

# **Dynamics and countervailing pressures of visa, asylum and immigration policy Treaty revision: explaining change and inertia from the Amsterdam IGC to the Constitutional Treaty**

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Paper to be presented at the 9<sup>th</sup> Biennial EUSA Conference, Austin,  
31 March – 2 April 2005.

Panel 9F: *Asylum and Immigration Policy: Taking Stock*

*Comments welcome!*

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## **ABSTRACT**

This paper seeks to explain the varying, and sometimes intriguing, outcomes of the past three Treaty revisions in the area of visa, asylum and immigration. Focusing on decision rules and the institutional set-up of these policies, the results of the Amsterdam Treaty, the Treaty of Nice and the Constitutional Treaty are subjected to a (causal) analysis. The paper argues that six 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; (5) the role of organised interests; and (6) countervailing forces. The framework, especially through its dialectical nature (combining both dynamics and countervailing factors), may also enable us to explain some more specific aspects of decision outcomes.

## **INTRODUCTION**

During the last three revisions of the Treaty, we could witness rather differing, and to some extent, puzzling decision outcomes concerning the institutional set-up and decision rules in the area of visa, asylum and immigration policy. For example, given the generally modest integrative achievements of the Amsterdam Treaty, and given the rather low expectations concerning the likelihood of communitarisation of the above policies until the mid-1990s (e.g. O’Keefe, 1995; van Ouirive, 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 Treaty of Nice, how can the last Treaty revision be explained which arrived at considerably more far-reaching results?

In order to answer these questions, to account for the outcomes of the Treaties of Amsterdam and Nice as well as the Constitutional Treaty, and to attempt an explanation of change in visa, asylum and immigration policy Treaty revision, more generally, I have developed a framework which draws on functional-endogenous pressures; the role of supranational institutions; socialisation, deliberation and learning processes; exogenous pressures; the role of organised interests; and countervailing forces. These pressures are interconnected in several ways and cannot always be clearly separated from each other.

I thus focus on a traditional research question in the area of EU integration studies, i.e. explaining outcomes of 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. 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 as regards the most relevant factors accounting for the dynamics and standstills of the European integration process and certain segments of it. This research question is particularly interesting in the context of visa, asylum and immigration policy: on the one hand, this domain is very close to the heart of national sovereignty. On the other hand, it has become one of the most dynamic and fastest moving sectors of the European integration project (cf. e.g. Monar, 2001).

The paper proceeds as follows: First, my theoretical framework is specified, including its underlying assumptions and explanatory factors. The subsequent section contains my case analysis of the 1996-97, 2000 and 2002-04 Intergovernmental Conferences. Finally, I draw some conclusions from my findings.

## **THEORETICAL FRAMEWORK**

### **Underlying assumptions**

While (strongly) drawing on neofunctionalist theory (e.g. Haas 1958; Lindberg, 1963), my theoretical framework departs from, and further develops, this theoretical strand in several ways.<sup>1</sup> This section focuses on specifying my core assumptions and explanatory factors. I have discussed the development and modification of neofunctionalist theory at length elsewhere (cf. e.g. Niemann, 1998, 2004a, 2005 forthcoming).

My approach does not strive for ontological purity. While eschewing arch-rationalist and hardcore reflectivist ontological extremes, my account takes on board the (empirical) insight that agents tend to be subject to different social logics and rationalities and that they combine several modes of action in their behaviour. The recent literature suggests that the

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<sup>1</sup> For example, as partly pointed out below, a self-understanding as a grand theory is rejected; an emphasis mainly on agents is replaced by a more equal ontological status between structure and agency; integration is not seen as a dynamic process but as a dialectical process; the automaticity of spillover maxim is discarded; assumptions concerning the end of ideology, unabated growth in Europe, and a political community as the end-state of the integration process have been discarded. Also, neofunctionalists did not systematically formulate a basic ontology (but cf. Haas, 2001). Their mainly 'soft' rational-choice ontology with some reflexive elements has been complemented by a more explicitly 'soft' constructivist ontology (see below). For a more detailed account of the issues mentioned in this footnote, see Niemann (2004a, 2005 forthcoming).

rational choice logic of consequentialism and the more constructivist logics of appropriateness and arguing coexist in the real world (cf. e.g. March and Olsen, 1998, pp. 952-953; Checkel, 1999, p. 546; Risse, 2000: esp. pp. 1-9). There are different interpretations concerning the relationships between these logics. My ontological position is that these logics are activated under different conditions and in different environments, but that the relationship between the rational-choice logic and the two more constructivist ones tends to be a developmental one: agents are more likely to enter into new relationships following an instrumental rationale, but tend to develop certain norms and identities and may change their preferences as a result of their experience and interaction.

However, my ontology can be further specified by delimiting the frame within which these logics take place. Some of the hardcore rational-choice<sup>2</sup> maxims are loosened in my framework, while two core rational-choice assumptions are recognised: firstly, agents are rational, i.e. they choose that option which they believe best fulfils their purposes. Preferences do not result from random choice but reflect deliberate behaviour. Secondly, actors are basically egoistic. They base their behaviour on consequential calculations of self-interests and try to enhance their utility through strategic exchanges. However, some other rational-choice tenets cannot be taken on board. Assumptions of preferences as consistent, stable and exogenously-given are relaxed. Moreover, rational-choice presumptions of intentions as causes determining outcomes and suppositions of formally predictable outcome patterns are dropped. In addition and partly following from the above, the unequivocally materialist philosophy of science – according to which behaviour is the simple response to the forces of physics that act on material objects from the outside – that characterises many rational-choice accounts is not shared. On the other hand, the reflectivist or postmodernist extreme (e.g. Rosenau, 1992; Alexander, 1995) is also dismissed. According to this ontological stance, it makes no sense to assume the independent existence of an external reality, as reality cannot be known outside human language. There is no way of deciding whether statements correspond to reality except by means of other statements. Hence, reality, under such ontology, is turned into linguistic conventions.

