the national governments. However, high deficits in one or several countries can create inflationary pressure and thereby harm the interests of the others.

Up to a certain extent, the EMU construction prevents public deficits from having inflationary consequences. In contrast to previous times, the governments cannot order the central bank to create more money and then send it to them. Now deficits have to be financed by proper loans. If private households buy government bonds, this will have no inflationary impact because the households lose as much liquidity as the government gains.

But if, for example, banks lend money from the ECB and buy government bonds, and then the governments spend the money, then the broad money supply M3 will increase. This will imply a potentially inflationary build-up (ECB 2004, p. 55). Of course, the ECB can stop this traffic by raising its short-term interest rates. In this case, all member countries, the virtuous ones included, will be hit by higher ECB interest rates. But it would be much worse if the ECB failed to act: then the much more important long-term interest rates would increase.

High public deficits and debts could also endanger the euro politically. Profligate governments might be tempted to pressurize for more inflation, in order to inflate their debt away. The ECB is formally independent, but the EMU construction is built on the principle of double security: the ECB is independent, and at the same time only countries with stable finances, which have no interest in higher inflation, are accepted as members. But if a group of Member States were again to lose control of their finances, as happened in the 1970s and 1980s, then the credibility of the euro on financial markets could crack.

Under the EMU negotiations the delegations discussed whether it could be left to market forces to discipline the member countries (ECB 2004, pp. 51-53). A profligate country will usually be punished by higher interest rates on its debt. This was the mechanism which in the 1980s converted the profligates to the creed of fiscal rectitude. However, inside a monetary union, to quite some extent, a deficit country is protected by the stability which the others produce. Debt translates much slower into rising interest rates. This creates a free-rider problem. Furthermore, the financial markets seldom work smoothly and predictably. Risk premia on interest rates can remain small for a long time, and then suddenly jump up when new information becomes available. This can produce a disruptive crisis. Therefore the task of imposing fiscal discipline cannot be left to market forces.

These potential problems began to look very real in the mid-1990s, when Italy introduced a set of one-time budget improvements in order to fulfill the convergence criteria just in 1997, the year which was the yardstick for acceptance to the EMU. The solution found by then, ironically not the least due to German pressure, was to make the convergence criteria on deficit and accumulated debt

permanent. This was the core of the Stability and Growth Pact (SGP). Furthermore, in 1997 all countries signed that they would achieve a budget position close to balance in the medium term.

Very often the SGP was criticized because it allegedly restricted governments in running deficits in times of a recession when demand should be supported by public spending. This has been a misunderstanding; the SGP explicitly allowed for larger deficits in times of recession.[22] Furthermore, if the fiscal position of a country is close to balance, there is plenty of room for expansionist policies. But in 2005 some countries were still far away from balance. This constituted a breach of the commitments of 1997.

In contrast to the convergence criteria for EMU membership, the SGP has had only limited political clout: a country which wanted to become an EMU member, but did not fulfill the convergence criteria, ran the risk of being excluded from EMU (we leave the problem of statistical fraud out at this point). This created a strong incentive to comply. But the SGP has had to discipline countries which are already members. Furthermore, the sanctions could only be set in motion if a qualified majority in the council supported this.

The éclat of November 2003, when the ECOFIN council let France and Germany off the hook, revealed one positive thing: the actors on the financial markets were firmly convinced of the stability of the euro (and the power of the ECB to guarantee low inflation) that no one seemed to have interpreted the ECOFIN decision as the start of a new round of fiscal irresponsibility. This could have haddrastic consequences for the interest level. But the financial markets reacted with calmness.[23] This could not have been taken for granted in 1997.

The negotiations about a reformulation of the Pact became protracted. This could not be a surprise, given the point that a substantial conflict of interests had to be solved. Eventually the new version of March 2005 allowed more flexibility. When discussing whether a country runs an 'excessive deficit', special consideration will be given to 'financial contributions to fostering international solidarity and to achieving European policy goals, notably the unification of Europe …' (ECOFIN 2005, p. 15). This can mean in practice that the three per cent threshold will be lifted upwards.

At the same time, the new Pact contained much more explicit and binding commitments than the original paragraphs. As a starting-point, the council confirmed that the SGP is an 'essential part of the macroeconomic framework of

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[22] According to the 'old' SGP, in case of severe recessions (when GDP falls by more than two per cent) the deficit limit would automatically be invalid. With milder recessions (GDP falls by more than 0.75 per cent), the ECOFIN could declare larger deficits to be acceptable.

[23] As the *Financial Times* reported: 'If the European Union's fiscal rules died yesterday – at least in their strictest version – few in the financial markets mourned their passing.' Ben Broadbent of Goldman Sachs was quoted: ' … its interpretation is moving in the direction of allowing more cyclical leeway for budget deficits during economic downturns, and that is something we think should have been there from the beginning' (Crooks 2003).

the Economic and Monetary Union', and it 'plays a key role in securing low inflation and low interest rates …' (ECOFIN 2005, p. 2). Council and Commission 'are resolved to clearly preserve and uphold the reference values of three per cent and 60 per cent of GDP as the anchors of the monitoring …' (ECOFIN 2005, p. 13). However, the governments received more room for 'exceptionally and temporarily' trespassing these borders. As a rule, they are acceptable not only in times of economic downturns, but also if they result 'from the accumulated loss of output during a protracted period of very low growth relative to potential growth'. Also financial contributions to 'fostering international solidarity and to achieving European policy goals, notably the unification of Europe' (ECOFIN 2005, p. 14f) should be taken into account when assessing whether a country runs an excessive deficit. On the other hand, deficit countries will be exposed to much more political pressure early on. As the council declared, 'peer support' and even 'peer pressure is an integral part of a reformed Stability and Growth Pact', and the Eurogroup will strengthen the monitoring process of 'national budgetary developments and their implications for the euro area as a whole. Such an assessment should be done at least once a year before summer' (ECOFIN 2005, p. 6). The member countries confirmed that in the medium term they should have balanced budgets,[24] and in order to reach balance, they 'should pursue an annual adjustment in cyclically adjusted terms, nets of one-offs and other temporary measures, of 0.5 per cent of GDP as a benchmark'.[25] This is a much more binding commitment than the old text.

All in all, the Pact became more flexible, but not necessarily softer. Accordingly, the Governing Council of the ECB declared, on the one hand, to be 'seriously concerned'; it must be avoided that the changes in the 'corrective arm' of the Pact 'undermine confidence in the … sustainability of public finances …' On the other hand, the ECB 'also takes note of some proposed changes which are in line with its possible strengthening' (ECB 2005).

In fact, the SGP and the protracted negotiations have performed an important function, namely to give a political alarm signal before fiscal policies were in danger of becoming too loose. The trespassers came under strong political pressure to do something about their deficits, and to accept stronger commitments than before. All in all, although the fiscal policy of France and Germany is far from optimal, the frame seems to be sufficiently solid to prevent a repetition of the 1970s when deficits run out of control in many countries. If a government should turn *really* profligate, the others have the instrument of imposing fines.

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[24] To be precise, the text mentions medium-term budget objectives (MTO) which for 'good' countries can be slightly below balance: 'The range for the country-specific MTO … would thus be, in cyclically adjusted terms, net of one-off and temporary measures, between one per cent of GDP for low debt/high potential growth countries and balance or surplus for high debt/low potential growth countries' (ECOFIN 2005, p. 9).

[25] 'Their adjustment effort should be higher in good times; it could be more limited in bad times' (ECOFIN 2005, p. 11).

Inflationary pressures seemed to be low, the ECB could keep its interest rates at the historically low level of two per cent, and the markets for long-term credit remained calm.[26] But presumably, the subject will regularly enter the headlines, unless all Member States have followed the example of the Scandinavian countries which work with surplus budgets and pay back public debt.

Theory: Why Things are 'About Right'

No Convincing Arguments why EMU should be Unstable

As was mentioned in the introduction, the current stability of EMU and the euro stands in striking contrast to many academic contributions which predicted that EMU could not work. According to my knowledge, David McKay has produced the most elaborate version of this kind of reasoning, integrating many productions of political scientists and economists. We are going to scrutinize the arguments in more detail.

In the first place, McKay referred to the theory of Optimal Currency Area (McKay 1999, pp. 142-146). According to these models, a country is likely to be exposed to an 'asymmetric external shock', which hits this country, but not the neighboring one. The shock could hit the supply side (for example, oil-price hikes), or the demand side (sudden fall in export earnings). Usually such a shock can be absorbed in various ways: the government could devalue the currency, in order to increase competitiveness, or increase public spending, to boost aggregate demand; also falling wages would restore competitiveness; the unemployed might migrate to other regions. But in the case of EMU, all solutions are practically blocked: in a monetary union, devaluation is excluded, wages in the EU countries are inelastic downwards, labor mobility across the national borders is low, and finally, the countries are not allowed to run high deficits, due to the Stability and Growth Pact. Therefore, an asymmetrical external shock will produce long-lasting misery and massive political tensions. By contrast, the United States would never encounter the same kind of problem: if one or several states are hit by external shocks, the interstate-transfer, up to 20 per cent of GDP, cushions them. Therefore, the

[26] To be precise, according to the rating agency Standard & Poor's, if the current fiscal policy remains unaltered, then the public debt of France will deteriorate significantly after 2010, mainly due to demographic pressures; at about 2025, French government bonds would be classified as 'speculative' (*junk bonds*), with hefty risk premia on the interest rate. The United States, Germany and the United Kingdom would follow the downward tour with some years' delay. However, these calculations were not meant as a prognosis; it is not likely that financial policy will not be altered. Even in the case of France there is ample time to do so (Malingre 2005). Interestingly, Italy, once the black sheep in this context, has brought long-term development under control; its debt ratio will under given policies also fall from 104 per cent now to 91 per cent in 2050 (Munter 2005).

argument goes, EMU can only survive if the transfers are lifted to the US level. This line of reasoning has been the main source of inspiration for many of those who saw the EMU as a high-risk enterprise.

Fortunately, it is unfounded. As we have already seen, it has been a misunderstanding that the Stability and Growth Pact precluded demand-management in times of a severe downturn. But there is an enormous difference between a Keynesian-inspired deficit spending in times of a recession, and the habitual fiscal irresponsibility, which many European countries produced in the 1970s and 1980s, running high deficits year after year, even in times of boom. Only this last kind of policy is forbidden under the Stability and Growth Pact (old and new), but not the first one.

Besides, the idea of 'asymmetric' shocks is highly speculative. No one has ever produced an example of what a shock should look like, which hits, say, Germany but not France. The European economies are highly diversified and interconnected, so demand or supply shocks would hit them all, albeit to a different degree. Monetary policy will absorb most of the shock for all countries; fiscal deficit spending can do *the rest* of demand stabilization for the countries which are hit worst.

Those who feared that EMU would be unstable forwarded another economic argument: the ECB engineers a one-size-fits-all policy when it sets the interest rates, but conditions in the member countries might vary. For instance, in a given situation higher interest rates might be appropriate for the Euro zone on average, but countries such as Ireland or Portugal might be severely hurt. Again, as the argument goes, only substantial cross-border transfers could compensate the 'losers' of ECB decisions, otherwise political tensions, up to the breaking point, might arise.

However, in this argumentation many benefits of the EMU, which more than compensate for these losses, become overlooked: by producing low inflation in a huge area and by eliminating exchange-rate risks, EMU has had an enormously positive impact on capital markets and long-term interest rates. In particular, the poorer and more peripheral countries profited. Already in the 1990s, when EMU and the consolidation efforts became credible, this process was visible.

Table 6.2 Nominal and real long-term interest rates, four countries, 1994 and 1999

	1994	1999
Nominal long-term interest rates:		
Italy	10.5	4.7
Ireland	8.0	4.8
Portugal	10.4	4.8
Spain	10.0	4.7
Real long-term interest rates:		
Italy	7.0	3.2
Ireland	6.3	0.8
Portugal	4.1	2.2
Spain	6.0	1.6

Source: OECD 2000, p. 279. Real interest rate calculated by using the GDP deflator (ibid., p. 258).

For a country such as Italy, with a debt burden of 124 per cent of GDP in 1994, the more-than-halving of the interest burden has meant a colossal relief, not least in social terms. For other countries the relief has not been *so* pronounced, but it was still substantial. In comparison, the 'burden' that perhaps an ECB decision does not match *perfectly* the, say, particular Portuguese situation is almost trifling. It cannot be excluded that in such a situation Portuguese populists might demagogically rail against the ECB. But it can be excluded that any Portuguese government will ever threaten, let alone really consider, leaving EMU in such a situation. This would only bring Portugal's interest rates back from the right to left side of Table 6.2. Also Portuguese politicians have an essential interest that the Euro zone as a whole remains a low-inflation area.

Furthermore, inside the Euro zone, the inflation differentials among the countries (and this is particularly important with a view to ECB/central bank decisions) diminished to the degree which can be observed in the US.[27] This means that the 'misfit' between decisions for the Euro zone as whole and, say, Portugal has become very small and is not bigger than in the US.

In the 1990s, a group of German economists forwarded another argument, why high cross-border transfers should be necessary: 'With a common currency, the weaker members of the European Union will be exposed to greater competitive pressures, suffering growing levels of unemployment as a result of their lower productivity and competitiveness. Substantial transfer payments in the interest of financial equalization will therefore be necessary' (McKay 1999, p. 149). In this

[27] As ECB President Jean-Claude Trichet put it in April 2005: 'The unweighted standard deviation for 12 euro area countries dropped from close to six percentage points at the beginning of the 1990s to around one percentage point in 1999-2004. The dispersion of annual inflation in the euro area is similar to that of the 14 US metropolitan statistical areas, which has hovered around one percentage point in recent years' (Trichet 2005).

perspective, even in the absence of asymmetric shocks, high cross-border transfers become a necessity.

This argument echoes a long debate. Mainstream economists have usually argued that economic integration is beneficial for all, in particular for the poorer regions; in general, we can expect convergence instead of polarization. Others, for instance Gunnar Myrdal, have expressed deep skepticism and warned of 'cumulative effects' which could produce downward spirals. However, as regards the European Union as a whole, fears of this kind have fortunately been unfounded. Within the EU15, the poorest Member Sstates have usually experienced growth rates above average.[28] There have also been some regions which have been growing below average. The overall picture, however, is convergence. This can be explained in part by the EU Structural Funds. It should, however, be emphasized that the 'catching-up' of the poor countries already took place in the 1970s and 1980s,[29] before the Structural Funds gained any significance.[30]

Also the new EU countries in Central and Eastern Europe have been catching up significantly. Between 1995 and 1999 their economies grew by four per cent a year, in 2004 even by 5.4 per cent, considerably above the Euro zone average, at two per cent (Tumpel-Gugerell 2005, p. 2).

Fortunately, European integration has created convergence and not social polarization. The EU regional policy has presumably played a positive part. It would be a nice gesture if the rich EU member countries would augment the means for the Structural Funds. There is, however, no necessity for them to do so, and as the above section on the budget showed, there will not be much more money for structural policy in the period 2007-2013, in spite of Eastern enlargement, which has increased regional disparities inside the EU substantially.

All in all, neither 'asymmetric' shocks nor 'social polarization' can substantiate that cross-border transfers at the US level are *necessary* for the survival of the EMU. Of course, in the future more fiscal centralization *cannot be excluded*, new tasks may make this advisable. But there is no necessity in this direction, there are no unavoidable functional spill-overs from EMU to fiscal centralization. One might even reverse McKay's reasoning: currently, the collective identities of most EU citizens are predominantly national, and European only to a minor extent. This might gradually change. But unless this picture has been altered substantially, more

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28 'Disparities in income and employment across the European Union have narrowed over the past decade … Between 1994 and 2001, growth of GDP per head in the cohesion countries [Greece, Ireland, Portugal, Spain, WZ], even excluding Ireland, was 1% a year above the EU average, and the proportion of working-age population in employment in all apart from Greece increased by much more than the average' (COM 2004, p. 4).

29 Between 1970 and 1987, in relation to Switzerland (=100), the relative position of the countries changed as follows. Greece: 28 to 40, Ireland: 40 to 48, Italy: 59 to 77, Portugal: 30 to 40, and Spain: 44 to 55. Calculated on the basis of OECD figures, National Accounts, as quoted in Statens offentliga utredninger 1993f, p. 13.

30 Interestingly, at that time Greece, Portugal and Spain were not even members of the EU. Presumably, under certain circumstances, an already comparatively loose association, free trade agreements and so on, can make economic convergence possible.

transnational transfers would presumably provoke *Lega Nord*-phenomena in many member countries, and thereby substantially undermine the EU.

Sustainable Financial Positions – Relief and not a Burden

Article 104. 1 of the Treaty Establishing the European Community (consolidated version) requires: 'Member states shall avoid excessive government deficits.' The benchmark of three per cent GDP and the stipulations of the Stability and Growth Pact only specify this term 'excessive deficit'.

Numerous authors have depicted these principles as a tough burden for the member countries, implying substantial pressure on the welfare states. McKay, for instance, qualified the convergence criteria as looking 'almost unattainable' (McKay 1999, p. 7); EMU could be stable only if mass publics tolerate high cross-border transfers and/or 'centrally induced welfare state retrenchment' (McKay 1999, p. 173). This alleged anti-social character of the stability requirements has also been part of the folklore of some euro-skeptics, for example, during the Danish referendum in 2001.

But it is a marvelous misunderstanding. Obviously, McKay and others have imagined that it is possible to maintain a welfare state, while continuously running excessive deficits. Of course, *short-term* deficits are no big problem, and in times of recession, they are even advisable. But in non-recession times deficits have little, if any, stimulating effect on economic activity; then their main effect is an increase of the public debt, and servicing an increasing public debt requires more public money, every year. At the beginning of the 1990s almost continuous deficits brought, for example, Italy into a position where just interest payments on the public debt were *more than double as high* as the total of health-service expenditure.

In Italy and many other countries the many years of high deficits have produced a situation where the working class becomes heavily taxed, and thereafter the money is transferred to capitalists in the form of interest payments. How can people on the political left ever accept such a state of affairs?

In the case of Italy, this madness became contained in the process towards EMU membership. Responsible Italian politicians even deliberately used the coming EMU as a *vincolo esterno* in order to induce financial discipline into the Italian system (Dyson and Featherstone 1999, pp. 485-507). Without this external bondage it would have been much more difficult.

Denmark had similar problems, albeit to a much lesser degree. Being a country with a reasonably efficient political system, the madness was stopped much earlier (from 1982 onwards). No one spoke of convergence criteria this time, but Denmark started working towards fulfilling them. Making public finances sustainable and stopping inflation was not easy. But afterwards, not least due to dramatically falling levels of interest rates, the Danish welfare state was much better equipped than before (Zank 2002, pp. 221-244).

Of course, once irresponsible policies have highly indebted a country, then curing the situation implies some *temporary* inconveniences. In general, however,

it does not even require cutting aggregate public spending. Given the point that economies usually grow at a rate of about two per cent a year, aggregate public expenditure can continue to grow too. The expenditure increase has only to be below the GDP growth rate. This might imply actual cuts in *some* sectors, but they are temporal. At any rate, postponing consolidation only makes things worse; public debt and interest burden just continue to increase, making consolidation even more difficult.

Here it is time again to include an argument about democracy and EMU: in principle, only a balanced state budget is compatible with a democratic state. Only such a budget can show burdens and benefits in a transparent way.[31] By contrast, deficits make burdens less transparent, and they transfer part of the burden to the next generation which currently cannot vote. This can be justified if the debt is used for investment, that is, the current generation also passes goods to the next generation. But in our context, a substantial part of the debt has been used for consumption. This can be justified only temporarily, in times of recession. Measured by this yardstick (and the corresponding one on inflation and democracy), EMU brought a substantial increase in democratic quality, in particular to the Mediterranean countries. The new member countries can expect a similar progress.

University Economics and EMU

To quite some extent, the 'puzzles' which many academic observers have seen can be explained by a time-lag in some parts of university economics.

For several decades macroeconomic textbooks have been containing a set of standard models. According to them, by raising public expenditure or lowering the interest rate, the state can stimulate demand and employment: the higher the public expenditure and the cheaper the national bank credits are, the higher is employment. The causation works only this way. Conversely, cutting public spending or raising interest rates produces misery. Of course, no academic would ever have said that public spending should be raised indefinitely. But formal models seem to have quite a hypnotic effect.

In this model universe, the state could and should counter demand fluctuations by using the appropriate combination of public expenditure, low interest rates and exchange rates. In these models, the monetary sphere has usually been depicted as rather harmless. In the Investment Saving Liquidity Money (ISLM) model, for instance, a fiscal expansion could make money scarce, but then the national bank could always alleviate the problem by generating more money. Also capital flows are comparatively harmless. As the famous Mundell-Flemming model showed, when the central bank, under conditions of free capital movements, lowered its interest rates, capital would flow out of the country and generate currency depreciation. This in turn would gently support exports and employment – capital

[31] A balanced budget is, of course, only a necessary, not a sufficient, condition for transparency.

flows as friendly helpers of macroeconomic policy. In this model universe, a currency devaluation or depreciation is always an appropriate instrument. Under some circumstances it might be rather ineffective, but it could not produce negative results.

The above-mentioned models of Optimal Currency Areas (OCA), which have played such a central role for McKay and others who saw high cross-border transfers as necessary, were but variations of this kind of reasoning. The OCA models became elaborated in the 1960s, some 20-30 years before the euro came on the agenda, under completely different circumstances.

According to the so-called Phillips curve, there is allegedly a trade-off between inflation and employment: expansionist policies can boost employment, but this might imply some inflation. Governments can choose which combination of employment and inflation they prefer. At this point, most textbook authors have accepted a modification: in the long run, the Phillips curve is vertical: inflation is positive for employment only for some time, thereafter unemployment falls back to its original level. But even in this perspective, there is no reason why fighting inflation should have priority. Inflation might not help in the long run, but neither does it cause much damage. According to this model, a pragmatic government can still use inflation as a temporary relief against unemployment. We have stressed here particularly the ISLM, Mundell-Flemming and Phillips curve models because they figure prominently in many textbooks. In extreme cases, the whole textbook consists *of nothing else* but these models (Dedekam 1996).

