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Explaining visa, asylum and immigration policy Treaty revision: insights from a revised neofunctionalist framework*

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ABSTRACT

This paper seeks to explain the varying, and sometimes intriguing, outcomes of the past three Treaty revision negotiations of European Union/Community visa, asylum and immigration policy. Regarding this policy area, I focus on the substantial constitutional issues of decision rules and institutional set-up. The results of the Intergovernmental Conference (IGC) negotiations leading to the Amsterdam Treaty, the Treaty of Nice and the Constitutional Treaty are subjected to causal analysis. The paper draws on a revised neofunctionalist framework and argues that five explanatory factors can account for the Treaty outcomes: (1) functional pressures; (2) the role of supranational institutions; (3) socialisation, deliberation and learning processes; (4) exogenous pressures; and (5) countervailing forces.

KEY WORDS: political science, intergovernmental conferences, treaty reform, European Convention, asylum policy, immigration policy, neo-functionalism, socialization

INTRODUCTION

During the last three Treaty revision negotiations, we could witness rather differing, and to some extent, puzzling decision outcomes concerning the institutional set-up and decision rules

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in the area of visa, asylum and immigration policy. For example, given the generally modest integrative achievements of the Amsterdam Treaty, the traditional perception of these policies belonging surely into the member state domain and, somewhat related, the rather low expectations concerning the likelihood of communitarisation of visa, asylum and immigration until the mid-1990s (e.g. O'Keefe 1995; van Ourive 1995), how can the progressive results of the IGC 1996-97 in this field be explained? In contrast, why did the IGC 2000 fail to achieve similar progress, in view of certain prevailing functional and exogenous pressures for further decision rule and institutional reform of Title IV? Considering the modest advances made in the Nice IGC, how can the last Treaty revision be explained, which arrived at considerably more far-reaching results, although (pre-)negotiations began merely a year after the Treaty of Nice had entered into force? In order to answer these questions and to attempt an explanation of change in visa, asylum and immigration policy Treaty revision, more generally, I have made use of a framework which draws on (1) functional-endogenous pressures, (2) the role of supranational institutions, (3) socialisation, deliberation and learning processes, (4) exogenous pressures, and (5) countervailing forces.

I thus primarily focus on a traditional research question in the area of EU integration studies, i.e. explaining outcomes of European Union (EU) decision-making. In the last decade many researchers have shifted their attention to questions such as the nature of the EU political system, the social and political consequences of the integration process and the normative dimension of European integration (cf. Diez and Wiener 2004). However, the issue of explaining outcomes of EU decision-making, which has occupied scholars since the 1950s, is still a very important one. The ongoing salience of this question partly stems from the continuing disagreement among analysts regarding the most relevant factors accounting for the dynamics and standstills of the European integration process and certain segments of it. Treaty revision in the context of visa, asylum and immigration policy is a particularly interesting and significant research question: on the one hand, this domain has become one of the most dynamic and fastest moving sectors of the European integration project. On the other hand, it is very close to the heart of national sovereignty. The revision of decision rules and the institutional set-up in this 'high politics'¹ area is a substantial constitutional question. The constitutional debate, which has evolved since the 1990s, has mainly focused on normative questions (e.g. Abromeit 1998; Schmitter 2000). This paper contributes to the constitutional debate by concentrating on explanatory and analytical aspects of constitutional development.

The paper proceeds as follows: first, my analytical framework is specified. The subsequent section summarises the outcomes of the 1996-97, 2000 and 2002-04 Intergovernmental Conferences. The third and central part of this paper seeks to explain the decision outcomes and examines the strength and relevance of the hypothesised factors. Finally, I draw some conclusions from my findings.

ANALYTICAL FRAMEWORK

While the subsequent framework strongly draws on neofunctionalist theory (e.g. Haas 1958; Lindberg 1963), it departs from this theoretical strand in several ways. The framework is not meant to constitute a full-fledged theory. It rather comprises building blocks that may be used for more formal theorising. The explanatory factors of the framework have been derived inductively from prior research (Niemann 1998; 2000). How the framework relates to the original neofunctionalist approach and its later developments (e.g. Schmitter 2004), the framework's underlying assumptions, and inter-paradigm debating points are discussed elsewhere (Niemann 2004a, 2006 forthcoming). Hence, this paper is not concerned with a theoretical or paradigmatic discussion of the revised neofunctionalist approach, but focuses on the empirical insights that the framework – and its analytical components – may provide.

The subsequent pressures are intertwined in several ways and cannot always be neatly separated from each other. The first four factors (functional-endogenous pressures, exogenous pressures, socialisation, deliberation and learning and the role of supranational institutions) are hypothesised as dynamics, while the fifth factor (countervailing forces) goes against these integrational logics. Hence, integration is assumed to be a *dialectical* process, both subject to dynamics *and* countervailing forces.

Functional-endogenous pressures

Functional-endogenous pressures come about when an original goal can be assured only by taking further integrative actions (cf. Lindberg 1963: 10). The basis for the development of these pressures is the interdependence of policy sectors and issue areas. Individual sectors and

¹ Originally, 'high politics' was defined by Hoffmann (1966: 882) as those issues that touch upon a state's survival, i.e. questions related to security policy. I use the term here in a figurative sense, denoting questions of fundamental importance (to the state).

issues tend to be so interdependent in modern polities and economies that it is difficult to isolate them from the rest (cf. Haas 1958: 297, 383). Endogenous-functional pressures, thus encompass the tensions, contradictions and interdependencies arising from within – or which are closely related to – the European integration project, and its policies, politics and polity, which induce policy-makers to take additional cooperative/integrative steps in order to achieve their original objectives.

Functional pressures constitute a structural component in the explanatory framework. These pressures have a propensity for causing further integration, as intentional actors tend to be persuaded by the functional tensions and contradictions. However, functional pressures do not ‘determine’ actors’ behaviour in any mechanical or predictable fashion. Endogenous-functional structures contain an important element of human agreement. Agents have to perceive functional structures as plausible and somewhat compelling. They need to conceive them as (strong) pressures in order to act upon them.

Exogenous pressures

Exogenous pressures encompass those factors that originate outside the integration process itself, i.e. that are exogenous to it. It is an attempt to take account of the fact that changes in, and pressures from, the external political and economic environment affect the behaviour of national and supranational actors and also influence EU and domestic structures. This is to recognise that the Community and its development need to be viewed in the global context. It is argued here that exogenous factors – although they can constitute an obstacle to further integration – generally encourage or provoke further integrative steps.²

There are several logics behind hypothesising exogenous factors primarily as a *dynamic* of integration. Firstly, some exogenous events and developments are viewed as threats or shocks. It has been pointed out in the literature that perceived threats are conducive to the integration of regional blocks. In such instances close cooperation partners – or Member States of an integration project – tend to rally together and find common solutions. This has been illustrated, for example, concerning the Cold War origins of the European Communities (cf. e.g. Milward and Sørensen 1993). One particular but frequent type of threat is competition between states and/or regions, which tends to foster EU Member States to pool their strengths and resources

² While Hill (1993), for instance, has emphasised the integrative dimension of external factors, George (1991) has underlined that external factors can have both disintegrative and integrative effects.

through further cooperation/integration with the intention of advancing the Union's competitive position (cf. Sandholtz and Zysman 1989; Peterson 1991).

A second logic of external dynamics is grounded in the nature of many international problems and their perception. Regional integration is often viewed as a more effective buffer against disadvantageous or uncertain external developments. This is related to the perception that many problems go beyond the governance potential of individual Member States. Processes such as migration, globalisation and environmental destruction require a common approach in order to tackle them with some success (cf. George and Bache 2000: 39). This exogenous aspect is linked to, and further explained by, an endogenous one: European democratic nation-states depend on the delivery of economic, social and other well-being to their people. Increasingly, due to more global problems and regional interdependencies, they lose their power to deliver these goods. To circumvent the decrease in influence over their territory, governments tend to cooperate more closely on the European level (cf. Wessels 1997: 286ff).

Thirdly, Schmitter has pointed out that once a regional integration project has got under way and developed common policies 'participants will find themselves compelled - regardless of their original intentions - to adopt common policies *vis-à-vis* non-participant third parties. Members will be forced to hammer out a collective external position (and in the process are likely to rely increasingly on the new central institutions to do it)' (Schmitter 1969: 165). Schmitter points to the incentive of forging common positions and policies to increase the collective bargaining power of the Community *vis-à-vis* the outside world as well as involuntary motives such as the demands of the extra-Community environment reacting to successful developments within the regional integration project.

Exogenous factors are often closely linked to, and not always separable from, endogenous ones. Like functional pressures, they are conceptualised here as essentially structural in nature. However, similar to all structural pressures, exogenous factors are also closely intertwined with the property of agents. This implies that actors' preferences cannot be treated as given. The external environment, just like EU membership, to some extent, constitutes decision-makers' preferences, not least through the impact of internationally prevailing policy paradigms and discourses.³

Socialisation, deliberation and learning processes among (mainly governmental) elites

Socialisation, deliberation and learning processes taking place in the Community environment are hypothesised to facilitate cooperative decision-making as well as consensus formation and thus contribute to more progressive and integrative decision outcomes. The gradual increase of working groups and sub-committees on the European level has led to a complex system of bureaucratic interpenetration that brings thousands of national civil servants in frequent contact with each other and with Commission officials on a recurrent basis. This provides an important foundation for such processes, not least due to the development of mutual trust and a certain *esprit de corps* among officials in Community forums (cf. Lindberg 1963; Lewis 1998). The underlying assumption is that the duration and intensity of interaction have a positive bearing on socialisation and learning processes.

It is maintained here that not only the quantity, but also the *quality* of interaction constitutes a significant factor in terms of inducing cooperative norm socialisation and learning processes. We can distinguish two types of learning: (1) incentive-based learning – the adaptation of means/strategies to reach basically unaltered and unquestioned goals – and (2) more deeply-rooted reflexive learning – changed behaviour as a result of challenged and scrutinised assumptions, values and objectives (cf. Nye 1987: 380). The latter cannot be sufficiently explained through incentives/interests of egoistic actors (cf. Checkel 2001: 225, 242). Furthermore, if we want to understand social behaviour and learning, we need to take communication and language into greater consideration. It is through speech that actors make sense of the world and attribute meaning to their actions. In order to account for the *quality* of interaction, to provide a more fundamental basis for *reflexive learning* and to integrate the role of *communication* more thoroughly, I will draw on the notion of communicative action.