In contrast, my ontological position is situated in between these two poles. While acknowledging that there is a real (material) world out there, which offers resistance when we act upon it, behaviour is only to some extent shaped by physical reality. Instead, agents' capacity for learning and reflection has an impact on the way in which they attach meaning to

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<sup>2</sup> On rational-choice theory and its various assumptions, see for example: Brennan (1997: esp. 91-104); and Green and Shapiro (1994: 14-17).

the material world. Agents cognitively frame or construct the world according to their knowledge, norms, experience and understandings. Hence, actors' interests and identities are moulded and constituted by both cognitive and material structures. Their preferences are shaped by social interaction and the evolving structures, norms and rules of the domestic and the EU polity (i.e. membership matters) rather than exogenously given. Collective actions are not merely the aggregation of individual preferences, but individual actors' objectives are influenced by and derivative from the social group with which an agent interacts and identifies. And because agents are assumed to have the capacity to learn, their preferences are subject to change rather than stable, given evolving social structures and varying actor constellations in the real world. The nature of being is thus viewed as transformative.

As for the ontological status of structure and agency, my framework regards the properties of both structure and agency as very significant to explaining social and political processes and, for that matter, European integration. It dismisses both structural determinism and agency-centred voluntarism. Instead, my framework embraces the concept of structuration which emphasises the interdependence of structures and agents (cf. Giddens 1984). Structure and agency mutually constitute each other. Structure has a dual nature. It enters simultaneously into the constitution of the agent and social practices, and exists in the generating moments of this constitution. Agency, however, is not reduced into servants of structure. They have created structural properties in the first place and can potentially change any aspect of structure. Agents act upon both structures and their own preconceived interests. Hence, this framework assigns agency and structure an equal ontological status.

Additional underlying – and partly overlapping – basic assumptions can be specified: firstly, as conceptualised by most EU integration scholars these days, integration is understood here as a process. This differs from intergovernmentalist accounts that tend to look at isolated events. Secondly, this process is influenced by multiple and diverse actors (and structures). States are not unified actors and certainly not the only actors that matter in EU decision-making processes. Thirdly, once established institutions can take on a life of their own and are difficult to control by those who created them. Fourthly and closely related, there is considerable scope for unintended consequences, as decisions taken by national politicians are often taken under circumstances of uncertainty, imperfect knowledge or under time pressure which restricts the possibility of long-term purposive behaviour (cf. e.g. Pierson, 1996). Fifthly, not all games played between actors are zero-sum games. Interaction is often better characterised by positive sum-games and a 'supranational' style of decision-making in which actors attain agreement by means of upgrading common interests or by

arriving at mutual understandings. Sixthly, functional interdependencies between issues and sectors spur the propensity for further or more intensified cooperation/integration (cf. Haas 1958). Finally, as will be further elaborated below, integration is assumed to be *dialectical* process, both subject to dynamics *and* countervailing forces.

### **Explanatory factors**

Based on the above assumptions and my prior research findings (e.g. Niemann, 1998, 2000), a number of explanatory variables have been derived, which are hypothesised to explain change in decision outcomes (dependent variable). The subsequent pressures are intertwined in several ways and cannot always be neatly separated from each other. The first five factors (functional-endogenous pressures, exogenous pressures, the role of organised interests, socialisation, deliberation and learning and the role of supranational institutions are hypothesised as dynamics, while the sixth factor (countervailing forces) goes against these integrational logics.<sup>3</sup>

#### *Functional-endogenous pressures*

Functional-endogenous pressures come about when an original goal can be assured only by taking further integrative actions (cf. Lindberg, 1963, p. 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 likely to be difficult to isolate them from the rest (cf. Haas, 1958, pp. 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 integrative steps in order to achieve their original objectives. Functional pressures may not only induce (further) integrational steps in *other* sectors or policy areas, but may also generate impetus for increased co-operation/integration in the *same* field.

Functional pressures constitute a structural component in my explanatory framework. These pressures have a propensity for causing further integration, as intentional actors tend to

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<sup>3</sup> However, the separation between dynamics and countervailing forces reflects tendencies. Factors that are held to be dynamics may, on occasion, turn into countervailing forces, and vice versa, as my empirical analysis will indicate.

be persuaded by the functional tensions and contradictions. However, functional structures 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 of them as (strong) pressures in order to act upon them. (Functional) structures and (national, supranational and other) actors are interdependent. These structures enter into the constitution of actors (i.e. influence their preferences) and also, to some extent, exist from the generating moments of this constitution, as actors tend to reproduce structures under the impact of their interests that have been moulded by structures. However, actors are not structural idiots. They have created structures in the first place and can potentially change them at any time. And, in doing so, there is a (considerable) degree of non-structural autonomy.