In this model universe, there is only one interest rate, and it is the central bank which steers it by augmenting or reducing the quantity of money. More central bank money means cheaper credits. But as everyone knows, on the financial markets there are numerous interest rates, all dependent on the duration of the loan and the risk assessment by the lender. However, according to the textbook models, these differences can be neglected; cheaper central bank money automatically feeds through the whole system, lowering all interest rates. What the textbooks usually do not mention is that this assumption is valid *only* under the condition of a stable low inflation rate. As soon as inflation expectations enter the picture, risk premia inevitably drive the longer rates upwards. If in such a situation the central bank accepts an increase in the quantity of money, it would build up even more inflationary pressure and consequently push the longer interest even further upwards. No central banker, no staff member of the ECB or OECD, no minister would ignore these elementary mechanisms. But many university economists do so. Sometimes one might even suspect that textbooks consciously try to conceal the problems of inflation and long-term interest rates.[32]

[32] See, for instance, Begg 2005. At length Begg exposes the traditional model, where the central bank sets 'the' interest rate by varying the quantity of money. He then informs the readers that central banks nowadays set their interest rates directly, delivering whatever quantity of money is demanded at a given interest rate. As to this point, the students first learn something, and then have to un-learn it. Consistently, in a rather lengthy text, Begg keeps to the fiction that there is only one interest rate (see, for instance, p. 464, Maastricht, or p. 466, UK interest rates). He mentions the Fisher

The simple textbook model, where the central bank sets 'the' interest rate by steering the quantity of money, can actually be found in John Maynard Keynes' *General Theory* (Keynes 1986[1936]), or in John Hicks' influential article *Mr. Keynes and the Classics* (Hicks 1937), which pioneered the ISLM model. At that time, at the end of the 1930s, it was acceptable to neglect the difference between central bank rates and the financial market rates. *At that time* inflation was not the problem, and capital movements across the border were not free. But it is a remarkable case of intellectual inertia that these decades-old models still dominate today's textbooks. Even in the cases where textbooks *mention* the problems of financial markets, the 'basic' formal models, which most teachers see as the core of the art, remain untouched. In this model world, the problems of financial markets do not influence the conclusions when it comes to discussing devaluations, Phillips curves, or deficit spending. It is sad on behalf of the historical Keynes that textbook models, which so grossly neglect the problems of financial markets and their potentially destructive impact, are often labeled as 'Keynesian', given the point that the historical Keynes saw exactly financial markets and the monetary sphere as the source of dangerous instabilities.

The macroeconomic orthodoxy became challenged in the 1970s by 'monetarism'. Milton Friedman and his followers pointed at the many problems which state interference had created, not least in the monetary sphere. But their conclusion was overly simple: stop all kinds of state interference, except from securing low inflation through a precise targeting of the quantity of money. This particular recipe, and not the recommendation to secure low inflation, has been characteristic for monetarism. There are many reasons for prioritizing low inflation, and authors from various normative angles have argued for it. Suffice perhaps to mention Gösta Rehn, in the 1950s and 1960s the leading economist of the Swedish trade unions, who coined the expression 'to hate inflation', because of its perverse effects on income distribution. But many 'Keynesian' university economists labeled all those who argued for low inflation as 'monetarists'. This made it easy not to listen.

The textbook models became tested in the 1970s: practically all governments tried to combat unemployment by higher expenditure and accepting higher inflation. Most results were disastrous: after a few years, the European countries experienced both higher inflation *and* higher unemployment[33] and public debt got out of control. Under the impact of inflation and widespread uncertainty, the long-term interest rates moved upwards too.[34] The rising interest rates (nominal and real) were doubly disastrous, killing private investment and consuming increasing chunks of state money. And the differences in inflation rates (together with the

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hypothesis according to which real interest rates change little, without explaining how higher inflation should generate a higher nominal interest rate. And even when he discusses the costs of uncertain inflation (p. 462), he avoids mentioning the effect which this uncertainty might have precisely on the long-term interest rates.

[33] For a graphical presentation of the hypothetical Phillips curve and the factual development in twelve countries, see McKay 1999, p. 59.

[34] For a graphical presentation for twelve European countries, see Tsoukalis 1997, p. 151.

gyrations of the dollar) generated exchange rate volatility: countries with relatively high inflation rates had to devalue regularly. This in turn exacerbated instability (read: higher interest rates) in the financial markets.

Governments were forced to change their policies. The definite turning point was the *tournant* of the socialist French government in 1982/3.[35] At the end of the 1980s, there was a new consensus among central bankers and leading politicians: inflation makes things much worse because it drives interest rates up and generates financial and economic instability. Financial markets are not gentle, but potentially very destructive, in particular if destabilized by devaluations and inflation expectations. There was therefore no alternative to a low-inflation policy.

Interestingly, 1982 was also the year when Friedman's monetarism lost all political influence.[36] But many university economists continued to glue the label of 'monetarism' on all those who advocated a low-inflation policy. This meant on practically *all* politicians and central bankers in Western Europe and Northern America, social democrats and socialists included. It is, by the way, in general a grave mistake to think that the ideological divisions which can be found in academia correspond to the divergences among the practitioners of economic and monetary policy.

In the 1980s, because of the strong position which Germany occupied on Europe's financial markets, most European central banks ended in a position where they had to shadow the Bundesbank decisions.[37] There was hardly any 'national'

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[35] When elected in 1981, the French socialists started an expansionist program, based on higher consumption. The balance of payment (transactions between France and the other countries) deteriorated sharply, and the franc came under heavy speculative attacks. A combined devaluation of the franc and revaluation of the deutschmark in June 1982 did not stop a further deterioration of the situation. In autumn 1982 and winter 1983 the French government discussed leaving the EMS, but the French leaders came to the conclusion that this, given the thin currency reserves, would only bring France under the command of the IMF. Finally, in March 1983, President Mitterand decided to stay within the EMS. This was not least a political decision (proceeding on the way of European integration). The exchange rates in the EMS were adjusted again, and the French government introduced a harsh austerity program, in order to support the franc. This austerity program had to be doubly as strong as the original augmentation of consumption (two per cent GDP against one per cent). For a detailed description, based on numerous internal documents, see Schabert 2002, pp. 178-196. This book contains much more than the title suggests.

[36] As Paul Krugman depicted the US developments: 'From a monetarist perspective, Federal Reserve policy after 1982 was nothing short of scandalous. The rate of money growth shifted erratically, sometimes rising to double digits, sometimes becoming negative [as has been the case with the Bundesbank and then the ECB, WZ]. For several years after the abandonment of targets, monetarists – Friedman in particular – routinely forecast a disastrous acceleration of inflation and/or a severe recession as a result of monetary instability. Yet the actual result was remarkably smooth sailing … Milton Friedman's forecasts of doom were at first taken seriously, then ridiculed, then ignored' (Krugman 1996, p. 107).

[37] When the Bundesbank raised its rates, most other central banks had to do likewise. Otherwise capital would flow to Germany.

monetary policy left. Consequently, by joining an EMU, the member countries would not 'give up' national monetary policy. On the contrary, they would partly regain it: an ECB would make European policy, instead of the Bundesbank making German policy for Europe.

Also giving up devaluation as a policy instrument was not seen as a real loss any more. Previously, countries such as Italy or Denmark used devaluations in order to restore competitiveness, after high inflation and rising costs had pressed them out of the export markets. But when they shifted to a low-inflation policy, the devaluation option became superfluous. Even trying to keep devaluation as an open option for the future could be dangerous because the mere rumor of a devaluation could trigger off capital flights and drive interest rates up.[38]

When EMU came on the agenda in 1988-1991, it was therefore relatively easy for the leading politicians to create consensus on some basic principles: the overall aim had to be price stability, and this had to be communicated strongly to the financial markets. In order to do so, on a French proposal, quantifiable convergence criteria were introduced.[39] By fulfilling them, membership hopefuls could show that they had reached macroeconomic stability to a reasonable degree. The convergence criteria also solved the problem of whether some EU members should be excluded from the first round: with quantifiable convergence criteria, every Member State that so wished could join in the first round.[40] It was exclusively a question of political will. Almost all governments wanted membership because the rewards were enormously attractive: low interest rates for every one, exchange rate stability and an end to speculative capital movements; not to mention political gains such as anchoring Germany in a European framework more firmly. Against the background of the practical experiences of the 1970s, 1980s and early 1990s, the basic decisions as regards EMU made perfect sense.

But EMU did not make sense in the model universe of standard economic textbooks. Financial markets, their speculative destructiveness and their power over the long-term interest rates, were not part of this universe, and therefore there was no reason to prioritize low inflation and stability. Nor was there any reason to send strong stability signals to the financial markets in the form of the convergence criteria. On the contrary, all this appeared to be dogmatism ('monetarism!') at the

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[38] The matter is, of course, different as regards depreciations under a floating exchange rate.

[39] The French 'Finance Ministry saw the need to establish a new credibility for EMU in the financial markets. Hence it:
– introduced the concept of a three per cent budget-deficit criterion into the negotiations;
– advocated the incorporation of the criteria in the treaty;
…
Clear and tough criteria were a demonstration of commitment to be alongside the "stability-oriented" states, to be at least as virtuous on deficits and debts as the Dutch and the Germans. From this perspective the idea of weak, imprecise criteria was anathema for the French' (Dyson and Featherstone 1999, p. 240f).

[40] The French Finance Minister 'Bérégovoy was determined to position himself as a proponent of Community solidarity by finding a formula that would not exclude a state like Italy in advance' (Dyson and Featherstone 1999, p. 241).

expense of employment. Limits to public deficits could only be negative because it implied bondage on fiscal policy. Also giving up devaluation was seen as highly risky because in these models devaluations were (imaginary) absorbers of (imaginary) asymmetric external shocks. The negative social effects of high public debts were equally absent from the model universe.

The second convergence criterion is perhaps best suited to illustrate the mental distance between the EMU architects and the models of university economics. The criterion demands that EMU member countries must have brought their long-term interest rates[41] down to a level not higher than two percentage points by comparison to the three countries with the best inflation record. The criterion aims, of course, at the long-term stability of public finances, as seen by the lenders on financial markets: it is not enough that membership hopefuls have actually produced low inflation, in addition they must have convinced the financial markets that long-term stability is also ensured; the long-term interest rates reflect exactly this. Convincing the financial markets has been a tough political task (and for many countries it still is). In the standard models, however, the national bank has only to augment the quantity of money, then 'the' interest rate will fall.

Small wonder that many university scholars have viewed EMU as being highly risky and inherently unstable.

Conclusions

The latest treaty revisions, including the Constitution Treaty, have left the basic principles of monetary and fiscal policy intact. Revising them was not even much discussed during the Convention. This must have been surprising for many observers, given the point that they deemed EMU to be unstable and undemocratic. A very prominent role in the criticism was played by the fact that cross-border transfers are small (roughly one per cent of GDP). But as we have seen, the arguments why higher transfers should be necessary are not convincing. In contrast to many academic contributions, EMU did not imply horrible burdens or welfare-state retrenchments, but economic and social benefits, mainly in the form of lower interest rates. EMU also brought, at least in relative terms, progress in democratic accountability.

The fact that many economists have been highly critical towards the EMU architects can, to quite an extent, be explained by intellectual inertia in parts of academia: changing circumstances have produced changing political answers, but not changing textbook models.

The EU institutions are, of course, not static. The priorities of the EU budget are changing, the Stability and Growth Pact became reformulated, the euro is expanding, the ECB will experience a departure from the principle of Member State equality, and the EMU members formed a new Eurogroup. Currently, it is

[41] Ten-year government bonds.

mainly a deliberation forum, but the potential impacts, not least on the global scene, are substantial. This is perfectly in line with the founding fathers of EMU.

For the main architects of EMU, in particular for the French President François Mitterand, the monetary union was first and foremost a political project, a part of the *Construction Européenne* (Dyson and Featherstone 1999, pp. 71-75). It should bring the states and people of Europe closer together and enhance their cooperation. EMU did this. More is likely to come: trade will presumably continue to increase among the Member States, and so will the process towards a fully integrated capital market. The financial discipline which EMU implies will (hopefully) also bring sustainable fiscal and monetary conditions to those countries which currently still lack it (for example, Hungary), and prevent a return to the irresponsible policies of the 1970s in the existing Member States. The euro will presumably also have a cultural impact, strengthening the feeling of a European togetherness among the citizens of the EU. The diminished factual role of the dollar might also reduce the mental presence of the US, in particular in the new accession countries. Last but not least, due to its growing weight in international trade and to the (presumably) closer cooperation within the Eurogroup, the international weight of the EU will increase: in matters of international trade and financial diplomacy, but presumably also as regards general political issues.

Seen from a federal perspective, the EMU has meant an important step towards transforming the EU into a federation. Institutionally and symbolically the federal level became strengthened, and more is to come. But at the same time, the EMU did not generate uncontrollable dynamics, and particularly not to a centralization of fiscal policy, which none of the leading politicians wanted. EMU has been (successfully) constructed as a 'stand-alone project':[42] supporting further moves to a political union, but in itself not being dependent on it. The combination of centralized monetary policy and decentralized fiscal policy might look unusual when compared with the US, for example. But this just illustrates once again that the EU is something different from the US, and characterized by different dynamics. If it is a federation, then the EU is a federation sui generis, and it will continue to exhibit policies and dynamics sui generis.

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[42] In particular the German side attached great importance to this point during the negations, consistently emphasizing two principles: firstly, the euro must become at least as stable as the D-Mark; and furthermore, 'Köhler's prime negotiating task was to design a technically viable EMU. Neither Genscher nor Kohl were prepared to challenge these principles.' (Dyson and Featherstone 1999, p. 424).

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Chapter 7

The Regions in the New Europe

Kaisa Lähteenmäki-Smith

Introduction

Increasing interest in the role of the regional tier in the European integration process is not merely a recent phenomenon. In fact much of the debate on, and indeed the academic tradition of European federalism itself is deeply embedded in theories of regionalism, as well as regionalist ideology, for example, stemming both from political movements and academic theories, where the regional level is an essential part of the equation. The nature of post-war federalist ideology as it relates to the regional tier, and the political realities of today's integration process, will be discussed below. However, despite the historical underpinnings of federalist, as well as regionalist, ideas, it is argued here that the recent resurgence of regionalist ideas within the constitutional agenda relates more to the debates emerging from the broader governance debates currently ongoing both within the EU and internationally. These ideas and influences are also discussed below. The role of the Committee of the Regions in the deliberation and preparatory work in the context of preparing for the European constitution will then be discussed in the last section of this chapter. Whilst the Committee of the Regions as well as the independent lobbying organizations and activities of individual regions have at times implied that regions can in fact be perceived as actors in their own right, regions are in the view of this chapter still first and foremost objects of European policies, though at times with enforced autonomy or standing that provides them with increased leverage in this context also. The Structural Funds have been part of the process of Europeanizing the regions, in the sense of channeling the influences discussed previously in relation to European governance and of establishing a common policy platform and some of the methodologies that the regional level actors implement in their activities. Here shared methodologies of programming and projectification, evaluation and development strategies can be referred to, with the question emerging: are the European instruments of territorial cohesion (for example, Structural Funds) in fact solidifying the status of the regions as objects of policy or can they also be perceived as having empowering influence? These questions are discussed in section five of the chapter. Finally in section six, conclusions are drawn with regard to how these processes of an historical and ideological nature have been imprinted upon the current state of affairs, in terms of the degree of the *regionalization of Europe* or the *Europeanization of regions*, arguing that the regionalist tendencies prevalent in the post-Maastricht era (seen

under the rubric of 'regionalization' in the EU context) have given precedence to the Europeanization of the regions, thus placing the constitutionalist role of the regions on the back-burner, thus setting territorial policy at the core of Europeanization, and replacing the focus of interest very much from regions as actors or *subjects* in policy terms to regions as instruments, or *objects* of territorial policy. Here we will also consider the Europeanization of regions from the point of view of policy diffusion, learning and discourse. Regionalization as it has been understood and defined in relation to the constitutional agenda of the EU is often largely perceived as a process of Europeanization of the regions, rather than regionalization (in the sub-national empowerment or institutionalization sense) of Europe.[1]

Finally, it is argued that the enlargement process has necessarily taken precedence over all other goals such as finding a constitutional settlement that would better promote a more regionalist outcome. In the coming years then it seems more likely that the regional scope of European integration will concentrate on the issue of territorial policy (that is, achieving territorial cohesion, with the novelty of the territorial dimension of cohesion being brought to bare on the traditional notions of *economic and social cohesion*) and regional competitiveness as an element or building block of European competitiveness (that is, the territorial implications of the Lisbon strategy).

In the broader international debates that set the Europeanization debate firmly within the (comparative) context of internationalization, some interesting observations can be made. The recent debates on European governance and 'good governance' in the European sphere have in many cases much in common with earlier though similar international debates. Within the international sphere it can be argued that similarly to the way in which 'good governance' was viewed as an important consideration in almost every aspect of the current politico-administrative debate/concern, the European policy audience has been equally grateful for such a useful, yet conveniently ill-defined, principal policy debate.

The popularity of 'governance' is understandable for (at least) two reasons: its imprecision and its political instrumentalism. As has been noted by Rhodes amongst others, the term 'governance' has multiple uses, based on the policy area in which it is used, as well as on its policy orientation, alternatively referring to either the minimal state, corporate governance or new public management, as well

[1] Here it is worth noting that the distinction between regionalism and regionalization is of more than merely analytical interest, as it relates to the policy implications of regionalization attempts nationally and in the European context. Regionalization can be defined as the politico-administrative process by which regions merge as relevant units of analysis for economic and political activity and welfare and service provision, whilst regionalism relates to the ideology that lies behind either the internal mobilization (bottom-up regionalization) or external mobilization (top-down regionalization), which seek to promote regions as the unit of analysis, level of activity and sphere of political mobilization. These are discussed in more detail, for instance, in Lähteenmäki-Smith 2004.

as 'good governance' and socio-cybernetic systems or self-organizing networks (Rhodes 1997). Within the regional sphere, a mix of new public management and good governance tends to prevail. The second reason for the popularity of the concept is its political 'usefulness' (perhaps even the 'political correctness') of the concept, as 'governance' (especially in the meaning of 'good governance') has become a catch-all concept for international organizations (from the World Bank and the IMF to the EU) with high political expedience, encompassing those principles and political ideals which are generally accepted as universal, though also at times fluid and difficult to measure and assess in concrete terms, such as openness, participation, accountability, effectiveness and coherence (for example, CEC 2001). It is therefore also relevant to the debate at hand to consider the implications of, and the wider set of interests wrapped up within, the EU governance debates as they relate to territorial/spatial policies. Whilst no drastic changes have taken place to improve the constitutional position of the regional tier, there has been an increased realization of different sector policies having territorial impacts (for example, transport and infrastructure, R&D, the Lisbon agenda). For the future challenges of territorial cohesion one can only assume that the financial resources allocated to territorial cohesion in the future will provide an even more problematic equation, and while it may be easy to show effects and impacts of European Structural Policy in areas that have strong growth, it is likely to remain equally difficult to prove any direct correlation between the financing and the growth patterns.

Federalist Ideas and the Regionalist Turn[2]

As is argued in Chapter 2 in this book, the key elements of establishing a federation include:

- A division of powers at two or more levels, with exclusive competencies at these various levels (the central government may not occupy policy areas belonging to the Member States without their consent). As a matter of principle, as many policy areas as possible are to be the responsibility of the Member State or sub-national level;
- The Member States form the basis for the federation, as they have concluded a treaty establishing the federation. In that sense making a federation is a bottom-up process;
- The sovereignty of the federation is an amalgam of the sovereignty of the constituent Member sStates and the federation, in that they share sovereignty and do not hold it alone.

[2] This section of the chapter is largely based on the author's PhD-work undertaken and influenced by the post-Maastricht era of regionalist aspirations (see, for instance, Lähteenmäki 1999).

It is important to bear in mind the fact that while regional interest in federalism may often simply be a form of political opportunism, as a political idea or program, federalism contains its own view of social change. According to Altiero Spinelli (cited in Pistone 1991) support for federalism is weaker at times of stable government and prosperity, but in times of crisis federalism is reconsidered, not only by the political elite, but also the public at large. It is thus no surprise that the federalist movement was particularly strong in the post-war period. Spinelli's vision then is one of the crisis-driven nature of the federalist movement mobilizing support for federal solutions when governmental power was at its weakest. This view is easily understood in the light of Spinelli's own life history and his active participation in the Resistance movement during the Second World War, which marks his federal thinking and that of the *Ventotene Manifesto* in general. Spinelli was convinced that we are living at a historically critical stage for nation-states, subject to intense crises in their political systems, creating problems not amenable to nationally based solutions, but instead requiring a common approach. Current political, social and economic trends centered around the dual processes of globalization-centralization and fragmentation do seem to echo Spinelli's concerns, with the historically unique opportunities of EU enlargement requiring novel policy approaches and enabling the mobilization of major resources (both human, financial and even natural). Currently popular ideas on the need to expand upon European economic policy in order to strike a balance between the political and the economic, particularly in relation to the establishment of economic and monetary union and the introduction of the euro, also find resonance in Spinelli's ideas on European federalism. Federalism, for Spinelli, was the required means to fight the chaos and inefficiency that results from the lack of the common management of the interdependent economies of modern states and their foreign and defense policies (Pistone 1991, p. 355). This concern with efficiency should not, however, hide the idealistic undertones of Spinelli's federalism. Spinelli was latterly also strongly influenced by the members of the British Federal Union movement (such as Lord Lothian, Lionel Robbins and Sir William Beveridge among others), in that his objective was similar to theirs: '...to secure support in Great Britain and elsewhere for a federation of free peoples under a common government elected by and responsible to the people for their common affairs, with national self government for national affairs' (Burgess 1986, p. 181). Thus the final goal was federal government on a world scale, not only within Europe.