The concept of communicative action, as devised by Habermas (1981a, 1981b), refers to the interaction of people whose actions are coordinated not via egocentric calculations of success but through acts of reaching understanding. In communicative action, participants are not primarily oriented to achieving their own individual success; they pursue their individual objectives under the condition that they can coordinate or harmonise their plans of action on the basis of shared definitions of the situation. Agents engaging in communicative action seek to reach understanding about valid behaviour. Habermas distinguishes between three validity claims that can be challenged in discourse: first, that a statement is true, i.e. conforms to the

³ For example, the gradual acceptance of (originally Anglo-Saxon) neo-liberal economic ideas by West European elites has certainly facilitated agreement on the Single European Market and the liberalisation of many policy sectors

facts; second, that a speech act is right with respect to the existing normative context; and third, that the manifest intention of the speaker is truthful, i.e. that s/he means what s/he says. Communicative behaviour counterfactually assumes the existence of an 'ideal speech situation', in which nothing but the better argument counts and actors attempt to convince each other (and are open to persuasion) with regard to the three types of validity claims. This way, agents have a basis for judging what constitutes reasonable choices of action, through which they can reach agreement (Habermas 1981a: 149). Where communicative rationality prevails, actors' pursuit of their interests is conditioned by their perception of valid behaviour according to these three standards. Interests may also change in the process of communicative interaction, as actors challenge each others' causal and principled beliefs.

While agents bargain in strategic interaction, they *deliberate, reason, argue* and *persuade* in communicative action and may also undergo more profound learning processes. Rather than merely adapting the means to achieve basically unchanged goals, as in strategic action, they redefine their very priorities and preferences in validity-seeking processes aimed at reaching mutual understanding. Somewhere between hard bargaining and communicative action lies what has been referred to as 'rhetorical action', the strategic use of norm-based arguments (Schimmelfennig 2001). Actors whose self-interested preferences are in line with certain prevailing norms or values can use these to add cheap legitimacy to their arguments. Whereas communicative actors attempt to reach reasoned understanding, rhetorical actors seek to strengthen their own position strategically and are not prepared to be persuaded by the better argument. Communicative action is granted greater potential for deep-rooted learning than rhetorical action, and especially hard-bargaining. However, it is argued that agents combine all these (complementary) modes of action in their behaviour (cf. Risse 2000). Hence, we cannot expect constant learning. Nor can we expect unidirectional learning, as the EU level is not the single source of learning, with the domestic and international realms also constituting (important) socialisation sources.

While socialisation, deliberation and learning processes are mainly about the social interaction of agents, this pressure also links actors to broader structures. For example, functional, exogenous, domestic structures become part of decision-makers' norms and values throughout processes of socialisation and learning. In addition, actors who engage in communicative action, in their quest to arrive at the most 'valid' solution, tend to be more open-minded, i.e. beyond the narrow confines of their preconceived interests, and are thus more inclined to also consider arguments derived from the wider structural environment. Put

(cf. e.g. Green Cowles 1995: 521).

differently, during communicative interaction agents are likely to uncover structural factors, which are subsequently incorporated in their deliberations. Socialisation, deliberation and learning thus work as an interface between structure and agency.

The role of supranational institutions

Several underlying factors point to the plausibility of hypothesising supranational institutions as promoters of intensified cooperation and integration. Firstly, there is the likelihood of unintended consequences, as decisions taken by domestic politicians are often taken under circumstances of uncertainty, imperfect knowledge or time pressure which restricts the possibility of long-term purposive behaviour. The implications of delegating tasks to supranational institutions are thus often not taken into consideration at the time when decisions are made. Secondly, mainly following from this, institutions, once established, tend to take on a life of their own and are difficult to control by those who created them (Pierson 1996). Thirdly, concerned with increasing their own powers, supranational institutions become agents of integration, because they are likely to benefit from the progression of this process. Finally, institutional structures – of which supranational institutions are part – have an impact on how actors perceive their interests and identities.

The *Commission* as the most prominent agent of integration facilitates and pushes agreement on integrative outcomes in several manners. For example, it can act as a promotional broker by upgrading common interests, e.g. through facilitating logrolling or package deals (e.g. Haas 1961: 369ff). It may also cultivate relations with interest groups and national civil servants to gain support for realising its objectives. It has been pointed out that the Commission is centrally located within a web of policy networks and relationships, which often results in the Commission functioning as a bourse where problems and interests are traded and through which support for its policies is secured (cf. Mazey and Richardson 1997). The Commission may also exert itself through its often superior expertise and act effectively due to its substantial propensity for forging institutional cohesion (Nugent 1995).

Over the years, the *Council Presidency* has developed into an alternative architect of compromise. Governments taking on the six-month role face a number of pressures, such as increased media attention and peer group evaluation, to abstain from pursuing their national interest and to assume the role of a neutral mediator (Wallace 1985b). During their Presidency, national officials also tend to undergo a sometimes rapid learning process about the various national dimensions which induces a more ‘European thinking’ and often results in ‘European

compromises' (Wurzel 1996). Several studies confirm Presidencies' inclination to take on the role of an honest and promotional broker (Elgström 2003; Tallberg 2004).

The *European Parliament* (EP) has fought, and in many respects won, a battle to become, from being an unelected institution with minor powers under the Treaty of Rome, an institution which since the Treaty of Amsterdam is on an equal footing with the Council in the larger part of normal secondary legislation. It has very clearly become another centre of close interest group attention (Bouwen 2004) and plays a critical, even if not wholly successful, role in the legitimisation of the European Union. Even at the IGC level its role has significantly increased. It has traditionally pushed for further integration, partly in order to expand its own powers (Westlake 1994).

The *European Court of Justice* (ECJ) has been able to assert the primacy of Community law and transform the Treaty of Rome into something like a constitution, a process described as 'normative supranationalism' (Weiler 1981). The Court has given subnational (pro-Community) constituencies a direct stake in Community law through the doctrine of direct effect. It also has a self-interested stake in the process: the Court seeks to promote its own prestige and power by raising the visibility, effectiveness and scope of EC law. In addition, the ECJ has been singled out as an important agent of recognising and giving way to functional pressures. Moreover, the Court tends to upgrade common interest by justifying its decisions in light of the common interests of members as enshrined in the general objectives of the original EEC Treaty. The *modus operandi* is the 'teleological' method of interpretation, by which the Court managed to rationalise important decisions (Burley and Mattli 1993; Mattli and Slaughter 1998).

Countervailing forces

Contrary to original neofunctionalist theory, integration cannot plausibly be conceptualised as solely a dynamic or integrative process. Thus, countervailing forces need to be accounted for. In this framework, integration is assumed to be a *dialectical* process, both subject to dynamics *and* countervailing forces. The latter may either be stagnating (directed towards status-quo/standstill) or opposing (directed towards spillback/reversal of integration) in nature. One can only ascertain the relative strength of the (forward-)dynamics of integration if one also accounts for these forces. In the absence of strong countervailing forces even weak integrative pressures may drive the integration process forward. In such a case the strength of the dynamics may easily be overestimated. In addition, it is maintained that informed guesses about the integration process cannot be made without taking countervailing forces on board.

For reasons of simplicity and methodology⁴ they are grouped together here and conceptualised as one single hypothesis. The following main countervailing forces – which partly overlap – can be hypothesised:

Sovereignty-consciousness – which in its most extreme form can be described as nationalism – encapsulates actors' lacking disposition to delegate sovereignty to the supranational level, or more specifically to yield competences to EU institutions. Sovereignty-consciousness tends to be linked to national traditions, identities and ideologies and may be cultivated through political culture and symbolisms (cf. Callovi 1992; Meunier and Nicolaïdis 1999). Sovereignty-consciousness has repeatedly impeded the development of the Community, as, for example, during de Gaulle's and Thatcher's terms of office. Other less prominent actors such as bureaucrats, especially when working in ministries or policy areas belonging to the last bastions of the nation-state, can be sovereignty-conscious agents. Sovereignty-consciousness tends to rise with waning trust in the objects of delegation, i.e. EU institutions.

Domestic constraints and diversities may significantly circumscribe governments' autonomy to act (Hoffmann 1964; Moravcsik 1993). Governments may be constrained directly by agents, such as lobby groups, opposition parties, the media/public pressure, or more indirectly by structural limitations, like a country's economy, its legal tradition or its administrative structure. Governments' restricted autonomy to act may prove disintegrative, especially when countries face very diverging domestic constraints. This may disrupt emerging integrative outcomes, as domestic constraints may lead to national vetoes or prevent policies above the lowest common denominator. In the case of strong domestic constraints in different Member States, considerable overlap in the (domestic constraint-based) positions might be necessary to arrive at substantial common accords due to the restricted scope for changing positions on the part of governments. Bureaucratic politics also partly comes under this rubric, when constraints created at this level are not so much ideological in nature (cf. sovereignty consciousness), but when bureaucrats limit governmental autonomy of action in order to protect their personal interests or to channel the interests of their 'constituencies'.

Diversity can either be viewed as a sub-issue, or the structural component, of domestic constraints or as a countervailing pressure on its own.⁵ The economic, political, legal, social, administrative or cultural diversity of Member States may counter common integrative

⁴ Lijphart (1971: 678) has pointed out that limiting the number of variables is advisable in small 'n' research due to the danger of insufficient observations per variable and indeterminate outcomes.

⁵ On diversity in the integration literature, see for example Wallace (1985a) and Héritier (1999).

endeavours. The sheer differences between Member States can prove to be a disintegrative force because common positions or policies may require some Member States to disembark substantially from existing structures, customs and policies which tend to have evolved over substantial periods of time and are linked to certain grown traditions. Hence, diversity may potentially entail considerable costs of adjustment for some actors for countries outvoted in the legislative process. Diversity among Member States is reinforced through the gradual enlargement of the European Union. Domestic constraints and diversities help explaining variation in national choices for integration.

Methodology

My epistemological position can be located somewhere between the positivist and post-positivist extremes, acknowledging the importance of interpretative and contextual features in establishing causal inferences and middle-range generalisations. My dependent variable is the outcome of instances of EU negotiations and can be distinguished in terms of varying scope and level of integrative commitment regarding decision rules and institutional set-up. My key causal variables are the various pressures mentioned above. I start off from a multiple causality assumption, arguing that the same outcome can be caused by different combinations of factors. In order to arrive at valid causal inferences, allowing for some degree of positive causality, a number of methods are employed, including comparative analysis, tracing of causal mechanisms and processes, as well as triangulation across multiple data sources (including documentation, participant observation, and about 40 interviews). The danger of case selection bias has been minimised by choosing cases according to a range of values concerning the dependent variable, without paying attention to the values of the key causal variables (the identification of which was subject to my inquiry). Outcomes range from rather modest (IGC 2000) to progressive (IGC 1996-97 and Convention/last IGC). More can be learned about the causal relevance of explanatory factors when we examine cases with varying outcomes (cf. King *et al.* 1994).