### *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.<sup>4</sup>

There are several logics behind hypothesising exogenous factors as primarily 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. This has been illustrated, for example, concerning the Cold War origins of the European Communities (cf. e.g. Milward and Sørensen, 1993; Neuss, 2000). The rationale behind the integrative impact of external shocks and threats is that in such instances close cooperation partners (or Member States of an integration project) tend to rally together and find common solutions. One particular but frequent type of threat is competition between states and/or regions. Perceived competition with other international players tends to foster EU Member States to pool their strengths and resources through further cooperation/integration with the intention of advancing the Union’s competitive position. Examples of the integrative

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<sup>4</sup> While Hill (1993), for instance, has emphasised the integrative dimension of external factors, George (1991) has underlined, for example, that external factors can have both disintegrative and integrative effects.

impact of external (mainly US and Japanese economic) competition in the history of European integration include agreement on the 1992 programme (Sandholtz and Zysman, 1989) or the development of industrial and high technology policies (Peterson, 1991, 1992).

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. Phenomena and processes such as globalisation, migration, environmental destruction or international terrorism require a common approach (e.g. of integration partners) in order to tackle them with some success (cf. George and Bache, 2000, p. 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 regional interdependencies and more global problems, they lose their power to deliver these goods. To circumvent the decrease in influence over their territory, national governments tend to cooperate more closely on the European level (cf. Wessels, 1997, pp. 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* nonparticipant 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, p. 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. Hence, there is an endogenous logic linking internal and external events.

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, as all structural pressures exogenous ones are also closely intertwined with the property of agents. This implies that actors' preferences cannot be treated as given. The external environment/system, just like EU membership, to some extent, constitutes decision-makers' preferences. This is difficult to trace in empirical analysis. One



indicator for the significance of such, often ‘invisible’, influences of the wider international context is the impact of internationally prevailing policy paradigms and discourses.<sup>5</sup>

### *The role of organised interests*

Organised interests, including NGOs, are hypothesised as a dynamic because in many policy areas they tend to perceive that their substantial interests are better served at the European level, through EU solutions and EU institutional involvement. Two sub-hypotheses are inherent in this factor. Firstly, that groups gradually focus more of their attention, lobbying and organisation onto the European level with the growing competence of supranational institutions and the increased number of policy sectors governed (at least partially) by the European level (e.g. Mazey and Richardson, 1993; Bindi Calussi, 1992).

Secondly, interest groups tend to gradually promote further integration, as they become aware of the benefits of European level cooperation in their policy area. Such interest-based learning is fostered, for example, because societal (especially business) groups benefit from one set rather than fifteen or twenty-five sets of rules and the advantages of larger markets and economies of scale, more generally (Stone Sweet and Sandholtz, 1997). Moreover, enhanced competencies of supranational institutions, are usually associated with greater efficiency and effectiveness, and when involving the co-decision procedure, also greater EU-level democratic legitimacy than more intergovernmental set-ups. Furthermore, organised interests may seek EU solutions as, in some policy areas, EU institutions are viewed as pursuing a more balanced and ‘neutral’ policy line compared with Member governments. In addition, interest groups tend to be inclined to support further integration due to functional logics, e.g. stemming from the internal market/free movement of persons rationale, which induce them to seek European solutions in order to solve contradictions and tensions from prior integrational steps (Haas 1958).

While functional pressures, pull-factors from European integration and the EU institutional development are regarded as significant factors influencing interest group behaviour, other structures such as exogenous pressures and domestic constraints also influence the organised interests. The role of organised interests mainly concerns non-governmental elites, but may include governmental elites (which are primarily hypothesised

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<sup>5</sup> 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 (cf. e.g. Green Cowles, 1995, p. 521).

in the next section) for example when forming part of advocacy coalitions to which the above integrative rationales may also apply (cf. Niemann 2004a, 2005).

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

The general hypothesis of this section is that socialisation, deliberation and learning processes do take place in the Community environment and that these processes tend to facilitate cooperative decision-making as well as consensus formation and thus contribute to more progressive and integrative decision outcomes. The first point worth noting in that respect is that 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 socialisation and learning processes. Deeply-rooted genuine learning cannot be sufficiently explained through incentives/interests of egoistic actors (cf. Checkel in Checkel and Moravcsik, 2001, p. 225, 242). More ‘complex’ learning goes beyond interest-based learning (cf. previous section), i.e. the adaptation or redefinition of means or strategies to reach basically unaltered and unquestioned goals. Instead, it constitutes changed behaviour as a result of challenged and scrutinised assumptions, values and objectives.<sup>6</sup> Furthermore, if we want to understand and explain 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 notions of communicative action and deliberation.

The concept of communicative action, as devised by Habermas (1981, 1986), refers to the interaction of people whose actions are coordinated not via egocentric calculations of success but through acts of reaching understanding (*Verständigung*). In communicative

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<sup>6</sup> I have based my distinction between deeply-rooted, reflexive or complex learning, on the one hand, and adaptation or incentive-based learning, on the other hand, on Nye (1987: 380) who used the terms ‘complex’ and ‘simple’ learning.