On viewing the relationship between federalist and regionalist ambitions, it soon becomes clear that decentralization and federalization go hand in hand, though the connection between regionalism and federalism is not a straightforward one.

Decentralization is seen as advantageous in more than one respect, as summarized by Abromeit (2000, p. 4.):

- 'It unburdens the central authority' – not only by transferring the onerous day-to-day concern with smallish matters to smaller units, but even more so by relieving it from the strain of resolving conflicts between territorial segments of the society maybe adhering to different values;
- It helps optimize the supply and allocation of collective goods in a differentiated society, in that it allows for decisions upon collective goods to be taken at exactly the level where preferences about them are homogeneous ('fiscal federalism'), which seems a promising way to avoid externalities;
- It can be a valuable contribution to democracy in that it may widen the range of opportunity structures and, more particularly, provide citizens with some sort of say in matters close at hand and 'near to their hearts' as well as familiar to them.

The last point of identity-building is less present in the institutionalist approach applied in this chapter, though in some cases it is also of relevance as, for instance the solidarity implied by the European regional and cohesion policies will show. In terms of the identity issues involved, the Europeanization project is also inherently one of building a shared identity. While regionalists see federalism and federalization as a means of enhancing the development potential and status of their own region, federalists are in turn likely to use regions and regionalism as stepping stones towards their long-term goal of a federalist Europe (Loughlin 1996, p. 151). These connections may, however, be useful in helping to provide answers to some of the questions raised previously in respect of European governance. The current trend towards multi-level decision-making, political strategies and identities requires us to reformulate political ideas balancing different sources of legitimacy and identity. Federalism and regionalism can be useful contributory factors in this exercise. Indeed as Josep Ferrater Mora argued with regard to Catalonia and its place in the modern Spanish state: 'The Catalanization of Catalunya may be the last historical opportunity to make Catalans "good Spaniards", and to make Spaniards "good Europeans"' (Ferrater Mora, cited in Castells 1997, p. 50). Similar challenges were faced all across Europe prior to the constitutional settlement. Notions of federalism are thus quite compatible with the complex interdependence and globalization approaches – emphasizing the need to overcome nationalistic mindsets and unilinear state-centric governance solutions. The position from which we begin here shares some basic assumptions with the multi-level approach as far as the impact of regionalization is concerned. As argued by Beate Kohler-Koch, regionalization or Europeanization alone cannot transform the constitutional situation of states, neither is it expected to, but it can contribute to the modification of the principles, ideas and rules that determine the legitimacy of governance, as well as political 'actorness' and empowerment in everyday life contexts (Kohler-Koch 1999, p. 53).

In this chapter the broader themes of federalist ideology are only touched upon in passing and the debate around the regionalist-federalist nexus is thus largely to be found in the margins rather than center stage (this issue is addressed more specifically in, for example, Lähteenmäki 1999), while attention is generally placed on the recent focus on governance as a solution or as an analytical backdrop

to the policy changes, as well as some of the constitutionalist issues that are of particular relevance for regionalization and regionalism. Next we will investigate some of the contemporary trends of relevance to regions in the EU, embedded in the broader theme of European governance.

Regions within the Discourse and Policy Practice of European Governance

The European White Paper on European Governance from 2001 has become an important frame of reference in the debate on *governance* as opposed to *government.* The concept of *governance* used here refers to a system of coordinating multiple players in non-hierarchical systems of political negotiation, regulation and administration that bring together and coordinate the actions of an increasingly wide array of social, political and administrative actors seeking to guide, steer, control or manage societies (for example, Jachtenfuchs 1997, p. 40). Thus we also need to be cognizant of the need to see governance essentially as a process of adjustment and adaptation in trying to find new solutions for managing change in an environment in flux. Although the constitutional agreement seeks to put in place (settled) parameters for this process, in many areas (including the role of the regions in the European governance structure) the balance remains ill defined. Thus the need to both find and reconfigure governance solutions and systems and to come up with new ways of evaluating these solutions and systems is inherently also about addressing the question of *how* learning takes place. The underlying federal/regional dimension of the governance situation represents, both for the dynamics of the institution and for economic development, a suitable level of authority in the application of the principles of subsidiarity and proximity: itself one of the fundamental principles of the European government system, as stated in the Commission's White Paper on European Governance, which highlights the role of mediator between citizens and communitarian institutions for the regions and local authorities, and recommends close cooperation among European institutions, national governments and regional and local authorities, as well as referring to the local and regional authorities as playing an active role in the policy-shaping process, together with the Commission and the national authorities 'in a more systematic dialogue' (CEC 2001, p. 13). This is also referred to as an element in promoting policy coherence, as an increasing array of policies are seen as having a territorial dimension, thus also necessitating an assessment of the territorial impacts of sector policies (ibid.)

As such, the regional level is not only a level of analysis, but also a level of policy action and mobilization as well as a level of policy impact. This has particularly been the view of the Committee of the Regions (CoR) which has outlined the process connected to the White Paper in terms of an opportunity to promote and consolidate its role as a 'regional gatekeeper' when it comes to subsidiarity and good governance. It has been argued on a number of occasions by the CoR that the White Paper on European Governance can be interpreted as an

acknowledgement that the EU has moved into a system of multi-level governance and that consequently there must be an enhanced role for and greater respect for the powers of the local and regional spheres of government (CoR 2003a). Thus the ongoing processes impacting upon territorial policy in the increasingly inter-dependent policy complex that is the European Union, with the concurrent national, European and sub-national policy shifts taking place in relation to the wider currents of internationalization and integration then provide us with a useful point of departure. For the purposes of this chapter the most interesting policy processes in this regard include:

- *Shifts in the patterns and methods of governance*: including the move from government to governance; organizationally implying a shift from hierarchies to heterarchies (for example, Stark 1999). In the case of territorial policies, this is reflected in the debates on economic and social cohesion, territorial cohesion, good governance and the alternative solutions proposed for the administration of the Structural Funds beyond 2006;
- *The relativization of scale*: the reorganization of the levels of government and governance and the re-articulation of representation in ways that question previous assumptions and understandings over the level seen as most relevant (and why); the concurrent processes of concentration and decentralization (for example, Jessop 2002);
- *Process rather than structure*: the process of coordinating multiple players in non-hierarchical systems (heterarchies instead of hierarchies) of political negotiation, regulation and administration that bring together and coordinate the actions of an increasingly wide array of social, political and administrative actors seeking to guide, steer, control or manage societies. Placing emphasis on networks rather than hierarchies, self-organizational qualities rather than 'top-down' organizational design;
- *Relational rather than positional*: governance relationships between the actors' non-hierarchical partnership relations, where the state is only one (though often 'first among equals', still in many cases setting the rules and the agenda for new forms of partnership- or network-based governance models);
- *Plurality rather than duality*: potentially leading to a questioning of the traditional duality between the market and the state, 'the economic' and 'the political' (or at least influencing the balance and boundaries between them, within the context of the managerialism entailed in the 'new regionalism').

In the recent Report on European Governance, 2003-2004 (CEC 2004b) the regional and local dimensions of the EU were explicitly addressed and the 'more systematic dialogue' called for by the White Paper was assessed, noting that while the process of dialogue has been launched, only the first few steps have been taken thus far (a meeting between the Commission, the CoR and representatives of the European and national associations of local and regional authorities being set as a new working practice) (CEC 2004b, pp. 11-12). Even though the results of the constitutional process disappointed those arguing for the right of the regions to put

cases before the ECJ, further steps were taken within the context of target-based tripartite contracts and agreements in policy formulation through various 'soft' law instruments.

The Treaty of Rome refers only to nation-states and to their national governments. Yet regions are implicitly present, through the desire to reduce regional disparities evident even in 1958, understood as the promotion 'throughout the EU [of] a harmonious development of economic activities, [...] a high degree of convergence of economic and of social protection, the raising of the standard of living, economic and social cohesion and quality of life and solidarity among Member States' (Treaty of Rome, Article 2). Enlargement soon revealed that a re-evaluation of such optimism was necessary. Though protocol 30 of Ireland's 1972 act of accession already emphasized the need to end regional disparities in the Community, the European Regional Development Fund was only established in 1975, largely to compensate the UK for its poor return from the Common Agricultural Policy (CAP) (for example, Dinan 1994, p. 404.) Gradually regional policy – or structural policy, to emphasize the fact that the CAP is still the most important instrument of European policy with regional implications – was developed and expanded, in particular with the 1988 policy reform and the subsequent Agenda 2000 process. In a sense then the regions were important in the policy context because such a large share of European resources was targeted on them, but the policy focus and choices remained largely national within the confines of the broad objectives of Structural Policy set at the European level. Programming and the more detailed planning of the policy substance, however, gradually became regionalized, with the programs now being drafted and managed in an increasingly regional context.

Previously the current author has analyzed the role of the regions in the context of three alternative routes to influence (Lähteenmäki 1999): the direct route (interest representation), the institutional route (through the decision-making structure, that is, in particular through the Committee of the Regions), and thirdly through the, thus far, less developed constitutional route (basically that route available to constitutional regions through their national structures and methods of decision-making).

Procedural questions are in many ways relevant for regional actors. The principle of subsidiarity was at least partially conceived of in procedural terms, though its relevance to the regions has been contested (van Kersbergen and Verbeek 1994). Participation in the deliberations of the Council is also important, though such an approach has been less influential than regional expectations had once hoped. Moreover, its relevance here has been minimized as it only applies to German and Belgian regions (with regional ministers) (Hooghe 1995, p. 180). On a more general level, regarding the key principles of European integration, questions of constitutional reform also need to be considered (see, for instance, van Kersbergen and Verbeek 1994).

The Committee of the Regions: a Paper Tiger in the Constitutional Setting?

As noted previously, the Maastricht Treaty failed to give regional governments the entrenched constitutional status they sought, with thereafter the question being largely overlooked, given the need to concentrate on the pressing concerns of enlargement and institutional reform. The ability of sub-national regional actors to influence the IGC proved to be as limited as the skeptics expected – German and Belgian regions had the ability to influence the outcome because of their own national constitutions; however, any general regional voice was missing. Cross-EU lobbying by other regions is thus still quite ineffective, as most states limit such issues to the governmental level. The outgrowth of arenas for the promotion of a transnational regional 'voice' may bring regional actors closer together, creating new alliances, yet it is governments that continue to make the key strategic decisions.

The constitutional issues inherent in the Maastricht debate surfaced yet again at the Amsterdam IGC. The Committee of the Regions outlined its goals for the IGC in a similar fashion to the German *Länders*' Maastricht agenda. On constitutional issues the key points referred to the principle of subsidiarity and to the right of appeal of the CoR. The principles by which the proposals were legitimated can be seen to reflect the spirit of subsidiarity, in relation to which democratic legitimacy, transparency and efficiency were cited as the key elements (CoR 1995, p. 3).

Of the objectives expressed by the Committee (CoR 1996), the right of appeal was not accomplished, neither was the explicit reference to regions in relation to the principle of subsidiarity (CoR 1997). The Committee's administrative independence and the enlargement of its scope of competence were, however, acknowledged. This still falls some way short of giving the 'third level' a significant measure of governance ability within the EU structure. Though the moment was seized by the regional lobby, it is unlikely that regional powers and the 'third level' will remain the main issues for European integration in the coming years; as such therefore the results of this process, from a regionalist perspective at least, remained limited. With enlargement issues dominating the current agenda, institutional issues may thus be less visible in the years to come, as energy is directed towards making the enlargement process as smooth as possible.

In sum, on the constitutional or procedural route to influence, we can consider the European community building process to be a model that reflects the shift from a managed *Gesellshaft* towards a nascent *Gemeinschaft*. In the managed *Gesellschaft* model, democracy is merely a matter of input into the political processes of decision-making, while in the nascent *Gemeinschaft* model, democracy becomes a question of output. Whereas the managed *Gesellschaft* tends to value the horizontal integration of elites, giving relatively little relevance to the participation of the citizens, the nascent *Gemeinschaft* is more sensitive to demands for an increase in democratic participation and the horizontal integration of the *demos*. (Chryssochoou 1997, p. 82), echoing the ideas of Ralf Dahrendorf from an earlier period.

These questions are connected to the contested notion of *demos* and democracy outside the traditional nation-state framework, dealt with elsewhere in this study (see, for example, Chapter 3). Here its role functions more as a reminder that the constitutional and procedural questions are of the utmost importance when evaluating the articulation of the 'regional voice' and the potential empowerment of the regions. Moreover further developments are occurring in the sense that a number of decision points where potential moves from managed *Gesellshaft* towards nascent *Gemeinschaft* can take place have already been identified, such as the 1996 IGC, though actual substantive reforms in this sense remained relatively modest.

The multi-layered scenario generally corresponds to the practical elements of multi-level governance that already exist in the current EU. Thus its problems, strengths and weaknesses have been outlined above in relation to multi-level governance. Most importantly these include problems connected to the fact that interest representation and possessing a 'voice' do not necessarily ensure influence, nor indeed are they a guarantor of democracy and accountability. The range of conflicting voices is a reality that has to be accepted, as the articulation of those voices has to be constitutionally ensured before one can envisage any real empowerment.

The process of preparing the European constitution, including both the choice of representatives and working methods for the European Convention entrusted with the task of drafting the constitution, is beyond the scope of this chapter. Yet it is necessary to note that many decisions made in connection with the Convention and its working practices undoubtedly also influenced the outcomes of the Convention in areas of relevance for the regional tier. While so many constitutionally important issues of direct relevance for national sovereignty were on the table, it is perhaps not so surprising that the issue of whether to include the regional tier or not was not one of the top priorities for national governments, and was seen as even less so for European representatives. The democratic nature of the Convention has also been discussed *ad nauseam* and it has been argued that although the Convention was a more representative and deliberative forum than any IGC thus far (in the sense of having a wider range of positions canvassed, with some more encompassing processes of deliberation also taking place), the Convention proved nevertheless to be largely presidential in character. (On this issue see, for instance, Vergés Bausili 2003, p. 14, or Chapter 3 in this book.) This was the case as regards the substantial purpose of the Convention and its working methods, the Convention being led by its Chairman, with the overall consent of the assembly. But more particularly as regards the drafting processes and the building of genuine consensus, the hand of the Secretariat and the discretion of the Chairman were visible in many instances. In some dossiers (such as social policy, a Congress of peoples, demands from regions with legislative powers, and so on), the domination of the Secretariat (drawn from the Council of Ministers' bureaucracy) and the Convention's Chairman was evident. Thus, although deliberative in principle, criticisms emerged regarding the fact that the Chairman

and the Secretariat essentially filtered inputs from Convention members and Working Groups and excluded legitimate views by various mechanisms – from feet-dragging to biased reporting of the proceedings (ibid.) It is undoubtedly also the case that the dominant issues of enlargement and constitutional reform effectively sidelined regional issues, as the traditional concerns for national sovereignty and the nature of democracy within the European decision-making system raised further concerns. In consequence, few Member States exhibited any serious desire to include the regional tier in the new constitutional set-up (the notable exceptions here being Germany and Austria); the first of whom claimed that the role of the regions should be explicitly included in the Treaty, and the second that the regions should also be given the right to take cases to the ECJ (for example, Michalski and Heise 2003).

Subsidiarity and Committee of the Regions in the draft constitution

CEC 2003, p. 95:

> **The Committee of the Regions as a gatekeeper of subsidiarity?**
> **The Status in the Draft Constitution – Protocol on the application of the principles of subsidiarity and proportionality**
>
> The Commission shall justify its proposal with regard to the principles of subsidiarity and proportionality. Any legislative proposal should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal's financial impact and, in the case of a framework law, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. The reasons for concluding that a Union objective can be better achieved at Union level must be substantiated by qualitative and, wherever possible, quantitative indicators. The Commission shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved.

The regions, at least institutionally through the Committee of the Regions, seized the opportunity to support the consolidation of the European integration project through the constitutional process and in many cases argued for the need to use it in order to promote a more positive image of the European integration project, for example, by arguing that the constitutional process be used as an impetus for increasing interest in the European elections of 2004, as well as calling for a positive outcome in the ratification process (CoR 2004a and 2004b). The Committee took a firm stand yet again as the representative body for local and regional authorities and the guardian of grass-roots democracy in the Community decision-making process (CoR 2004a, p. 2). The Committee has also repeatedly expressed its hopes that the focus on governance predating the constitutional settlement would allow it to further consolidate its role, arguing that the role of the

Committee of the Regions in monitoring the application of the subsidiarity principle (especially the Committee's right to bring an action before the Court of Justice) needs to be confirmed in the Constitutional Treaty (CoR 2003b, p. 4). This settlement represents status quo, however, in that the constitution does only authorize indirect access by regional and local authorities to the Court of Justice via the Member States under their own constitutional systems (as is the case at the moment). In addition, the CoR can bring action (with appropriate screening) before the Court of Justice for infringement of the subsidiarity principle at the request of the regional or local authorities it represents and in accordance with its rules of procedure, which need not be specified in the constitution.

Regions as Subjects or Objects of European Policy?

The view of this chapter has been that regions are not ontological entities in their own right and the definition of 'regions' in itself is shifting over time and space. What is also of relevance is the fact that the standing of regions as actors is contested and in some cases they are perceived more as objects of policy rather than subjects. Despite the impact of the regional tier and of the Committee of the Regions in the preparatory stages of the Constitutional Treaty, it is still worth noting that rather than bringing the regional tier more firmly in line with the other institutional actors within the EU, the current state of affairs in the EU governance structure still largely maintains the regions as *objects* of policy, thus preserving their status as actors with a role to play in the delivery of regional growth contributing to national and European competitiveness and the pursuit of territorial cohesion. In many cases regions can be useful in Europeanization processes and policy diffusion terms. As argued previously, as the methodologies of the Structural Funds (as well as other European policies) have become more firmly established, this has not only implied the adaptation of uniform solutions for policy delivery and evaluation, but also an increasing perception of the need to allow for differentiation. The programming practices of the Structural Funds have been based on a shared basic methodology (and indeed ideology), set in the regulations and guidelines, while the final policy practices and innovations remain based on their national, regional and local specificities (which need to be effective in their local contexts). Thus the Europeanization of regional policy methodology has been accompanied by the gradual realization that 'top-down' regulations and methodologies can only achieve so much, and, from the Commission's side, that a clearer emphasis has been placed on the potential for 'bottom-up' mobilization and innovation, as at its best evaluation and programming contributes to these aspects, thus further enabling new governance solutions. This then is where the issue of 'best practices', both in terms of working with evaluation *per se* (for example, seeking to find new methods and practices for evaluation as a strategic development tool and closely integrating evaluation in other strategic activities)

and as regards putting forward more versatile 'bottom-up' approaches to programming more generally, should be addressed further.

A useful starting point here would be to remind ourselves of the motivation and focus of European structural policy, that is, the Structural Funds, which essentially aim to re-balance the economic and social disparities between the regions in Europe, and by so doing, to overcome the imbalances in socio-economic development (measured in most cases in terms of GDP and unemployment). By contributing to this primary aim, the Structural Funds also potentially contribute to the goals of balanced territorial development and territorial cohesion. These policy goals and their attainment can then be assessed on different levels, from the micro level to the *meso* and macro levels, implying, in some cases, policy choices as to which level of cohesion we are seeking to promote first and foremost.

Territorial cohesion is defined thus in the third Report on Economic and Social Cohesion in Europe (CEC 2004a):

- The EU is to 'promote economic and social progress and a high level of employment and to achieve balanced and sustainable development, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union...'. (Article 2 of the Treaty);
- Implied equality on the individual level, i.e. 'people should not be disadvantaged by wherever they happen to live or work in the Union';
- Services of general interest a key area, i.e. Article 16 (Principles) of the Treaty recognizes that 'citizens should have access to essential services, basic infrastructure and knowledge by highlighting the significance of services of general economic interest for promoting social and territorial cohesion';
- Territorial disparities and the lack of balanced development within the EU (the dominance of the 'Pentagon' in particular) acknowledged, regions where special attention is required still largely defined in 'problem region' terms, i.e. as within regions and cities, the identification of 'pockets of poverty and social exclusion in areas with often only limited availability of essential services', 'specific areas constrained by their geographical features (islands, sparsely populated areas in the far north, and certain mountain areas), population is declining and ageing, while accessibility continues to be a problem and the environment remains fragile, threatened, for example, by regular fires, droughts and floods' and 'in outermost areas, with an accumulation of natural and geographical handicaps';
- Combating territorial disparities and achieving a more spatially balanced pattern of economic development requires coordination of (national and European) development policies in order to render them coherent and consistent with each other (e.g. the European Spatial Development Perspective from 1999).

Territorial cohesion is defined thus in the draft constitution:

> ECONOMIC, SOCIAL AND TERRITORIAL COHESION
>
> Article III-116
>
> In order to promote its overall harmonious development, the Union shall develop and pursue its action leading to the strengthening of its economic, social and territorial cohesion. In particular, the Union shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions or islands, including rural areas.
>
> Article III-117
>
> Member States shall conduct their economic policies and shall coordinate them in such a way as, in addition, to attain the objectives set out in Article III-116. The formulation and implementation of the Union's policies and action and the implementation of the internal market shall take into account those objectives and shall contribute to their achievement. The Union shall also support the achievement of these objectives by the action it takes through the Structural Funds (European Agricultural Guidance and Guarantee Fund, Guidance Section; European Social Fund; European Regional Development Fund), the European Investment Bank and the other existing financial instruments.
>
> The Commission shall submit a report to the European Parliament, the Council of Ministers, the Committee of the Regions and the Economic and Social Committee every three years on the progress made towards achieving economic, social and territorial cohesion and on the manner in which the various means provided for in this Article have contributed to it. This report shall, if necessary, be accompanied by appropriate proposals. European laws or framework laws may establish any specific measure outside the Funds, without prejudice to measures adopted within the framework of the Union's other policies. They shall be adopted after consultation of the Committee of the Regions and the Economic and Social Committee.