Specifying the indicators for all of the above pressures would go beyond the scope of this paper. However, some signposts will be given here for the pressure, which is most difficult to operationalise in empirical research, namely socialisation, deliberation and learning. Firstly, the level of enmeshment among officials in a certain setting has been ascertained. The frequency of formal and informal contact, as well as the duration of interaction can serve as pointers here. Secondly, the degree of socialisation can also be estimated. This (ideally)

involves a comparison of actors and norms at different times, in order to be capable of distinguishing whether frequent and prolonged interaction in the IGC representative groups and other forums led to the development of an *esprit de corps* and the internalisation of certain co-operative norms. Thirdly, the occurrence of socialisation processes can be corroborated through interviewees' statements describing the process, without prodding. Fourthly, concerning the depth of learning, through interviews and cross-interviews, verified by other sources, it can, to some extent, be inferred if actors have adapted their strategies or really changed their interests. In addition, the assertion that persuasion and genuine learning have really taken place, gains further substance when that what has been learned is used or applied. More concretely, when decision-makers start to use arguments (in a non-strategic manner) by which they have been convinced, they are likely to have been truly persuaded. Further indicators for distinguishing communicative action/deliberation from strategic arguing will be suggested in the section on socialisation, deliberation and learning.

THE EVOLUTION OF EU/EC VISA, ASYLUM AND IMMIGRATION POLICY

Visa, asylum and immigration which form part of the wider policy field of justice and home affairs (JHA) are relatively new areas of European policy-making. The original text of the Treaty of Rome did not contain any provisions on these policies. The necessity to deal with these issues in a European context was first mentioned in the Tindemans Report of 1975. However, it received more significant attention during discussions concerning the elimination of internal border controls, following the 1984 European Council in Fontainebleau. As a result, the Single European Act of 1986, which mandated the creation of an area without internal frontiers, was accompanied by a political declaration stipulating cooperation in matters of entry and stay of third country nationals. To continue discussions on compensatory measures necessary for the abolition of frontier controls, the Ad Hoc Group on Immigration was set up in 1986 which, as its greatest success, conducted negotiations leading to the signing of the Dublin Convention of 1990. At Maastricht, asylum and immigration as well as most of visa policy came into the sphere of intergovernmental cooperation within the third pillar of the Treaty on European Union (TEU). Two aspects of visa policy in Article 100c came into the EC Treaty.

The Intergovernmental Conference 1996/97 and the Treaty of Amsterdam

JHA including visa, asylum and immigration policy turned into one of the most prominent issues at the IGC 1996-97. With the Amsterdam Treaty the old third pillar has been divided into two parts: the first part, which constitutes the focus of this analysis, became Title IV of the TEC on visas, asylum and other policies related to the free movement of persons, which shifted into the community sphere. The second part, the substantially reduced third pillar (Title VI TEU), is composed of police and judicial cooperation in criminal matters and remained largely intergovernmental. The new Title IV TEC did not immediately create ‘an area of freedom, security and justice’, but rather introduced mechanisms and a timetable for the progressive establishment of such an area. Title IV laid down a general obligation on the Council to adopt – within a period of five years after the entry into force of the Amsterdam Treaty – the necessary flanking measures aimed at ensuring the free movement of persons. These included measures to abolish any controls on persons and to agree measures for the control regime applying at the external frontiers of the Union, including visa rules (Article 62). In addition, aims concerning asylum, refugees and displaced persons as well as immigration were established (Article 63). The actual content of the measures to be taken were not specified, but the main thrust in each case is to establish minimum standards, rather than common rules.

In terms of decision mode and institutional matters, the following provisions were laid down: during a five year transitional period decisions were to be taken by unanimity in the Council on an initiative of either the Commission or a Member State and after consultation of the EP. Five years after the entering into force of the Treaty, the Commission would obtain an exclusive right of initiative and the Council would decide unanimously whether all or part of the areas of the new title were to be decided by qualified majority and co-decision (Article 67).⁶ As for the Court of Justice, application of Article 234 concerning references by national courts to the ECJ for preliminary rulings was limited only to the highest national courts (Article 68). Special provisions were adopted in the form of non-application of, or opt-out from, Title IV for the UK, Ireland and Denmark (Article 69).

Observers generally agreed that the progress made during the IGC 1996-97 was substantial. Measured against the benchmark of the *ex-ante* practice, the new provisions were

⁶ With the following exceptions: the list of third countries whose nationals must be in possession of visas and a uniform format for visas were to be decided by qualified majority voting (QMV) after a proposal from the Commission and after EP consultation. After the five year period provisions on procedures for issuing visas by Member States and rules for a uniform visa would automatically be taken by QMV and co-decision, on a proposal of the Commission.

described as ‘certainly a net gain’ (Brinkhorst 1997: 49), ‘decisive progress’ (Brok 1997: 377) or even ‘a substantial qualitative leap’ (Schnappauff 1998: 17). Compared with the expectations held prior to the IGC, Title IV should be viewed as a real achievement (cf. O’Keeffe 1995; van Outrive 1995). Patijn (1997: 38) concluded that the IGC had succeeded in transferring asylum, visa and immigration policies to the first pillar ‘against all odds’. Measured against the various other options considered during the work of the Reflection Group and the IGC, the outcome achieved at Amsterdam must be considered as progressive (cf. Italian Presidency 1996). Also compared to most other provisions of the Amsterdam Treaty the new Title IV fared very well. Some have thus regarded it ‘the main improvement of the Treaty’ (Hoyer 1997: 71). Only when measured against the institutional demands and requirements necessary to meet the Union’s objectives, the Amsterdam Title IV results have been viewed as mixed or moderately positive (cf. Monar 1998: 138; Müller-Graf 1997: 271).

The Intergovernmental Conference 2000 and the Treaty of Nice

At the IGC 2000, justice and home affairs was negotiated under the broader issue of the extension of qualified majority voting (QMV). Title IV issues of asylum, immigration and visa policy were included alongside policies subject to the third pillar (Title VI TEU) of judicial cooperation in criminal matters and police cooperation. During the IGC negotiations leading to the Treaty of Nice, the JHA cluster turned out as one out of six controversial QMV subject areas and also formed part of the Nice summit agenda.

The IGC has brought about the following Treaty changes to visa, asylum and immigration: Article 63 (1) (measures on asylum) and Article 63 (2a) (on refugees and displaced persons under temporary protection) would change to Article 251 (QMV in the Council and co-decision of the European Parliament), subject to prior *unanimous* adoption of Community legislation defining the common rules and basic principles governing these issues. Hence, a switch to QMV and co-decision was possible before the May 2004 date, set out in the Treaty of Amsterdam, from when the Council was to decide unanimously which areas become subject to the procedure of Article 251. On the other hand, this change depended on the unanimous agreement and specification of comprehensive basic legislation. Therefore, it was asserted in the aftermath of the conclusion of the Treaty that ‘it is possible that Nice will lead to a delay of transfer to QMV’ (Stuth 2001: 11). Indeed, the unanimity requirement for the adoption of legislation has hampered the legislative process in these areas, as a result of which the important directive concerning minimum standards for qualification of third country

nationals as refugees was only adopted at the last moment, while the directive concerning minimum standards on procedures for granting refugee status was delayed even further and could only finally be adopted in 2005.

In addition to these Treaty changes, the contracting parties also decided upon a number of procedural advances in a declaration annexed to the final act. They decided to actually do what the Amsterdam Treaty had foreseen: to switch the procedure of Article 251 from May 2004 in the cases of Article 62 (3) (freedom to travel of third country nationals) and Article 63 (3b) (illegal immigration). In addition, it was agreed to change Article 62 (2a) (checks at external borders) to QMV and co-decision when agreement on the field of application concerning these matters has been reached. These provisions arguably facilitate political agreement on the respective measures. However, they are not legally binding. The final decision on these changes was to be taken by unanimity.⁷ A number of important areas remained unchanged: Article 62 (1) (abolition of controls on persons at internal borders), Article 63 (2b) (balanced distribution of refugees), Article 63, (3a) (entry, residence and procedures for long-term visa) and Article 63 (4) (conditions for residence of third country nationals). The provisions on Title IV have generally been viewed as providing 'minimal' or 'small' progress (cf. Stuth 2001: 11; Prodi 2000: 3; Lavenex 2001: 851). Moreover, the partial and deferred switch to QMV, mostly but not exclusively accompanied by co-decision, subject to different conditions, and only in part legally binding, is a rather complex and non-transparent solution.

The Convention, the IGC 2003-04 and the Constitutional Treaty

The Laeken European Council decided to summon a Convention on the Future of Europe, and thus departed from the more standard methods of preparing EU Treaty reforms. JHA became one of the main issue areas at the Convention, which is partly reflected by the fact that a Working Group on Freedom, Security and Justice was established. The Draft Treaty that came out of the Convention already provided for the substantive changes which are outlined below. First pillar JHA issues were barely discussed at the subsequent IGC 2003/04, which brought about only cosmetic changes on visa, asylum and immigration.

⁷ In December 2004, agreement was reached to transfer Articles 62(1), (2a) and (3) as well as Article 63 (2b) and (3b) to QMV and co-decision, but not Article 63 (3a) and Article 63 (4). See Council (2004). This progress was not necessarily expected by decision-makers when the Nice deal was struck (interviews 2004, 2005). Part of the rationale for the December 2004 decision can be found in the Convention/IGC 2003-04 outcome (see below).

The Treaty provisions on visa, asylum and immigration have substantially progressed in terms of scope and depth: (1) the Community method – i.e. qualified majority voting in the Council, co-decision of the EP, the exclusive right of initiative of the Commission and jurisdiction of the ECJ – has been introduced with only very few exceptions; (2) turning from decision rules to policy objectives, in terms of border control, asylum and immigration the new Treaty uses the term ‘policy’, instead of merely ‘measures’, and thus denotes a higher degree of integration; (3) specific objectives in the three fields have also been extended, including the introduction of a management system for external borders, a uniform status of asylum, a uniform status of subsidiary protection for third country nationals, and the combating of trafficking in persons; (4) the new structure of the Treaty abolishes, at least formally, the division of JHA into two different pillars. The current pillar separation is sub-optimal, not least because of past conflicts concerning the legal basis of cross-pillar measures.

