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Dynamics and countervailing pressures of visa, asylum and immigration policy Treaty revision: explaining change and stagnancy from the Amsterdam IGC to the IGC 2003/2004·

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Abstract

The objective of this article is to account for the varying, and sometimes puzzling, outcomes of the past three Treaty revisions of EU/EC visa, asylum and immigration policy. The article focuses on decision rules and the institutional set-up of these policies, subjecting the results of the Intergovernmental Conference negotiations leading to the Treaties of Amsterdam and Nice and the Constitutional Treaty to causal analysis. The article maintains that four factors can explain the various Treaty outcomes: (i) functional pressures; (ii) the role of supranational institutions; (iii) socialization, deliberation and learning processes; and (iv) countervailing forces.

Introduction

The outcomes of the past three Treaty revision negotiations on decision rules and the institutional set-up in the area of visa, asylum and immigration policy have been differing and, to some extent, intriguing. For instance, in view of the traditional perception of these policies belonging surely into the member state domain, the generally modest integrative achievements of the Amsterdam Treaty, and the rather low expectations regarding the likelihood of their communitarization until the mid-1990s (O'Keeffe 1995; van Outrive 1995), the progressive results of the Amsterdam Intergovernmental Conference (IGC) in this field are rather

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perplexing. In contrast, the Nice IGC failed to achieve similar progress, despite certain prevailing functional and exogenous pressures for further decision rule and institutional reform. And considering the modest advances made at the IGC 2000, the Constitutional Treaty revisions arrived at considerably more far-reaching results, even though (pre-)negotiations began merely a year after the Treaty of Nice had entered into force. To explain these different outcomes and to attempt an explanation of change in visa, asylum and immigration policy Treaty revision, more generally, I use a framework which draws on (i) functional pressures, (ii) the role of supranational institutions, (iii) socialization, deliberation and learning processes, and (iv) countervailing forces.

My analysis therefore predominantly focuses on a traditional research issue in the area of European integration studies – explaining outcomes of European Union (EU) decision-making. It is a question that has occupied scholars since the 1950s and remains of fundamental significance. Its continuing salience derives in part from the persistent disagreement among scholars over the most relevant factors that account for the dynamics and standstills of the European integration process. Treaty revision in the field of visa, asylum and immigration policy is a particularly interesting and important research question: on the one hand, this area has become one of the most dynamic and fastest moving domains of the European integration project. On the other hand, it remains very close to the heart of national sovereignty. In that sense it can be considered an area of 'high politics' in that it raises substantial constitutional questions. The constitutional debate, which has evolved since the 1990s, has mainly concentrated on normative questions (e.g. Schmitter 2000); this study contributes to the constitutional debate by focusing on explanatory and analytical aspects of constitutional development and change.

The article is organized as follows: section I specifies my analytical framework. Section II summarizes the outcomes of the 1996-97, 2000 and 2002-04 IGCs. The third and central part of this article seeks to explain these outcomes and examines the strength and relevance of the hypothesized factors. Finally, conclusions will be drawn from the findings presented.

I. Analytical framework

The subsequent 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; 2006). The subsequent factors are intertwined in several ways and cannot always be neatly separated from each other. The first three factors (functional pressures, the role of supranational institutions, and socialization, deliberation and learning) are hypothesized as dynamics, while the fourth factor (countervailing forces) goes against these integrational logics. Therefore, integration is assumed to be a *dialectical* process, subject to both dynamics *and* countervailing forces.[1]

Functional pressures

Functional pressures come about when an original objective can be assured only by taking further integrative actions (Lindberg 1963: 10). The basis for the development of these pressures is the interdependence of policy sectors and issue areas. Individual sectors and issues tend to be so interdependent in modern polities and economies that it is difficult to isolate them from the rest (Haas 1958: 297, 383). Functional pressures thus encompass the tensions, contradictions and interdependencies closely related to the European integration project, and its policies, politics and polity, which induce policy-makers to take additional integrative steps in order to achieve their original goals. Functional pressures constitute a structural component in the analytical framework. These pressures have a propensity for causing further integration, as intentional actors tend to be persuaded by the functional tensions and contradictions. However,

[1] Although my framework strongly draws on neofunctionalist theory (e.g. Haas 1958; Lindberg 1963), it departs from this theoretical strand in several ways. How the framework relates to the original neofunctionalist approach and its later developments, its underlying assumptions and inter-paradigm debating points is discussed elsewhere (Niemann 2006). Hence, this article focuses primarily on the empirical insights that the framework – and its analytical components – may provide.

they do not 'determine' actors' behaviour in any mechanical or predictable fashion. Functional structures contain an important element of human agreement. In order to act on such structures, agents have to perceive them as credible and, to a certain degree, compelling.

The role of supranational institutions

There are several factors that underpin the plausibility of hypothesising supranational institutions as promoters of intensified integration. Firstly, institutions, once established, tend to take on a life of their own and are difficult to control by those who created them (Pierson 1996). Secondly, concerned with increasing their own powers, supranational institutions become agents of integration, because they are likely to benefit from the progression of this process. And lastly, institutional structures (of which supranational structures are a part) have an effect on how actors understand and form their interests and identities.