The tension in territorial cohesion can be identified in the search for balance between competitiveness and growth and equity: whilst previously opinion was clearly in favor of the territorial balance (at least on paper, in political terms), striving for competitiveness as the main goal for the whole of Europe may have shifted this balance towards competitiveness and growth, with potentially less attention being paid to equity concerns.

Regardless of the definition of this key concept, however, it seems clear that policy implications of European relevance are thus high on the regional agenda, while constitutional settlements or policy-making, where the regional *voice* would potentially be heard much more clearly, have still been less visible or likely to emerge. Theoretically the general picture has become even more blurred, with traditional federalist or, for that matter, functionalist or neo-functionalist notions of European integration being able to provide a plausible explanation for the current state of affairs or indeed of the future challenges and the dynamics observable within the regional sphere within the broader theme of integration studies. It is thus argued here that despite the acknowledged lack of theoretical rigor, it may be that the regional level of analysis within integration studies is most accurately explained, and in fact resembles most vividly the picture provided by the

empirically motivated comparativists within the 'Europeanization' approach (for example, Bache 2003; Borras and Greve 2004; Featherstone and Radaelli 2003; Kohler-Koch 1999; Richardson and Jensen 2000; Radaelli 2004 and so on).

The discussions around Structural Funds and European regional policy as an instrument of solidarity and a means towards European cohesion has, ever since the inception of the European regional policy, been the object of controversy and intense political bargaining. It is clear that the European constitution consolidates European regional policy, which is based on solidarity, whilst adding the focus on territorial cohesion, a concept that is still in the process of being defined. At the time of the writing of this chapter, the Dutch presidency of the EU prepared the informal ministerial meeting on territorial cohesion and urban policy, where this issue was to be debated and an agenda for the political debate set by adopting an agenda for specific actions to be taken in this field during the next two to three years. The starting point here was the realization of the fact that whilst Member States, regions and municipalities are responsible for the development of their own territory, there is an increasing necessity to place that development in terms of what is going on in their surrounding areas and in Europe as a whole. As argued by the Dutch presidency, 'given the major EU policy goals of improving global competitiveness and sustainable, balanced development, it is time to look closely at the cohesion of the European territory', in particular in relation to the question of clarifying the meaning of 'territorial cohesion' in terms of policy objectives and implementation at the regional, national, transnational and European levels, amongst other things (homepage of the Dutch presidency 2004). The main policy challenge here naturally lies with accommodating the need to achieve better coordination between various sector policies (most of which have territorial impacts) and at the same time maintaining the national room for maneuver, also taking into consideration that many of the policy areas which are of relevance here are *not* European areas of competence, rather subject to more subtle Europeanization pressures and accommodated through informal and variable policy coordination processes (most specifically the Open Method of Coordination, for example, in the area of employment, social policies or spatial planning). The fact that the informal ministerial meeting for spatial planning held under the Dutch presidency in Rotterdam in November 2004 argued that 'territorial challenges require a coherent approach to the development of the EU territory that takes account of its diversity' reflects this ambiguity and difficult balance. Thus in many cases the policy instruments and working methods remain national, whilst there are efforts at coordination on the EU level and the policy goals are increasingly agreed upon in the European sphere (for example, Lisbon and Gothenburg processes are typical examples here).

The status of the regions is naturally relevant both as a subject and as an object of policies. The territorial balance of the Union, as operationalized in the concept of territorial cohesion for instance, has been the object of further analysis, for instance in the framework of the ESPON Program, which was launched after the preparation of the European Spatial Development Perspective (ESDP), adopted by

the ministers responsible for Spatial Planning of the EU in May 1999 in Potsdam (Germany), calling for a better balance and polycentric development of the European territory. The program is implemented in the framework of the Community Initiative INTERREG III. Under the overall control of Luxembourg, the EU Member States have elaborated a joint application with the title 'The ESPON 2006 Program – Research on the Spatial Development of an Enlarging European Union', currently consisting of a total of over 20 research projects on territorial aspects of various sector policies, as well as projects investigating the territorial impacts of these policies (for more information, see www.espon.lu).

The author has been involved in three projects of relevance to the theme at hand, namely an overall study on the territorial effects of the Structural Funds, a similar study on effects specific to urban areas, and a recently launched study on territorial governance in the EU (Nordregio 2003, 2004). Most of the findings drawn upon in this chapter relate to the first of these projects. Here the starting-point for the investigation has been that whilst the Structural Funds aim to re-balance the economic and social disparities between regions in Europe, thus overcoming imbalances in socio-economic development (measured mostly in terms of GDP and unemployment), there are aspects of territorial cohesion that go beyond this more limited economic focus. It is in fact argued that by contributing to this primary aim, the Structural Funds also potentially contribute to the objectives of a balanced territorial development and territorial cohesion. The overarching research question for this study has been formulated as: can the Structural Funds, by contributing to their primary aim of economic cohesion, also contribute to the objectives of a territorially balanced and polycentric development?

In many cases effects are found more in policy diffusion and governance terms than in macroeconomic terms, highlighting the well-known fact that the importance of governance processes is reflected in different aspects of the Structural Funds system. In the context of the Structural Funds in urban areas, aspects such as urban management, participation processes and comprehensive development strategies were seen as the key issues. In the study on the territorial effects of the Structural Funds (SF) on urban areas, the dimensions addressed included:

- Good urban management: the wide range of problems which many urban areas are facing today are such that they have to be tackled through many policy areas, creating the need for an integrated approach involving several sectors. The establishment of partnerships between different levels of government (local, regional, national, European) and also between the various actors active in the same area are considered an integral part of good urban management;
- Public participation in developing processes: the active involvement of local citizens affected by SF interventions, in the development and implementation of projects of neighborhood renewal, is considered to contribute to the success of such interventions;

- Support of comprehensive development strategies: in addition to individual interventions addressing urban needs and interests, at their best, the Structural Funds may provide a platform for the development of more comprehensive urban development actions (for example, as regards urban renewal actions, where the human, environmental and physical infrastructure are all addressed in an urban renewal context).

In terms of policy clout, it needs to be borne in mind that the total expenditure of the European Structural Funds is very limited. In 1999, structural aid as a share of the GDP constituted, on average, some 0.28 per cent of the total EU15 GDP. Only the Cohesion countries were above this average, with the highest rates being for Portugal and Greece with 1.89 and 1.86 per cent respectively. Despite the long-term nature of the Funds, and the fact that the Structural Funds have important additional leverage effects (that is, they mobilize an important amount of additional national, both private and public, resources), this necessarily means that the capacity for reducing disparities through this financial source remains limited.

Though not a central focus in this chapter, in the ESPON study referred to above the actual funding patterns in different types of European regions (for example, polycentric regions, urban vs. rural regions and so on) were also investigated. Here it is of course also of relevance that while urban areas received an important share of the financing, the amount of funding actually addressing issues with a distinctly 'urban focus' is low. Though the total funding is naturally only one part of the equation here, it does put into perspective the extent to which different urban issues were addressed in SF interventions from 1994 onwards. Regions as objects of policy are necessarily differentiated and their needs vary greatly, which also places them in a highly differentiated position when it comes to the policy challenges.

As has been argued on the basis of the data collection and analysis of the study on territorial effects of the Structural Funds regarding the total SF expenditure allocated to different types of regions, an initial assessment of where Structural and Cohesion Fund assistance has been used during the 1994-99 period shows that more than half was used in what were categorized as functional urban areas of local or regional importance (micro), less than 20 per cent went to functional urban areas of national importance (meso), while only approximately ten per cent went to areas of transnational-European importance (macro), with an approximate 15 per cent being allocated to areas not defined as functional urban areas. In addition, based on this study we can also note, this time concentrating on *assistance per inhabitant*, that densely populated areas seemed to receive less funding than sparsely populated ones. Sparsely populated rural areas received on average about three times as much assistance, *per inhabitant*, as did densely populated urban areas. Looking at *total spending*, more than 75 per cent of the assistance goes to densely populated urban areas and medium and sparsely populated rural areas. Areas in between these extreme cases (typically the kind of medium-sized urban

areas included in the case studies) received only a small share of the overall assistance.

The limited nature of the funding does not necessarily undermine its impact, rather it makes it all the more essential to use the available funds effectively. It is most likely that vast amounts of funding (such as those of the Cohesion countries) cannot but help to contribute to local economic development, particularly as much of this funding is directed towards investment. In many cases Structural and Cohesion funding constitutes the lion's share of total public investment in a poor region. How well this financing is utilized, and for what kind of investments, was investigated in the case studies undertaken as part of the project.

The assessment of the aims of the Structural Funds undertaken in this project show that there is something of a 'coincidence' between the aims formulated in the Structural Fund programs and the aims of European spatial development policy. Furthermore, the assessment of the relationship between European regional policies and national regional policies illustrates that the Structural Funds have considerable leverage effects in the countries receiving the highest *per capita* assistance in particular.

In the project on the territorial impact of the Structural Funds our methodology consisted of the following three main dimensions:

- *Territorial Development*
  Here the analysis of the developments occurring across the European territory was undertaken at the lowest level possible (that is, NUTS III level), where ongoing spatial development and the investments of the Structural Funds were mapped. Assessments were then carried out regarding the coincidences between Structural Fund spending and spatial developments in terms of GDP, the change of the relative economic position of a region (economic concentration) and the transportation accessibility;
- *Governance and Policy Development*
  Of most relevance to the chapter presented here is the work relating to the policy dimensions of the Structural Funds. This comprised the governance of the Structural Funds in the various countries as well as their conformity to national policies. Another aspect of this dimension was the influence of INTERREG on the formation of transnational macro-regions;
- *Causal Links*
  Comparing actual spatial development to actual Structural Fund investment by region shows where development and investment coexist. This does not, however, allow for conclusions on the causal links between them. In order to pin down the territorial effects of the Structural Funds, a number of 15 'hot' and 'cold' spots were analyzed with regard to their causal relations in case study contexts.

While the intention here is not to provide an overview of these two projects, we can note some interesting conclusions as to the governance impacts in particular, as

well as some of the limitations or shortcomings of the Territorial Impact Assessment (TIA) methodology used. In many cases the case study approach provides the best (most informative and most reliable) way of establishing a causal connection between governance and the effectiveness of SF interventions.

In the view of the study on territorial effects of the Structural Funds, governance practices are an element in ensuring that regional development and territorial cohesion can be addressed on all levels of governance and that each unit of analysis (on the macro, meso and micro levels) can be taken as a unit of evaluation in its own right. If we expect impacts to emerge in relation to a more polycentric development and thus greater social cohesion to result, we cannot only look at the possible patterns of convergence between the units of analysis: we also need to address the question of which type of governance impacts emerge and how these can help or hinder the achievement of the policy objectives related to polycentricity and cohesion. Here it is clear that the quantitative analysis of how Structural Fund spending has thus far supported polycentric development shows a rather bleak picture: most of the regions that receive a relatively high share of the funding are those that show persistently low growth figures when measured in traditional indicators such as GDP. There are no countries within the EU15 of pre-May 2004 that demonstrate a clear-cut positive relationship between (relative) regional economic growth and the level of Structural Fund spending. Thus one possible conclusion here could be that if there is indeed a discernible positive impact of the Structural Funds, it is not to be found in relation to the economic growth indicator. This is largely consistent with our previous hypotheses on Structural Fund impacts, that is, that the indirect and qualitative impact is likely to prove more interesting than the impact on changes in economic performance.

Due to the leverage effects referred to above, one of the main goals of our T I A study of the Structural Funds (ESPON 221)[3] was, from the outset, intrinsically connected to the development of a holistic approach to Structural Fund interventions as a part of the suite of regional development interventions and policies in their entirety. Thus a key focus here has been the consideration of the interrelationships between national regional policies, EU regional policy and EU competition policy.

In order to achieve effective structural policies, national and European policies thus need to be better coordinated so as to make them compatible. Here the governance systems also play a role. In a majority of countries, the two policies can be considered as 'separated': Austria, Belgium, Denmark, France, Western Germany, Luxembourg, the Netherlands and the UK. In Eastern Germany, Greece, Ireland, the Italian *Mezzogiorno*, Portugal and Spain, the two policies should be considered coincident, while a third cluster of countries includes those where national regional policies (NRP) and European regional policies (ERP) do not

[3] The ESPON research program has sought to develop tools for territorial impact assessment, with policies assessed in terms of their input and output vis-à-vis the different territorial scales (see for instance Nordregio 2004.)

coincide, but are certainly closely interrelated (either due to the geographical scope, or due to the overall approach and strategies implemented). These countries include the Italian Centre-North and the two Nordic countries of Finland and Sweden.

This typology on the interrelationship between national and European regional policies shows a clear core-periphery picture, with separated policies in the core of Europe and more related policies in the peripheral parts of the EU15. The only exception here is Germany, which can be explained by the relative weight given to Eastern Germany.

The leverage effects of the Structural Funds on national regional policies imply that the Structural Funds have a wider range of indirect effects in Greece, Ireland, Italy and Spain (that is, those countries seen as overall overlapping) than in the rest of Europe. The effects of national regional policies can, to a large extent, be considered together with the effects of the Structural Funds – that is, the effects of national regional policies may be considered as the indirect/leverage effects of the Structural Funds.

As to the financial quantifiable impacts, the picture is equally varied across the Member States. While again this issue is not a major area of focus in the context of this chapter, it is worth noting that in the quantitative study of SF funding and its impact (on socio-economic performance, demography and accessibility), Structural Fund programs have had a tangible net economic impact in the Cohesion countries and other larger Objective 1 regions. Outside these areas, however, the economic impacts are difficult to quantify. The Funds have, however, enabled additional economic activity to take place and the quality of economic development to be improved, as well as acting as a catalyst for regeneration across the Member States (regardless of the funding intensity in the country in question).

When investigating the effects from the point of view of polycentric development, which in itself can be seen as a process of policy learning, we used a qualitative method of case study analysis based on interviews and desk studies on evaluation and other research reports and project databases in the regions and among the key stakeholders in Structural Fund activities.

An overview of the indirect and direct effects on all three scales is provided in Table 7.1 below.

Table 7.1 Structural Funds influence on polycentric development

Geographical level of influence/effect / Type of influence/ effect		MICRO	MESO	MACRO	SUM
Aspects explicitly targeting polycentric development	Direct				
	Indirect	⬆			
Distribution of population	Direct				
	Indirect				
Functional/economic specialization	Direct				
	Indirect	⬆			⬆
Connectivity/accessibility/ transport	Direct	⬆	⬆	⬆	⬆
	Indirect				
Strengthening of international cooperation	Direct		⬆		
	Indirect				
Diminishing regional divergence	Direct				
	Indirect				
SUM					

Source: ESPON 2.2.1

The distinction between the *direct* (effects discernible among those directly targeted by the intervention/investment in question) and *indirect* effects (broader effects that are also discernible among those that have not been the direct addressees of the intervention) show that, overall, the indirect effects are as important as the direct ones – a fact that is often forgotten in the debate. A more detailed look at the various fields of effects, however, shows that the direct and indirect effects tend to occur in different areas.[4]

As illustrated in the table above, most of the effects are found in the fields of (a) connectivity and accessibility, and (b) socio-economic functional specialization.

It is hardly surprising that the highest single effect is seen in the field of direct effects on *connectivity and accessibility*. This relates in particular to improvements in accessibility at the regional and national levels. The impact on the transnational transportation system is, however, considered to be of slightly lesser importance. Indirect effects are rarely encountered in this field.

In the area of *socio-economic functional specialization*, the sum of direct and indirect effects accumulates to a similar level as that in the field of connectivity and accessibility. In this case, however, the main emphasis lies with the indirect effects as regards specialization within a region and, to a certain extent, on the

[4] A more elaborated analysis of these effects and impacts is found in Nordregio 2004.

placement of the region in a transnational context. Indirect effects in respect of the national context, and direct effects in relation to the regional and national context, are here considered to be of medium-range importance.

In the area of functional specialization, socio-economic profiling is the second strongest aspect of polycentric development in terms of the possible influences of the Structural Funds. *The areas in which the Structural Funds can best contribute to existing profiling activities are in the fields of R&D and tourism.* In both cases the geographical scope is mostly on profiling within a regional or, on occasion, a national context. A few cases have been unearthed where funding could assist profiling activities of an international character. These were mainly linked to specific existing endogenous potentials and key actors in the region that already had international key competences.

Another high-scoring field with regard to spatial effects is that of *strengthening international cooperation*. Here the direct effects are considered to be of greater importance than the indirect ones, showing particular significance with regard to contacts at the *meso* level. Aspects such as *diminishing regional divergence* and the *distribution of population* appear, however, to have been less affected by the Structural Funds than the other above-mentioned aspects.

A general observation that applies to the learning and governance effects of the Structural Funds is particularly relevant in two key aspects of regional development activity:

- *Programming cycle methodology*: ranging from the preparation of the program with the analysis this entails to the implementation, monitoring and evaluation. While the programming cycle may have originated in the EU programs, it is increasingly also implemented in the development of national (including urban) policy initiatives;
- *A more developed and extensive partnership approach*: partnership may still be limited to the public authorities and their cooperation with counterparts from the business sector and the R&D field, but it is now also being gradually developed in the voluntary sector while also being implemented in the domestic policy sphere (thus making the synergy effects easier to achieve, when the working methods are shared).

It is argued that studies addressing urban policy impacts and types of urban governance associated with Structural Fund interventions may be relevant, not only to urban policy or urban regions themselves, but may also be indicative of the types of governance impacts that may be interesting *per se*. While we necessarily need to assess and evaluate policy impacts and governance methods on the micro level in order to identify these policy impacts, the policy impacts themselves may also bear potential relevance for other types of regions. The further away from the local micro level we move, the less blurred the picture becomes as to governance impacts, which may be why in order to assess governance we need always to bear in mind the question of scale.

Conclusions

The argument of this chapter is based on the analysis of the key processes of relevance connected to the constitutional debate, as well as some of the inter-connected policy processes that have emerged on the European agenda (most importantly the Lisbon agenda with regard to global competitiveness and the governance debates that largely preceded the constitutional debate) that are of relevance for the regional level. There has been an attempt to reflect the perceivable tensions within the EU governance structure between regions as *actors or subjects in their own right* and as *objects of policy*. It has been argued that whilst territorial impacts of public policies and the theme of territorial cohesion has been embedded in the constitutional basis of the EU, there is still no one common understanding of what territorial cohesion in fact means and how the policy practices and coordination methods can be integrated and made more effective in a way that ensures that territorial cohesion as a clear policy priority is also embedded in sector policies with territorial impacts. Neither is it clear how the role of regional actors can be ensured in this process. Regions in the new Europe are still actors in the making and though territorial aspects of policies are increasingly visible and acknowledged, and the introduction of territorial cohesion brings territorial concerns higher on the European policy agenda, it still remains unclear how to ensure that the regional level is also strengthened in terms of emerging as subjects in their own right.

It is thus argued here that, due to the complexity of the macroeconomic and financial concerns and policy processes, as well as to the need to address the question of European competitiveness as an issue with implications on all policy levels (macro = EU, meso = national and transnational, micro = regional sub-national level), regional issues have remained secondary in terms of the wider EU constitutional agenda. They have emerged as more relevant, but mostly in terms of policy delivery and the level of intervention, with, in particular, issues relating to the level of 'actorness' suffering most from the change in macro-level priorities. Essentially then we can see that most countries (as well as the EU as a whole) simply had too many other more pressing concerns in respect of service provision, economic balance and territorial management. Enlargement thus emerged as the driving-force issue that propelled the reform process, with the challenge here being concerned with building up the necessary regional capacity required to provide sufficient support for the delivery and management of the Structural Fund policies, the focus of which will, after 2007, shift to the new Member States, many of whom have very centralized administration structures with little or no regional capacity. Cooperation and dialogue with the regional level actors is promoted in the EU context when it can find solutions to service delivery and territorial cohesion, but mostly only in an instrumental sense, and thus not necessarily as an essential element of democratic accountability or legitimacy as such.

The inclusion of territorial cohesion in the draft constitution is important for the regions, however, as it establishes a new level of ambition for structural policy and

thereby also influences the regional policy methodology and ideology across Europe. The Structural Funds and the policies that they impact are thus an important area of further study when it comes to analyzing the potential role of regional level actors in the new European governance structure. As the coordination of national and European policies, as well as the closer integration of sector policies with territorial impacts, is an important element in delivering more effective, efficient and sustainable policy results in the regional sphere, much remains to be done in order to assess the best ways to promote such policy goals as territorial cohesion. Bringing the territorial dimension of policies into the European policy agenda, side by side with the goals of economic and social cohesion, is thus an important paradigmatic change and as such will be of particular relevance for the European regions for years to come.

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Chapter 8

The State of EU Foreign Policy – Constituting a Global Player

Knud Erik Jørgensen

Introduction

The state of EU foreign policy has always been a hotly contested issue.[1] While some contending views are caused by profoundly different analyses of EU foreign policy, other contending views can be explained by the fact that different analysts operate with different subject matters. With a view to the latter option, I begin this chapter by illustrating the consequences of applying narrow and broad conceptions, respectively. While narrow conceptions tend to focus exclusively on Common Foreign and Security Policy (CFSP) matters, broad conceptions include other major issue areas such as trade, development, enlargement, environment, value promotion, defense and crisis management.[2] In the second section, I outline four contending images of contemporary EU foreign policy, demonstrating how different mindsets heavily influence perspectives and conclusions. In the third section, I analyze what it takes to constitute a global player. One common answer is a proper constitution. By contrast, I argue that constitutional matters may have their function in the making of foreign policy but they also have their significant limits. In general, the chapter traces linkages between foreign policy practice, our analytical reflections on practice, and the codification of certain practices. This focus is based on the assumption that treaties may codify existing practices but are unlikely to trigger significant new foreign policy practices.