There are few safeguards and exceptions in the Treaty provisions: in the area of immigration, a prohibition of harmonisation of Member States’ laws has been codified for the integration of third country nationals. In addition, Member States’ right to determine access to the labour market by third-country nationals shall remain unaffected by the Treaty. It has also been judged detrimental that the Treaty followed the system of individual objectives listed for each policy area. As a result, aims which have not been expressly stated may not be subject to Union action (Monar 2003: 539). Overall, the new provisions, especially concerning decision rules, have commonly been judged as bringing substantial progress in terms of a further communitarisation of visa, asylum and immigration policy (Cuntz 2003; Monar 2003; Zypries 2003).

EXPLAINING TREATY REVISION NEGOTIATION OUTCOMES

Functional pressures

During the IGC 1996-97, functional pressures constituted a strong dynamic for the communitarisation of visa, asylum and immigration policy. Two types of functional pressures were at work here. Firstly, there were pressures, stemming from the objective of free movement of persons, the realisation of which required certain measures to be taken in the areas of external border control, asylum and immigration policy to compensate for the elimination of intra-EU borders. The free movement of persons principle goes back to the four

freedoms inscribed in the Treaty of Rome. The idea of abolishing border controls at the EC's internal frontiers has been on the Community agenda more seriously since the 1975 Tindemans report. The adoption of the Schengen Agreement on the gradual abolition of controls at the common frontiers by five Member States in 1985, the Single European Act of 1986 (aiming for the realisation of an internal market by the end of 1992) and the Schengen Convention of 1990 gradually reinforced the objective (den Boer 1997). Considerable significance was attached to it partly because, amongst the four freedoms, this free movement of persons has the most direct bearing on the lives of individual citizens (Fortescue 1995: 28). In addition, from an economic perspective, the proper working of the internal market would be jeopardised, unless this principle were to be put into practice (Commission 1985: 6).

The most obvious functional link concerns external border control and visa policy. States are unlikely to waive the power of internal controls, unless they can be provided with an equivalent protection with regard to persons arriving at external frontiers. This implies shifting border controls to the external borders and also a common visa policy, regulating short-term admission to EC territory (Papademetriou 1996). The functional link to immigration and asylum policy is also a strong one. To create a common external frontier for the internal market, common policies on immigrants, asylum-seekers and refugees are necessary. Otherwise, the restrictive efforts of one Member State would be undermined by diverging (liberal) policies of other Member States, as 'the free movement of persons also means free movement of illegal immigrants' or rejected asylum seekers (de Lobkowitz 1994: 104). It was feared that the abolition of internal borders would lead to an increased internal migration of asylum seekers denied asylum in the first country, to multiple applications for asylum and an uncontrollable influx of illegal immigrants (Achermann 1995). The Dublin Convention in September 1997, to some extent, tackled the problem of asylum shopping.⁸ However, by determining the first entry state as the one having to deal with asylum applications, a problem of arbitrariness arises, given Member States' differing standards of reception and varying interpretation of the refugee status. As a result, minimum standards on the reception of asylum seekers were necessary. To arrive at this and other flanking measures a greater degree of Community methods was required, so as to make cooperation more efficacious, and to enable cooperation to move beyond the lowest common denominator. This rationale for communitarisation was the most widely accepted and articulated one among decision-makers (e.g. Benelux 1996; UK Government 1996b; cf. Niemann 2006 forthcoming).

⁸ Yet, neither the Dublin Convention, nor the Regulation 343/2003 replacing it, may be wholly successful in reducing multiple applications or secondary movements within the EU (Immigration Law PA 2001).

The second important functional pressure resulted from the dissatisfaction of collective goal attainment, not from another policy area, such as the internal market, but from within the same field. Effective cooperation in JHA – and particularly visa, asylum and immigration policy – had become an increasingly important EU policy objective. From that perspective, the considerable weaknesses of the third pillar became a major stumbling block towards the goal of effective cooperation. There has been great consensus in the literature concerning the ‘failure’ of the third pillar in the run-up to the Amsterdam IGC (e.g. O’Keeffe 1995; Justus Lipsius 1995; Monar 1997, also for points below). The most important flaws included: (1) overlapping competencies between the first and third pillar, for instance concerning external borders. A communitarisation of such issues promised to increase the efficiency of measures and the coherence of EC action. (2) The legal instruments of the third pillar were widely regarded as flawed and there was uncertainty concerning the legal effect, particularly concerning joint actions. (3) The unanimity requirement was always assumed to have been a severe obstacle to the adoption of measures under the third pillar. The QMV option, through the ‘passerelle’ provision, which allowed the Council to bring issues to the scope of the Community, was very difficult to invoke, and in fact never had been. (4) The third pillar essentially lacked a generalised system of judicial review. As it affects individual rights, a strong claim could be made to seek judicial review in the areas covered by it. (5) Although the Commission was supposed to be fully associated in the area of JHA, it was suggested that the Commission merely had the status of *observateur privilégié*. A communitarisation of visa, asylum and immigration policy promised to improve on these shortcomings and enable goal attainment in terms of effective cooperation in that area. Policy-makers attached substantial significance to this rationale (e.g. Reflection Group 1995).

During the IGC 2000, functional rationales were somewhat less potent, compared with the Amsterdam IGC. Pressure from the free movement of persons objective was still a fairly considerable, albeit diminished, rationale for the further communitarisation of visa, asylum and immigration policy. That the free movement of persons had not yet become a complete reality by the late 1990s was acknowledged by several sources. However, the perceived deficiencies in terms of realising this principle and the intensity of demanding progress in this area had both decreased compared with the discourse of the early and mid-1990s (e.g. Commission 1998). In comparison with the previous IGC, this logic was less on the minds of decision-makers (interview EC-8, Brussels, July 2004, on file with author; interview CS-5, by telephone, November 2003, on file with author).

A moderate functional logic was at work through pressures stemming from the decision on future enlargement, taken at various European Councils since Edinburgh in 1992. Although an exogenous event, enlargement after those internal commitments largely became an endogenous source of pressure for reform of EU decision-making procedures. Once enlargement became an internal goal, problems were anticipated in terms of decision-making for policy areas ruled by unanimity, such as asylum and immigration as well as part of visa policy. Unanimity was already regarded as problematic with 15 delegations by some. With 25 Member States and the corresponding diversification of interests and increased heterogeneity of political and legal cultures, it was feared that those areas which were still governed by unanimity would become substantially susceptible to deadlock. Hence, the growing prospect of enlargement added some additional functional pressures for communitarisation. However, these functional pressures were only moderate, as enlargement was not perceived as immediately imminent at that stage. As one observer put it, 'Nice was supposed to be about enlargement, but there was no great sense of urgency among decision-makers coming from enlargement when considering JHA and other areas where decisions were taken by unanimity' (quote: interview CS-7, Brussels, July 2004, on file with author; also: interview EC-5, by telephone, October 2002, on file with author).

Another moderate functional pressure developed from necessities for increased cooperation in the *same* issue area due to the dissatisfaction with the attainment of collective goals in this very sector. The establishment of an area of freedom, security and justice, with Title IV as a significant component part, has become one of the most important EU projects, comprising about 250 planned binding legislative acts (Monar 2000: 18). It has been furnished with concrete aims and deadlines through the provisions of the Amsterdam Treaty, concretised by the 1998 Vienna Action Plan and further built on by the conclusions of the 1999 Tampere European Council. The ambitious goals laid down in this area created pressure on the institutional set-up and decision rules. However, this pressure was still perceived as moderate. It was widely argued that the improved Amsterdam provisions had been in use only for a few months and 'needed to be thoroughly tried out first' (interview EC-7, Brussels, July 2004, on file with author).

As for the Convention and last IGC, all in all functional pressures on visa and migration decision rules had intensified after the Nice IGC. Substantially contributing to this was the ever growing pressure of enlargement. With the Seville European Council of 2002 and its provisions for signing the Accession Treaty the following year and the participation of new

Member States in the 2004 EP elections, enlargement had now become an imminent reality. This put substantial pressure on issue areas such as Title IV that were mostly subject to unanimity, given the growing danger of decision-making deadlocks in the Council. In the Convention, enlargement became a frequently cited rationale to substantiate the need for reforming the decision rules of Title IV (Commission 2002a; EP 2003b).

Another strong functional pressure was exerted in terms of the dissatisfaction with the collective goal of achieving the area of freedom, security and justice – and more particularly the concrete targets set in the Treaty of Amsterdam, the Vienna Action Plan and the Tampere programme. Pressure was growing in that respect, due to little progress in the legislative process. The European Council meetings of Laeken in 2001 and Seville in 2002 increased the pressure by reaffirming the commitment to the policy objectives defined at Tampere and by expressing its concern that progress was slower and less substantial than expected. Similarly, the ‘scoreboard’, a bi-annual update established to review the progress concerning the area of freedom, security and justice indicated the severe problems of complying with the time limits that had been set (Commission 2002b). Many observers, both in academic (e.g. Fletcher 2003: 535) as well as in policy-making (Belgian Presidency 2001) circles, made the unanimity requirement responsible for the lack of progress in this area. Additional to the Amsterdam objectives, the Tampere programme asked for a wide range of measures, some of which were likely to remain subject to agreement beyond the Amsterdam deadline. Hence, during the Convention improved decision rules in the Council were called for with a view to dealing with possible leftovers from this comprehensive programme after 2004 and further objectives set thereafter (e.g. Vitorino 2002a: 80).

The Laeken European Council added moderate functional pressure in another way. By putting particular emphasis on greater simplification and efficiency, the Heads of State and Government increased the rationale for Title IV reform. Given the complexity of its decision-making rules, Title IV provided much scope for improvement along these lines. Streamlining halfway decision-making provisions can go both ways: re-nationalisation or supranationalisation. However, given the various other dynamics pointing towards further communitarisation, the bias was clearly in favour of the Community method. The Laeken European Council had also called for more democracy and transparency. The two solutions at hand – greater involvement of the EP and an enhanced role of national parliaments – were not equal competitors, given the strong predisposition in favour of the Community method, and especially QMV. As ministers could be outvoted in the Council, the democratic deficit would be dealt with more effectively through greater EP involvement. The functional tensions created

by these aims should not be exaggerated. They had been formulated at various European Councils before without much impact. Yet, at Laeken, these objectives were arguably emphasised more strongly than in previous Presidency conclusions⁹ and the members of the Convention took them more seriously than officials preparing previous IGCs (interview EC-9, Brussels, July 2004, on file with author).