As the most visible agent of integration, the *Commission* facilitates and pushes agreements on integrative outcomes in a number of ways. For example, it can act as a promotional broker by upgrading common interests, e.g. through facilitating package deals. In addition, it 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 (Nugent 1995).

Over the years, the *Council Presidency*[2] 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 assume the role of honest and promotional broker (Elgström 2003; Tallberg 2004). During their Presidency, national officials tend to undergo rapid learning processes about the various national dimensions which induces a more 'European thinking' and facilitates 'European compromises' (Wurzel 1996: 272, 288).

[2] Several authors have argued that the Presidency can be regarded as an institution on its own (cf. e.g. Schout 1998).

In addition, the *European Parliament* (EP) has fought, and in many respects won, a battle to become, from being an unelected body with minor powers, an institution on an equal footing with the Council in the larger part of normal secondary legislation. It has clearly become another centre of close interest group attention (Bouwen 2004) and plays a critical, even if not wholly successful, role in the Union's legitimization. Even at the IGC level its role has (significantly) increased. The EP has traditionally pushed for further integration, partly in order to expand its own powers (Westlake 1994).[3]

Socialization, deliberation and learning processes

Socialization, deliberation and learning processes that take place in the Community environment are hypothesized to facilitate cooperative decision-making as well as consensus formation and thus contribute to more integrative results. The gradual increase of working groups and committees on the European level has led to a complex system of bureaucratic interpenetration that brings thousands of national and EU civil servants in frequent contact with each other on a recurrent basis. This provides an important basis for such processes, due to the development of mutual trust and a certain esprit de corps among officials in Community forums. The underlying assumption is that the duration and intensity of interaction have a positive bearing on socialization and learning processes (Lindberg 1963; Lewis 1998).

It is held here that not only the quantity, but also the *quality* of interaction constitutes a major factor regarding cooperative norm socialization and learning processes. We can distinguish between (1) incentive-based learning – the adaptation of strategies to reach basically unaltered and unquestioned goals – and (2) more deeply-rooted reflexive learning, i.e. changed behaviour as a result of challenged and scrutinized assumptions, values and objectives (Nye 1987: 380). The latter cannot be sufficiently explained through incentives/interests of egoistic actors (Checkel 2001). Furthermore, if we want to understand social behaviour and

[3] The role of the European Court of Justice has been omitted here, as its impact on these IGC negotiations was marginal.

learning, we need to take language into greater consideration. It is through speech that actors make sense of the world and attribute meaning to their actions.

Drawing on the notion of communicative action allows us to attain a more fundamental basis for reflexive learning and to integrate the role of communication more thoroughly. The concept of communicative action, as devised by Habermas (1981a,b), refers to the interaction of people whose actions are coordinated not via egocentric calculations of success but through acts of reaching understanding about valid behaviour. Participants are not primarily oriented to achieving their own individual success; they pursue their individual objectives under the condition that they can coordinate or harmonize their plans of action on the basis of shared definitions of the situation. Habermas distinguishes between three validity claims that can be challenged in discourse: first, that a statement is true, i.e. conforms to the 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.

Under 'communicative' behaviour the force of the better argument counts and actors attempt to convince each other (and are open to persuasion) with regard to these validity claims. By arguing in relation to standards of truth, rightness and sincerity, agents have a basis for judging what constitutes reasonable choices of action, through which they can reach agreement (Habermas 1981a: 149). 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. However, strategic action and communicative action are only ideal types, and agents combine different (complementary) modes of action in their behaviour (cf. Risse 2000; Schimmelfennig 2001). 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 triggering socialization processes.

Socialization, deliberation and learning processes work as an interface between structure and agency. Functional, exogenous and domestic structures become part of decision-makers' norms and values throughout processes of socialization and learning. In addition, actors 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.

Countervailing forces

As integration cannot solely be conceptualized as a dynamic or integrative process, countervailing forces need to be taken into consideration. Hence, integration is assumed here to be a *dialectical* process, both subject to dynamics *and* countervailing forces. The latter may either be stagnating (directed towards standstill) or opposing (directed towards spillback) in nature. One can better ascertain the relative strength of the (forward-)dynamics of integration if one also accounts for these forces.

Domestic constraints may substantially 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 geography or its administrative structure, especially when distinct from that of the European mainstream due to adjustment costs of integration (Héritier 1999). 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. Adverse bureaucratic pressures also partly come 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 preferences of their 'constituencies'.

Sovereignty-consciousness – which in its most extreme form can be thought of as nationalism – encompasses actors' lacking disposition to transfer sovereignty to the supranational level and 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. Less prominent actors such as bureaucrats, especially when working in ministries or policy areas belonging to the last bastions of the nation-state, may also represent sovereignty-conscious agents.

II. The evolution of EU/EC visa, asylum and immigration policy

The Intergovernmental Conference 1996/97 and the Treaty of Amsterdam

With the Amsterdam Treaty the old third pillar – established through the Treaty of Maastricht – was divided into two parts: the first part, which constitutes the focus of this analysis, became Title IV of the TEC on visa, 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 introduced mechanisms for the progressive establishment of an area of freedom, security and justice. It 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 contained measures concerning external border controls, including visa rules (Article 62), and aims regarding asylum, refugees and immigration (Article 63). The main thrust of the measures to be taken concerned the establishment of minimum standards, rather than common rules.

