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**Søren Dosenrode**

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# Federal and European Union Policy Making - A Comparative Perspective<sup>1</sup>

Søren Dosenrode<sup>2</sup>

## Summary

By using the policy cycle approach, this paper compares the policy-process in a number of Anglo-Saxon type federations with the policy-process in continental-European style federations from within the European Union (EU) area. The comparison would reveal: a) distinct different styles of policy making in European style federations in relation with the Anglo-Saxon ones. b) that the policy-process in the EU resembles that of the European style federations, and c) the Constitutional Treaty (CT) or a possible CT-light would strengthen the federal policy-making characteristics already present in the EU understood as a polity of state character.

## Introduction

The aim of this paper is to analyze the federal policy-process within a number of federations<sup>3</sup> as well as within the EU; how federal respectively EU-laws are made and the degree of state involvement in the process.<sup>4</sup> This topic is rarely treated on a systematic, comparative basis and there is a need for further

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<sup>1</sup> The gathering of empery for the following analysis was supported by the Obel Family Foundation, Aalborg. I gladly express my gratitude!

<sup>2</sup> I would like to thank Mammo Muchie, Staffan Zetterholm and Wolfgang Zank, Aalborg, for their comments; omissions are of course my own responsibility. The paper is a revised version of a chapter on the same topic, now published in *Approaching the European Federation* (Dosenrode, 2007).

<sup>3</sup> Although there seems 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 Lijphardt e.g. mentions that federal state 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 suggest there is, others 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 be surprising if policy outcome tend to look alike. Still a systematic comparison of a number of ‘typical’ federations and unitary states would be interesting but is without the limits of this paper.

<sup>4</sup> This implies that this paper analyses 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 (Ann Bowman 2004). At EU-level this implies that this paper concentrates on supranational legislation.

analysis to gain insight in the policy-process of federations as a starting-point for further comparisons with non-federal states<sup>5</sup>. The policy- process may be roughly divided into two traditions<sup>6</sup>: the European (cooperative) and the Anglo-Saxon (dual)<sup>7</sup>.

#### Anglo-Saxon Style Federations:

- some kind of Westminster-democracy, or majoritarian-democracy
- Consensus seeking is not necessary and thus not a part of the political culture. (Lijphart points out that this model is ‘exclusive, competitive and adversarial’ (1999, p. 2)

#### European Style Federations:

- 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 [...]”’.

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<sup>8</sup>. The space available in this paper as well as the purpose of finding a few ‘arch-types’ may give it a certain superficial look, but it is the hope that it will be able to isolate central features of the policy-process in federations and in the EU<sup>9</sup>.

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 distillate 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

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<sup>5</sup> To my knowledge only a few comparative studies of policy-making in federations exists. Ute Wachendorfer-Schmidt (2000) and Ditmar Braun (2000 and 2003) have made such analysis from a federal policy perspective,, and only Braun has used a strict frame of analysis (2003).

<sup>6</sup> I refer to Dosenrode 2007, Chapter 2.

<sup>7</sup> Agranoff & McGuire claims that the US never was a dual federation (2004. p. 500); this is contested by many e.g. Pierson (1991, p. 464)

<sup>8</sup> It is clear from the outset, that the federations within the two groups varies e.g. does the US not seriously try to introduce fiscal equalization whereas Canada does (Pierson 1995, pp. 463-473).

<sup>9</sup> It follows that a lot of details and the existing complexity will not be done full justice; e.g. Hanpf & Toonen (eds.) will most likely be critical to this approach.

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 paper.

This paper starts out with 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<sup>10</sup> and in the (Nice- and CT-) EU. In the conclusion we try to answer the initial question.

### **The policy-cycle**

As mentioned is the concept of the policy-cycle a heuristic tool, which illustrates the making of policies in modern democratic states. It builds on the assumptions that policy-making is: a) a process; b) a process that begins long before a policy-proposal is presented in a parliament; and c) that 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; i.e. for giving the impression that the policy-process is strait forward, mowing swiftly from one phase to the next (Sabatier & 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 fare away from strait-forward, moving neatly from one phase to another. Also the approach may indicate a rationality not necessarily present in policy-making<sup>11</sup> but when one has recognized this, and taken care of it in the concrete analysis, the policy-analysis approach is a useful tool as its division of the process in a number of phases. Wayne Parsons has put it like this (1995, p. 80):

If we put aside the stagiest model [the policy-cycle and alike, SD] the choice is either a bewildering array of ideas, frameworks and theories, or the acceptance of another alternative model. In broad terms, therefore, the stagiest framework does allow us to analyze 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.