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 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, which aims at reasoned understanding, 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. 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, 1981, p. 149). Where communicative rationality prevails, actors’ pursuit of their interests is conditioned by their perception of valid behaviour according to these three standards. When engaging in communicative action, agents do not seek to maximise their interests, but to challenge and substantiate the validity claims that are inherent in their interest. 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 *discuss, deliberate, reason, argue* and *persuade* in communicative interaction. Actors engaging in communicative behaviour have the potential to undergo more profound learning processes. Rather than merely adapting the means to achieve basically unchanged goals, as in strategic interaction, 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, pp. 62ff). Actors whose self-interested preferences are in line with certain prevailing norms or values can use these argumentatively to add cheap legitimacy to their position and delegitimise the position of their opponents. 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.

Once Community/collaborative norms<sup>7</sup> have become internalised by actors, another mode of action becomes increasingly relevant: normatively-regulated action. This type of behaviour refers to members of a social group who orient their action towards common values or norms which they have thoroughly internalised (Habermas, 1981, p. 127). The individual actor complies with a norm when, in a given situation, the conditions are present to which the norm has application. All members of a group for whom a given norm has validity may expect of one another that, in a certain situation, they will carry out the actions proscribed. Norms are taken for granted. They are not enacted out of choice, but out of habit. Collective understandings about appropriate behaviour (i.e. norms) make an impact because ‘the individual intentionality that each person has is derived from the collective intentionality that they share’.<sup>8</sup>

Communicative action is granted greater potential for deep-rooted learning than rhetorical action, and especially hard-bargaining. And socialised actors are more likely to engage in norm-regulated and communicative action than agents who have not undergone these common processes. However, consistent with my ontological position, agents combine all these (complementary) modes of action in their behaviour. 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, endogenous-functional, exogenous, domestic and EU institutional 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 to the problems at hand, 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 differently, during communicative interaction agents are likely to uncover structural factors, which are subsequently incorporated in their deliberations. Socialisation, deliberation and learning thus (also) works as an interface between structure and agency.

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<sup>7</sup> Norms are defined here as ‘collective expectations for the proper behaviour of actors with a given identity’. See Katzenstein (1996, p. 5).

<sup>8</sup> See Searle (1995: 25). Concepts like bargaining, communicative action and normatively-regulated action should be seen as ideal types which do not often appear in their pure form.

### *The role of supranational institutions*

The final dynamic specified here is the integrative role played by 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 under 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 considerations at the time when decisions are made. Secondly, and 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 (e.g. 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 a promotional broker by upgrading common interests (e.g. through facilitating logrolling or package deals) (cf. Haas, 1961, pp. 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 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 as well as peer group evaluation, to abstain from pursuing their national interest and to assume the role of a neutral mediator (e.g. 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, pp. 272, 288). A number of case studies confirm Presidencies' inclination to take on the role of an honest and promotional broker (e.g. 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 (Maurer, 2004, p. 230). 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, 1991). The Court has raised the awareness of subnational actors concerning the opportunities offered to them by the Community legal system. It helped create these opportunities by giving pro-Community constituencies a direct stake in Community law through the doctrine of direct effect. The European Court of Justice also has a self-interested stake in the process: it seeks to promote its own prestige and power by raising the visibility, effectiveness and scope of EC law (e.g. Burley and Mattli, 1993). 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. While the Commission is doing so by acting as an institutionalised mediator, the ECJ is 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 many important decisions, such as those on direct effect (on the above see Burley and Mattli, 1993; Mattli and Slaughter, 1998).

### *Countervailing forces*

As integration cannot solely be conceptualised as a dynamic process, countervailing, inertia or spillback forces need to be accounted for. One can only ascertain the relative strength of the dynamics of integration if one also accounts for inertia forces. In the absence of strong countervailing pressures even weak integrative forces may drive the integration process forward. In such a case the strength of the dynamics may easily be overestimated. When demonstrating that outcomes, which went beyond the lowest common denominator, came about even despite strong countervailing forces, the case for the causal relevance of the hypothesised dynamics is considerably strengthened. In addition, it is maintained that

informed guesses about the integration process cannot be made without taking countervailing pressures on board. For reasons of simplicity and methodology<sup>9</sup> ‘inertia forces’ 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 (cf. e.g. Hoffmann, 1964, pp. 89, 93; Moravcsik, 1993, pp. 483-94). Governments may be constrained directly by agents, such as by lobby groups, opposition parties, the media/public pressure, or more indirectly by structural limitations, like a country’s economy, its demography, 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 of governments may lead to national vetoes or prevent policies to move beyond 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 in order 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’.

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<sup>9</sup> Lijphart (1971, p. 678) has pointed out that limiting the number of variables is advisable in comparative research which looks at only a few cases, as otherwise the researcher would not have enough observations per variable and the outcome would be indeterminate.

*Diversity* can either be viewed as a sub-issue, or the structural component of, domestic constraints or as a countervailing pressure on its own.<sup>10</sup> The economic, political, legal, demographic, sociological, administrative or cultural diversity of Member States may counter common integrative 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. Diversity may also develop and have conflictual implications (among member governments) as a result of material benefits/costs and prospects of gaining or losing decision-making power through particular policy decisions. 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.