Understanding EU Foreign Policy

In both academic literature and journalism, there is a widespread habit of thinking of the CFSP as the EU's only field of foreign policy.[3] This is surprising, particularly because studies of national foreign policy routinely comprise

1 I am most grateful to Søren Dosenrode and Heidrun Abromeit for their comments on an early draft of this chapter. The chapter draws in part on Jørgensen 2004a, 2004b.

2 For a similar broad conception of foreign policy, see Dosenrode and Stubkjær 2002.

3 When *Jyllands Posten* (16 February 2003) declares that the EU's common foreign policy has become a bad joke, it is the CFSP that is the target of criticism. In the case of policy-making on Iraq, such criticism is fully adequate.

diplomacy, development, trade, security and the promotion of values (Carlsnaes 2002). In the case of the EU, the tendency can probably be explained by reference to different institutional settings and decision-making modes, that is, to systems of governance. One should expect that the longstanding research agenda on the EU as an international actor would have transcended dispersed institutional settings. Not so. Most research remains as compartmentalized as our subject matter. Unfortunately, assessments of the quality of foreign policy are often based on analyses of parts of the EU's international engagement, for which reason generalizations will be based on fragile foundations, leading in worst cases to misleading conclusions. In order to avoid such risks, the present chapter makes a plea for a broad and fairly traditional understanding of foreign policy, focusing on an entire bundle of foreign policy issue areas.

Trade has always been among the EU's key external policy issue areas, leading some scholars to apply the term 'trading power' (Meunier and Nicolaidis 2005). Given that the rationale of the EC/EU from the very beginning had to do with trade, customs and tariffs, this role can hardly be surprising. Internal aspects of trade had external ramifications and the EC has been in charge of representing Member States in international fora such as the UN, the GATT and the OECD. The EC was thus engaged in the GATT Tokyo round in the 1960s (Grieco 1991). Similarly, incompatibility between successive Lomé Conventions and global GATT rules had to be negotiated (away), a task for which highly technical expertise in trade and development related matters was a precondition (Ravenhill 1985; Goldstein 1993). Furthermore, the Single European Market has become the world's largest market, a fact that has huge consequences for trade. The change from GATT to the WTO was actively sponsored by the EU, and the EU has become one of the two *de facto* superpowers within the multilateral framework of the WTO (Mortensen 2002).

Development policy also belongs to the EU's core external activities. The origin of the EU's development policy can be found in bygone colonial relations (Ravenhill 1985). In this fashion, the policy area functions as a bridge between old-time colonial Europe and a modern Europe perceived to have global responsibilities (Karagiannis 2004). Indeed, the various versions of the Lomé Convention demonstrate that Europe always has had a global reach. The EU development policy budget is very considerable and when the EU and Member States' financial efforts are combined, Europe has become the world's largest provider of development aid. The change from the Lomé Convention to the Cotonou Agreement indicates that the policy has been markedly reformed during recent years. An OECD policy review, published in 1998, was highly critical of EU development policy. It has therefore been former Commissioner Poul Nielson's task to get the policy back on track. It should be added that EU relations with the Third World comprise more than development issues. Thus the EU has recently negotiated agreements with immigration 'producing' countries such as Sri Lanka, aimed at reducing immigration from those countries (Lavenex and Ucarer 2004).

The EU has also launched the initiative *Everything But Arms*, aimed at creating improved access to the EU market for the group of Least Developed Countries.

Enlargement policy has rightly been termed the EU's most influential kind of foreign policy (Wallace 2003). The EU has always attempted to influence its environment and conditions for doing so have become more favorable to the EU. The combination of ever stronger negotiation positions and efficient foreign policy instruments imply that the five enlargement rounds have profoundly changed the EU's economic-political environment, that is, Europe. In turn, this environment has gradually changed and the EU's ability to influence has markedly increased. Despite uncertainly about Turkey's future relations with the EU, the *Wider Europe* (2003) concept could imply that the EU now, for the first time ever, has a mental and organizational surplus to move beyond its predominantly Euro-introvert orientation. The *Wider Europe* initiative and the so-called New Neighborhood Policy may well indicate a new aspiration and awareness of potentials in terms of influencing the EU's future neighborhood, that is, Northern Africa, the Middle East, the Caucasus, Iran and Russia (see also *A Secure Europe* 2003).

During the most recent decade, the normative dimension of EU foreign policy has become more pronounced. Previously, the EU's international identity has been discussed in terms of civilian or military power, but focus has later changed to conceptions of normative power (Manners 2002). Other aspects of normative foreign policy include ethical dimensions of foreign policy and the so-called Grotian dimension of humanitarian intervention. Policy-makers have also become more aware of the role of values and principles in the making of foreign policy. Hence, key EU policy-makers introduce such principles, for which reason they talk about European values, Europe's global responsibility and they provide principled reasons for their actions.

Most EU Member States have defense policy in the foreign policy portfolio. The same cannot be said for the EU. Actually, it is tempting to talk about foreign policy without defense. Formally, the Treaty on the European Union (TEU) introduced the possibility of eventually formulating a defense policy. With the Amsterdam Treaty, the Petersberg tasks were codified in the treaty foundation of the Union. However, these legal provisions have only to a limited degree been employed in operational policy-making. The first military operations under EU military command were launched as late as 2003.[4] However, in a less formalistic perspective, one can claim that the EU has developed elements of defense policy ever since the Western European Union (WEU) was reactivated in the early 1980s. Most EU Member States were or became members of the WEU which *de facto* functioned as the EU's military wing, only to eventually be subsumed by the EU. By contrast, the EU has never played any role concerning territorial defense, particularly because the area has been considered a national or NATO alliance task. However, due to threats associated with the age of terror, territorial defense is

[4] EU peacekeeping operations include Macedonia (2003), PR Congo (2003) and Bosnia (2004).

in the process of being reconsidered. Military defense provided by means of Dannevirke, Maginot lines or the frozen trenches of the Cold War is no longer adequate.[5] In the European security strategy (2003), five threats are singled out: terrorism, WMD, 'failed states', regional conflicts and organized crime. In this perspective, the launch of *gendarmerie* forces in several European countries (Lutterbeck 2004), as well as making harbors secure – for example, in Rotterdam, Aarhus and Gothenburg – can be seen as a contribution to territorial defense in a new era. Traditional watertight distinctions between territorial defense, emergency crises and peace support operations have been overtaken by events.

During the last 15 years, the EU has been politically, economically and militarily engaged in the Western Balkans. As readers of David Owen's excellent book, *Balkan Odyssey* (1995), will know, the EU has been deeply involved since the break-up of former Yugoslavia and this engagement has been continued ever since. Indeed, it is difficult to underestimate the impact that this involvement has had on the EU as an international actor, including crisis management doctrines, acknowledgement of the use of military power and recognition of the limits of clout of individual Member States (Jørgensen 1997). In this perspective, the Clinton Administration's undermining of EU-led peace negotiations can be seen as an early warning of the coming of the Bush Administration's unconstrained American unilateral strategy. Furthermore, the Balkan case illustrates that EU foreign policy is far from being exclusively a feature of the future or purely declaratory policy.

The six issue areas belong to the most important, yet the list is far from being exhaustive. Thus, the EU's many interregional engagements include the Barcelona process, ASEM, relations with Mercosur and Russia, and so on. Finally, it should be pointed out that the broad conception of EU foreign policy also implies that the policy process is broad and complex. The European foreign policy system is a highly differentiated, multilevel system of governance. In this context, it is significant that the European Commission runs the world's fourth largest diplomatic service (Duke 2002). Furthermore, bilateral embassies of Member States within the EU have a markedly different function and relations between foreign services organizations at Member State and EU institutions level have significantly changed (Güssgen 2002; Spence and Hocking 2003).

When looking at the full range of global commitments and engagements, it is tempting to conclude that the EU is a formidable foreign policy actor. In the literature, the procedure is not unknown but it downplays ramifications of the dispersed nature of handling different issue areas (cf. Stetter 2004). Furthermore, impressive budgets cannot always mechanically be cashed in, that is, translated to political influence. Finally, like all policies, EU policies also have both intended and unintended consequences. Where there are policies, there may also be policy

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[5] Reconsiderations of defense at the beginning of the 21st century can be found in the report, 'De sikkerhedspolitiske vilkår for dansk forsvarspolitik' (Udenrigsministeriet 2003).

failures, even disasters.[6] All three levels should be included in assessments of the state of EU foreign policy.

Contending Images

The contemporary main images of the EU as a global player range from 'misery' and 'failure' to 'potentials' and 'ascending power'. In the following, I describe each image in turn and argue that they all contain elements of truth, yet also aspects of neglect and misleading conclusions.

Misery

According to numerous newspaper articles, the first victim of the war over Iraq was the vision of the European Union as a global actor. The articles claimed that the EU's foreign policy had become a pile of rubble (Burkard Schmitt, *International Herald Tribune*, 13 February 2003). Similarly, the former Commissioner for External Affairs, Chris Patten, thought the Iraq issue had 'blown apart Europe's ambitions to be a global player', and that, 'The handling of the Iraq issue has been seriously damaging for the CFSP' (*The Independent*, 10 March 2003). According to a poll, officials in European institutions thought that the CFSP had been 'destroyed beyond repair' (*European Voice*, 27 March – 2 April 2003). These and many similar interpretations suggest it was close to common wisdom that the EU's foreign policy had been severely damaged. And, seemingly, this is an appropriate conclusion to draw because, as most readers will remember, the spring of 2003 was characterized by fundamental disagreement, lack of trust, and exchanges of accusations.[7] On the other hand, the disappearance of EU foreign policy is something that routinely happens during most major international crises. Equally routinely, the policy reappears phoenix-like shortly after. One may wonder how it is possible for a policy to live such a harsh life.

Most readers of this chapter also read newspapers and therefore know that editors, commentators and journalists are prone to believe that the EU has *no* foreign policy. According to them, it is quite simple: there is no such thing. One example is William Pfaff writing: 'the EU has no foreign policy itself, other than a generalized commitment to international law and multilateral solutions' (*International Herald Tribune*, 16 October 2002). A somewhat similar opinion can

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6 Thus, EU policy toward the Western Balkans did not achieve stated objectives. Both situation analysis and the employed instruments constitute the EU's worst foreign policy failure ever.

7 It is not very comforting that the same words can be used to characterize relations in NATO and in the UN Security Council. Furthermore, it is not necessarily comforting to note also that American diplomacy has been wrecked, in the sense that the US during March 2003 even proved incapable of orchestrating a so-called moral majority in the UN Security Council.

be found in Judy Dempsey's portrait of Javier Solana's lonely spring of 2003 (*Financial Times*, 12-13 July 2003). These are just a few examples. However, searching the media systematically leads one to conclude that there are numerous examples of *denying* the existence of an EU foreign policy. In fact, there is an entire community of deniers. But journalists do what they probably have to do. They focus on spectacular, breaking news, they then note the absence of an EU policy and conclude accordingly. When they write background news analyses, they consult their archives and note the many times they have concluded that the EU has no policy. Logically, a pattern emerges. How can they possibly conclude differently?

But it is not only in the media that one finds the image of misery. It is also very much present in academic writings. On the bookshelves of university libraries, there are plenty of studies of *national* foreign policy of Member States, written as if the EU does not exist. The possible existence of an EU foreign policy is not even contemplated, and the possible impact of the EU on national foreign policies is left completely unexamined. A similar result is reached if, on the basis of theoretical assumptions, only *great powers* are regarded worthy of attention. In such a context, the EU is most often not even considered – and if considered, then dismissed as irrelevant. On the basis of one such theoretical stance, it is well known that Kenneth Waltz once concluded: 'Denmark does not matter.' Concerning other minor EU Member States, he would have reached similar conclusions and, notably, in his theoretical universe, the EU counts as something similar to an international institution, that is, an arena where real actors – read great powers – play real games (see also Mearsheimer 2003). Barry Posen's recent analysis of the European Security and Defence Policy (ESDP) may indicate that neorealists have started to take the EU more seriously as a power (Posen 2004; see also Wivel 2004).

As we have seen, the misery image can be found in media coverage and in academic writings. What about *officials* working in foreign ministries or EU institutions? Having told diplomats about my research interest in EU foreign policy, I have received different kinds of response. A young Dutch diplomat commented: 'I did not know we had one' – before he went on to criticize my naïve belief in rhetoric and declaratory diplomacy. A European Commission official said: 'But the European Commission is not in the cockpit of that policy area, so there cannot be a *truly* European foreign policy.' She continued by describing the necessity of institutional reform. This kind of reasoning is very representative of a common Commission self-image: that of being the true carrier of the European torch. In other words, it is implicitly assumed that only the Commission is capable of launching genuine European policies, foreign policy included. Finally, an old fox in the Foreign Office, London, was brief and caustic in his response: 'You are working on that Euro-crap?' Then he slipped into a reflective mode, 'It was probably in this building the bombardment of Copenhagen [1812] was planned.'

There is a tendency in the media and among academics and officials to believe that there is no such thing as an EU foreign policy, indeed the policy seems to be living through a kind of perpetual existential crisis. Nonetheless, it would be wrong

to conclude that we are witnessing a huge example of collective misperception. Analysts adhering to the misery image are not completely out of touch with current European events. Therefore, I am *not* going to argue that there is nothing phantom-like about the EU's foreign policy or that it has always existed, in all thinkable foreign policy issue areas. Did the EU have a policy on Iraq? No, certainly not.[8] Does the EU have a policy on strategic military developments in the Far East? 'No way'. In many respects, the Far East is beyond the EU's horizon. European aircraft carriers do not ply the waters of the South China Sea. Does the EU have a policy on current problems concerning relations between Israel and Palestine? I think it does, but I also think it *does not matter*, at least not alone. As a member of the so-called Quartet, the EU plays a minor role. So, what do I argue? Simply that the policy sometimes is phantom-like but also that, sometimes, it does exist. Sometimes, it even matters, in some issue areas. Enlargement, trade and international environmental policies come to mind as examples. Furthermore, there is a significant difference between conviction and conclusion to balanced un-biased studies. In a sense, it is the crucial difference between dogma and reality. Probably, the prime problem is that most followers of the misery image do not really attempt to question their own premises, analyses or findings.

Failure

Some argue that the EU is bound to fail as an international actor. Let me mention four examples. The first example concerns the EU's policy-making vis-à-vis the break-up of Yugoslavia. It has been common to argue, 'the policy does not work, so it does not exist', that is, claiming that the EU had no policy, thus seemingly confirming the image of misery. I contend that view, arguing that the case belongs to the category of policy failures. Clearly, the EU had a policy, built on five pillars: 1) diplomatic mediation; 2) deployment of lightly armed UNPROFOR forces; 3) economic sanctions/carrots; 4) non-employment of military power; and 5) cynical old European-style Realpolitik. In terms of ending the conflict, it was an unsuccessful policy – a failure. Characterized by the absence of a military-backed process of coercive diplomacy, it proved to be a dead-end policy or a case of mission impossible. In fact, it was very close to becoming the worst foreign policy failure the EU has ever experienced. Consider the exit option back in July 1995. It has been estimated that rescuing 10,000 largely European UNPROFOR forces would have required 25,000 American troops. What a humiliating mess such an operation would have been. Instead UNPROFOR was reinforced, NATO airpower was used and preconditions for the Richard Holbrooke-brokered Dayton peace agreement were in place. In summary, the EU clearly had a policy but it is equally clear that the EU experienced a largely Anglo-French-sponsored policy failure.

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[8] European Dis-union cannot achieve much. But France, Germany and the UK did play a certain role in the diplomatic game leading to the war.

The second example concerns an EU role in security and defense. According to two American defense analysts, the defense dimension of the EU has to be a failure, because the EU does not possess aircraft carrier battle groups. When reading their analysis, we learn that among Europe's many weaknesses, 'the most serious (…) stems from a lack of fleet carriers and a satisfactory airlift wing' (Birch and Scott 1993, pp. 273-274). A critical response would point out that the two defense specialists seem not to take the rather modest objectives of the EU defense project into consideration. The aspiration is not to *wage* and *win* wars but, slightly more modest, to engage in peace support operations. It is a well-known fact that most peace support operations do not require aircraft carrier battle groups.[9] In other words, Birch and Scott do not compare ends and means but compare the EU to the US, and because the EU is lacking the US 'big hammer', EU military action must by necessity end in failure.

The third example is provided by Robert Kagan, who has characterized the CFSP with the following words: 'The truth is that EU foreign policy is probably the most anemic of all the products of European integration.' For Kagan, Europe is from Venus, living in a postmodern paradise, fully unaware of cruel conditions in the Hobbesian world. The EU is therefore, by definition, incapable of conducting a real, non-anemic foreign policy (Kagan 2002, p. 20; see also Kagan 2003).

The fourth example concerns the mode of decision-making. According to this example, EU foreign policy must be a failure because it is *intergovernmental*, not supranational. This is a typical verdict of European Commission officials and European federalists respectively. A critical response would point out that NATO has never been deemed a failure by default, even though it has been based on intergovernmental foundations from the very beginning. Intergovernmentalism does not require a rotating presidency or the absence of a general secretary. Yet for a long time, EU Member States concluded that they could afford the luxury of keeping the former while avoiding the latter institutional asset. Furthermore, it should be noted that only the CFSP and ESDP parts of EU foreign policy are intergovernmental, whereas important policies such as trade, development and enlargement are conducted in a supranational mode of governance.

Many more cases of failure could be mentioned. Thus I do not argue that there have been no failures, or that EU foreign policy-making has been one long row of successes. To argue along such lines would be foolish or apologetic. I have no intention to represent either option. However, there are reasons to point to a number of significant 'non-failures', thus emphasizing the counterclaim that, actually, there has been more EU foreign policy than many seem ready to acknowledge. This image will be in focus in the next two sections.

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[9] Though deployment of the rather small European aircraft carriers has happened, for instance during conflicts in former Yugoslavia (see Jørgensen 1997).

Potentials

In recent years, awareness of the EU's material assets and global commitments has been steadily increasing. It has been pointed out that the EU represents 26 per cent of world GDP and constitutes the largest trading block in the world. Furthermore the EU and Member States combined provide a very significant part of world development aid; a very significant part of troops to peace-support operations, including UN peacekeeping operations. The EU is committed to support post-conflict resolution processes in countries like Somalia, Bosnia and Kosovo. Finally, the EU and Member States have – combined – more diplomats than any other world region, even more soldiers than the US. However, such aggregated data usually function as a prelude to the argument that, given such gravity, the EU *ought to* play a much more prominent role in contemporary world politics. In my view, we can look at such normative statements in at least three ways. We can note the *aspiration* to become a global player. No single Member State can possibly expect ever (again) to reach a similar level of aspiration, except, obviously, cases when processes of mental self-aggrandizement are running ahead of realities. Furthermore, we can acknowledge the existence of not only the aspirations and desires for recognition but also the presence of a material basis for playing a global role. In other words, the aggregate data are not made up. The data represent a reality which is often unrecognized because Europeans are not used to looking at things this way. In a Kantian language, the EU has capabilities *an sich* but only to a degree *für sich*.

Neither the aggregate material basis nor the aspirations or potentials can realistically be expected to be automatically cashed in and translated into influence or power. Instead, it seems that the capability to translate potentials into accomplishment is falling behind aspirations. Why is that? Some may think that new hardware solutions are required. I tend to agree. It could be traditional solutions in terms of new institutional design. The present combination of foreign ministries and EU institutions has proved incapable of delivering sufficient value for money. Similarly, European defense has a hopeless cost-benefit balance and communication networks among policy-makers are largely obsolete. The IGC 2003-04 has prepared new treaty provisions. For the first time ever, treaty designers have explicitly mentioned an EU Foreign Minister. The idea is to merge the positions presently occupied by Javier Solana and Commissioner Benita Ferrero-Waldner. The key problem is that Solana represents the Council of Ministers. He can travel the world, give talks, negotiate, mediate and so on. But the institutional back-up for conducting the EU's foreign policy is weakly developed for example, a budget of only about 48 million euros). It is the Relex Commissioner who has a diplomatic service at her disposal – some 2,700 people; furthermore, a budget of some 700 million euros per year. In other words, the proposed fusion is about merging political authority with administrative and financial means, expecting that the two levels will trigger organizational and political synergies. It takes legal provisions to create the legal framework for such

a merger and such provisions are precisely the novel features in the Constitutional Treaty.

But institutional hardware solutions would be *insufficient* and it would be wrong to use them to solve problems of a different kind, for instance *software* problems. Which kind of software? Software solutions are necessary in terms of ways of thinking foreign policy, political-strategic visions of the EU's international role in the 21st century and public philosophies – values and principles – guiding policy-making.

What would it take to upgrade European foreign policy? If the goal is to carry the EU towards a global leadership role, it is fairly easy to specify the steps that need be taken. But there are some pitfalls along the road, so I will present two contradictory arguments. The first argument begins with a presumably well-known plea: 'send more money, diplomats, soldiers and institutions'. According to this line of thinking, it is not without costs to be a key player at the global level. In this context, note that during the last decade the budget for the EU's international activities have been steadily increasing. A global leader will most likely meet all sorts of demands for money: blackmailing states, free-riders, need for side-payments in order to achieve agreements, the costs of keeping failed states floating, that is, avoid their collapse, and so on. Furthermore, the process of turning global visions into reality needs people to do it, skilled people. In short, diplomats to handle communication, negotiate and bargain on behalf of the Union. Sometimes diplomacy works better if backed by a credible military force. Soldiers are therefore necessary to constitute such a credible military force. If we look at all the crises around the world calling for Petersberg task missions, the conclusion is the same: send more soldiers, skilled soldiers. Finally, given that the present institutional set-up does not produce optimal political outcomes, a need for more institutions seems relevant. In summary, the intuitive argument leads one to expect the following: it is going to be expensive.