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<sup>10</sup> This analysis includes Australia, Canada and USA on one side, and Austria, Germany and Switzerland and the EU on the other. Belgium has been left out, as it is still trying to develop its policy-making, and Spain and Italy as they are 'in the making', what is les interesting when trying to define an archtype federation (but this does of course not imply, that federations are static they do develop as e.g. Germany, which is in the middle of a 'federalism reform' which will strengthen the role of the states).

<sup>11</sup> Everett (2003) has criticized the 'rationality' of the approach, as well as what she saw as a 'mechanic', and a 'how to make efficient policies' approach to policy making. I agree with her basic criticism, that the policy cycle is mainly an analytical tool, but find that she is exaggerating the actual 'belief' in those concepts by authors such as Edwards.

Besides, the policy-cycle approach does not only highlights 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. Additionally it 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-Héritiers 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 to detailed to keep an overview especially in comparative studies. Thus Windhoff-Héritiers 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) they are willing to invest in promoting an issue as ‘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, with Windhoff-Héritiers words, the bridge between the problem-definition and the decision-making (1987, p. 69). As for the content of the agenda, Windhoff-Héritier remind 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<sup>12</sup>, 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 in the policy, no

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<sup>12</sup> The term ‘implementation’ or ‘implementation studies’ had its hay-days in the 70s and 80s, was mixed up with ‘regulation’ and ‘innovation’ in the 90s, and is now back in its own right (cf. Schofield & Sausman (2004), Hill (2003), Riccucci (2005)).

changes or the termination of the policy. Demand for changes may set of the policy-cycle anew<sup>13</sup>.

### **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 arch-types, 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 characteristic, which may help to analyze, classify and thus understand decision-making in federations<sup>14</sup>.

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 (in 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 is characterized, *grosso modo*, by segregation, understood as policy-making on the federal level includes mainly federal actors, and policy-making on the member-state level includes 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 is this phase hard 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, understood as resources. It is

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<sup>13</sup> Implementation and especially evaluation of federal laws will be the topic of this authors next project, thus it will be treated in a more rudimentary way in this paper as it seem to form a *lacuna* in comparative federalism studies.

<sup>14</sup> It may also have been fruitful to extend this analysis to include a comparative analysis of the influence of the parties and the electorate in decision making process; in e.g. 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 paper.



essential, if something understood as an issue is going to be accepted as ‘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), over those who consider the EU some kind of multi-level polity (Hix 1999) to those still regarding the EU as primarily international and intergovernmental arrangement (Moravcsik 1998). This is not the place to answer the question of the nature of the EU<sup>15</sup> (I refer to Dosenrode 2007, chapter 9). In the problem definition phase there is not the same degree of a 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-states discuss the same issues at the same time; examples of this sporadic European opinion were the discussions of the participation in the Iraq-war, of the French and Dutch ‘no’ to the CT and Danish newspapers cartoons of the Islamic prophet Mohammed. Thus potential policy-issues will ‘arise’ in or around the Commission, which is

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<sup>15</sup> 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, i.e. the establishment of a supranational polity, which enacts binding legislation for the member-states, thus trespassing the border between confederation and federation. Under the supranational level, there still is a national level, consisting of 27 states, all of liberal democratic character. Below the state-level there is an increasingly important sub-national level of regions (Dosenrode 1995, Dosenrode & Halkier 2003, Lähteenmäki-Schmidt, chapter 7 in Dosenrode, 2007). 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 (e.g. foreign trade, and - for some states - the 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 initiate 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 decides 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 other has a right to advice 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 Dosenrode (2007, chapter 9).

very open to ideas. This openness is used by lobbyists, member state governments and the European Parliament. It is worth remembering that no 'extra-Commission' actor has a *right* to deliver an opinion in this phase. If the Commission should be interested in a proposal, an idea, it will either ask an already existing consultative committee or more seldom from 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 (e.g. 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 already existing idea of promoting 'Europe-wide' political parties, with the explicit aim of creating a European political consciousness (Art.I-46.4)<sup>16</sup>.