### **Interconnections between explanatory factors**

As already alluded to earlier, the various pressures formulated above are interlinked in many ways and cannot always completely be separated from each other. Especially the dynamics are intertwined in multiple and complex ways. For example, the two structural dynamics (functional and exogenous) require agency – particularly but not exclusively supranational actors and interest groups – to make an impact. Conversely, pro-integrative preference formation and learning processes implying European solutions – of national, supranational or transnational agents spelled out in the role of organised interests and supranational institutions – call for some (endogenous-functional or exogenous) structural input and medium to develop. In addition, the two structural dynamics are interconnected, as exogenous pressures (such as international competition) can give rise to or help create functional-endogenous logics (e.g. those stemming from the single market). The more actor-centred dynamics are also interwoven. For instance, supranational actors often cultivate relations with interest groups and thus foster integrative pressures. Hence, the presence of a certain dynamics may activate other integrative pressures, as a result of which the dynamics can be seen as mutually

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<sup>10</sup> On the issue of diversity in the integration literature, see for example Wallace (1985a) and Héritier (1999, esp. pp. 4-8).



reinforcing. The linkages among countervailing forces are also significant as the above account of domestic constraints and diversity suggests.

Particularly interesting is the relationship between the two key types of pressures. By hypothesising for countervailing forces in addition to dynamics it follows, almost logically, to view or hypothesise integration to be a *dialectical* process. The strength, variation and interplay of pressures on both sides of the equation thus determine the outcome of a particular decision-making issue or process. More specific insights about the relationship between dynamics and countervailing pressures are expected from the subsequent empirical analysis.

## **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 decision-making/negotiations, and my key causal (independent) 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. My analysis can be described as qualitative. 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 for the subsequent cases). 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 far-reaching/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)

## NEGOTIATIONS ON THE COMMUNITARISATION OF VISA, ASYLUM AND IMMIGRATION POLICY

### 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 the coordination or harmonisation of visa, asylum and immigration matters. 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 European Council in Fontainebleau in June 1984. 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 co-operation in matters of entry and stay of third country nationals (Nanz, 1994). 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. With the Maastricht Treaty, asylum and immigration as well as most of visa policy came into the Union framework, which attributed these policies to the sphere of intergovernmental co-operation within the third pillar of the Treaty on European Union (TEU). Only two aspects of visa policy in Article 100c came into the EC Treaty.<sup>11</sup> However, under Article K.9 (the *passerelle* provision) there was the possibility of bringing JHA issues into the Community sphere if the members of the Council unanimously agreed to do so, but this provision was never used. With the entering into force of the Amsterdam Treaty in May 1999, policies on visa, asylum and immigration became part of the Community framework. The Treaty of Nice which is in force since February 2003 brought about rather complex (potential) alterations of decision rules. These, however, resulted in only modest steps towards further deepening. By contrast, in the Constitutional Treaty Member States agreed on substantial supranationalisation of decision rules by introducing the Community method into almost all areas of visa, asylum and immigration policy.

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<sup>11</sup> Article 100c has empowered the Community, acting unanimously and after consultation of the European Parliament, to determine the third countries whose nationals will require a visa in order to enter the Community. Since 1 January 1996 the Council acts by qualified majority on these issues.

## **The Intergovernmental Conference 1996/97 and the Treaty of Amsterdam**

The area of justice and home affairs including the communitarisation of 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 co-operation 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 to harmonise 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 (cf. 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 - as intended earlier throughout the Conference - common rules (Duff, 1997).

In terms of decision mode and institutional matters, the following provisions were laid down: during a five year transitional period decisions would be taken by unanimity in the Council on an initiative of either the Commission or a Member State and after consultation of the European Parliament. Five years after the entering into force of the Treaty, the Commission would obtain an exclusive right of initiative. At the end of the transitional period the Council would decide unanimously whether all or part of the areas of the new title are to be decided by qualified majority and co-decision (Article 67).<sup>12</sup> 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

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<sup>12</sup> The provisions on short-term visa issues formed an exception: the list of third countries whose nationals must be in possession of visas and a uniform format for visas was to be decided by QMV after a proposal from the Commission and after consultation of the EP. 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.

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 described as ‘certainly a net gain’ (Brinkhorst, 1997, p. 49), ‘decisive progress’ (Brok, 1997, p. 377) or even ‘a substantial qualitative leap’ (Schnappauff, 1998, p. 17). Compared with the expectations held prior to the IGC, Title IV should be viewed as a real achievement. O’Keeffe (1995) and van Ouirive (1995), for example, thought that a communitarisation of third pillar issues would be unlikely. Patijn (1997, p. 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 other provisions of the Amsterdam Treaty, like those on institutional matters and CFSP, the new Title IV fared very well. Some have thus regarded it ‘the main improvement of the Treaty’ (Hoyer, 1997, p. 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, p. 138; Müller-Graf, 1997, p. 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. JHA appeared on the QMV agenda right from the beginning of discussions in early February 2000. As for first pillar JHA issues (Title IV TEC) of asylum, immigration and visa policy, they 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 2000 has brought about the following Treaty changes to Title IV TEC: firstly, only Article 65, on judicial cooperation in civil proceedings (with the exception of aspects related to family law), is governed by the procedure referred to in Article 251 (QMV in the Council and co-decision of the EP) since the entering into force of the Treaty of Nice. Secondly, Article 63 (1) (measures on asylum) and Article 63 (2a) (on refugees and displaced persons under temporary protection) will change to the procedure of Article 251 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 depends 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, p. 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 could, despite (considerable) political agreement, not be adopted, yet.<sup>13</sup>

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. Firstly, they decided to actually do what the Amsterdam Treaty has 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). Secondly, the contracting parties 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.<sup>14</sup> In addition, a number of important areas have brought about no advances at all: Article 62 (1) (abolition of controls on persons at internal borders), Article 63 (2b) (balanced distribution of refugees and displaced persons), Article 63, (3a) (entry, residence and standards of procedure for long-term visa) and Article 63 (4) (rights and conditions for residence of certain third country nationals). Broadly in line with the above elucidation, the provisions on Title IV have generally been viewed as providing ‘minimal’ or ‘small’ progress (Stuth, 2001, p. 11; Prodi, 2000, p. 3). 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 intransparent solution.