Functional rationales stemming from the single market and the free movement of persons objective had further receded. The perceived deficiencies in terms of realising the free movement of persons principle and the intensity of demanding progress in this area had further diminished.¹⁰ Moreover, the general feeling in the policy-making and also in the academic Community was that issue areas such as asylum and immigration had for some time developed aspects and objectives beyond the abolition of internal borders. Hence, this rationale played only a subsidiary role at the last Treaty revision negotiation (interview EC-8, Brussels, July 2004, on file with author).

Exogenous pressures

Another structural rationale influencing Treaty revision in the area of visa, asylum and immigration policy is exogenous pressure. During the IGC 1996-97 this dynamic was an important one. Although somewhat less powerful here than functional pressures, exogenous factors reinforced functional ones in driving decision-makers towards communitarisation. Exogenous pressures are understood here as large numbers of asylum seekers, immigrants and refugees entering the Community and staying there, legally or illegally. This, combined with rising levels of unemployment in Western Europe, resulted in the perceived need to limit the number of third country nationals migrating to the Community. Since the late 1980s migration was pinpointed as a serious problem (Collinson 1993). Even though, the number of asylum applications was falling in the EC (apart from the Netherlands and the UK) since 1991-92, migration continued to be perceived as a threat (Butt Philip 1994: 188).

The need for a common EU response to those problems was a mixture of the perception of a common threat and the (related) inability of individual nation states to cope with these problems single-handedly. National immigration and asylum policies became ineffective,

⁹ Cf. Presidency Conclusions of Cannes (point IV), Madrid (pp. 1, 3), Helsinki (point I), Feira (point I).

¹⁰ Interview (2004). It should also be noted that the Commission has been conspicuously more silent on the free movement objective since its 1998 communication (cf. Commission, 1998).

especially because ‘no single country in Western Europe [was] capable of regulating migration flows without influencing those in other countries’ (Baldwin-Edwards and Schain 1994: 11). European states confronted with the growth of asylum applications and illegal immigration adopted ever stricter asylum and immigration regulations, which however, were unsuccessful because restrictions in one country only led to more asylum seekers in other countries until those countries adopted the same or even stricter rules. As a result, it was recognised that ‘solo runs’ did not help and that cooperation was needed (Achermann 1995).

Hence, underlying this issue was, at least to some extent, the nature of the asylum and immigration problems that went beyond the governance potential of individual nation states. Regional integration was viewed as a more effective buffer against exogenously originated problems of international migration. The perception often was that the free movement of persons rationale decisively exacerbated these exogenous developments (EP 1995; Schelter 1996). Exogenous pressures formed part of decision-makers’ rationales for strengthening cooperation on the European level to work out common measures (e.g. UK Government 1996a; Luxembourg Government 1995).

During the IGC 2000, exogenous pressures remained at a fairly substantial level. The number of asylum applications had begun to rise again in the EU after 1996, even if in 1999 it was still only about half the 1992 level (Eurostat 2003). In addition, the decline in legal immigration, resulting from more restrictive national approaches, was ‘compensated’ by increasing illegal immigration (Greens/EFA 2001). EU unemployment, which was slightly diminishing after 1996, was still at a relatively high level and still viewed as a major problem. Governments’ reflex to migratory pressures was still to resort to restrictive policies. However, given the ineffectiveness of national measures, in view of the gradual abolition of internal borders, the awareness of the need for common European solutions to the exogenous phenomenon of migratory pressure was strong (e.g. Märker 2001). A number of the measures, at least partly viewed as a response to exogenous pressures, needed to be worked out, for example on the qualification as a refugee and on procedures for granting and withdrawing refugee status. And progress in these areas can be attained more easily with more supranational decision rules.

Until the Convention and last IGC, exogenous pressure grew slightly. EU-wide migratory pressures in terms of asylum applications remained fairly constant between 2000 and 2002. The rationale for *common* asylum measures tackling (at least partly) exogenously induced problems and for decision-making by QMV was still on, as progress for instance

concerning the directives on procedure and qualification – the core provisions of a common asylum system – was forthcoming only very slowly under unanimity during the Convention. And further measures, to what were perceived as exogenously induced problems, were regarded as likely thereafter, for example going beyond ‘minimum standards’ (interview CS-10, Brussels, July 2004, on file with author).

In addition, a new exogenous dimension had arisen. The terrorist attacks of 11 September 2001 had certain implications for visa, asylum and immigration policy (Guild 2003; Brouwer 2003). The link between terrorism and immigration/asylum policy is the assumption that terrorists tend to come from outside and enter the country in question as third country nationals – as legal immigrants as in the case of some of the perpetrators of 9/11, as illegal immigrants or as asylum seekers. Of course, the Tampere programme already included objectives related to the combat of terrorism. However, ‘9/11’ was certainly a spur to work out EU level provisions, such as the Common Position on Combating Terrorism. Yet, additional anti-terrorist measures were judged necessary, for example related to the expulsion, extradition and detention of (potential) terrorists. Further progress in this area would be substantially facilitated by the extension of qualified majority voting. This rationale for QMV and the Community method was accepted by most interviewees and also articulated less overtly by some policy-makers (Martikonis 2002). But on the whole, 9/11 was perceived only as a moderate, and certainly not decisive, extra spur for further communitarisation (interview CS-9, Brussels, July 2004, on file with author).

Socialisation, deliberation and learning processes

Throughout the IGC 1996-97, socialisation, deliberation and learning processes influenced the outcome on visa, asylum and immigration policy in two respects. Firstly, with regard to *EU policy-making*, JHA was still a new field at the time. The question is how fast and to what extent the new decision-making structures, forums and actor constellations allowed socialisation, learning and communicative action processes, and thus cooperative behaviours, to take place. Such processes were far from developed in the mid-1990s.¹¹ As one close participant of JHA policy-making noted, ministers and officials in the third pillar had not yet realised ‘the need to make concessions and to seek compromise’. Moreover, ‘the fact that [...]

the ministers and ministries involved [were] not yet sufficiently accustomed to the working methods and disciplines of the Council to actively seek ways of making decision-making possible' was referred to as one of two main features 'most uncondusive to progress' (Fortescue 1995: 26, 27). Few policy-makers suggested that the cumbersome, rigid, and often uncooperative policy process in the area of JHA was a natural reflection of still insufficiently developed socialisation and learning processes, and that the new system needed more time to develop (Justus Lipsius 1995: 249). Instead, the intergovernmental institutional set-up was usually solely blamed for this. By largely ignoring the socialisation dimension, most actors naturally focused on the question of decision rules and competencies, which increased the rationale in terms of communitarisation. Hence, somewhat paradoxically, the minimal occurrence of such processes until the mid-1990s intensified the pressure for further institutional and decision-making reform in JHA at the IGC (interview EC-2, Brussels, December 1997, on file with author; interview CS-3, Brussels, April 1999).

Secondly, there is the question of socialisation, deliberation and learning processes *at the IGC itself*, possibly contributing to consensus formation and more integrative outcomes. On the whole, a moderate development in that respect seems to have occurred. In the IGC Representatives Group, which is the focus here, there was some scope for such processes. Meetings were held frequently, usually once a week. Informal dinners, 'working trips' organised by the Presidency and bi-lateral contact allowed representatives to get to know each other personally. Several members of the group noted that there was 'something like a club-atmosphere', in which 'basic relationships of trust' developed (interview with M. Scheich, Brussels, December 1997). This seems to have facilitated and promoted the development of reciprocity as a collective understanding about appropriate behaviour in the Representative Group (interview NAT-4, Brussels, April 1999, on file with author). As one official told the author: 'only sometimes we openly talked about returning concessions. After we agreed in principal on the communitarisation of certain JHA policies, the Presidency understood that it could not also push us on CFSP' (interview NAT-3, Brussels, December 1997, on file with author). In addition, as one official put it: 'there was a feeling that we were very much responsible for the [outcome of the] conference. This collective responsibility was a source of motivation for making progress' (interview NAT-6, Brussels, April 1999, on file with author). A number of other mechanisms seem to have been at work in the Representatives Group easing consensus formation. For example, participants could test ideas and say things that they would

¹¹ Reasons for the lack of socialisation include the novelty of the third pillar and its structures, the heterogeneity of the K4 Committee, further fragmentation by designating various Committee members for different issues,

not normally wish to say in more formal settings. Moreover, officials noted that socialisation processes and reasoned discussions helped in the sense that one could get access to their peers' motives, which is often the first step to solving a problem. For example, as Manfred Scheich, the Austrian IGC Representative, remarked: 'through private talks with Niels [Ersboll] I could finally understand why the Danes made so much fuss about the communitarisation of asylum and immigration policy' (interview with M. Scheich, Brussels, December 1997). The understanding and knowledge of the severity of the domestic problems facilitated a swift acceptance of the special provisions for Denmark. On the whole, however, socialisation processes seemed less evident in the Representatives Groups than in longstanding permanent working groups or committees (cf. Lewis 1998). Members of the Representatives Group, who at the same time were also members of the Committee of Permanent Representatives (COREPER), pointed out, that the group was rather heterogeneous at the outset, and although a significant *esprit de corps* developed, 'relations never got as close as between the ambassadors in COREPER' (interview NAT-2, Brussels, December 1997, on file with author).

During the Nice IGC, processes of socialisation, deliberation and learning were substantially hampered by several factors. Perhaps most importantly, while at the IGC 1996/97 the Dutch Presidency had successfully managed to divert national JHA officials' and ministers' attention away from the IGC – by putting forward an Action Plan Against Organised Crime, a sexy topic with much public appeal – this time they were much more alert and managed to assert their interests to a much greater degree. A substantial fraction of national JHA officials were sceptical of the Amsterdam provisions and sought to limit further loss of control (Guiraudon 2003: 279). Their views were fed into the formation of national positions through the process of inter-ministerial coordination. This led to tight and restrictive instructions to IGC Representatives. As a result, a reasoned discussion on the merits of the issues at hand became difficult. Cooperative norms, such as reciprocity, that tend to lead to the realisation of an enlarged common interest, were also countervailed by such externally induced constraints.