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 i.e. a European opinion. This implies a tendency of particularistic issues being brought up, at the costs of common European issues developing. This is attempted solved by giving one institution the right and duty to initiate ideas designed at strengthening the development of all the Union. In this work the Commission depends on in-put from its environment: lobbyists, grassroots 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 which may also make in-put to the legislative process, not unlike a second chamber in a federation<sup>17</sup>. In this way at kind of 'parallel' policy-cycle 'interferes' as the request of the Council implies that a problem-definition phase, an agenda-sitting 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.

The difference of the EP's role is clearest compared to the Anglo-Saxon federations, and less so towards the European style federations. In all cases it is the elites, understood as governments, bureaucracies, political parties and lobbyists etc. who play important roles. For an American Middle-Western farmer, the distance from Iowa to Washington DC, is not much shorten than for a Danish Farmer to Brussels, perhaps even at the contrary.

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<sup>16</sup> Thorlakson (2005) presents an interesting analysis of the European party system.

<sup>17</sup> Concerning the specific role under co-decision Burns (2004) argues that the Commission is still exercises agenda-setting and gate-keeping.

### *The Agenda-Setting Phase*

When an issue has been recognized as *political* issue the next step is to make sure, that it is placed on the political agenda. Resources and stubbornness are paramount assets in this phase, too. This phase is 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, 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 up-coming 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 etc.) an important role.

Theoretically there is no difference between the federal states and the EU (Nice & CT) concerning the ways one secures the placing of an issue on the agenda<sup>18</sup>. There are at least three obvious ways to secure that an issue is placed and remain on the political agenda: 1) One good way for an interest organization or a political party is to commit the member-state government to a political issue<sup>19</sup>. Apart from the status 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 issues 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 the Commission to look into a matter, in this phase, is less influential than a federal parliament in a nation-state. Thus where as actors in national federations have three channels of access, the actors from the EU-member states prefer going via the member-states political system, ending with it government or to lobby the Commission directly.

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<sup>18</sup> For a discussion of lobbyism in the EU, see e.g. the classical work Mazey & Richards (1993). Alternatively, see Dosenrode & Sidenius (1999), or Eising (2003).

<sup>19</sup> 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.

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 of 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)<sup>20</sup>.

**Table 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 esp. 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.

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<sup>20</sup> In Switzerland the majority of such popular proposals for referenda on the national level have been defeated in the following election, but their influences should not be underestimated, as all important legislation is passed with an eye to a possible referendum thus ensuring most legislation to be passed in a form perceived acceptable to a majority of citizens and cantons. In the same way the CT’s rather weak formulation of ‘inviting the Commission’ would possibly be fairly strong in praxis.

Braun (in 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.

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, inclusive the federal states and the EU<sup>21</sup>, where the media 'break news' and the phase on which scholars and journalists have 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<sup>22</sup> and parliamentary committees of the member states in 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 1995/464). The provinces are strong, and look for their rights. Problems come up, when new

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<sup>21</sup> The EU constellation differs, compared to the two federal types looked at here, in so far 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 e.g. 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 extend.

<sup>22</sup> COREPER, the Committee of Permanent Representatives of the EU-member states in Brussels. COREPER is basically a coordination committee, where the Commissions proposals are prepared among the member-states representatives on ambassadorial level, before they are finally negotiated in the Council of Ministers.

policy areas have to be placed: is it a federal or a provincial matter? In Canada it is certainly right to talk of 'inter-governmental' 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, 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 as e.g. 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, this contrary to the US and the European style of federations but it is still a 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 to participate 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<sup>23</sup>. 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 Regan as a return of 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

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<sup>23</sup> But the federal government respects the jurisdiction of the states within the federation (Agranoff & McGuire 2004, p. 497).

preferred to bypass these *fora* (McKay 2001, p. 75). Thus it does not surprise that the relationship between the two levels at times has been very confrontative.

Although the dual systems thrive there is a tendency to more joint decisions between the federal and the member state level in the Anglo-Saxon federations<sup>24</sup>. This may over time lead to a decision making culture more like the European style.