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).[4] Hence, no IGC was required to make such changes. As for the Court of Justice, it was agreed to permit references from the highest national courts (Article 68). In addition, the well-tried, binding Community legal instruments (directives and regulations) were now to be used. Furthermore, the Commission now also had the right to draw on Article 226 TEC, through which it may bring a case against a Member State before the Court in case of faulty or insufficient implementation of legislation or Treaty obligations. Special provisions were adopted for the UK, Ireland and Denmark in the form of non-application of, or opt-out from, Title IV (Article 69).

The progress made during the 1996-97 IGC has generally been considered significant. First, the above analysis suggests that noticeable inroads in terms of supranationalization of Title IV were made. Second and related to the first point, measured against the benchmark of the *ex-ante* practice, the new provisions were described as 'decisive progress' (Brok 1997: 377) or '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 attained 'against all odds' (Patijn 1997: 38). Also viewed in light of the overall Treaty revision, the new Title IV fared very well and was regarded as 'the main improvement of the Treaty' (Hoyer 1997: 71).

However, in terms of progressiveness the Amsterdam Title IV outcome has only been judged here as 'medium to high' (and not 'high'). This is largely due to the considerable distance still to be covered before arriving at a full-fledged Community method. Most importantly in that respect, qualified majority voting, co-decision and full jurisdiction by the ECJ would only become possible after five years 'if – and this is a big if – this move finds unanimous backing in the Council' (Monar 1998: 138). As the possibility for such a switch

[4] However, by derogation part of visa policy (Article 62 (2b) (i) and (iii)) was governed by qualified majority and co-decision which – after the five year period – was also to be applied to some additional visa policy provisions (Article 62 (2b) (ii) and (iv)).

appeared 'rather unlikely' for a number of observers (van Selm-Thorburn 1998: 632; also Moravcsik and Nicolaïdis 1998), there was a serious risk that Title IV remained only 'a half-way house' (Brinkhorst 1997: 49).

The Intergovernmental Conference 2000 and the Treaty of Nice

A progressive outcome would have come about at the IGC 2000 with the implementation of an actual, full-fledged introduction of a Community method. This would have entailed changing Articles 62 (1), 62 (2a), 62 (3), 63 (1), 63 (2), 63 (3), and 63 (4) from unanimity to qualified majority, augmenting EP powers for those provisions from consultation to co-decision, and granting full jurisdiction to the Court of Justice.[5] A concomitant shortening of the transitional period (to three years)[6] would have been a quantum leap, but an automatic switch after five years would have also meant considerable progress.

The Title IV provisions in the Treaty of Nice, however, did not come very close to this. First of all, important areas of Title IV – such as Article 62 (1) (abolition of controls at internal borders), Article 63 (2b) (balanced distribution of refugees), Article 63 (3a) (long-term visa) and Article 63 (4) (residence of third-country nationals) – remained completely unchanged. Secondly, in those areas where there were changes – Article 63 (1) (measures on asylum) and Article 63 (2a) (on refugees under temporary protection) – these were conditional on prior *unanimous* adoption of legislation defining common rules and basic principles (cf. new Article 67 (5)). Hence, a switch to QMV and co-decision was possible before the May 2004 date specified in the Treaty of Amsterdam. However, given the magnitude of the hurdle set with unanimous agreement on basic legislation little utility was attached to this provision (Stuth 2001) and eventually no switches could be achieved during the transitional period. In addition, it has been argued that the new Article 67 (5) merely derogated from the transitional period provisions and would therefore only be effective until May 2004 (Fletcher 2003: 542; but cf.

[5] By abolishing important remaining restrictions, i.e. expanding its scope of jurisdiction to include all matters that affect domestic law and order or security, and allowing direct access to the ECJ by citizens.
[6] In view of the time needed for ratification, a transitional period of only three years would have amounted to its termination once the new Treaty was to come into effect.

Peers 2006). Thirdly, a number of changes were merely procedural, i.e. not legally binding, made in a declaration annexed to the final act. It was decided actually to do what the Amsterdam Treaty has foreseen: to switch to 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. However, the final decision on these (thus far non-binding) alterations was to be taken by *unanimity*.[7] Fourthly, none of the Nice provisions on Title IV brought any progress regarding the role of the Court of Justice. Finally, attempts to shorten the transitional period to three years were unsuccessful (Peers 2006: 44).

In view of these provisions the progress made at Nice can only be regarded as 'low to medium'. This is also reflected by how the Title IV outcome was perceived by policy-makers and academics (e.g. Stuth 2001: 11; Prodi 2000: 3; Lavenex 2001).

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

Departing from the standard method of preparing EU Treaty reforms, the Laeken European Council decided to form a Convention on the Future of Europe. The Draft Treaty that came out of the Convention already provided for the substantive changes of this Treaty revision.[8] The provisions of the Constitutional Treaty in this area have substantially progressed: (i) a breakthrough was reached by agreement on QMV in the Council, co-decision of the EP, and full jurisdiction of the ECJ – i.e. the complete introduction of the Community method for the entire scope of the Amsterdam provisions. And this is no small feat, in view of the considerable gap that was still to be bridged, the prior doubts regarding breaking Amsterdam's

[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). See pp. 31-32 for a fuller explanation of this agreement.