Secondly, institutional topics pertaining to the balance of power between small and big Member States had led to substantial distrust among negotiators. Although these issues were largely left to the Nice summit, they also rubbed off on other issues, such as justice and home affairs. Under such circumstances, socialisation and communicative action processes had little chance to unfold. Thirdly, there was such a large number of issues on the QMV agenda that even prominent and controversial ones, like JHA, were dedicated too little time to engage in an

sovereignty-consciousness of officials and ministers (cf. Niemann 2000, 2006 forthcoming).

extensive reasoned debate on the pros and cons of extending QMV in Title IV. Fourthly, the shorter life span of the Representatives Group was detrimental to the development of intense enmeshment and socialisation processes (interview NAT-9, by telephone, October 2002, on file with author; interview CS 9, Brussels, July 2004, on file with author).

One of the more substantial changes from the Nice Treaty revision was the greater favourable impact of socialisation, deliberation and learning processes in the Convention which also influenced the IGC 2003-04 outcome. This was facilitated by several favourable conditions: (1) the Convention started off with an initial listening and reflection phase during which expectations and visions could be freely stated. It generated a deeper understanding of other members' ideas and softened pre-conceived opinions. (2) The Convention negotiating infrastructure – with more than 50 sessions that both the Plenary and the Praesidium held over a period of 18 months – also induced the development of an *esprit de corps* and a strong sense of responsibility for a successful outcome in both forums of the Convention (Göler 2003). (3) Members of the Convention were in a position to act freely and were largely unbound by governmental briefs (Maurer 2003: 134; but cf. Magnette and Nicolaïdis 2004: 393). Closely related, one important source of countervailing pressures was largely shut out: bureaucratic resistances were in a much less favourable position to counter the deliberation process in the Convention because government representatives did generally not have to go through the process of inter-ministerial coordination for the formation of national positions (Maurer 2003: 136). (4) The atmosphere, spirit and negotiating structure made it very difficult for members of the Convention to reject something without explanation, or without entering into a reasoned discussion where one's arguments would become subject to scrutiny.

In such an environment good arguments, validated on the basis of accepted criteria, could register more easily with participants, and were therefore more likely to prevail in the discussion. Hence, the strong structural (i.e. functional and exogenous) rationales for further integrational steps in Title IV now had a better chance to be taken up by actors and thus unfold their logic. In such deliberative process, negotiators tended to concur more fully in the common results. A reasoned consensus rather than compromise was reached. My interviewing suggests that the Title IV Convention outcome was largely perceived as such. This also, albeit to a lesser extent, applies to the Draft Constitutional Treaty as a whole, which increased the weight and impact of the Convention text and made it difficult for negotiators at the IGC to considerably depart from this consensus. This was the case not least because Member States were very much part of this consensus. The IGC 2003-04 was negotiated on the level of Ministers and Heads of

State and Government only. And these two levels had, either directly or indirectly (represented), participated in the Convention process. Moreover, there was a general feeling that the Convention had done a good job. The dominant policy discourse suggested that the Convention text should be kept as much as possible (c.f. Frankfurter Allgemeine Zeitung 16/6/03; Guardian 14/3/03). In addition, due to the substantial bonding strength of the Draft Constitutional Treaty, the Convention text became the basis for further negotiations on most (non-institutional) issues in the IGC. In a way, it turned into the default setting (Beach 2005: 199). Regarding visa, asylum and immigration policy, the bonding strength was such that the Convention text on these issues was not reopened.

What has been presented above as socialisation, deliberation and learning is difficult to substantiate within given space limitations.¹² Suffice it to say that interviewees characterised the negotiations in terms of arguing and reasoning, either without being prodded, or when offered different potential characterisations. In addition, negotiators generally avoided pointing to hierarchy, status, qualifications or other sources of power when making their statements, and thus did not add non-discursive authority to their arguments (interview with K. Hänsch, Brussels, July 2004). Moreover, speakers' utterances in the plenary seem to be very consistent with their statements in other forums, which reinforces the case of truthful arguing (cf. e.g. Vitorino 2001, 2002a, 2002b). Finally, 'powerful' actors did not manage to prevail in the Convention when their arguments were not persuasive. For example, the German Foreign Minister, the UK government representative and others sought to reintroduce unanimity for the (whole) area of immigration (Fischer 2003, Hain 2003a). They were not successful as their case was not convincing given the powerful rationales for further communitarisation pointed out above. Also the UK government representative was not successful with his quest for an emergency clause allowing the possibility to derogate from legislation establishing a common asylum system (Hain 2003b), since the reasoned consensus regarded this a step backwards compared with current practice (interview EC-10, Brussels, July 2004, on file with author).

The role of supranational institutions

During the 1996-97 IGC, the integrative role played by supranational institutions was rather substantial. Prior to the IGC, the *Commission* had provided the ground for being granted more responsibility in visa, asylum and immigration decision-making. By adopting a less

‘doctrinaire’ and a more ‘gradualist’ strategy from the (early to) mid-1990s, the Commission had demonstrated that it could bring some added value into JHA policy-making. It generally presented well researched, creative and balanced proposals, which signalled to Member States that it could be entrusted with more powers in this politically sensitive field (Myers 1995: 296). Secondly, the Commission made an integrative impact on the IGC by cultivating functional pressures. This practice began long before the Amsterdam IGC. Papademetriou (1996: 22) even suggests that it was a conscious strategy of the Commission to promote the elimination of internal borders in order to reap later spillovers in the form of Community policies on migration and other areas related to the free movement of persons. In the run-up and during the Conference, the Commission repeatedly invoked this rationale (e.g. Commission 1996). Thirdly, although at IGCs the Commission is only one of many actors making proposals, it can still substantially influence the agenda, as the early decision-making stages are of critical importance in terms of shaping actors’ perceptions and interests (cf. Peterson 1995). Its early, comprehensive and well argued proposals to the Reflection Group and IGC are said to have been influential in the JHA debate (cf. Moravcsik and Nicolaïdis 1999: 72). Fourthly, on JHA issues the Commission made use of its detached position and its greater overview of developments in the various Member States including their legal systems. As one observer put it, ‘national officials were always saying that something had to be done, but they could not table any sensible proposals for remedies’. The problem for representatives from Member States was that their national administrations were very conservative and traditional in their thinking in terms of sovereignty. In addition, ‘they were too familiar with their own legislations, unable to go beyond merely taking photographs of each other’s legislations and to bring some real dynamic into the debate, whereas the Commission did not always fall back into a national approach, as it did not carry such baggage and was free of such intrinsic national thinking’. As a result, the Commission was able to considerably advanced the substantive debate on visa, asylum and immigration policy, and eventually provided most of the formula for communitarising part of the third pillar (interview NAT-1 and EC-2, Brussels, December 1997, on file with author; also cf. Beach 2005: 135, 143). Finally, the Commission was further capable of asserting itself by cultivating alliances with governmental and non-governmental elites, and above all the various Presidencies (Beach 2005: 134; Niemann 2006 forthcoming). One Commission official even suggested that ‘most of “Dublin II” on JHA came straight from our pen’ (interview EC-1, Brussels, December 1997, on file with author).

¹² But also see general indications in the literature (Göler and Marhold 2003; Göler 2003; Maurer 2003) and Niemann (2006 forthcoming) for a fuller account. For indicators of communicative action and persuasion, see

The various *Presidencies* contributed significantly to the IGC changes on visa, asylum and immigration policy. Both the Irish and Dutch Presidencies succeeded in their task as institutionalised mediator, since they found compromises on Title IV with which all parties could live without feeling pushed to the sidelines. The Presidencies also played a strong role as promotional brokers. They ensured a progressive outcome, beyond the lowest common denominator. Both ‘Dublin II’ and the Draft Treaty that went to the Amsterdam summit can be characterised as being ‘on the upper end of realism, keeping the momentum up at a high, but not too high, level of ambition’ (interview CS-2, Brussels, December 1997, on file with author). The above texts foresaw a short one year interim period and an automatic switch to QMV thereafter, and a three year period (with automatic change to QMV thereafter), respectively. In addition, the Dutch Presidency also cleverly managed to divert the attention of senior JHA officials and ministers by pushing the Action Plan on Organised Crime parallel to the IGC. This minimised their interference with JHA issues at the IGC which was negotiated by the more ‘progressive’ foreign ministries (interview NAT-7, Brussels, April 1999, on file with author).

The role played by the *European Parliament* – even though its impact on the 1996-97 IGC negotiations concerning visa, asylum and immigration policy was limited – further contributed to the progressive outcome at Amsterdam. Since the mid-1990s the EP began to play a more constructive part in JHA policy-making (Esders, 1995). During the IGC itself, Parliament made a moderate contribution to the JHA negotiations. It seems to have had some influence through its participation at the IGC table, its cultivation of contacts with national elites and an informal alliance with the Commission on a number of issues like JHA (interview EP-3, Brussels, April 1999, on file with author). Bobby McDonagh (1998), an Irish diplomat closely involved in the negotiations, has given a rather up-beat account of the EP’s role, as it helped significantly to maintain ambitions at the highest attainable level.

The *European Court of Justice* influenced the wider debate on migration policy at the IGC 1996-97 through its progressive interpretation of EC law in the field of immigration policy and the related areas of anti-discrimination and free-movement of third country nationals by often going beyond the express provisions of the Treaty (P. Ireland 1995). Among these areas, the ECJ was most influential on the issue of anti-discrimination where its case law was also cited by NGOs (Justice 1996). The Court also indirectly influenced the IGC debate on the question of judicial review within JHA. Its sound reputation and good standing are likely to have contributed to its choice in fulfilling the need of judicial review (Neuwahl 1995).

Throughout the IGC 2000, the *Commission's* assertion and impact on visa, asylum and immigration policy was weaker than during the Amsterdam IGC. The Commission was on the defensive from the very start of the Nice IGC. This was partly due to the resignation of the Santer Commission in 1999 and the subsequent priority of putting its own house in order and also due to the fact that the Commission, itself an item on the agenda, was more object rather than subject to the negotiations, as a result of which the Commission was to some extent sidelined during the IGC (Grabbe 2001). The Commission did cultivate and act out some of the structural dynamics, such as the inadequacy of current decision rules for a swifter progress on the objectives set (Prodi 2000: 3). However, on the whole it was admitted that more could have been done by the Commission in that respect. In retrospect, it was deplored that energy was wasted on issues that had little chance of succeeding, such as social security, taxation or the public prosecutor, while important issues such as JHA were rather neglected (interview EC-6, by telephone, October 2002, on file with author). There was no substantial comprehensive paper by the Commission on the extension of QMV in this area. Such a paper could have further contributed to cultivating the various structural rationales pointed out above.