The policy-making in the *European Union* is, in the first and decisive phases (problem definition, agenda setting) dominated by the European Commission, with it 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 for possibilities of various actors.

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.<sup>25</sup>

Until the Single European Act all decisions were taken by unanimity, one negotiated until consensus was reached. It changed with the Single European Act (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 relationship Council – EP 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, co-operation also seems to be the rule although to different degrees. Swiss federalism is decentralized and of cooperative nature; the cantons are strong, and they cooperate among

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<sup>24</sup> Cf. Agranoff & McGuier (2004), Saunders (2002), Selway (2001). Beattie, primer of Queensland, denies this development (2002).

<sup>25</sup> For a detailed discussion of the EU decision making system, see Dosenrode 1997.

themselves and with the government in many ways i.e. in the conference of the cantonal governments, in the various ‘directors conferences’<sup>26</sup>, where they try to reach a consensus when replying the governments law-proposals, or through the many inter-cantonal agreements (*Konkordate*). 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<sup>27</sup>. 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, e.g. 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. 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 (e.g. the French-speaking cantons and the German speaking cantons often have different interests).

In Germany and Austria one 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 federal reform of 2006 has not changed that. 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 on policy-issues related to them, and the second chamber has a veto-power towards the first chamber<sup>28</sup>. But the second chamber behaves according to an ideological logic, not – or seldom – out of a territorial one. 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). This was one of the reasons, to launch respective re-launch the federal reform process in autumn

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<sup>26</sup> 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 political / geographically determined groups or all of them. The purpose is to discuss problems of common interest including responses to federal law-proposals.

<sup>27</sup> Switzerland is a cooperative i.e. European style federalism (Frenkel 1984, p. 112, Krisie 1995, p. 56 and Wältli & Bullinger 2001, p. 78).

<sup>28</sup> In other words the second chamber mixes the legislative and the executive powers.



2005; to prevent the second chamber with an opposite majority than the first chamber, to be able to stop or prolong the legislation process. But that was not the result (Scharpf 2006)<sup>29</sup>. The *Bundesrat* has a veto right, but this right is used scarcely. A lot of coordination between the two levels take place; at the federal government level and the *Bundesländer* have considerably influence on the policy-outcome (one talks of *Politikverflechtung* or ‘interlocking federalism’ (Scharpf et al. 1976 & 1977, McKay 2001, p. 92)). The problem being, that the policy-results are sub-optimal. (Scharpf et al. 1976, p. 236)<sup>30</sup>. Concretely do the Prime Ministers, *Ministerpräsidenten*, meet four times a year to coordinate positions, and on a rotating basis does one *Bundesland* after the other has the presidency and act as secretariat. Twice a year the Prime Ministers meet the *Bundeskanzler* after their own meeting. Additionally do the ministers in charge meet e.g. 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)<sup>31</sup>. 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 always has been divided ideologically and 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, as indicated, fairly weak. As in Switzerland and Germany the member states coordinate their positions towards law-proposals from the government. Coordination takes place at governmental level in various permanent conferences (the most important the one of the *Landeshauptleute*) and at civil servant level. A very important institution is the ‘*Verbindungsstelle der Bundesländer*’ (Agency of the member states) which maintains the contact to the federal government and conduct the practical coordination of the member states opinions (Klöte & 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<sup>32</sup>. 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.

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<sup>29</sup> An other purpose was to minimise the ‘interlocking’ structure. That, too, failed (Scharpf 2006).

<sup>30</sup> Wachendorpher-Schmidt (2000, p. 8) acknowledges the influence of Scharpf et al.s theory, but contrasts it with the theory of dynamic federalism of Hesse & Benz.

<sup>31</sup> A trend against the centralization began with the preparation for an Austrian EU-membership, see below.

<sup>32</sup> Interviews in Vienna, June 2006.