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<sup>13</sup> Hence, at the time of writing (January 2005) Article 251 does not yet apply to the latter area.

<sup>14</sup> In a Council decision of 15 December 2004, agreement concerning QMV and co-decision has been reached concerning Articles 61(1), (2a) and (3) as well as Article 63 (2b) and (3b), but not on Article 63 (3a) and Article (63) (4). This subsequent progress reached in December 2004 was not necessarily expected by decision-makers when the Nice deal was struck (interviews 2004; by telephone 2005). Part of the rationale for the December 2004 decision can be found in the Convention/IGC 2003-04 outcome (see below).

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

The Laeken European Council decided to convene a Convention on the Future of Europe, and thus to depart from the more standard methods of preparing EU Treaty reforms. It was the EP that first proposed the Convention approach, with the Commission and the Belgian Presidency as the strongest supporters of this idea. The area of JHA was identified in the first plenary debate of the Convention as one of the subjects requiring substantial further discussion and action. It 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. First pillar issues of visa, asylum and immigration policy (and judicial cooperation in civil matters) were discussed a bit less than third pillar issues of judicial cooperation in criminal matters and police cooperation. The Draft Treaty that came out of the Convention already provided for the changes which are outlined subsequently. First pillar, i.e. Title IV, issues were barely discussed at the IGC following the Convention, as a result of which only cosmetic changes were made in this area during the IGC 2003/04.

The Treaty provisions on Title IV issues 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 European Parliament, the exclusive right of initiative of the Commission and jurisdiction of the European Court of Justice – has been introduced for all first pillar issues with only very few exceptions; (2) turning from decision rules to policy objectives, in terms of border control, the new Treaty talks of a ‘policy’, and with regard to asylum and immigration it uses the term ‘common 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, cooperation with third countries for the purpose of managing inflows of people applying for asylum, 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 new provisions: in the area of immigration policy, a prohibition of harmonisation of Member States’ laws has been codified for the promotion of 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 provisions. Regarding judicial cooperation in civil matters, measures concerning family law will remain subject to unanimity and the European Parliament will only be consulted. It has also been judged detrimental that the Constitutional Treaty followed the system introduced at Amsterdam, whereby individual objectives are listed for each policy area. Not only is it unusual for a constitution to contain such detailed programmatic elements. These catalogues also have the disadvantage that they may be interpreted such that aims which have not been expressly stated may not be subject to Union action (Monar, 2003, p. 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 (e.g. Cuntz, 2003; Monar, 2003).

After having looked at the outcomes of the last three Treaty revisions, the subsequent analysis will examine the strength and relevance of the six hypothesised pressures concerning the communitarisation of visa, asylum and immigration policy. We analyse in turn (1) functional-endogenous pressures; (2) exogenous pressures; (3) socialisation, deliberation and learning; (4) the role of organised interests; (5) the role of supranational institutions; and (6) countervailing forces.

### **Functional pressures**

During the IGC 1996-97, functional pressures constituted a very 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 flanking 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 Tindemans report of 1975. The adoption of the Schengen Agreement on the gradual abolition of controls at the common frontiers by five Member States in 1985, and the Single European Act of 1986, aiming for the realisation of an internal market by the end of 1992 reinforced the objective. Outside the Community framework, the principle was strengthened through the signing and entering into force of the Schengen Convention in 1990 and 1995 respectively by an

increasing number of Member States (den Boer, 1997b). 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 amongst the four freedoms (Fortescue, 1995, p. 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, p. 6).

The most obvious functional link is between the abolition of internal borders and increased co-operation in terms of external border controls 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 the 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, p. 24; Hailbronner, 1994). The functional link to immigration and asylum policy is also a strong one. In order 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, p. 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, and to multiple applications for asylum as well as uncontrollable influx of illegal immigrants (Achermann, 1995). The Dublin Convention in September 1997, to some extent, tackled the problem of asylum shopping (i.e. asylum applications in several countries).<sup>15</sup> However, by determining the first entry state as the one having to deal with the application of an asylum seeker, this provision created a (serious) problem of arbitrariness, 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. In order to arrive at this and other flanking measures a greater degree of Community methods was required, so as to make co-operation more efficacious, and to enable co-operation 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; Finnish Government, 1996; UK Government, 1996; for a fuller account: Niemann, 2005 forthcoming).