[8] Only cosmetic changes were made on visa, asylum and immigration in the subsequent IGC.

'double lock'[9], and given the relative failure to do so at Nice; (ii) in addition to the objectives stipulated in the Amsterdam Treaty, the Community method was also accepted for an expanded scope of measures on visa, asylum and immigration (listed in Articles III 265-267), which includes, for instance, the introduction of a management system for external borders, a uniform status of asylum, and the combating of trafficking in persons; (iii) in terms of policy objectives, for border control, asylum and immigration the new Treaty uses the term 'policy', instead of merely 'measures', and thus denotes a higher degree of integration; (iv) 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: in the area of immigration, a prohibition of harmonization 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 remains unaffected by the Treaty. Overall, the new provisions have commonly been perceived and judged as bringing substantial progress in terms of decision rules and the institutional set-up in the area of visa, asylum and immigration policy (e.g. Cuntz 2003; Monar 2003, 2005; Thym 2004; interviews 2004).

III. Explaining Treaty revision negotiation outcomes

My analysis starts off from a multiple causality assumption, suggesting that the same outcome can be caused by different combinations of factors. In order to arrive at causal inferences, allowing for some degree of positive causality, a number of methods are employed: comparative analysis, advancing alternative explanations, process tracing and triangulation across multiple data sources, including about forty interviews.[10]

[9] Duff (1997: 21) characterized the Amsterdam provisions as such because the lifting of the national veto for the legislative process was itself made subject to a national veto in the Council (or during IGC negotiations).
[10] On the above methods, see e.g. Ragin (1987), George (1979).

Before embarking on an analysis along the hypothesized pressures I want to briefly address *exogenous pressure*s that have been omitted in the analytical framework. Exogenous pressures constitute factors that originate outside the integration process, mainly understood here as large numbers of migrants entering the Community and staying there, legally or illegally: migratory pressures 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 mid/late 1980s migration was pinpointed as a serious problem (Butt Philip 1994). 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. European states confronted with the growth of asylum applications adopted ever stricter 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 recognized that 'solo runs' did not help and that more intensified cooperation was needed (Achermann 1995), which could be achieved more easily in a more supranational setting. Exogenous pressures are not considered a key explanatory factor (or alternative explanation) for changing outcomes because they remained fairly constant throughout (interviews 1997, 2002, 2004). While asylum applications and legal immigration decreased since the early 1990s, this was 'compensated' by increasing illegal immigration (Greens/EFA 2001). And when measures, at least partly viewed as a response to exogenous pressures, came into place, beginning with the Dublin Convention, exogenous pressure for more supranational decision rules remained, as progress under the existing (Amsterdam and later Nice) regime was forthcoming only slowly (cf. Niemann 2006).[11]

Functional pressures

[11] The external shock of 9/11, which seems to have made some impact at the legislative level (Guild 2003), barely did so at the IGC level as a spur for Title IV decision rule reform (interviews, 2003, 2004).

Functional pressures constituted a strong dynamic for the communitarization of visa, asylum and immigration policy during the *IGC 1996-1997*. Two types of functional pressures were at work here. First and foremost, there were pressures stemming from the objective of free movement of persons, the realization of which required certain measures to be taken in the areas of external border control, asylum and immigration 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 and has been on the Community agenda more seriously since the 1975 Tindemans report. The adoption of the Schengen Agreement of 1985, the internal market project 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, the 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 jeopardized, unless this principle was 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 controls to the external borders and also a common visa policy, regulating short-term admission to EC territory (Papademetriou 1996). Common policies on asylum-seekers, refugees and illegal immigrants are necessary, as otherwise the restrictive efforts of one Member State would be undermined by liberal policies of another state, since 'the free movement of persons also means free movement of illegal immigrants' or rejected asylum seekers (de Lobkowicz 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, to some extent, tackled the problem of asylum shopping. 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 interpretations 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 communitarization was the most widely accepted and articulated one among decision-makers (e.g. Benelux 1996; UK Government 1996; cf. This Author 2006).

A 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; also for points below). The most important flaws included: (I) overlapping competencies between the first and third pillar. A communitarization promised to increase the coherence of EC action. (II) The legal instruments of the third pillar were widely regarded as flawed and there was uncertainty concerning the legal effect, particularly concerning joint actions. (III) The unanimity requirement was always assumed to have been a severe obstacle to the adoption of measures under the third pillar. (IV) The third pillar essentially lacked a generalized 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. (V) Although the Commission was supposed to be fully associated in the area of JHA, it was suggested that it merely had the status of *observateur privilégié*. A communitarization of visa, asylum and immigration policy promised to improve on these shortcomings and enable more effective cooperation. Policy-makers attached substantial significance to this rationale (e.g. Reflection Group 1995).