According to the second argument, the counterargument, the EU does not need more money, diplomats, soldiers or institutions. On the contrary, less is potentially better. A few examples illustrate this point. Consider development assistance. Combined, the EU and Member States constitute the single largest aid provider to the world. Is this unique contribution translated into political power in global development institutions like the World Bank, the IMF or the UN? Is it likely that an even bigger budget would make this happen? It is reasonable to have severe doubts. In other words, the EU and Member States could usefully improve their performance in terms of translating economic assets into political power, that is, they should demonstrate capacity to act as a structural leader. Concerning diplomats, it is a fact that Europe has some 45,000 diplomats working around the world. In Washington, there are around 1,000 European diplomats. Does this gigantic workforce deliver the assets it takes to become a global key player? Could the governance of diplomatic services be greatly improved? Made more efficient? Perhaps this could even be accomplished with fewer diplomats? Perhaps private sector strategies for 'lean production' could be employed? Put differently, the EU

and Member States have opted for the possibly most expensive solution, an arrangement where many tasks are not only duplicated but performed as if Member States were not constituent parts of a Union. Therefore each Member State runs its own diplomatic service (to the degree they each can afford and has aspiration for it). On top of this we have the EU institutions, in the various modes of integration that have developed (intergovernmental and supranational). Concerning Europe's armed forces, two words summarize developments after the end of the Cold War: restructuring and hot peace. Restructuring has been a constant and the demands of hot crises the single feature which has most profoundly challenged customs and habits developed during the Cold War. Nonetheless, Europe's armed forces remain over-staffed and less capable than demands require. In short, less could potentially be better.

Finally, the launch of the euro implies that the EU will acquire new options in influencing international monetary policy, possibly including the IMF. This potential has not yet been brought into operational policy-making. IMF policy-making vis-à-vis the Turkish currency crisis was not influenced by the EU although the Turkish economy is important for Europe. A similar mismatch between EU stakes and EU influence can be observed in areas as different as development policy and the Middle East peace process. Whether the ambition to become the world's most competitive economy by 2010 can be met is doubtful, yet remains to be seen.

The Rise of a Great Power

In a comprehensive perspective, the misery and failure images are insufficient to characterize the state of EU foreign policy. In the introduction, I mentioned some of the key issue areas in EU foreign policy. The EU negotiates on behalf of Member States at the WTO, commands peacekeeping troops. In a world politics perspective, the enlargement process is of truly strategic importance, because Europe in the future will operate on a single legal foundation, constituted by the *acquis communautaire*. Europe, which used to be the archetype of international politics, seems to have been substituted by its antithesis. We have even seen some successes and some examples of EU global leadership. First, the influence of the EU in UN politics has increased during the 1990s and the EU now plays a significant role in General Assembly committee politics. To a degree, the rise of the EU reflects the decline of US interest in the UN. However, rescuing the UN from institutional decay is a frightening challenge. The EU has yet to demonstrate that it has leadership capabilities to carry such a magnificent burden. Second, the EU has been responsible for peacekeeping operations in Macedonia and Congo. The operation in Macedonia was even launched when the crisis over Iraq was at its peak, that is, when it was claimed that the CFSP had been seriously damaged – if not actually disappeared. The EU also runs police and military operations in Bosnia. Obviously, commanding such operations does not amount to a major military role – which the EU has never aspired to in the first place. Yet the

examples do suggest that the EU has accepted responsibility for European security. For Europeans, Europe is self-evidently not an insignificant part of the world. In a wider perspective, it is also true that the only military field where the EU plays a major role concerns peace-support operations. However, the terror attacks of 9/11 have prompted a new type of territorial defense and this could imply that the EU in the future will play a role in the modern defense of Europe.[10]

Despite fierce opposition from the US, the EU has continued sponsorship of both the International Criminal Court (ICC) and the Kyoto Protocol. Agreements have been signed and the ICC was inaugurated in July 2003. US attempts at undermining common EU policies have been rebuffed. In September 2003 the Palestinian politician, Qurai, asked for US and EU guarantees when he contemplated accepting the offer of becoming Palestinian Prime Minister.

Within the framework of the WTO, the EU and the US has provided global leadership in trade negotiations.[11] If we take our point of departure in the misery and failure images, this EU global leadership role is quite an accomplishment, if not beyond imagination. Nonetheless, journalists, diplomats and academics all report that the leadership role is there, only to conclude in their next article that the EU plays no role in foreign policy.

As regards competition policy, dramatic changes are underway. Within this area the European Commission has perhaps its strongest powers. In order to meet the challenges of globalization, a massive process of restructuring has been launched, implying that the European Commission delegates some of its powers back to the national level and, thus freed from a substantial administrative burden, becomes a truly powerful player at the global level. It remains to be seen whether the operation will be successful or not.

Clearly, this list of non-failures could become much longer. However, there is no need to use more space on this issue. The point I am trying to make should be clear by now. Namely, that a balanced analysis of the EU's absences and presences on the global scene raises some serious doubts about casual jumps to conclusions about the qualities of the EU's international activities. In other words, a comprehensive balance sheet would present a much more complex picture than the misery and failure doctrines suggest.

Constituting EU Foreign Policy

Constitutions provide meta-norms for the governance of entities, whether such entities are states, firms or the EU. The Constitutional Treaty is no exception to this. It would, nonetheless, be misleading to believe that the EU so far has been

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[10] Mette Eilstrup Sangiovanni (2003) has argued that the ESDP 'is not good for Europe'. By contrast, Everts (2003) has proposed 'two cheers for the EU's new security strategy'.

[11] The meager outcome of the WTO 2003 meeting in Cancun demonstrated that the US and the EU are not the only players in the WTO game.

governed without guidance by meta-norms. Throughout the history of European integration, constitutional principles and norms have slowly, and in a piecemeal fashion, been developed, in fact an entire constitutional *acquis* (Weiler and Haltern 1998). It follows that the prime *raison d'être* of the Constitutional Treaty is to consolidate and weave the already existing patchwork of meta-norms into a more structured and closely knit fabric. Furthermore, the process leading to the Constitutional Treaty demonstrates that the European political system has finally recognized treaty reform as a form of constitutional politics (Greve and Jørgensen 2002). It is hardly surprising that this recognition has been highly contested.

The Constitutional Treaty contains a range of provisions concerning the governance of foreign policy. Most of these provisions have been part of the political *acquis* guiding the governance of EU foreign policy. They are well known, have been described in a rich literature (see, for example, Smith 2003; Smith 2004) and in the present context there is no need to address the issue any further. Instead I will briefly describe the draft treaty's novel features regarding the governance of EU foreign policy and then briefly discuss their potential significance.

The Constitutional Treaty introduces three prime novelties. First, it suggests a connection between, on the one hand, basic European values and principles and, on the other hand, the nature of EU foreign policy. This feature has been present in previous treaties but never to the same degree as in the Constitutional Treaty. Reasons for the change should be found in the process of inventing the EU's international identity, including the EU-'domestic' and international recognition of the EU as an international actor and, furthermore, recognition of the EU for what it is and stands for. It is in this context that European values and principles play a key role in the genesis of 'a certain idea of the EU'.[12] Both the Prodi Commission and the High Representative, Javier Solana, have done their best to flesh out defining values and principles. It is significant that the Director-General of the Council's foreign service, Robert Cooper, has analyzed the process through which Japan and Germany 'reinvented themselves' after the Second World War, 'The choices each made were essentially about the kind of country they wanted to be. Interests and policies flowed from that and not the other way round' (Cooper 2003, p. 135). It is predictable that the Constitutional Treaty summarizes and synthesizes these ideational, identity and normative dimensions of EU foreign policy practice. Whether ratified or not, the treaty will function as a milestone in future engagements in (re-)defining the EU as an international actor and, hence, identifying the nature of EU foreign policy.

Second, the Constitutional Treaty proposes the creation of a European Foreign Minister. While the gradual development of an EU foreign policy has been marked and often obstructed by the seemingly perpetual dilemma between supranational

[12] Previously, there have been 'a certain idea of France' (see Charles de Gaulle, *War Memoirs*, 1984) and 'a certain idea of Britain' (see former senior diplomat John Coles 2000).

and intergovernmental modes of governance, the idea of a Foreign Minister seems to represent an attempt to identify a hybrid, a third way. In this respect the position of the Foreign Minister is significant: chairing the Council Foreign Affairs Committee and also being the Vice-President of the European Commission. The minister is supposed to take foreign policy initiatives, assure coordination and consistency (horizontally as well as vertically), represent the Union vis-à-vis third parties and, in general, be responsible for the making, the conduct and the implementation of EU foreign policy. In other, understating, words: it is a very demanding job. Without proper political and administrative support, it will be a mission impossible.

Third, the issue of proper administrative support is being addressed by provisions describing a reform that amounts to a thorough refurbishment of the diplomatic service institutions, if not indeed the launch of a genuine European foreign service. The basic idea of the reform is to give the Foreign Minister administrative clout and the means is collecting a number of existing institutions under one heading, the network of external delegations being one significant example. As there is no space to go into detail, let me return to my introductory remarks about meta-norms. The Constitutional Treaty aims at creating a new normative, political and administrative framework for the conduct of EU foreign policy. By contrast, the treaty does not specify the precise implications of that new framework. That task has been left to politicians and officials, implying that they have a long and demanding agenda in front of them. Issues to be addressed include whether the European Foreign Service should include all policy fields or leave some apart. Giovanni Grevi and Fraser Cameron (2005) suggest that trade and development should remain separate. In case these DGs will not be part of the EU's Foreign Service, how should inter-organizational relations be defined? Grevi and Cameron also have recommendations concerning the Foreign Minister's cabinet, deputy and special representatives.

Combined, the novel institutional features seem to trigger significant changes (see, for example, Duke 2003; Everts and Keohane 2004). The foreign policy process will take place in a new institutional key. In turn, this could have a significant impact on the making and conduct of EU foreign policy. However, a balanced analysis should also take counterarguments into consideration. Hence, I point to three relevant factors. First, the letters of constitutions do not always reflect the reality-to-come. During the 1930s and 1940s, Sidney and Beatrice Webb analyzed the Soviet constitution. On the basis of a formal-institutional approach, they concluded that it was a great constitution and that the Soviet Union was a brilliant political system (Brown 1999). From this example we have learned that studies of the functioning of the constitution and its implementation should go beyond a mere reading of the letters. But the EU's constitution is sometimes read in this old-time superficial and nominal fashion by EU-positive and EU-negative interpreters alike.

Second, constitutional original intent is not necessarily the most interesting or relevant aspect, when trying to assess the significance of provisions. Terence Ball

(1995) steers a prudent course between complete irrelevance of original intent and letting intent completely determine outcomes. The balance gains importance when trying to assess whether we have a constitutional *treaty* or a *constitutional* treaty in front of us, that is, a meta-norm transcending the *form* of a treaty, formally constituting the EU as a genuine European political system. There is a complicating factor to this discussion, namely that EU constitutional interpretation has been characterized by a peculiar bias. Debates about the constitution have primarily been conducted by legal scholars. Quite naturally, they have emphasized constitutional law aspects. Even constitutional politics has been analyzed predominantly from the legal perspective. By contrast, political science scholars have been characterized by a structural inability to analyze European constitutional politics. Only very recently has the European Union been regarded as a genuine political system (Hix 1999). Political scientists believe that the EU has no constitution but may possibly get one. Leading legal scholars contest this view. They emphasize how the EU's legal foundation during the last three to four decades has acquired ever more constitutional qualities. This process has been sponsored by the ECJ, by a significant part of the epistemic community of lawyers and by the Council's implicit acknowledgement (Weiler and Haltern 1998).[13] The general debate about the EU's constitution has not been about foreign policy but it is worthwhile noting that lawyers with expertise in the legal dimension of foreign policy adopt a similar interpretation (Curtin and Wessel 2003; Griller 2003). The result is that there is a significant gap – constitutional politics – in the political science literature and, in turn, that relations between constitutional law and constitutional politics have been largely unexplored.

Finally, very few foreign policy analysts introduce their studies by means of looking at constitutional matters. Indeed, few constitutions have much to say about foreign affairs. Yet, there have been cases in which constitutions had an impact on the conduct of foreign policy. At the beginning of the 20th century, the Italian constitution did not allow the Italian navy to have airplanes, with the consequence that the new strategic asset, aircraft carriers, was a no-go for Italian admirals. Similarly, the dominant interpretation of the West German constitution did not allow deployment of German troops *out of area*. Finally, the Nice Treaty contains provisions about 'common strategies' and 'common action' and so on. These provisions have prompted problematic attempts to give them substance. Seemingly, Member States have regarded common strategies as a kind of Christmas tree, ready for decoration with their pet concerns. The final result did not quite live up to expectations about strategy. Treaty provisions are legal concepts, seldom suitable for the making of operational foreign policy.

[13] Among lawyers, the argument about the actually existing constitution has always been contested. For a brilliant discussion, see Weiler and Haltern 1998.

Conclusion

The conclusion is that EU foreign policy has evolved during the last 30 to 45 years. This may sound banal but it actually contradicts the core assumptions among most foreign policy analysts. When precisely the policy was launched depends on our focus and criteria in terms of coherence, consistency and impact. This kind of specification should be greatly welcomed to studies of EU foreign policy and substitute general, sweeping statements about the essence of the EU and its foreign policy made on the basis of a very limited slice of the cake. Furthermore, we can conclude that the impact of the observer on findings is significant. The mindsets of analysts vary considerably and greatly influence assessments, ranging from misery and irrelevance to potentials and significance. When assessing the performance of international actors, such contrasting views are not unusual. Remember the image of US declining power which was popular in the late 1970s and 1980, and then contested by Joseph Nye's *Bound to Lead* argument (1991). Finally, when assessing the constitution of the EU as a global player, I have pleaded for a balanced approach. On the one hand, I fully acknowledge the potential significance of the Constitutional Treaty and its provisions on foreign policy and the policy process not least. Particularly the 'invention' of a European Foreign Minister, an embryo Ministry of Foreign Affairs and the recognition of the EU as a legal entity would contribute to streamlining the foreign policy process, contribute to a more coherent and consistent foreign policy, and allow the EU to enter international agreements and treaties. However, the treaty will be only one among several factors that, combined, will determine the EU's role in world politics. Furthermore, it remains to be seen which new organizational features can be introduced in the possible absence of the Constitutional Treaty. For instance, there is nothing in the Nice Treaty preventing EU Member States from giving the EU a more prominent role in international organizations.

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Chapter 9

The EUropean Federation

Søren Dosenrode

> Reflecting the will of the peoples and the States of Europe to build a common future, this Constitution establishing a Union […], within which the policies of the Member states shall be coordinated, and which shall administrate certain common competencies on a *federal basis*. (The later removed art. 1, Establishment of the Union, CONV 528/03, ANNEX I; Title I; my emphasis, SD)

In a number of recent contributions the federal character of the EU is taken as a given fact (for example, von Beyme 2005; Thorlakson 2005; Christin, Hug and Schulz 2005). The aim of this chapter is to give an in-depth analysis of this 'fact'. In Chapter 2, I set up some variables to look at, when analyzing a polity, to see whether it is a federation, namely:

- Statehood;
- The founding members;
- The legal basis of the federation;
- The governmental system;
- The division of power;
- Legitimacy and participation;
- Resources.

This list will be used to analyze the state of the Nice-EU and the CT-EU and to structure this chapter. In doing so, I will include the findings of the previous chapters.[1]

Statehood[2]

In itself statehood or state as concept is contested. It is old-fashioned, and not always easy to come to grips with, especially as the development in the intensity of cross-border interactions between individuals, firms, NGOs and so on has

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1 But not refer to them all, and not necessarily agree with them.

2 As the question of the Union's statehood is contested, and as I include the Union's foreign political actorness under this headline, this first section occupies more space than other, less controversial issues.

increased dramatically since the Second World War. Thus the hard shell around the state which the classical realists expected has been penetrated, but on the other hand the state has not withered away as some liberal scholars expected in the 1970s and 1980s. The end of colonialism in the 1950s and 1960s, as well as the end of the Cold War and the breaking up of the Soviet Empire in the 1990s, did clearly show that the notion of 'state' is alive and kicking. We are clearly not beyond the state! In Europe itself, the populations in Denmark, Sweden and the United Kingdom are reluctant to further integrate as they fear it would jeopardize their states, and that is exactly why Norway and Switzerland have not even joined the EU.

The discussion of the EU's statehood has divided the academic community. At one end of a continuum, McKay (2001) and Dosenrode (2003) argue for the statehood of the EU, whereas Moravcsic (1998) at the other end denies this. In the middle, one finds, for example, Caporaso who already in 1996 called the EU an international state, or Simon Hix who considers the EU to be a full-functioning political system (1999). As I have already argued for the statehood of the EU elsewhere (for example, Dosenrode 2003) I only give a short summery here. Dunleavy and O'Leary's (1987, p. 2) five characteristics of what they describe as a 'modern state' are used to structure this section.

Dunleavy and O'Leary's first point is that the state should be a recognizable separate institution, which should create identifiable public and private spheres. To make a long story short, let me simply list some of the attributes giving the Nice-EU a distinct public sphere: the European Council, the Council of Ministers, the Commission, the Parliament, the Court of Justice, the European Central Bank and so on. The EU has its own flag, a national hymn, a citizenship, a small military force. This list would in itself make the Nice-EU score high on a continuum. But the CT-EU offers an extension to this list, providing a whole constitution as successor to the fragments which today gives the EU a constitution. The CT also adds the Union's values (art. I-2 CT), objectives (art. I-3 CT), declaration of the Union's legal personality (art. I-7 CT), the listing of its symbols (art. I-8 CT) and the Charter of Fundamental Rights (part II CT).

The second characteristic demands that the state is the supreme power within its territory and by definition the ultimate authority for all laws. It is a central notion that we as citizens accept that the state issues binding decisions (legitimacy).[3] Equally important is that no state interferes with the internal affairs of another state and legislates on its behalf. The EU issues legislation, which is directly applicable for the citizens in the Member States. The legislation is passed by the Council of Ministers in which representatives of the 25 Member States sit. The legislation is often passed by qualified majority vote which implies that, for example, a German minister may very well vote against it, but if there is the needed majority, the act of legislation will be applicable in Germany anyway. Should a Member State choose not to follow EU legislation, it can be brought

[3] In the following, I will simply understand legitimacy broadly as the citizen's acceptance of the government.

before the Court of Justice and be forced to follow the law if the European Court of Justice decides so. Thus the Member States do not possess the ultimate authority any longer. Also important in this context is the fact that an EU citizen may sue 'its' state at the European Court of Justice if the person feels his/her rights are neglected. Adding to this, approximately 25 per cent of all new legislation in Denmark originates in Brussels.[4] Thus it does not seem exaggerated to recognize that the EU, to a very large extent, has the right to issue legislation binding for the individual Member States, and to enforce the law, should a Member State decline to comply with it. But there is room for the Member States to legislate within certain policy areas. Does this pose a problem in regard to the second criterion? If we look at federalism theory,[5] the answer is negative. The federal government has certain autonomous competencies, and the states have others (see Dosenrode, Chapter 2 or Klöti 1997, pp. 6-8). Together these two levels constitute the federation, which is sovereign. It is here that the discussion of a catalogue of competencies turns central; in the Treaty on the European Union (TEU) the competencies are scattered around, much like in the Austrian constitution. Thus, this second criterion has been fulfilled, too, and the EU scores fairly high. In the CT the characteristic catalogue of competencies is set up (part I, title III CT), and it includes 'areas of exclusive union competencies' (art. I-13 CT), which is linked to art. I-6 (CT).

The next two characteristics are fairly quickly dealt with. The third stipulated that laws and regulations should be applicable to all without exceptions due to rank or position. This also applies to EU law. The laws are applicable to everybody they address. Equally the observation that the state's personnel are mostly recruited and trained for management in a bureaucratic manner is applicable to the EU, for example, the civil servants are mostly recruited through competitions, '*concours*', and they are trained in a traditional bureaucratic manner. Thus both criteria are fulfilled, and this would not be changed in the case of ratification of the CT.

The question whether the EU has the capacity to extract monetary revenues (taxation) to finance its activities from its subject population is an important one. The Union does have the ability to levy taxes, but it is small, nearly symbolic. This implies that EU institutions, to a very large extent, depend on financial contributions from the Member States, thus restricting their freedom of action.[6] Therefore, this criterion is only marginally fulfilled if one looks at the EU

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4 Unpublished counting made at the Institute for History, International and Social Studies, Aalborg University. Apart from the directly applied legislation, one has to add the 'socialized' laws, which are national, but made in an 'EU-fashion', which had otherwise not been used. One may talk of 'socialization' (Dosenrode 2002) or 'osmosis' (Rasmussen 2002).

5 Holzinger and Knill (2000, p. 6), and Börzel and Risse (2000); but Lepsius (2000) is critical of this approach.

6 This is clearly demonstrated in the yearly budget negotiations, when the Council of Ministers normally declines an application from the Commission for a larger budget in order to create more positions in the Commission.

institutions. Should one look at the EU with federal eyes, the picture is not unknown; for example, the German constitution of 1871 left the federal government with the same problem. The question of the Union's resources is discussed below.

Dunleavy and O'Leary's five criteria are central and of an organizatorical nature but also of a traditional 'domestic policy' approach. Thus one should add three additional points to the five points analyzed above, the first organisational, and the second and third sociological:

- The state has the official monopoly to conduct foreign relations, and;
- To secure endurance and stability a modern state must build upon a core-culture common to a vast majority if not all citizens. This core culture is the fundament of the values, rules and laws governing the civil society.[7]
- The state is the focal point of the population's loyalty (is a political community).