### *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 the federal EU-policy (cf. Klöti & Dosenrode 1994, Dosenrode 1995). Germany is the oldest federal member of the EU, and the question of the *Bundesländers* participation foreign policy has been discussed since the Lindauer-agreement of 1957, but until the Maastricht-treaty the influence of the member states on the shaping of Germanys EU-policy was small (cf. Müller 1993; Zuleeg 1992). The SEA 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 2/3 majority to be ratified (Art 23 GG). As with Austria and Belgium, the member states send representatives to the Council of Regions<sup>33</sup>. 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 accept 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 ministers office called the behavior of the member states ‘pure blackmail’<sup>34</sup>. 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, or at least they thought so<sup>35</sup>. The heads of the *Länder* had had to act as federal authority in certain situations, what often lead to uncertainty and definitely undermined the independence of the member states. In the German agreement, which was a model of the Austrian, concerning the participation of the second level in the federal levels 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 one made the compromise, that both parliament and government should participate in the discussions, and that it was the head of the state government who should present an 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

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<sup>33</sup> This direct involvement of the *Länder* in the negotiations in Brussels has never been popular with the federal authorities who, in vain, tried to have it removed during the negotiations leading to the German federal reform.

<sup>34</sup> In conversation with the author.

<sup>35</sup> In reality it has remained. An senior official told the author, that maintaining it is very convenient for the *Landeshauptläute*, when they have difficult or unpleasant decision to make ‘my hands are tight by Vienna’ they can say (Interview in Vienna, June 2006).

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, did the preparations for a membership of the European Economic Area (EEA) give the cantons new rights. Foreign policy is basically a federal prerogative in Switzerland as in most states<sup>36</sup>. 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 get 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). 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), although the Swiss people and a majority of cantons eventually voted 'no' to a membership of the EEA. Thus the EU has strengthened the cantonal cooperation in general, and the cantons position towards the federal government in particular.

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 doing lobbying (this is also the case for the regions in the centralized states cf. Dosenrode & 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 below).

**Table 2 Style of cooperation**

	<i>Anglo-Saxon style federation</i>	<i>European style federation</i>	<i>Nice- EU</i>	<i>CT-EU</i>
<i>Cooperation style</i>	<i>Confrontation</i>	<i>Cooperation</i>	<i>Cooperation</i>	<i>Cooperation</i>

<sup>36</sup> But 'Volk und Stände' (people and cantons) must be heard in a referendum before Switzerland can ratify certain international treaties, and certain 'low foreign policy' areas are left for the cantons.

In the Anglo-Saxon federations it is appropriate to talk of inter-governmental relations between the two levels. Especially in Canada and Australia, but also in the US, the member states are basically excluded from the federal decision-making; there are more or less formal committees with representatives from both levels but they are of 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). Disagreements are taken to the federal court / European Court of Justice, but due to the cooperative tradition and the involvement of both levels, compromises are normal ... esp. in the EU<sup>37</sup>.

### **Implementation phase**

The parliament has decided upon a policy, and now it has to be implemented. As it has been noted is implementation not a simple thing, as Pressmand & Wildavsky made it clear already in the sub-title of their 1973 book: 'How big expectations in Washington are dashed in Oakland'<sup>38</sup>. 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 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 2003, p. 396)<sup>39</sup>.

The *Anglo-Saxon* dual-system style implies that in principle the laws decided upon by the federal parliament are implemented by federal agencies without intermediary between the federation and the addressee be that citizens, firms or organizations. The states are not involved in the process<sup>40</sup>. Reality looks a bit different. The two tiers of government do exist, with each their agencies responsible for the implementation of the federal respectively the state legislation. But in all federations exists a number of concurrent and joint policy-

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<sup>37</sup> But of course the EC / EU has had its crisis' too; one only has to think of president de Gaulle in the late 1960s and the split over support to the US lead invasion of Iraq 2003. After all, politics is about sharing limited resources.

<sup>38</sup> 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-Herietie (1987); Wayne Parsons (1995); Paul A. Sabatier (1986). Kenneth Hanf & Theo Toonen (1985) explicitly discusses the complexity of implementation, and the involvement of various actors.

<sup>39</sup> To be fair one has to say that if politicians should use time on supervising implementation and evaluation a very large extra burden would be placed on them.

<sup>40</sup> In all federations exists a number of concurrent and joint policy-areas or programs, but we try to distil the 'arch types' in this paper, as mentioned before.

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:

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 (Selway 2001, p. 121).