Functional rationales were somewhat less potent during the *IGC 2000*, compared with the Amsterdam IGC. Pressure from the free movement of persons objective was diminished. That the free movement of persons had not yet become a complete reality 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 (interviews 2003/04). There was also (limited) functional pressure stemming from necessities for increased cooperation in the *same* issue area. 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 was furnished with concrete aims and deadlines through the Amsterdam provisions, concretized by the 1998 Vienna Action Plan and further built on by the conclusions of the 1999 Tampere European Council. For some IGC delegations these developments warranted further reform of decision rules. However, many delegations argued that the improved Amsterdam provisions had been in use only for a few months and needed to be thoroughly tried out first (interview 2004; den Boer 2002: 533).

From various European Councils since Edinburgh in 1992, a growing functional logic was at work through pressures stemming from the decision on future enlargement. 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 had become an internal goal, problems were anticipated in terms of decision-making for policy areas ruled by unanimity, such as asylum, immigration and 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, it was feared that those areas still governed by unanimity would become substantially susceptible to deadlock. However, the pressure of enlargement was limited as it was not (yet) perceived as immediately imminent (interviews 2002, 2004).

As for the *Convention and last IGC*, overall functional pressures on Title IV decision rules had intensified. 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 migration that were subject to unanimity, given the growing danger of stalemate in the Council. In the Convention, enlargement became a frequently cited rationale to substantiate the need for reforming the decision rules of Title IV (cf. Commission 2002a; EP 2003b).

Another strong functional pressure was exerted in terms of the discontent with the collective goal of achieving the area of freedom, security and justice – and more particularly the concrete targets set in Amsterdam and Tampere, further widened by subsequent European Councils. Pressure was growing in that respect, due to only modest progress in the legislative process. This was underlined by the 'scoreboard', a bi-annual update reviewing progress in this area, which indicated severe problems of complying with the time limits that had been set (Commission 2002b). The European Council meetings of Laeken in 2001 and Seville in 2002 increased the pressure by expressing concern about this development. 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. During the Convention it was widely argued that improved decision rules were necessary, not only to deal with the Tampere objectives and possible leftovers after 2004, but also for further objectives set thereafter and more effective decision-making in this area more generally (e.g. Vitorino 2002a: 80; cf. Norman 2003: 120).

The Laeken Declaration on the Future of Europe added further moderate functional pressure; by putting particular emphasis on greater simplification and efficiency, Heads of State and Government increased the rationale for Title IV reform. Given the intricacy 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-nationalization or supranationalization. However, given the various other dynamics pointing towards further communitarization, the bias was clearly in favour of the Community method. The Laeken Declaration 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 above aims had been formulated at various European Councils before without much impact. Yet, at Laeken, they were arguably emphasized more strongly than in previous Presidency conclusions[12] and the members of the Convention took them more seriously than officials preparing previous IGCs (interview 2004).

The role of supranational institutions

The integrative role played by supranational institutions was rather substantial during the *1996-1997 IGC*. Prior to the IGC, the *Commission* had provided the ground for being granted more responsibility in migration policy. By presenting well researched, creative and balanced proposals, the Commission had demonstrated that it could bring some added value into 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 Conference. Papademetriou (1996: 22) even suggests that it was a conscious strategy of the Commission to promote the elimination of internal borders in the 1980s to reap later spillovers in areas related to the free movement of persons. In the run-up and during the IGC, 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

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

shaping actors' preferences (Peterson 1995). Its early, comprehensive and well argued proposals to the Reflection Group and IGC – as well as subsequent proposals on JHA – made an impact on the debate (Moravcsik and Nicolaïdis 1999: 72; den Boer 2002: 519). Fourthly, the Commission made use of its greater overview of developments in the various Member States and their legal systems. While during the negotiations on visa, asylum and immigration, Member States representatives were often unable to go beyond (their) national perspectives and legislations, or merely tried to take 'photographs' of each other's legislations, the Commission was able to contrast data and take a more holistic approach. It thus considerably advanced the substantive debate and eventually provided most of the formula for JHA communitarization (interview 1997; Beach 2005: 135). Finally, the Commission was further capable of asserting itself by cultivating alliances with important actors, and above all the various Presidencies, which reinforced its agenda-setting ability (Gray 2002: 392ff; Dinan: 2000: 260f).

Also, the various *Presidencies* contributed substantially to the IGC changes on visa, asylum and immigration policy. Both the Irish and Dutch Presidencies succeeded in their task as institutionalized 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 characterized as being 'on the upper end of realism, keeping the momentum up at a high, but not too high, level of ambition' (interview 1997; den Boer 2002). 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 away from the IGC by pushing the Action Plan on Organised Crime parallel to the Conference, a sexy topic with much public appeal. This minimized their interference with JHA issues at the IGC which was negotiated by the more 'progressive' foreign ministries (interview 1999).

The *European Parliament* further moderately 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 moderately contributed to the Title IV result through its cultivation of contacts with national elites, especially though political parties, an informal alliance with the Commission and by suggesting that it would make its assent to enlargement conditional on a satisfactory IGC outcome (interview 1999; Maurer 2002). 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.