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<sup>15</sup> Yet, neither the Dublin Convention, nor the Regulation 343/2003 replacing it (‘Dublin II’), may be wholly successful in terms of reducing multiple applications or secondary movements within the European Union. Cf., for example: Immigration Law Practitioners’ Association (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 the area of JHA, and particularly visa, asylum and immigration policy, had become an increasingly important EU policy objective. From that perspective, the considerable (structural and institutional) weaknesses of the third pillar became a major stumbling block towards the goal of effective co-operation. 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). The most important flaws included: (1) overlapping competencies between the first pillar and the third pillar, for instance concerning the rules governing the crossing of external borders. A communitarisation of issues where there is such a link to existing EC competencies promised to increase the efficiency of measures and the coherence of action taken by the Union (Monar, 1997). (2) The legal instruments of the third pillar were widely regarded as flawed. For example, there was some uncertainty concerning the legal effect, particularly concerning joint actions (O’Keeffe, 1995). (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, acting unanimously, 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 the third pillar affects individual rights, a strong claim could thus be made to seek judicial review in the areas covered by it (Drüke, 1995). (5) Although the Commission was supposed to be fully associated in the area of JHA, some observers suggested that the Commission merely had the status of *observateur privilégié* and that it was unclear to what extent the Commission was actually associated with the work in the third pillar. A communitarisation of visa, asylum and immigration policy promised to (considerably) 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 (High-Level Panel on the Free Movement of Persons, 1997; Commission, 1998). Also, this logic, which had dominated the IGC 1996-97 discourse concerning visa and migration was less on the minds of decision-makers, which is reflected by the IGC 2000 documentation (also interviews, 2003, 2004). Instead, another internal market pressure increasingly began to unfold its rationale in the late 1990s. Despite substantial progress concerning the completion of the single market, there was still no adequate access to judicial authorities in other Member States for individuals and businesses. As a result the Tampere programme endorsed the principle of mutual recognition as the cornerstone of judicial cooperation in both civil and criminal matters (Monar, 2001, p. 755). It also gave the mandate for new procedural legislation in cross-border cases, in particular on those elements which are instrumental to smooth judicial cooperation and enhanced access to law. Decision-making by QMV would allow faster progress to be made in one of the last loopholes of the internal market. It has been argued that this rationale was on the minds of (some) policy-makers when transferring judicial cooperation in civil matters to the Community method during the IGC 2000 (interview, 2002).

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. It was the internal EU agenda and the way this was marketed within and outside the Union rather than demands from applicant countries which put the Union under pressure to reform its institutions and decision rules. Once enlargement became an internal goal, problems were created (or rather anticipated) in terms of decision-making and co-ordination among the Member States for policy areas rules by unanimity, such 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 decision-making deadlocks. Interviews mostly substantiated this growing understanding. However, in JHA – even more than in other policy areas given the already substantial differences in terms of legal traditions, migratory pressures and labour market approaches – diversity among Member States (further growing with enlargement) was also perceived as a concern, causing some reservations vis-à-vis QMV, because of the high costs of adjustment in the case of ‘minoritisation’ in the Council. However, overall the prospect of enlargement added some

additional functional pressure for (further) communitarisation (interviews, Brussels, 2002, 2004).

Another moderate functional pressure stemmed from necessities for increased cooperation in the *same* issue area due to the dissatisfaction with the attainment of collective goals in that 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 of the European Union, comprising about 250 planned binding legislative acts (Monar, 2000, p. 18). It has been furnished with concrete aims and deadlines through the provisions of the Amsterdam Treaty, concretised by the Vienna Action Plan of 1998 and further substantiated and built on by the conclusions of the Tampere European Council in 1999. The substantial goals laid down in this area created pressure on the decision rules in the Council. However, the pressures in this respect were still (perceived as) moderate. It was widely argued that the improved provisions of the Amsterdam Treaty, which were perceived as substantial progress by many, had been in use only for a few months, that these needed to be (thoroughly) tried out first, and that it was too early to tell whether they would be inadequate to cope with the problems at hand (interview, 2004).

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 June 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 become an imminent reality. This put substantial pressure on issue areas such as Title IV that were (mostly) subject to unanimity. In the Convention, enlargement became a frequently cited rationale to substantiate the need for reforming the decision rules of Title IV (Commission, 2002a; EP 2003). With growing understanding regarding the prospect of decision-making deadlocks in the Council, concern about growing diversity which would increase the costs of adjustment for countries outvoted in the Council had diminished (interview, 2004).

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 December 2001 and Seville in June 2002 increased the pressure by reaffirming the commitment to the policy guidelines and

objectives defined at Tampere and by expressing its concern that progress has been slower and less substantial than expected in the area of asylum and immigration policy. 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, p. 535) as well as in decision/policy-making (Belgian Presidency, 2001, p. 5) circles, have made the unanimity requirement responsible for the lack of progress in this area, which reinforced the pressure for a reform of decision rules. In addition to the lack of progress concerning the measures which were supposed to be in place by 2004, the second phase of the Tampere programme stipulated important aims for the period after 2004.<sup>16</sup> Hence, during the Convention improved decision rules in the Council were called for with a view to dealing with these objectives more effectively than current legislative endeavours (interview, 2004).

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 with many inconsistencies and irregularities, Title IV provided much scope for improvement along these lines. Streamlining and rationalisation of halfway/hybrid 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 for national parliaments, were not equal competitors. Given the strong predisposition in favour of the Community method, and especially QMV, through the various dynamics, the logic was clearly to involve the EP more substantially in Title IV. 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 having much impact. However, at Laeken, these objectives were arguably emphasised more strongly than in previous Presidency conclusions<sup>17</sup> and the members of the Convention took them more seriously than officials preparing previous IGCs (interview, 2004).

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<sup>16</sup> These included issues like the harmonisation of the conditions for refugees concerning entry and stay, the right of residence for third country nationals who wish to stay in Member States other than their country of residence, standards for long-term visas and residence permits, and provisions with respect to refugee 'burden-sharing'.