The sixth characteristic concerned the state as foreign political actor. As discussed in detail elsewhere (Dosenrode and Stubkjaer 2002, pp. 1-34), the Union today possesses an international actor capability of its own. An actor capability which by far exceeds that of some of the individual Member States, for example, that of Sweden, Spain or Germany.[8] But the actor capability is mixed. One part (the supranational one) is conducted by the Commission, another (the intergovernmental or con-federate one) is conducted by the Council of Ministers, which has appointed a High Representative of the EU, and the third part has been kept by the Member States, although this part, too, has been restricted insofar as the Member States may not take actions running contrary to the Union's foreign policy. In other words, the freedom of action of the Member States, one of the prime prerogatives of national sovereignty, has been strongly limited at least on paper. Thus, the EU possesses the foreign political actor capability but it is shared

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7 When discussing the concept of 'culture' it is important to distinguish between the underlying or core culture and the present manifest culture. To the former belongs the fundamental world-view and understanding of human nature; the commonly highest values and so on. The manifest culture includes guiding morals and rules and societal structures (for a thorough discussion, see Gullestrup 1992, pp. 38-49). It is important to remember that, albeit there is a common core culture, it does not imply that the manifest culture is or has to be totally identical in all entities (an example is the diversity of the Christian churches in Europe; they share a common core culture, but the manifest culture or form includes such different branches as the Roman Catholic, the Orthodox, the Reformed, and the Protestant churches).

8 Space prevents a thorough discussion of actorness, but let me refer to Sjöstedt (1977). Actorness is a quality which can vary in strength as one sees when looking at the international system today, with the USA at one end of the continuum and Fiji at the other. Using his criteria, it is possible to argue that the EU is an international actor in its own right, although it is not a superpower. Sjöstedt has been criticized, but I find his approach basically sound.

with the Member States. Again, looking at federations, this is not a unique case; for example, the Swiss cantons have some limited foreign political rights. The Nice Treaty fulfills this criterion.

But what does the CT bring additional to the Nice-EU? The CT would tighten up the means of the Nice-EU to play an even more active role in the world by adding new institutional features. Catching one's eye at once is the creation of a President of the European Council and a European Foreign Minister. *Nomen est omen*; whereas one could try to say that the President of the European Council was merely some kind of 'super secretary general', there is a tremendous signal power in naming a 'European Foreign Minister'; in case of doubt, only states have Foreign ministers; neither the UN, NATO nor the Red Cross has such an office.

One problem of the EU has been that for decades the Union has been seen as a significant international actor by anyone but itself. Allen and Smith (1990) introduced the concept of 'presence' into the study of EC foreign relations, implying that just being there mattered to the Union's neighbors and to the international society. If one defines power in the old-fashioned Weberian way, that possessing power gives the ability to make others do things they would not otherwise have done, then the development of the EC/EU in the years after Allen and Smith's article proved them to be correct. The way applicant countries are striving to solve old conflicts, thought unsolvable (for example, minority rights in Hungary and Romania), as well as *de facto* implementation of human rights (for example, Bulgaria, Romania and Turkey) speaks its clear language, as does the huge number of third countries having diplomatic missions accredited by the EU.[9]

Now a President of the European Council and a Foreign Minister are introduced to strengthen the Union's international profile and coordinate the existing infrastructure. Whereas the division of competencies between the two offices are unclear in the CT, it seems clear that the mix of letting a Foreign Minister become vice-president of the Commission as well as permanent chairman of the Council of Ministers General Affairs Council makes it possible to bridge the quasi-intergovernmental CFSP and the supranational work of the Commission, potentially ending the rivalry between the two and ending the frustrations of the civil servants of the Commission, often doing a lot of the diplomatic work while seeing the High Representative getting all the publicity on the one hand, and assuring coordination of the entire EU foreign policy as well as an efficient use of the large EU diplomatic service with missions all over the world on the other hand, which Jørgensen also points out (p. 178):

> The basic idea of the reform [the CT, SD] is to give the Foreign Minister administrative clout and the means is collecting a number of existing institutions under one heading, the network of external delegations being one significant example.

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[9] One of many practical indications was Yasir Arafat's stop-over in Europe to thank the EU for its support in 1998 after the signing of the Wye memorandum (Dosenrode and Stubkjær 2002, p. 138.)

Normative positions constitute a part of a normal state's foreign policy; the Bush government's wish to spread (Western style) democracy on the one hand, and the Iranian government's attempts to combat the same Western culture (for example, in its letter to the US government of 8 May 2006) on the other hand, are illuminating examples. A bit hidden away, the Nice Treaty (art. 11) mentions that the EU foreign policy shall have as its objective to preserve peace, promote international cooperation, develop and consolidate democracy, the rule of law, the respect of human rights and fundamental freedoms. In the CT this has been promoted to the first article of title V (The Union's External Relations), and not only that. Whereas the formulation in the Nice Treaty was courteous, just like a child using its big toe to test how cold the water is before jumping in, the formulation in the CT is very clear and ambitious (art. III-292):

> 1. The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

But before getting euphoric about the formulation, one has to remember that the CT keeps up the unanimity principle as a basic principle of the CFSP, thus one should not expect a dramatic change in the Union's foreign policy behavior. In the same vein Jørgensen reminds us of three general points concerning the assessment of legal texts (pp. 178-179):

- The letters of a constitution do not always reflect the political reality, and Jørgensen refers to the interwar Soviet Union. Although the Soviet Union was a dictatorship stained with blood and not a democracy in the Western meaning of the word, there is a point, as Kasanen also points out in her analysis of the role of the Finnish presidency in chapter 5;
- The intent of the makers of the constitution may not be the only relevant source when trying to evaluate the effect of a constitution on the actual foreign policy, but it would also be wrong to ignore it;
- Finally, very few foreign policy analysts introduce their studies by means of looking at constitutional matters. Indeed, few constitutions have much to say about foreign affairs. Yet, there have been cases in which constitutions had an impact on the conduct of foreign policy. At the beginning of the 20th century, the Italian constitution did not allow the Italian navy to have airplanes, with the consequence that the new strategic asset, aircraft carriers, was a no-go for Italian admirals.

Above I have argued that the EU does have a foreign policy of its own and thus fulfills the criterion.[10]

An important factor in 'state-building' is to ensure stability and endurance (criterion 7). For this purpose it will be important to build on a core culture[11] common to a vast majority if not all citizens. From a sociological point of departure, one cannot amalgamate two units with different core cultures and expect them to last. It is not enough to declare one's belief in human rights and democracy, as such declarations might just serve as political rhetoric to obtain a political aim. To build a sustainable state, one has to share the core culture. There is such a core culture in the EU. In Uffe Østergaard's words (1993, p. 406) the European core consists of four elements:

- Adherence to the French republican, political ideal;
- Participation in the modernization following the (British) industrial revolution;
- Incorporation of the German romantic idea of collective and individual identity;
- All of the previous based on the fundament of Catholic and Reformed – but not Orthodox – Christianity.

The values mentioned in the CT are stated already in the second article (Art. I-2 CT):

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

If one applies Gullestrup's division of culture in manifest culture and core culture on the two definitions above, one sees that Østergaard includes the core values which he identifies as the Catholic and Reformed versions of Christianity. The Convention and later the IGC did not want to include references to Christianity's role as a part of the European core culture. Thus the CT only lists manifest elements of the European culture. The present 25 Member States, with or without the CT, all adhere to the values stipulated in the CT, thus fulfilling this criterion too. But they do not all share Østergaard's view which may potentially endanger the European project.

I have included the last point – the state is a community – with some hesitation, and perhaps it would be more appropriate not to consider it a criterion, but as a condition for endurance and stability (already Aristotle looked at states as a community). Historically, a feeling of community or loyalty to the state has not been a condition either to found a state or to be able to talk of a state at all. Still, loyalty towards the state, a certain feeling of community, is the glue which ensures

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[10] For an in-depth analysis, I refer to Dosenrode and Stubkjær 2002, chapter 1.

[11] Hans Gullestrup 2003, p. 48.

stability of the state in question. And how then is the feeling of community within the European Union? Vaclav Havel searched in vain for the heart of the EU in a speech at the European Parliament in spring 1994, and later the late President of the Commission, Jacques Delors, launched a project aimed at giving Europe a soul. Both incidents indicate that the feeling of community is fairly low.[12] But according to Eurobarometer (June 2006, p. 46) there are signs of a growing feeling of belonging to the Union:

> In autumn 2005, 48% of European Union citizens see themselves as citizens of both their country and Europe, while 41% of the interviewees see themselves as only 'national' citizens. People who see themselves as 'European and citizens of their country' represent 7% of the population interviewed and people who see themselves as only European represent a marginal percentage (2%).

The creation of a common European currency, the adaptation of a flag and a national hymn, the exchange programs for students and scholars, the same design of driver's licenses and passports, all have to be seen as contributing to the creation of a common identity, a community. Seen with federal eyes, the above-mentioned score is fairly good. Experience from various federations (for example, Switzerland) clearly shows that a citizen can feel loyal both to his state and the federal state (as was actually argued in the United States of America in the *Federalist Papers* more than 200 years ago). As a matter of fact, a feeling of loyalty towards the Member State is essential, if a federation shall remain. Without this loyalty a federal state will very soon turn into a unitary state.[13]

In this part, it was attempted to show that the Union fulfills all the stipulated criteria. Thus, it seems reasonable to conclude that the Union does possess its own statehood. But statehood should not be equated with being a great or super-power.

As mentioned in Chapter 2 of this book, Dunleavy and O'Leary's model is rather static with a certain 'either-or' connotation. But as state-formation as well as the 'living' of a state can be looked at as a process – some would even look at a state as an organism – it is important to add the dynamic element. Thus one could consider the criteria as continua, where a certain polity can score from high to low.[14] From the analyst's point of view, this is not making things easier, as it unfortunately implies that it is getting less clear-cut when a polity is 'a state'. But it

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[12] The question of transfer of loyalty has been discussed in several of the integration theories, for example, federalism (for example, Etzioni 1965) and neo-functionalism (for example, Rosamond 2000, p. 52).

[13] On the other hand Flüler et al. have argued that a common feeling of being 'Swiss' and not Bernese or St. Galloise first arose between the First and Second World Wars (1975, p. 265).

[14] The procedural element is always present, but it is less important as soon as the polity in question has been recognized as 'a state'. When this has happened, the mere recognition bares a conserving element in itself towards the preservation of the obtained status, towards the outside world, although the state may be degenerating inside.

creates a possibility of drawing a more correct picture of a certain polity at a certain time in history.

I have argued that the EU possesses a statehood of its own. But being a state does not imply that the EU is a superpower or a superpower in the making. This is not the place to begin a lengthy discussion of the concepts of state and statehood ('modern', 'modern with postmodern accents', 'postmodern' and so on); I refer to Georg Sørensen's two books on the matter (2001, 2004), but I find his and Jackson's classification of states illuminating (1999, pp. 21-29).

They distinguish between juridical and empirical statehood. The juridical statehood, based on the Montevideo Convention, demands of a state that it has a government, a territory and a population, and that the state is recognized as an independent state by other independent states. But although this dimension is essential in itself, it is very unnuanced insofar as it places Somalia, the Fiji Islands and the US in the same group. Thus Jackson and Sørensen introduce the concept of empirical statehood and ask: to what extent has the state developed political institutions? Which economic basis does it have? And is there a popular support for the state? Scoring high on these variables classifies a state as 'strong'. But 'strong' is not meant as militarily strong; a state can be strong but militarily weak (like Denmark) or weak but militarily strong like Russia.[15] On this background they construct a matrix with four categories. To nuance their categories, I suggest that one should make a diagram with an x and a y axis, where the x-axis is a continuum ranging from strong to weak state, and the y-axis ranging from strong to weak power.

The EU in Comparison to Other States

Using this rudimentary system of classification and tentatively adding a few other states as comparison, the EU would, also tentatively, be placed as a militarily weak power (EU 1) and a 'not that strong state'. If instead of military strength one used foreign political 'actorness', including its importance in world trade and development aid, the EU would be ranked higher (EU 2).

[15] Jackson and Sørensen do not discuss the concepts of militarily strong or weak. I refer to Dosenrode (1993) for an introduction to small state theory.

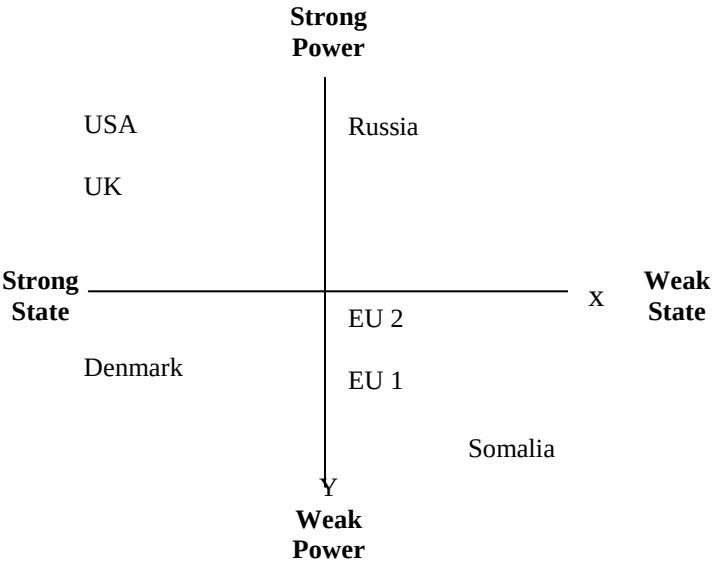

Figure 9.1 Forms of states (inspired by Jackson and Sørensen 1999, p. 24)

The Founding Members

In Chapter 2 of this book it was argued that the founding members of a federation are, as a general rule, sovereign states or territories with outspoken self-determination. When looking at the Nice-EU this is a clear fact, too. It is the states signing the treaties including the CT, not the Commission.[16] And also *de facto* the Member States are the basis for the integration process; it is hard to imagine, for example, the Committee of the Regions pressing forward the integration process against the will of the Member States. As Lähteenmäki-Smith mentioned in Chapter 7 the Committee of the Regions did not succeed in getting some kind of constitutional status alongside the Member States in the CT. It is this 'fact' which legitimizes the idea of the equality of the Member States and the federal government, and which gives substance to the doctrine of divided sovereignty. And, due to the *raison d'être* mentioned above, one must expect that the culture and characteristics of these Member States are protected as far as possible (minority rights).

[16] And according to art. I-60 CT, it is the Member States which can withdraw from the Union, not the regions.

The Legal Basis of the Federation

As mentioned in Chapter 2 Elazar (1987, p. 42) states that '[concerning] the desire or will to be federal on the parts of the polity involved, adopting and maintaining a constitution is […] the first and foremost means of expressing that will'. Auer adds three specific functions of federal constitutions (2005, pp. 423-426):

- The constitution normally defines and guarantees the constituent units. This implies that changes in the composition of the federal level (enlargement, secession, merger and division) must trigger a constitutional amendment. 'Federal constitutions are not merely constitutions of the central unit, enriched by some reference to constituent units. Federal constitutions belong to and constitute units, federal as well as constituent. They are superior to each one.' (Auer, p. 424);
- The federal constitution distributes the power between the federal and the state level. This distribution of power has three aspects: a) setting up the principles for the distribution of power sharing between federation and states. b) 'Operating the initial distribution means that the constitution, the time of its adaptation, enumerates the legislative, executive and financial competences of the centre, or of the periphery, according to the chosen distribution formula' (Auer, p. 424). And c) laying down the provisions for changing the original distribution of power;[17]
- As federations are complex, as de Tocqueville said (see Chapter 2), it is necessary with a scheme to solve conflicts between states, between states and the federation, and between the citizens and the federation.

One could consider these three basic functions as the main arguments for having a federal constitution. In Chapter 3, Abromeit has the above-mentioned functions, too, but goes on adding more, focusing on the rights of the citizens (for example, guarantee of civil liberties, safeguarding of partipartory rights, minority rights, formulation of values and standards).

Thus the next question is whether the EU has got a constitution. The question is answered affirmative and has been so for a while (for example, Weiler 1991, 1997), and the European Court of Justice has itself used the term constitution when describing the treaties (Parti Ecologiste 'Les Verts' vs. European Parliament, case 294/83, ECR 1339) in 1986. Hix sums up (1999, p. 108): 'The two central principles of this constitution [the Amsterdam-EU – SD] are the *direct effect* and the *supremacy* of EU law, which are classical doctrines in federal legal systems.' But it is important to add that the 'constitutionalization' of the EU is only partly due to the treaties; it is to a very large extent due to the rulings of the European Court of Justice. The CT would codify the 'present state of the Union' by laying

[17] This reminds us of the very important fact that federations change over time; they are not static but dynamic.

down the principle of supremacy or primacy of EU law over Member State law when exercising the competencies conferred to the Union (art. I-6 CT).

Governmental System

In Chapter 2, it was argued that both the federal level, and the Member State level needs a full system of government that is an executive, a legislative and a judicatiary, each possessing the ability to act independently of the other. It is fairly easy to see that the Member States possess a full governmental system, but what about the EU?

The Encyclopedia Britannica defines an executive as: 'a person or persons constituting the branch of government charged with executing or carrying out the laws and appointing officials, formulating and instituting foreign policy, and providing diplomatic representation.' Put differently, the executive 1) administrates governmental agencies; 2) enforces laws; 3) conducts external affairs; 4) appoints officials; and 5) issues secondary legislation. Who is doing that in the EU? The Commission springs to mind; it does lead the directorate generals, conduct foreign policy (cf. Chapter 8), appoint officials and issue secondary legislation, but when looked at with 'unitary state' eyes, it is only doing most of it 'by half' and it has no serious means of enforcement. Only from a federal point of view does it make sense to look at the Commission as an executive. As demonstrated in Chapter 2, a division of labor between the federal and the Member State level is normal and necessary, and the lack of means to enforce or implement legislation fits the European-style federations. The modus of appointment is untraditional insofar as it is the heads of state and government (the second chamber) which find a possible President (the Prime Minister). From then on the procedure is normal: the President of the Commission/Prime Minister collects a team of commissioners (ministers), which has to be approved by the European Parliament too (but when looking at the modi of appointing governments in Europe there is also quite a variety – Lane and Ersson 1996, p. 103). But the Commission still has an apolitical air[18] perhaps due to its mixed party political composition, because several of the areas within the competence of the Commission are of a technocratic nature, and compared to Prime Ministers in several European states, it is not possible for the President of the Commission to dissolve the European Parliament.[19] But most of all, a reason for the apparent 'tecnocratility' is found in the Nice-TEU as well as in the CT; the obligation to direct the Union and to lay out the political tracks is the task of the second chamber, the European Council. Compared to other governments, the European Commission is under very strong 'supervision' by the Union's second chamber, the Council of Ministers.

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[18] A former Danish minister described the commissioners as civil servants in a conversation with the author.

[19] As it is in Switzerland today.

The legislative of the Union consists of two unequal chambers: the European Parliament and the Council of Ministers/European Council. In federations, the Member States are always represented in an upper house. In the USA 'the great compromise' treated the states equally in the Senate, where each would be represented by two senators, no matter how large or small the state was. In the House of Representatives, the number of representatives a state could send would depend on the number of citizens. This was the model chosen by the Swiss confederation in 1848. Considering the Council of Ministers as well as its '*de luxe version*', the European Council, as the second chamber, one observes a development from a situation where the small states were 'over proportionally' represented, when counting votes per country, to a situation where this would no longer be the case to the same extent, should the CT enter into force. As QMV is introduced in more and more policy areas, equality of the states is eroded, at least on paper, as unanimity gave small as well as large states a veto-right. Still, in the EU policy game 'great-power alliances' are rare. Alliances are built according to interests and here it is more appropriate to speak of a 'Northern' group, a 'Southern' group and perhaps an 'Eastern' group. The latter could change the pattern of policy-making in the EU, but it is still too early to tell.

If one looks at the way members of second chambers have been elected over time it has varied a lot; from being appointed by 'their' state (early US and Switzerland), to being directly elected (US and Switzerland today). In Germany the members sent by the states are members of the state governments, thus indirectly elected, like the Nice-EU and in the CT-EU. Thus it constitutes no anomaly that the members of the Council are chosen in different ways in the different Member States. The main point is that they all have the same powers, as they *grosso modo* have (Danish representatives have sometimes had a tight mandate from the Danish parliament, but this has merely slowed down the decision-making process, not hampered it).

The actual 'manning' of the Council of Ministers is also an 'anomaly'; it is not a particular person being elected to represent the state, but the state government sending the relevant persons for the relevant meetings, be that a Minister of Finance, Agriculture or Trade. Thus there are no potential 'senators' who may form a distinct social group. This strengthens the governments of the Member States.

In no other federation is the second chamber of such importance as in the EU (Kasanen describes the Council as a 'super legislative'); the closest one gets is in Germany – which still lags far behind. The Council legislates either on the proposal of the Commission, or government, which is a normal feature in a state (pillar I), or on its own initiative (pillars II and III), also a possibility in a normal parliament – but contrary to the ideas of the founding fathers of the Union, who saw the Commission as a motor of integration. When acting under pillars II and III the second chamber is often entitled to make law without much more than consulting and informing the executive and the first chamber. In this sense (concerning pillars II and III) the executive is like a caretaker government,

implementing the decisions of the second chamber, whereas it functions like a normal government with regard to pillar I issues.[20] The second chamber has over the years also taken over the responsibility of mediating and making compromises within pillar I policy areas, thus weakening the executive.

The European Parliament, the first chamber, has been able to increase its powers over the years, from being simply an assembly which could debate whatever it liked and then make a declaration, to being an important institutional player elected directly by the people of the Union. The European Parliament has several traditional tasks, such as approving of the new Commission/executive, approving the budget of the Union, accepting new members of the Union and so on. But it does not have a right of legal initiative; this rests with the Commission and partly with the Council/second chamber. The EP may convey suggestions but they are not binding. When it was stated above that the EP is an important political actor it is due to the 'co-decision procedure' where a bill has to be approved both by the Council and the EP. This procedure gives the EP the possibility of influencing and shaping a proposal from the Commission. And as the use of this co-decision procedure has been expanded, and is foreseen to be even further expanded in the CT, the power of the EP has risen and will continue to do so if the CT Art. I-20 gets into the next constitution or treaty. The basic problem of the EP is that it lacks recognition as a parliament in the same way as national parliaments are recognized by the electorate; it cannot initiate legislation and it lacks Union-wide parties[21] (see Abromeit, Chapter 3, as well as below for a discussion of legitimacy; see also Follesdal 2005).