The same is the case in the US (Chun and Rainey 2005, p. 23). The demand for cooperation often comes from the federal state; some times in the way that the Congress passes a bill obliging the states to implement (and pay) a certain policy. This procedure of course creates frictions between the two levels (Grant 2004, p. 269). Grant refers to federal ‘black mail’ concerning implementation e.g. as the federal government under Regan (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 & 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 arch-type Anglo-Saxon style federation:

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 (Painter 1991, p. 274).

Concerning implementation, Painter mentions that when the federal government is dependent on the provinces cooperation, they may be bad 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 argument’. But the federal government is not dependent on the provinces alone as it has its federal agencies, too (Skogstadt 2000/63). But the implementation by the federal agencies is not perfect, as Skogstadt shows (2000, pp. 72-75).

The Anglo-Saxon federations have, in principle, opted for implementation of federal law through federal agensis occasionally creating parallel systems of implementation e.g. of courts and police forces as in the US. This gives the federal government a direct control of the implementation, in principle, and preserves its independence of the states. It also implies the danger of waste of resources as two organizations treats 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 the 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 (cited by Braun 2003, p. 13) puts it like:

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 secure, that the policy will get 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 actually 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 accept 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 (*Bundesversammlung*) legislate, and the cantonal implements; this is what is meant, when describing Swiss federalism as 'implementation-federalism':

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 (Kissling-Näf and Wälti 1999, p. 655).

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<sup>41</sup>. 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 minim<sup>42</sup>. 'Implementation' in EU-language differs a bit from the common usage. In EU-terms 'implementations' means that the directive has been transformed into national (member-state) law, whereas it normally implies, that the policy has been put into effect what is something quite different. The vast majority of the implementation is done by the states, and that is no coincidence<sup>43</sup>. 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 implementations 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 to. This implementation principle is laid down in the treaties: the Nice and CT-EU Treaties (Art. 249 resp. Art. I-33) 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

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<sup>41</sup> The catalogue of competencies in the Austrian constitution, including the question of who implements what, is a frightful mess.

<sup>42</sup> Exceptions are i.a. rules concerning fisheries and agriculture.

<sup>43</sup> A short look through the sparse literature on implementation in the EU, from Siendetopf & Zillre (1988), over From & Stave (1993), to Peters (2000) tell the same story.

on the member-states when directives have to be implemented (From & Stava in Andersen & Eliassen 1993)<sup>44</sup>.

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 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, or St. Gallen and Geneva in Switzerland, 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 with 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 Unions 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<sup>45</sup>.

**Table 3 Implementation**

	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

<sup>44</sup> A good, short, introduction is Cini (Cini 2003, pp. 384-364).

<sup>45</sup> 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 the uncertainty concerning at which level to place a new policy area rises, too.



## **Evaluation, Reformulation, Termination**

Although one could expect the fifth phase, *the policy-evaluation*<sup>46</sup> and perhaps *reformulation or termination* to be a very busy phase, this is rarely the case<sup>47</sup>.

The stagiest concept may imply policy-making to be rational, and one could foresee the following to happen: a through 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 re-formulation: a) the federal government need 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<sup>48</sup>. One could expect a court of auditors to be of value in this case, but they rarely look into the subject matter it self.

In the typical *Anglo-Saxon* federation, the federal government is responsible for the implementation of the 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 and unsatisfied citizens and interest organizations. Should it turn out in the way, that change 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 is of course 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) because it will cost extra work but not necessarily extra resources, c) due to an unwillingness to change etc.

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 and unsatisfied citizens and interest organizations to get an idea of how a policy is working. In other words its sources for feed-back or evaluation is limited compared to the Anglo-Saxon federation. Should it turn out in the way 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-

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<sup>46</sup> In 'real life' evaluation in some cases runs parallel to the policy-implementation.

<sup>47</sup> 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 planed by this author for 2007-2008.

<sup>48</sup> Bureaucratic politics theory as well as principal-agent theory point to this problem.

Saxon federation. This is so due to the fact that the states have a large number of veto-points. The piece of legislation which needs re-formulation or termination may be the result of a larger deal, involving compromising over several issues, implying that a change of one policy-issue may demand the change of other issues as well. If one then consider 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 27 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 change an already implemented procedure has to be overcome in the Commissions bureaucracy. The experience of national civil servants from Austria, Denmark, the Netherlands and Germany is that due to the Commission's very rigid understanding of rules, correction of regulations seldom takes place (interview Nov. 1995, and December 2004)<sup>49</sup>. 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 as the Sander Commission, which led to evaluation and reformulation of several EU-policies and practices.