As for the role of the *Presidency*, while the Portuguese accomplished the task of honest and promotional broker, the performance of the French Presidency in the important final half of the IGC was detrimental to a progressive outcome on Title IV. Its approach concerning the extension of QMV on Title IV was not particularly ambitious, certainly not on the upper end of realism. Even at relatively early stages it introduced fall-back positions (French Presidency 2000a). And as one observer noted, the French Presidency 'started-off right from the beginning to discuss Title IV sub-article by sub-article, and therefore invited delegations to ask for special treatments on different provisions, which inevitably watered the whole thing down' (interview EC-9, Brussels, July 2004). Secondly, the French Presidency failed to display an adequate degree of leadership on a number of issues, including qualified majority voting in the area of JHA. It did not succeed in sufficiently narrowing down the options on the table. It went into the Nice summit still undecided about the basic approach to be chosen and thus still presented two different frameworks – staying within the realm of Article 67 or to work with declarations/protocols – which both provided the possibility for further sub-options (French Presidency 2000b). Finally, the French Presidency somewhat departed from the principle of impartiality by advocating a shift in the balance of power between big and small Member States (Gray and Stubb 2001). This adversely affected its potential role as an honest broker across issue areas and also contributed to a deteriorating negotiating climate, especially in the final phase of the IGC.

The *European Parliament* was less influential than in the run-up to and during the Amsterdam IGC. The EP failed to make much of its enhanced role in the IGC proceedings. For example, it missed the chance to make an impact during the important agenda-setting phase by submitting its IGC opinion at a time when the issues had already largely been framed (EP 2000). On visa, asylum and immigration, as on all JHA issues, it spoke out in favour of QMV and co-decision, but failed to assert itself (interview EP-5, by telephone, October 2002, on file with author; interview CS-8, Brussels, July 2004, on file with author).

During the last Treaty revision negotiations, the *Commission's* assertion on the JHA debate substantially increased in comparison with the IGC 2000. For example, it made a more considerable effort to foster spillover by explaining the structural rationales for further integrative steps, such as the inadequacy of current decision rules for a timely implementation – or swifter progress – of the Amsterdam and Tampere objectives. The Commission did so both by pursuing personal contacts with national decision-makers and through interventions and papers at the Convention and other forums (e.g. Vitorino 2001, 2002b). The Commission also contributed to the above functional rationale by timely initiating the required legislative proposals. The pressure was thus on the Council to find agreement, which further spurred the revelation of problems attached to the unanimity rule. In addition, in the Working Group Freedom, Security and Justice, as well as in the Plenary, the Commission was represented by Antonio Vitorino, who was able to influence the debates through his superior expertise, his persuasive argumentation and his reputation as credible and trustworthy (Goulard 2003: 374; Beach 2005: 198). Finally, the deliberative decision-style which predominated in the Convention meant that arguments and explanations attached to propositions were considered more openly and seriously by participants. It also entailed that good arguments could register more easily with negotiators. And the Commission could and did make powerful arguments in favour of a further communitarisation by pointing to the various structural rationales.

The *European Parliament* made a considerably bigger impact on the Treaty revision negotiation in the field of visa, asylum and immigration policy than during the IGC 2000. EP members in the Convention managed to assert themselves because, apart from the small Commission delegation, they formed the most coherent and best organised fraction. In addition, EP members were among the most active ones at the Convention, also concerning Title IV issues. They frequently intervened in Plenary and Working Group debates and contributed their own papers to the discussion. Klaus Hänsch (PES), Elmar Brok (EPP), Andrew Duff (Liberals) and Johannes Voggenhuber (Greens), who all supported further

communitarisation of Title IV, also played a prominent role in their respective political families. Overall MEPs, with few exceptions, were alongside the two Commission representatives, perhaps the most fervent supporters of the Community method in all policy areas of JHA, including visa, asylum and immigration. This way, members of the EP pushed several of the above mentioned structural rationales for further integration and thus became active agents of integration (e.g. Brok 2002). In the end, MEPs and the European Parliament more generally were among the strongest if not the strongest, defenders of the Draft Constitutional Treaty and thus considerably contributed to its binding strength.¹³

The role of the various *Presidencies* during the IGC is of lesser relevance to the analysis of visa, asylum and immigration policy at the last Treaty revision negotiations. The Belgian Presidency in the second half of 2001 was one factor in turning the idea of a Convention into reality and also had an impact on the broad mandate of the Convention. The mutual agreement on Title IV issues reached during the Convention was, apart from some cosmetic changes, left untouched during the IGC 2003-04, hence making an assessment of the Italian and Irish Presidencies of 2003 and 2004 less important.

Countervailing forces

So far we have looked at the dynamics of integration. On the other side of the equation we have countervailing forces impacting on the decision-making process. During the IGC 1996-97 the countervailing pressures at play were of medium strength. One very important aspect is sovereignty-consciousness. Immigration and asylum policy touch upon traditional prerogatives of states, and therefore belong to the core of state sovereignty. Freedom of action over their own territory and the right to decide freely on the entry and expulsion of aliens are issues of national identity. It has been held that ‘the competent ministers act as policemen of sovereignty’ (van Outrive 1995: 395). As pointed out above, during the IGC negotiations, JHA ministers’ attention was successfully diverted away from the Conference by the Dutch Presidency, for example, through discussions on the politically expedient Action Plan on Organised Crime. This development (significantly) reduced the impact of sovereignty-consciousness at the IGC. Also often regarded as agents of sovereignty-consciousness and domestic constraints are bureaucrats working in national departments. During the IGC 1996-97 bureaucrats from various ministries fed their countervailing demands into national positions

¹³ Concerning support of the European Parliament for the Draft Constitutional Treaty, see for example EP (2003a: 7). Also cf. Frankfurter Allgemeine Zeitung (14/11/2003: 1); Beach (2005).

through the process of interministerial coordination. The fact that the French delegation prevailed on limiting the role of the ECJ in justice and home affairs has been attributed to sovereignty-consciousness within certain French ministries (e.g. Justice, Interior). The Danish opt-out has also largely been explained by sovereignty-consciousness on various levels of national government and administration (interview NAT-3, Brussels, December 1997, on file with author).

As for domestic constraints, the most significant ones emerged in German domestic politics. Chancellor Kohl's refusal at the Amsterdam summit to go along with an automatic switch to QMV after three years, is supposed to have been decisive as regards the final provision on voting rules in Title IV of the Amsterdam Treaty. The Kohl government which at the outset of the IGC had strongly supported QMV for visa, asylum and immigration policy faced opposition within his own party. Several CDU *Ministerpräsidenten* above all the Bavarian, Edmund Stoiber, opposed QMV for asylum and immigration issues, partly for ideological reasons (i.e. sovereignty-consciousness), partly because they feared potential detrimental effects of uncontrolled migration, particularly regarding their regional labour markets. Stoiber's intervention, backed by a number of his colleagues is said to have been crucial in persuading Kohl to press for an abolition of the envisaged automatic switch to QMV. Kohl needed their support to get the Treaty through the *Bundesrat*. Moreover, on the EMU debate Kohl had to stretch himself to win the support of some CDU *Länder* leaders. He did not have political support for both EMU and the shedding of more sovereignty over immigration and asylum, which led him to backtrack on the latter issue, given his priority for EMU (cf. Moravcsik and Nicolaïdis 1999: 68, 75; Devuyst 1998: 620-21; Beach 2005: 120).

Diversity – either viewed as an aspect on its own or as a sub-issue of domestic constraints – constituted another countervailing force. Particularly, the existence of different legal traditions in the various Member States has been seen by many as a potential hindrance of policy harmonisation. In addition, specific national interests related to geopolitical distinctness, as in the case of the UK and Ireland, obstructed a consistent communitarisation of visa, asylum and immigration policy. This geographical distinctness along with the customs union between the two countries (and British sovereignty-consciousness) can explain the opt-outs for the UK and Ireland (Monar 1998: 137; Devuyst 1998: 625).

Overall, for the IGC 2000 the forces obstructing further communitarisation of Title IV had gathered further strength. Most importantly, regarding sovereignty-consciousness, as opposed to the Amsterdam IGC, when JHA ministers' attention was successfully directed away from

the JHA issues, ministers were very alert and conscious of the IGC this time. After the considerable integrational step taken at Amsterdam, national bureaucrats frequently sought to limit 'agency loss' (Guiraudon 2003: 279) during the legislative process and also remained sceptical of further integration at the IGC 2000. It was the French, but also the German and UK delegation that most strongly opposed any broad scale extension of QMV in Title IV. French and German opposition has partly been attributed to the strong reluctance from (senior) officials in the respective ministries of interior and justice (interview CS-4, by telephone, October 2002, on file with author; interview EC-11, Brussels, July 2004, on file with author).

Even stronger domestic constraints also played an important role in hindering a further communitarisation of Title IV. Asylum and immigration had become topics of very high salience in domestic politics, partly coupled with the predominating high unemployment in most Member States. With elections scheduled or expected in the UK in 2001 and in Germany and France in 2002, there was a tendency to keep the unanimity rule because opposition parties could have capitalised on this during election campaigns. Particularly in the German government this thinking seems to have prevailed (Prevezanos 2001: 3).

During the Convention countervailing pressures impacted much less than during an IGC. The Convention structure and environment shut out most of the looming countervailing forces. Although members arrived at the Convention with certain domestic or institutional socialisations and frames guiding their behaviour, all in all they were able to negotiate freely without significant restrictions (Maurer 2003: 134-37). Due to the absence of inter-departmental coordination, representatives of national governments were not confined by the influence of the various functional ministries. As a result, domestic factors, while constituting important sources of information and feedback mechanisms, were far less constraining for members of the Convention than for negotiators in an IGC. More specifically, national civil servants, and also ministers responsible for JHA – who have been identified as important agents of sovereignty-consciousness and who also constitute a principal source of domestic constraints – were largely excluded from the process.

Those countervailing forces that made it onto the Convention stage had to withstand the process of deliberation and reasoning which largely prevailed. It was more difficult for those countervailing pressures that slipped through the Convention filter to register in an open debate than during a process in which all participants have a *de facto* veto. In a deliberative process, arguments stemming from countervailing pressures become subject to scrutiny along commonly accepted criteria and are also judged against other arguments, i.e. those stemming

from the various functional and exogenous rationales. Teufel, representing the German *Länder*, UK government representative Hain, and others who tried to ‘water down’ the progressive emerging consensus, largely failed to assert their proposals, because their arguments were only accepted to a limited extent (interview EC-12, Brussels, July 2004; on file with author). Most of the few modifications concerning Title IV issues, for example on immigrants’ access to the labour market, were made in the final stage of the Convention. This period has also been termed the ‘pre-IGC stage’, during which many features of the Convention structures had disappeared.