During the *Nice Intergovernmental Conference*, 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. 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, the Commission was to some extent sidelined during the IGC (Galloway 2001). The Commission did cultivate 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, with no substantial comprehensive paper by the Commission on the extension of QMV in JHA (interview 2002). In addition, the Commission had poor relations with the Portuguese Presidency, and even worse with the French Presidency, which substantially limited its agenda-setting ability (cf. Beach 2005).

As for the *Presidency*, while the Portuguese accomplished the task of honest and promotional broker, the performance of the French Presidency in the vital final half of the IGC was unfavourable for a progressive outcome on Title IV. Its approach concerning the extension of QMV in this area was, in accordance with its national position, not particularly ambitious

(interview 2004). Even at relatively early stages it introduced fall-back positions (French Presidency 2000a). Secondly, the French Presidency failed to display a sufficient degree of leadership. 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 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 especially 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.

The *European Parliament* was less prominent than in the run-up to and during the Amsterdam IGC; it failed to make much of its enhanced role in the IGC proceedings. For example, the EP missed the chance to make an impact during the important agenda-setting phase by submitting its IGC opinion at a time when issues had already largely been framed (EP 2000; cf. Neuhold 2006).

Throughout the *Convention and 2003/04 IGC*, the *Commission*'s assertion on the JHA debate substantially increased in comparison with the IGC 2000. The negotiating infrastructure suited the Commission. The deliberative decision-style which predominated in the Convention meant that explanations attached to propositions were considered more seriously and good arguments could register more easily with negotiators. The Commission did make powerful arguments in favour of further communitarization by pointing to looming enlargement or the inadequacy of current decision rules for swifter progress on the agreed objectives (e.g. Vitorino 2002b). The Commission also contributed to the latter rationale by timely initiating the required legislative proposals. It was thus up to the Council to find agreement, which further spurred the revelation of problems attached to the unanimity rule. In the Convention the Commission could also make use of considerable informational advantages vis-à-vis other groups (Beach 2005), as it could

draw on substantial administrative backing, a formidable institutional memory, and two representatives who had acquired considerable relevant experience of two IGCs (Barnier) and the Charter Convention (Vitorino). Both in the Working Group Freedom, Security and Justice as well as in the Plenary, Vitorino was able to shape the (JHA) debates through his superior expertise, his persuasive argumentation and his credible reputation (Goulard 2003: 374; Beach 2005: 198).

Unlike during the IGC 2000, the *European Parliament* made a considerable impact on the last Treaty revision negotiations in the field of visa, asylum and immigration. EP members in the Convention managed to assert themselves because they formed a very coherent and well organized 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 (Maurer 2003). Klaus Hänsch (PES), Elmar Brok (EPP), Andrew Duff (Liberals) and Johannes Voggenhuber (Greens), who all supported further communitarization 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 concerning Title IV issues. Members of the EP pushed the functional and exogenous rationales for further integration and thus became active agents of JHA 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 (see e.g. EP 2003a; Beach 2005).

The role of the various *Presidencies* is of lesser significance to the analysis of visa, asylum and immigration policy during the last Treaty revision. 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 barely touched during the IGC 2003-04, thus making an assessment of the Italian and Irish Presidencies of 2003 and 2004 less important.

Socialization, deliberation and learning processes

During the *Amsterdam IGC*, socialization, deliberation and learning processes influenced the outcome on visa, asylum and immigration policy in two respects. First, 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 socialization, learning and communicative action processes, and thus cooperative behaviours, to take place. Such processes were far from developed in the mid-1990s (Niemann 2000). As one close participant of JHA policy-making noted, ministers and officials in the third pillar had not yet realized '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 unconducive to progress' (Fortescue 1995: 26-27). Few policy-makers realized that the cumbersome, rigid, and often uncooperative policy process in the area of JHA was a natural reflection of still insufficiently developed socialization 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 socialization dimension, most actors naturally focused on the question of decision rules, which increased the rationale for communitarization. Hence, somewhat paradoxically, the minimal occurrence of socialization processes at the policy-making level intensified the pressure for institutional and decision-making reform in JHA at the IGC (interviews 1997, 1999).

Second, there is the issue of socialization, deliberation and learning processes at the IGC 1996-97 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

organized 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 1997). This seems to have facilitated and fostered the development of reciprocity as a collective understanding about appropriate behaviour in the Representative Group. For example, as one official mentioned, 'after we were granted our [Title IV] opt-out, it was clear to our delegation that we should be accommodating on other issues. Here, as often, there was no explicit talk about making a deal or returning concessions' (interview 1997). 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 1999). Other mechanisms at work seem to have eased consensus formation. For example, participants could test ideas and say things that they would not normally wish to say in more formal settings. Moreover, officials noted that socialization 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 communitarization of asylum and immigration policy'. The understanding and knowledge of the severity of the domestic problems facilitated a swift acceptance of the special provisions for Denmark (interview 1997).