**Table 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 & parliament	The federal government & parliament, and the states governments and parliaments	The European Commission, the EP the Council of Ministers, the Member – states governments & parliaments	The European Commission, the EP the Council of Ministers, the Member – states governments & 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-

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<sup>49</sup> In a rather old interview, Prof. John Toy, University of Sussex, stressed the same observation, stating in Danish Radio (P1), 27.2.1996, 18.10, that the rigidity of the EU-system prevented changes, although one recognized that the procedures were unsatisfactory.

568), but as sketched above are there 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 quote Rossi and Freeman for writing (1995, p. 569):

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 of course not imply that evaluations are unnecessary or even impossible, but simply that their role is limited and that changes are difficult. And as already indicated may a policy change or even termination be a tough matter. Policies, once made, tend to go on for ever. Prestige and energy has been invested in promoting, deciding and later implement them. When implemented, a policy-program rests with a certain agency which often develops ownership towards it, all of this securing a policy a long life. But this does of course not 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 Wildawsky's subtitle quoted above, just not always in the way the legislator intended to<sup>50</sup>. And here comes, second, an important way of changing, re-formulating or terminating policies: through the Supreme Court respectively the European Court of Justice.

The Supreme Court has the possibility either by it self or when complained to, to scrutinize 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 respectively its praxis. 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; Both the American Supreme Court, the Australian High Court<sup>51</sup> and the European Court of Justice are very active, where as, the Austrian, the Canadian, the German and the Swiss Supreme Courts seem more reluctant in comparison.

A general characteristic for all the federations analyzed here is that evaluation happens, to a smaller or larger extend, 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

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<sup>50</sup> This is not the place to discuss the important question of legitimacy.

<sup>51</sup> See Selway and Williams (2005) for an interesting analysis of the Australian High Courts role in building the federation.

federations, and next to impossible in the EU (the CT or a CT-Light are not likely to change this).

### **Making Policy in Federations and in the EU**

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 as well as the EU<sup>52</sup>. The main conclusion can be summarized in three points: First, there are distinct, different styles of the federal policy-processes in 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 the federal decision-making is higher in the European style federations<sup>53</sup>. 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 figure below 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 like this:

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 exactly this is the case. This raises the questions 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.

The policy-process, secondly, 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. This hardly

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<sup>52</sup> This is not the place to evaluate the approach, but in author's opinion, it has been useful.

<sup>53</sup> 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.

surprises, as the EU (European Coal and Steel Community) 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 have each 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 e.g. one member-state is able to block changes in the ‘constitution’<sup>54</sup> as one saw it with France and the Netherlands and 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 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 the table below)<sup>55</sup>. 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.

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<sup>54</sup> 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.

<sup>55</sup> When this is said, this paper also clearly indicates that systematic comparative studies are needed within this field.

**Table 5: Principle 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 emphasize on federal level (EU-Commission)	All incl. member-state level, but emphasize on federal level (EU-Commission)
Agenda-setting	All incl. member-state level, but emphasize 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 & member state level, but emphasize on federal level	Federal & member-states, but emphasize on member-states	Federal & member-states, but emphasize on member-states
Implementation	Federal level	Member-state level	Member-state level	Member-states level
Policy-Evaluation/ Reformulation/ Termination	Federal level	Federal & member-state level	Federal level & Member-state level (low activity)	Federal level & Member-state level (low activity)

Tiredly, the CT or a possible CT-Light would possibly strengthen the federal character already present in the Nice-EU in so far 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 stop it, or by proposing amendments. The latter opens for a series of possibilities for the EP to amend and change the original proposal which it does frequently. Also the CT itself was drafted over the federal last, as one could read in the earlier versions from the European Convent, 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 etc. In general, the original CT would remove the question of the nature of the EU, as its already existing statehood would be clear to anyone. Seen from an academic point of view this would make life easier, but the same is seemingly not the case for the majority of the European political elite.

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