Perhaps the most mature and developed of the Union's governmental institutions is that of the judiciary, the European Court of Justice (ECJ). Over the years it has changed character from some kind of court *à la* French administrative court to a full-fledged supreme court. Within the areas covered by pillar I especially the ECJ makes decisions in cases of conflicts between the institutions, between the institutions and the citizens, between the states and between a state and a citizen. The ECJ has two main functions (Nugent 1999, p. 262). 'First, it is responsible for directly applying the law in certain types of cases. Second, it has general responsibility for interpreting the provisions of EU law and ensuring that the application of the law, which on a day-to-day basis is primarily the responsibility of national courts and agencies, is consistent and uniform.' The role of the ECJ as 'lawmaker' and 'constitution maker' has already been mentioned. Generally the ECJ has used its powers to the utmost, strengthening the institutions and pressing the integration process forwards, very much like the US Supreme

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[20] An example from the political life of the states is the Danish government in the 1980s; being a minority government, it had to accept and conduct a foreign policy it did not approve of itself; the opposition was very critical of the NATO double track decision, contrary to the government (cf. Dosenrode 1993, pp. 283-285).

[21] Thorlakson discusses the European party system and its developments (2005).

Court. The legal activism of the Court has not been unopposed (cf. the Austrian Chancellor Wolfgang Schüssel).

The CT introduces a new presidency, that of a permanent presidency of the European Council.[22] At the moment the rotating presidency of the European Council is the closest one gets to a President of the Union, and the President of the Commission is the closest one gets to a Prime Minister. The novelty of the CT could be interpreted as a further step in the direction of establishing traditional governmental structures, a President of the Union (the President of the European Council) and a Prime Minister (the present President of the Commission). No doubt, one could also envisage the presidency of the European Council developing into the role of the 'speaker of the house', but the weak role foreseen for the President of the European Council (elected only by the second chamber, thus with little legitimacy; as well as the lack of right to dissolve the executive or the two houses of parliament) might be the way to cut the Gordic knot: getting a head of state(s), and bring more efficiency to the European Council without giving the presidency much power which could erode the power of the Member States.[23]

One principal 'anomaly' of the CT is the Foreign Minister being a member of the executive (vice-president of the Commission) as well as the legislative (permanent chair of the General Affairs Council). That is not in accordance with the division of power as Montesquieu and before him John Locke introduced to Western thought of government and democracy. But when looking at European states one discovers that 'CT-reality' is not really that great a difference to the praxis of several European states. In Denmark, for example, most ministers are normally active members of the parliament, and in Britain the members of the government (executive) are all members of parliament (legislative), and not only as elected MPs but also with the possibility of being an appointed or inherited member (peer).[24]

The policy-making process of the Union has already been discussed in Chapter 4 and one of the main conclusions was that the policy process in the European Union does resemble that of the European-style federations, especially in the later policy phases where the Member States to a very high degree are included in the process. The states are important actors in the European-style federation (with Austria as a possible exception), but not nearly as important as the Member States in the EU. Also the principle of close cooperation between the two levels, and not two parallel administrations, are adhered to, just as the old Althusian maxim of deliberation is.

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22 Kasanen has addressed this question of the double presidency in Chapter 5.

23 Parallel to the right of implementation discussed in Chapter 4. By keeping the right to implement union law at the Member State level, the Member States keep a strong means of regulation.

24 For example, Lord Carrington, 7th Baron, who was a peer (legislative) and a Foreign Minister (executive) in 1979-1982.

Division of Power

In the Lijphart quote in Chapter 2, he stated on the division of power (1999, p. 187): '…the fundamental purpose of guaranteeing a division of power is to ensure that a substantial portion of power will be exercised at the regional level'. And it only makes sense to talk of a federation if at least one policy area is under the sole control of either the federal government or the Member States.

As previously mentioned, the laws of the federal level do not have to be ratified by the Member States to enter into force. It seems to be a general principle in 'real' federations that the powers not explicitly handed over to the federal level remain with the Member States (although there are exceptions to this rule). Also Member States are allowed to legislate within a 'federal area' as long as the federal government does not use its rights. But when this happens, the Member State will have to accommodate to the federal law, as the Central European legal saying 'federal law breaks Member State law' goes. In the Nice-EU there is a constitutional division of competencies and labor between the Union and the states, and to a varying degree, between the states and the regions, depending on the individual state's constitution.

In the Nice-EU there is not a catalogue of competencies *per se*, but the treaty states where the competencies for the various policy areas lie. Within pillar I the Union has sole competency for, for example, the common trade policy and the common customs policy. The Union shares competencies with the Member States concerning, for example, agricultural policy, fisheries and transport. And there are complementary policies within, for example, the fields of economic policy, education and culture. Also there are policy areas which are explicitly excepted from the Union's competencies, for example, some aspects of social and labor market policy.

The CT includes a genuine catalogue of competencies (I-12 – I-18). In the first article (I-12) the various kinds of competencies are defined, then follows a list with the Union's exclusive competencies (CT I-13), the shared competencies (CT-14) and so forth. Thus the CT would bring a more systematic approach to what already exists.[25]

In federations worth their name there will always be forces trying to make it either more centralized or more decentralized. Follesdal (2005, p. 578) mentions a number of ways to stem centralist forces (referring to von Beyme 2005):

> […] to leave the burden of argument with those who wish to centralize in the form of a principle of subsidarity variously specified; or to give member states permanent powers to check Union authorities. The CTE [the CT, SD] pursues both of these options, and grants democratic legitimacy for competing views on the issues.

[25] Christin, Hug and Schulz have taken a somewhat different and stimulating approach to how the division of competencies could be allocated. Contrary to the standard, elite procedure, they have tried to find out which preferences EU citizens have. Not surprisingly they did not get a clear-cut answer (2005).

Table 9.1 Division of competencies

Pillar 1 The Supranational cooperation			**Pillar 2 & 3 The Intergovern-mental cooperation**	**No EUcompetencies – the Member States exclusive competencies**
EU's exclusive competencies	Shared competencies	Complementary competencies	'Special competencies'	
• The Common Trade Policy • The maritime biological resources in the areas included in the treaty • The monetary policy for the 12 Member States in the Euro zone • Customs policy	• Agriculture • Fisheries • The four freedoms • Visa, asylum and migration • Transportation • Competition • Fiscal questions • Social and labor market policy • Environment • Consumer protection • Health • Tran European networks (1) • Energy • Civil defense • Tourism • Union citizenship	• The economic policy • Employment • Education • Culture • Tran European networks (2) • Industry • Economic and social cohesion • Research and development • Development cooperation	• The Common Foreign and Security Policy (CFSP) • Justice and Home Affairs (JHA)	I-Areas which according to the treaty are explicitly excepted from the EU's competencies: • Certain aspects of social and labor market policy • Genuine harmonization of the Member-States' rules for culture, protection and improvement of public health and education II-Areas which fall completely outside the wording of the treaty text and thus are not encompassed by EU competencies: • Military service • Housing • The territories' borders • The organization of the civil service • Form of government • State religion • Member State citizenship • Constitutional rights such as freedom of expression, freedom of association, ownership • Municipality self-government •Etc. (the point of departure is that the Member States have the competence)

Source: Folketingets Europaudvalg. Europaudvalget (2. samling) (info-notat I 150), 28 May 2002 (translated from Danish).

Follesdal also mentions that the European Council remains powerful (2005, p. 578) as mentioned above.

When discussing the division of labor and competencies between the federal state and the Member States, there is a tendency to forget the level below the states; the 'new' third level of the Union. In the Union the category of 'regions' is an incredibly mixed bunch ranging from, for example, the Danish county of Bornholm with 45,000 inhabitants to the German *Bundesland* Bavaria with more than 12 million; Bavaria with its constitutional status as a state of a federation and Bornholm as a region in a unitary state.

According to Lähteenmäki-Smith (Chapter 7) the role of the sub-national regions is increasing but their wishes for an entrenched constitutional status have been overlooked from the Maastricht Treaty onwards, including in the European Convention. Lähteenmäki-Smith attributes this to the two central challenges of the EU in the last 15 years; enlargement and institutional reform. But one also has to add that apart from Austria, Belgium, Germany and perhaps Spain, none of the 25 Member States have a tradition of ascribing constitutional qualities to their regions in the sense that they understand the regions as constituting units of their respective states.[26] In spite of their growing importance, their close liaison with the European Commission, and the Committee of the Regions, the regions are not recognized, by the majority of Member States, as something remotely of the same quality as the Member States. Thus it was, with Member State eyes, natural to give the Committee of the Regions the right to send observers to the Convention, for example, the Economic and Social Committee, but not to send representatives. The regions are hardly mentioned in the CT, not to mention an idea of a 'third chamber'.

But Lähteenmäki-Smith points to the EU-wide importance of the region in relation to the European structural policy (the Structural Funds). The aim of the structural policy is, according to Lähteenmäki-Smith (p. 151):

> […] to re-balance the economic and social disparities between the regions in Europe, and by so doing, to overcome the imbalance in socio-economic development […]. By contributing to this primary aim, the Structural Funds also potentially contribute to the goals of balanced territorial development and territorial cohesion.

The aim of socio-economic cohesion is typical for all federations, and states, and this clearly indicates that the EU, and its aim, is much more than 'a lot of governance'. In spite of its relatively tiny volume, the structural policy is a sign of solidarity, as well as a way of creating new loyalties from the receivers to the EU. Seen in this perspective, the inclusion of territorial cohesion in the draft treaty is very important (for a divergent opinion see Zank, Chapter 6).

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[26] Until 1993 the Czech and the Slovak Republics were united in a federation. In the sense that they were both states in a federation, rising to sovereign states, one could argue that they should be added too.

Summing up, the traditional division of power exists in the Nice-EU, but the CT would systematize it, and give the national parliaments better means to control the powers going to the EU – one remembers Danish MEP Jens Peter Bonde describing the flow of competencies of the Nice-EU as a one-track motorway to Brussels.

Legitimacy and Participation

If one *only* looks at the concept of 'federation' as a type of organizing of states, it is possible to argue that legitimacy and participation are not central or essential parts of the federation concept. This is true insofar as neither the Holy Roman Empire German Nation, the United Dutch Republics nor von Bismarck's German Empire were democratic in today's understanding,[27] as already mentioned (Chapter 2). But at the beginning of the 21st century it is very hard to imagine a European state which is not democratic, and thus where legitimacy and participation are not a part of its life. The people is sovereign, and it legitimizes the federation as such, that is, both Member States and the federal level. But the way legitimacy and participation are understood and practiced are different from one democratic state to another. Abromeit (Chapter 3) reminds us that in the German tradition, no authority is legitimate unless it has a clear constitutional basis on the one hand, whereas the British, on the other hand, have no problems not having a document titled 'constitution' and do not consider their executive illegitimate on that account. Thus the European tradition is very broad.

In the literature the EU's legitimacy has for years been bound up in its efficiency, that is, output legitimacy as well as to the European Parliament's direct elections, and the indirect legitimacy of the Council, getting its legitimacy from the national level. But how does this look from the citizen's view? The Eurobarometer 64 (first results) from autumn 2005 (pp. 13, 15, 18, 21-24) gives a picture of the acceptance of, or rather attitude towards, the Union. If one starts out looking at the three federal institutions, European Parliament, Commission and European Council, the picture is not especially encouraging seen with 'federalist eyes'; 51 per cent trust in the EP (32 per cent do not), but after an all-time high in autumn 2002 (59 per cent), there has been a steady decrease in the positive attitude. The same picture is reflected when looking at the Commission, where 46 per cent is positive vs. 33 per cent negative, and at the European Council where 40 per cent have a positive attitude vs. 30 per cent with a negative one. The figures vary quite a lot when looking at the individual states, especially at the 'old' Member States. The United Kingdom has a generally skeptical attitude towards the European institutions (35 per cent have a positive attitude towards the EP, 31 per cent towards the Commission and 27 per cent towards the European Council) whereas

[27] For example, not all men had a right to vote and no women at all, but they were federations in the broadest sense.

Luxembourg and Portugal are very positive (Portugal: 67 per cent have a positive attitude towards the EP, 65 per cent towards the Commission and 59 per cent towards the European Council). Among the new Member States, the positive attitude prevails in general. If one adds the image of the Union where 44 per cent have a positive image vs. 20 per cent who have a negative image, and then looks at the perceived advantages, where the EU average is 52 per cent saying that they benefit from membership, and 50 per cent that membership is a good thing, then it is easy to conclude that the Union has legitimacy among its citizens, but also that this legitimacy is sinking and not at a high level. But of course one has to remember that the negative attitude in general lies between 20 per cent and 33 per cent, and that a fairly large proportion of the citizens are neutral in their attitudes or do not have any.[28] According to Follesdal (2005, p. 575) this situation is normal in federations, but one must assume that there is an under limit:

> […] citizens' mutual trust and support for the polity are weaker in many federations than in unitary states. After all, politicians often create federal arrangements explicitly to accommodate territorial based cultural or economic tensions.

Citizens' rights to participate are central for a democracy; the degree of participation is debatable, but without a right to participate in the state's decisions (directly or indirectly) one cannot speak of a democracy. Participation in the Nice-EU is fairly limited. The citizens are electing the European Parliament and may stand for it. The second chamber (the Council of Ministers) is chosen indirectly at the national level, and so is the executive, the Commission. Whereas this is not a unique situation in a federation, the problem is that the European Parliament does not have the full privileges of a normal parliament, as it cannot initiate legislation, only suggest it. In Chapter 4, another way of participating was discussed, namely through lobbyism. It was argued that citizens have the possibility of influencing their national governments, the Commission and the European Parliament at different phases of the policy-making process. But it was also remarked 1) that lobbying demands resources, and that those are not shared equally among the various interest groups, and 2) that the lobbying process is closed insofar as it is hard for the public to find out who has influenced an initiative from the Commission. All together, the citizens' rights to participate are limited compared to a 'normal' federation, mainly due to the first chamber's lack of power to initiate laws.

Abromeit specifically analyses the impact of a possible CT on the legitimacy of the EU in Chapter 3 in this book. Concerning participation she is critical and concludes (p. 51):

> While national participatory rights are inevitably weakened to a degree by the European layer of politics, the provision of new and effective opportunity structures gains in

[28] One has to treat the figures from autumn 2005 with a certain caution, as they may also reflect a certain frustration after the Dutch and French 'No' to the CT.

> importance. The Treaties and European political practice had offered two paths for citizen participation in European politics: the direct elections to the EP and the more indirect way of joining associations of civil society. To these, the constitution does not add much.

Concerning the question of legitimacy, Abromeit is equally skeptical concerning innovations in that field (Chapter 3). She mentions that one could have hoped for more readability and clarity in relation to the Union's power structures; the CT does not offer new ways to hold the powers provided in check, seen with citizens' eyes; the CT does define the competencies of the Union vaguely, thus opening the way for the erosion of the state's powers and so on.

Specifically concerning the 'second' presidency, Kasanen (in Chapter 5) considers it problematic that the role of the European Council is strengthened by proposing a President, without trying to give this President political legitimacy by, for example, letting him or her be elected by the European Parliament or the European citizens (like in Germany for the former, and like in Austria, Finland and France for the latter). And, added to this, the President's role is unclear and the division of competencies between the President of the Council, the President of the Commission and the foreseen Foreign Minister is unclear, too.

In an interesting article, Follesdal (2005, p. 582) discusses the CT with respect to trust and trustworthiness, and he concludes:

> The document [the CT, SD] confirms and strengthens four mechanisms and opportunity structures that may build support for the institutions and facilitate trust and trustworthiness among Europeans: the increased visibility of human rights, the role of national parliaments, European Parliament control over the Commission, and political parties. All of these will operate under greater transparency.

Abromeit is less enthusiastic but does not totally disagree with Follesdal. After her discussion of the Union's legitimacy in case of a new constitution along the lines of the CT, Abromeit concludes (p. 56): 'Hence, as regards enhanced legitimacy, the overall picture, albeit somewhat daunting, is not altogether bleak.' And I would add that participation and legitimacy will increase, should the proposed CT or CT-light be ratified in all countries. The EU is still in the phase where its legitimacy builds on output and not as much input. This was a model suitable for the founding of the ECSC/EC before it acquired its present quality, but it will not be sufficient for a federation in the long run.

Resources

It has been argued (Chapter 2) that for a federation to work well, both the federal and the state level must have their own independent financial resources of a size large enough for them to perform their executive functions. As a corollary, some have argued that not only should a federation have enough to run its executive

duties, but also enough to secure a certain minimum standard of living all over the federation to avoid social tensions.

The principle of the Union's institutions having their own resources has been formally adhered to already in the Nice Treaty (art. 269 TEU) saying that: 'Without prejudice to other revenue, the budget shall be financed wholly from own resources.' The formulation in the CT was (art. I-54): '1. The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.' Thus the EU fulfills this criterion formally.

The Union's own resources come from four sources (CONV 602/03/3):

- agricultural levies;
- duties in the common customs tariff;
- a percentage of the amount resulting from the application of a uniform rate to the VAT assessment base […];
- an amount resulting from the application of a rate, to be fixed under the annual budgetary procedures, to an assessment basis representing the sum of the gross national products […]

During the discussions in the Convention, some members argued that the two last categories of the 'own resources' were in fact national contributions. These members pleaded for an EU tax to enhance transparency and to secure real independent means, but could not convince a majority in the Convention (CONV 602/03/3-4). As the budget of the EU has been fixed around a bit more than one per cent of the Gross National Income of the Union for years, and the main part of the budget is paid by the Member States, it is hard to argue that the Union *de facto* has its own independent resources. Zank's conclusion about the whole 'new' budget procedure of the CT is that it only codifies the last year's praxis and does not give more resources to the federal level (Chapter 6).The federal executive is to a very high degree dependent on the Member States. As already referred to, this is not a unique situation in a federation. The German constitution of 1871 placed the federal executive in very much the same situation. This situation of economic dependence limits the freedom of action of the federal executive severely, cementing the dominant role of the Member States.

Concerning the 'inevitable' federal tax mentioned in connection with the introduction of the EMU, it was argued that redistributions were needed for 1) economic stability reasons (to counter 'asymmetrical external shock') as well as 2) for development reasons (to avoid social unrest, when the rich regions get richer and the poor regions get poorer). In Chapter 6 of this book, Zank has convincingly argued against this 'inevitability'. Concerning the asymmetrical shocks, he states that the idea itself is highly speculative (p. 125):

> No one has ever produced an example of what a shock should look like, which hits, say, Germany but not France. The European economies are highly diversified and interconnected, so demand or supply shocks would hit them all, albeit to a different degree.

And leaning on mainstream economists, Zank argues that economic integration is usually beneficial for all, especially for the poorer regions (p. 127):

> […] in general, we can expect convergence instead of polarization. […] Within the EU15, the poorest Member States have usually experienced growth rates above average. […] This can be explained in part by the EU Structural Funds. It should, however, be emphasized that the 'catching-up' of the poor countries already took place in the 1970s and 1980s, before the Structural Funds gained any significance.

On the other hand the fact remains that there is a federal tax in most if not all federations and that redistribution appears. But one of Zank's contributions is to remove the automatics from these processes.

One may conclude that the heads of state and government as well as the Convention have not made it easy for a future Union to work according to federal principles.

Conclusion

The main aim of this chapter was to offer an analysis of the EU, to find out whether the now often used description of the EU as a federation or an emerging federation was solid and not only intuitive. In doing so, the seven characteristics from Chapter 2 were used to structure the analysis (the statehood; the status of the founding members; the legal basis of the federation; the governmental system; the division of power; the legitimacy of the unit in question as well as the citizens' rights of participation; and the resources). The conclusion of this chapter is that the question mark after this book's title 'Approaching the EUropean Federation?' is superfluous. The EU is already a federation – with or without the CT – untraditional perhaps, but nevertheless a federation.[29] I repeat that federations, as any polities, are neither static nor are they assured 'eternal life'. Federations are man-made and they may flourish or wither away; nothing is 'automatic' in the ongoing process.[30] Right now, it looks as if the EU – once more – has overcome its crisis and is moving forward towards some kind of CT-light, thus strengthening both its statehood and its federal form.

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[29] Auer (2005, p. 429) captures the essence of federalism as organizing system when stating that: 'The inherent diversity, great flexibility and surprising dynamics of federalism make it difficult to define this particular state structure in precise terms.' And asking why it is difficult to define federations, he has a point, although it should *not* be overstretched (2005, p. 421): 'Mainly because there are as many federalisms as there are federal states, each one considering its own specificities as being absolutely essential to the very concept of federalism.'

[30] A number of federal projects have aborted over the years; the West Indian Federation, the Moroccan-Libyan Federation *plus plutra*.

The character of the European Union, as a federation, is that it is strongly asymmetrical. The (Member) states are stronger than the federal level. The second chamber, the European Council/Council of Ministers, has in the Nice-EU, as well as in a possible CT-EU, strong powers to prevent developments which are not in accordance with the wishes of the (Member) states; for example, changes of the treaty/constitution demands unanimity among the (Member) states, and the second chamber (as European Council) has the right to nominate the Prime Minister *in spe* (President of the Commission), and the federal executive (the Commission) has only a token right to levy taxes. Thus a picture of the Union as a potentially centralized polity seems wildly exaggerated.

I let Auer have the last word concerning the fear of ascribing statehood and federalism (2005, p. 428):

> It is somewhat surprising to realize how deeply and how directly the values of federalism are determined not by rational arguments and real experience, but by prejudice and presumptions based on these contradictory assumptions. Just as you will hardly find a French or a British scholar arguing scientifically in favor of federalism, you will have trouble finding a Swiss or German scholar criticizing federalism as being inherently inappropriate. On the EU level, those who oppose both a stronger Europe and correspondingly a weakening of the nation states argue that the EU cannot and must not become federal. Federalism in this view is inherently bad, because the concept is identified with centralism. Those who are in favor of a stronger EU and accept that member states might become a bit weaker do not dare to advocate federalism either, because they are afraid that the F-word will do more harm than good in promoting their goal.

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