Throughout the *IGC 2000*, processes of socialization, 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 – this time they were much more alert and managed to assert their interests. A sizeable fraction of national JHA officials was 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. A reasoned discussion on the merits of the issues at hand thus became difficult. Cooperative norms, such as reciprocity, that tend to lead to the realization of an enlarged common interest, were also countervailed by such constraints. Secondly, institutional topics pertaining to the balance of power between small and big Member States had led to considerable distrust among negotiators, also rubbing off on other issues, like JHA. Under such circumstances, socialization and communicative action processes had little chance to unfold. Thirdly, there were so many issues on the QMV agenda that even prominent and controversial ones, like JHA, were dedicated too little time to engage in an extensive reasoned debate on the pros and cons of extending QMV in Title IV. Finally, the shorter life span of the Representatives Group was detrimental to the development of intense enmeshment and socialization processes (interviews 2002, 2004).

One of the more substantial changes from the Nice Treaty revision was the greater favourable impact of socialization, deliberation and learning processes in the *Convention*, which also influenced the *IGC 2003-04* outcome. This was facilitated by several favourable conditions in the Convention setting: (I) the Convention started off with an initial listening and reflection phase during which expectations and visions could be freely stated. This generated a deeper understanding of other members' ideas and softened pre-conceived opinions (Kleine and Risse 2005). (II) The quantity of interaction – over 50 sessions of both the Plenary and the Praesidium held within 18 months – reinforced the development of an 'esprit de corps' and a strong sense of responsibility for a successful outcome (Göler 2003). (III) Convention members were in a position to act freely and were largely unbound by governmental briefs (Maurer 2003: 134; but Magnette and Nicolaïdis 2004). And in contrast to IGCs, bureaucratic resistances could barely counter the deliberation process 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). (IV) 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 were one's arguments would become subject to scrutiny (Closa 2004: 201).

In such an environment good arguments, validated on the basis of accepted criteria, could register more easily, and were therefore more likely to prevail in the discussion. Hence, the strong functional (and exogenous) rationales for further communitarization now had a better chance to be taken up by actors and 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 (Closa 2004), not least because Member States were very much part of it. Moreover, there was a general feeling that the Convention had done a good job. The dominant policy discourse suggested that the Draft Constitutional Treaty should be kept as much as possible (c.f. Frankfurter Allgemeine Zeitung 16/6/03; Guardian 14/3/03). Due to the substantial bonding strength of the Convention text, it also 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). The bonding strength, with regard to the Title IV issues, was such that the Convention text on these issues was not reopened.

What has been presented above as socialization, deliberation and learning is difficult to substantiate within given space limitations.[13] However, interviewees characterized the negotiations in terms of arguing and reasoning, either without being prodded, or when offered different potential characterizations. In addition, negotiators generally avoided pointing to hierarchy, status, qualifications or other sources of power when making their statements, and

[13] Also cf. general indications in the literature (Göler 2003; Maurer 2003; Closa 2004; Niemann 2006). For indicators of communicative action and persuasion, see Checkel (2001), Risse (2000), Niemann (2004).

thus did not add non-discursive authority to their arguments (interview with K. Hänsch 2004). Moreover, speakers' utterances in the plenary seem to be very consistent with their statements in other forums (e.g. Vitorino 2001, 2002a, 2002b), which reinforces the case of truthful arguing. Furthermore, '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 2003). They were not successful as their case was not convincing given the powerful rationales for further communitarization pointed out above (interview 2004). Finally, it can be assumed that when issues have already been discussed without (much) success in a bargaining-like setting, such as Title IV issues at Nice, and can be advanced in a more discursive setting, deliberation and arguing is likely to have played a role (cf. Kleine and Risse 2005).

Countervailing forces

Throughout the *IGC 1996-97* the countervailing pressures at play were of medium strength. As for sovereignty-consciousness, immigration and asylum policy touch upon traditional prerogatives of states, and therefore belong to the core of state sovereignty. 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, through the launch of the politically expedient Action Plan on Organised Crime. This development substantially reduced the impact of sovereignty-consciousness at the IGC (interview 1999). However, sovereignty-consciousness did play a role in the Danish and UK opt-outs, while in the UK case (as well as the Irish) domestic constrains in the form of geopolitical distinctness also add much to the explanation (Monar 1998: 137; Devuyst 1998: 625).

As for domestic constraints, the most significant ones emerged in German domestic politics, which eventually confined Chancellor Kohl to refuse an automatic switch to QMV

after three years at Amsterdam. The Kohl government which at the outset of the IGC had strongly supported QMV for visa, asylum and immigration faced opposition within his own party. Several *Länder* governments opposed QMV for migration issues, mainly because they wanted to protect their prerogatives in an area where they have to bear the financial costs. Kohl needed the support of the *Länder* 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 migration, which led him to backtrack on the latter issue, given his priority for EMU (Moravcsik and Nicolaïdis 1999: 68; Devuyst 1998: 620-21).

For the *Nice IGC*, the forces obstructing further communitarization of Title IV had gathered additional 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. Substantial extension of QMV in Title IV was most strongly opposed by France, but also by Germany and Britain. French and German opposition has partly been attributed to the strong reluctance from (senior) officials in the respective ministries of interior and justice (interviews 2002, 2004).

Domestic constraints, which had gained additional potency, also played an important role in hindering a further communitarization 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 capitalized on giving away the national veto (e.g. 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. Due to the absence of inter-departmental coordination, representatives of national governments were not confined by the influence of the various functional ministries (Maurer 2003: 134-37). Thus, national civil servants and 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 barred from the process.