Apart from the growing shadow of the IGC, the small number of exceptions to a full communitarisation can be explained by the particularly strong islands of countervailing pressures. Most prominently, exclusion of the right to determine access to the labour market by third-country nationals from the Treaty provisions can be attributed to strong constraints in Germany. Very important in that respect was the pressure from the CDU/CSU opposition. It is said to have ‘blackmailed’ the government not to give in on that question, as otherwise it would block the domestic immigration bill in the *Bundesrat*. In addition, the German government feared the conservative opposition would exploit the issue by accusing the government of disrespecting national interests and thus spark off a domestic political debate on the issue, on which most Germans were rather sceptical and cautious according to opinion polls (cf. Frankfurter Rundschau online 9/7/2003; 3/5/2004).

The greatly reduced countervailing pressures also had an impact, beyond the Convention, on the entire Treaty revision exercise. Due to its considerable bonding strength, described above, the Convention text became the default position (Beach 2005: 199). It was difficult for any countervailing pressures to manifest to an extent which would have changed this constellation. Moreover, as Title IV issues were almost entirely kept off the agenda, countervailing pressures were not really brought to bear on Title IV issues (interview EC-11, Brussels, July 2004, on file with author).¹⁴

CONCLUSION

All in all, the framework seems to provide a robust account for an analysis of the past three Treaty revision negotiations on the communitarisation of visa, asylum and immigration policy.

¹⁴ The countervailing forces that threatened the successful conclusion of the IGC as a whole during the autumn and winter 2003/2004 have been analysed and described elsewhere (Niemann 2006 forthcoming).

The hypothesised pressures can aptly explain variation in outcomes across cases. My empirical findings are summarised in Table 1.




During the 1996-97 IGC fairly substantial countervailing pressures – particularly in the form of domestic constraints and diversity and, to a lesser extent, sovereignty-consciousness – were largely overcome by strong dynamics. The functional pressure related to the objective of the free movement of persons was assisted by pressures that arose from the dissatisfaction with the non-achievement of attaining ‘effective cooperation’ in this field. Exogenous developments – i.e. mainly migration streams inducing competitive policy-making among Member States (towards more restrictive policies) – constituted important complementary pressures for communitarisation. These two structural pressures were most consistently promoted by supranational institutions which, also through their roles of honest and promotional broker, substantially contributed to the progressive outcome. As for socialisation, deliberation and learning processes, the minimal development of these processes and the parallel occurrence of flawed cooperation among Member States, induced only very few agents to conclude that the new system needed time to develop. Most concluded that the cumbersome, intergovernmental decision-making procedures were responsible for the lack of progress, which – together with modest socialisation processes at the IGC itself – further pushed for a far-reaching outcome.

During the IGC 2000 negotiations, the dynamics at work both in the run-up to, and during, the Conference were less substantial than throughout the IGC 1996-97. While exogenous pressures provided a similar rationale as three years prior, functional pressures – particularly the internal market rationale – had diminished. The latter was only to some extent compensated by additional functional pressures stemming from enlargement. More grave was the fact that these still substantial structural forces were not adequately acted out by agents. The Commission, the French Presidency and the European Parliament were either unable or unwilling to push for integrative outcomes, to reason out the logics for further communitarisation or to upgrade common Community interests. This was further compounded by the lack of socialisation, deliberation and learning processes. Their absence removed an important basis for connecting actors with the structural rationales. In addition, the diminished dynamics were met by even stronger countervailing forces compared with the Amsterdam IGC, both in terms of sovereignty-consciousness and domestic constraints.

As for the last Treaty revision, my analysis suggests that the dynamics of integration had gathered greater strength. Structural (functional and exogenous) rationales had grown, for example through the imminence of enlargement, the increasing perception of inadequacy of current decision rules for the timely realisation of EU objectives, and also slightly through the

terrorist attacks of 9/11. Also importantly, agents that can typically be expected to act upon these structural pressures, such as the Commission and the European Parliament, were much more able to assert themselves. In addition, socialisation, deliberation and learning processes during the Convention provided the much needed lubricant between structures and agents and constituted an important platform for the unfolding structural pressures. On the other hand, countervailing forces were diminished in comparison with previous IGCs. As a result, a stronger ignition and dissemination of integrational dynamics was possible.

Table 1: Summary of hypothesised pressures and outcomes across (sub-)cases

(Sub-)case	IGC 1996-97	IGC 2000	IGC 2002-04
Pressures			
Functional pressures	High	Medium	(Medium to) High
Exogenous pressures	Medium (to High)	Medium (to High)	(Medium to) High
Socialisation, deliberation and learning	Medium	Low	Medium to High
Role of supranational institutions	(Medium to) High	Low (to Medium)	(Medium to) High
Dynamics (combined)	Strong 	(Weak to) Medium 	Strong 
Countervailing forces (combined)	Medium	Strong	Weak to Medium
Outcome (in terms of level/scope)	Medium to High	Low (to Medium)	Medium to High

The framework, through its dialectical nature – combining both dynamics and countervailing factors – may enable us to account for more *specific* aspects of decision outcomes. Where there is across the board pressure for communitarisation of visa, asylum and immigration policy, strong

countervailing forces help us to make an informed guess concerning the extent and scope of integration, including issues and aspects where progress is less likely. The strong dynamics during the last Title IV Treaty revision suggested the likelihood of full communitarisation. When also considering the countervailing pressures at work, we can estimate that areas, such as the right to determine access to the labour market by third-country nationals, will be excluded, given the German government's domestic constraints. Thus, by analysing both sides of the dialectical equation the specificity of our judgement concerning decision outcomes is considerably enhanced.

My empirical analysis has indicated that dynamics and countervailing forces cannot always be clearly separated from each other. They impact on one another during the (decision-making) interaction, and thus already restrain each others' impact. For example, socialisation, deliberation and learning processes may be reduced by countervailing forces such as domestic constraints and sovereignty-consciousness, as during the IGC 2000. On the other hand, socialisation and learning processes also, to some extent, soften up sovereignty-consciousness and also curtail domestic constraints and diversities, since national elites are increasingly Europeanised and the EU – as well as interaction on the European level – contributes to the construction of their preferences and identities. On a general level one can also say that different structural pressures (endogenous-functional, exogenous and domestic) inform and constitute decision-makers' interests and attitudes, which suggests that dynamics and countervailing forces check and balance each other on many levels.

Closely related to the previous point, pressures that have been hypothesised as dynamics may – under certain conditions – turn into countervailing forces and vice versa. For example, during the IGC 2000 the role of the Council Presidency, which is usually viewed here as a potentially substantial driving force, obstructed agreement due to its lack of ambition, its bias concerning larger institutional questions and its failure to sufficiently narrow down the options for agreement. Elsewhere I have described how countervailing forces can turn into dynamics, for example through the convergence of domestic constraints (cf. Niemann 2006 forthcoming).

The causal relevance of individual pressures may also be probed by making use of a more formal comparative analysis. A comparison of five independent variables across three sub-cases can of course under most circumstances generate only indeterminate or tentative results. While this is conceded here, it is worth pointing out that a larger study with seven cases has brought about very similar results (Niemann 2006 forthcoming). In addition, a straight forward comparative analysis is hampered by the fact that we are dealing with (complex) multiple causality. By making partial use of Mill's (1843) methods of 'difference' and 'concomitant variation', one can examine whether hypothesised pressures co-vary with outcomes. Changing

levels of progressiveness in terms of outcome would corroborate those dynamics changing as hypothesised, and challenge those remaining constant or changing in the direction opposite to the one hypothesised. In other words, higher values on the decision outcome (or on the overall dynamics) would confirm those dynamics that also display higher scores, and challenge the causal relevance of those decreasing or remaining constant.

By including countervailing pressures in the framework, an additional layer of complexity has been introduced: dynamics may not co-vary with outcomes in a linear fashion due to strong countervailing forces. Hence, although the rule still applies, that increased measures of causally relevant dynamics should lead to higher scores on the dependent variable, countervailing forces may lessen or dilute dynamics. Therefore, as a first step, it was ascertained, if individual dynamics co-vary with the values of the combined dynamics. And as a second step, I investigated whether individual dynamics co-varied with the overall outcome of the sub-case in question, while taking the impact of countervailing forces into consideration. Table 1 indicates that the hypothesised dynamics, and particularly functional pressures and the role of supranational institutions, co-vary with the scores determined for the combined dynamics. When looking at final outcomes – while taking account of countervailing forces – this trend is also confirmed. This comparative analysis could only establish correlations between causal variables and outcomes. Hence, the main thrust of my empirical analysis has relied on tracing, analysing and discussing causal mechanisms and processes, providing the integrative knowledge absent at the level of correlations. The combination of comparative analysis and process tracing has augmented the conclusiveness of my findings.

The relatively high value of exogenous pressures during the IGC 2000 may be seen as a slight anomaly in face of the (low to) medium overall dynamics. However, as structural (including functional) pressures were not sufficiently acted upon by agents, the overall dynamics could not gather more strength. My analysis indicates that structural pressures can only really make an impact in combination with strong agency. Hence, we can conclude that the integrational logic tends to increase most when structural *and* more actor-based dynamics are substantially activated.

Given the analytical framework and the resulting isolation of countervailing forces as a variable, the most conclusive comparative analysis can be made in terms of this type of factor. Its causal significance can be measured directly when compared with outcomes in consideration of the values taken by the combined dynamics. In the 2002-04 and 1996-97 cases (even) ‘weak to medium’ and ‘medium’ countervailing forces, respectively, somewhat tamed

strong dynamics. In the 2000 case strong countervailing forces pushed (weak to) medium dynamics back to a fairly minimal outcome.

My research suggests that the above findings are also generalisable beyond visa and migration policy Treaty revision, i.e. that the hypothesised factors may also explain change and stagnancy in other issue areas and on different levels of decision-making (cf. Niemann 2006 forthcoming). The apparent utility of the framework for empirical analysis, the tentativeness of parts of the preceding investigation (e.g. concerning the specification of conditions for occurrence and impact of pressures) and the possibility of greater specification regarding the causal relevance of hypothesised pressures (e.g. which ones are merely *conducive* and which ones *necessary*), suggest that there is substantial potential for further research emanating from this study.

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