Those countervailing forces that made it onto the Convention stage had to hold up the process of deliberation that largely prevailed. It was more difficult for countervailing pressures to register in an open debate than during a process in which all participants have a *de facto* veto. Arguments stemming from countervailing pressures became subject to scrutiny along commonly accepted criteria and were also judged against other (pro-integrative) arguments. 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 2004). Most of the few modifications concerning Title IV issues, for example on immigrants' access to the labour market, were made in the final phase of the Convention, also termed the 'pre-IGC stage', which was characterized to a greater extent by bargaining (Norman 2003).

The small number of exceptions to full communitarization, apart from the growing shadow of the IGC, can be explained by the particularly strong islands of countervailing pressures. Most notably, exclusion of the right to determine access to the labour market by third-country nationals can be attributed to strong constraints in Germany. Here, the CDU/CSU opposition 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*. The government also feared that the conservative opposition would 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).

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 during the IGC 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 at the IGC (interview 2004).

Conclusion

Overall, the framework appears to provide a robust account for an analysis of the past three Treaty revision negotiations on the communitarization of visa, asylum and immigration policy. The empirical findings are summarized in Table 1.

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

(Sub-)case / Pressures	IGC 1996-97	IGC 2000	IGC 2002-04
Functional pressures	High	Medium	(Medium to) High
Role of supranational institutions	(Medium to) High	Low (to Medium)	(Medium to) High
Socialization, deliberation and learning	Medium	Low	Medium to High
Dynamics (combined)	Strong* ⇩	(Weak to) Medium* ⇩	Strong* ⇩
Countervailing forces (combined)	Medium	(Medium to) Strong	Weak to Medium
Outcome	Medium to High	Low to Medium	Medium to High

* Contained in the combined dynamics are also the largely unchanged exogenous pressures (cf. p. 13).

My framework may also explain the Council decision taken in December 2004 to move most of Title IV to QMV and co-decision (cf. footnote 7). This move can 'be accounted for by the

agreement upon the Constitutional Treaty, since Member States had already accepted a political commitment to change those rules when they accepted the Treaty' (Peers 2006: 45). Hence, this decision merely anticipated the new Constitution's provisions by making use of Article 67 (2) (cf. EP 2004a: 3). Another (functional) rationale was that not all objectives of the Tampere programme could be achieved, while new objectives were set (in the Constitution and) in the Hague programme, the realization of which would be facilitated by an expansion of qualified majority voting. In addition, the increased difficulty of negotiating, and reaching consensus, with 25 delegations 'was even more real now after enlargement' (interview 2007). Moreover, decision-makers also still seemed *convinced* by the Convention outcome, which suggests that the bonding strength of the (largely deliberatively reached) mutual understanding on Title IV decision rules still persisted (interview 2007; cf. p. 26). In addition to their roles played in the (interrelated) last Treaty revision, supranational institutions also played a role in the December 2004 decision. It has been noted that without the determination of the Dutch Presidency the opportunity of making these changes in late 2004 may not have been realized (EP 2004b: 13). The area of legal migration was exempted from the switch to QMV and co-decision. Like the related safeguard concerning access to the labour market by third-country nationals in the last Treaty revision, this can mainly be explained by strong countervailing forces in Germany. Due to the strongly opposing views held in the CDU/CSU and given the Conservative majority in the *Bundesrat*, along with the growing politicization of the issue in view of the links made between legal migration and access to national labour markets, domestic constraints were robust for German agreement on the issue (interview 2007; cf. Deutscher Bundestag 2003). Other delegation, such as Austria and Estonia, while largely hiding behind Germany, supported its position (interview 2007).

The causal significance of individual pressures may be probed by making use of a more formal comparative analysis. A comparison of four independent variables across three sub-cases can 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). By making partial use of Mill's (1843) methods of 'difference' and 'concomitant variation', one can examine whether hypothesized pressures co-vary with outcomes. Changing levels of outcome would corroborate those dynamics changing as hypothesized, and challenge those remaining constant or changing in the direction opposite to the one hypothesized. 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.

A further layer of complexity has been introduced by including countervailing pressures in the framework: individual dynamics may not co-vary with outcomes in a linear fashion due to strong countervailing forces, which may diminish 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, 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 hypothesized dynamics broadly co-vary with the scores determined for the combined dynamics and final outcomes. The causal significance of countervailing pressures 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 'medium to strong' countervailing forces pushed '(weak to) medium' dynamics back to a fairly minimal outcome. This more formal comparative analysis is corroborated through my tracing of causal mechanisms and processes (in the previous sub-sections), which provided the integrative knowledge absent at the level of correlations.

The framework, through its dialectical nature may allow us to account for more *specific* aspects of decision outcomes. For example, where there is across the board pressure for communitarization, strong countervailing forces help us to make an informed guess concerning the level 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 communitarization. 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.

The seeming utility of the framework for empirical analysis, the tentativeness of parts of the preceding investigation and the possibility of greater specification regarding the causal relevance of hypothesized pressures (e.g. which ones are merely *conducive* and which ones *necessary*), suggest that there is considerable potential for further research emanating from this study.

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