<sup>17</sup> Cf. Presidency Conclusions of the following European Councils: Cannes (point IV), Madrid (pp. 1, 3), Helsinki (point I), Feira (point I) and Laeken.

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.<sup>18</sup> 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 and the internal market. Hence, the free movement of persons objective played only a subsidiary role at the Convention and the IGC 2003/04 (interview, 2004).

### **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 interacted with and reinforced functional ones in driving Member States and Community institutions towards communitarisation in this area.

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 seeking asylum in, and immigrating to, the Community. Since the late 1980s migration was pinpointed as a serious problem (Collinson, 1993, p. 115). Even though, the number of asylum applications was falling in the EC (apart from the Netherlands and the UK) since 1991, migration continued to be perceived as a threat (cf. Butt Philip, 1994, p. 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, 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, p. 11). European states confronted with the growth of asylum applications and illegal immigration adopted ever stricter asylum and immigration regulations, which

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<sup>18</sup> 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).

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 co-operation 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, 1995c; Schelter, 1996). Overall, exogenous pressures formed part of decision-makers' rationales for strengthening cooperation on the European level to work out common measures (e.g. Portuguese Government, 1996; 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 European Union after 1996, even if in 1999 it was still only about half the 1992 level (cf. Eurostat, 2003). In addition, the decline in legal immigration, resulting from more restrictive national approaches, was 'compensated' by increasing illegal immigration (Green/EFA, 2001). Moreover, EU unemployment, which was slightly diminishing after 1996, was still at a relatively high level and still viewed as a major problem in EU Member States. Thus, since the early 1990s most Member States had opted for rather restrictive national policies. However, tolerating different asylum and immigration regimes in the EU context invited competitive policy-making among Member States. Member governments and administrations had become gradually aware in the 1990s that these policies could no longer be tackled effectively on the national level, also because of the gradual abolition of internal borders. Hence, European solutions needed to be intensified to prevent disruptive policy competition by determining common standards on which all Member States could rely (Märker, 2001). Further common measures, in addition to the Dublin Convention, needed to be worked out, for example on the qualification as a refugee and on procedures for granting and withdrawing refugee status, while new policy goals beyond Amsterdam had been formulated. And progress in these areas can be attained more easily with more supranational decision rules.

As for the Convention and last IGC, exogenous pressure had further grown since the previous Treaty revision. EU-wide migratory pressures in terms of asylum applications remained fairly

constant between 2000 and 2002. Competitive (restrictive) policy-making of the 1990s had risen awareness concerning the need for European solutions. Pressure for *common* asylum measures and decision-making by QMV was still on, as progress 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 more far-reaching policy objectives had been formulated at Tampere.

In addition, a new exogenous dimension had arisen. The terrorist attacks of 11 September 2001 had certain implications for asylum and immigration policy, as for the area of justice and home affairs more generally (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 of December 1999 already included objectives related to the combat of terrorism. However, 9/11 was certainly a spur to work out EU level provisions, for example the as regards Common Position on Combating Terrorism or the adoption of the Comprehensive Plan to Combat Illegal Immigration and Trafficking of Human Beings in the European Union. 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 in JHA. 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, 2004).

Further pressures, largely exogenous to the European integration process, had evolved as regards immigration and visa policy. In some Member States the political discourse, often in conjunction with growing concern regarding the demographic development in the European Union<sup>19</sup>, increasingly suggested that immigration policy should be somewhat liberalised, not least to allow for immigration of the young and well-qualified. Related to the latter point, there was and still is demand in many EU countries for highly-qualified professionals, for example in the IT sectors, to work in Member States for a number of years. In parallel, there has been talk in the WTO concerning the removal of barriers to the temporary movement of

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<sup>19</sup> See: Iglicka (2002, pp. 327-333). On the political discourse concerning the link between demographic developments and the need for immigration, for Germany see e.g.: Frankfurter Allgemeine Zeitung, 31.10.2001, p. 4; 17.01.2002, p. 4; concerning France see e.g.: Le Monde Economie, 13.11.2001; 16.4.2002; 24.9.2002.

people under the GATS. These developments created pressure for simplified and more straight-forward visa procedures or a GATS visa (cf. European Services Forum, 2001).

### **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, JHA was at the time still a new field with EU policy-making. The question in that regard is how fast and to what extent those decision-making structures, as well as actors and forums, allowed socialisation, learning and communicative action processes, and thus cooperative behaviours, to take place. Such processes were far from developed in the early and mid 1990s.<sup>20</sup> 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 in these early days, 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 with any kind of urgency’ was referred to as one of two main features ‘most uncondusive to progress’ (Fortescue, 1995, p. 26, 27; also see Westlake, 1995, p. 240). In essence, the minimal occurrence of such processes and behaviours until the mid-1990s increased the pressure for further institutional reform towards communitarisation at the IGC. Few policy-makers suggested that the cumbersome, rigid, and often uncooperative policy process in the area of JHA (Justus Lipsius, 1995, p. 249) was a natural reflection of still insufficiently developed socialisation and learning processes, and that the new system needed more time to develop (but see UK, 1996a). 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 pressure in terms of communitarisation. Hence, somewhat paradoxically, the minimal occurrence of socialisation and learning processes spurred the reform of the old third pillar (interviews, 1997, 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

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<sup>20</sup> 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, sovereignty-consciousness of officials and ministers (cf. Niemann, 2000, 2005 forthcoming).



the IGC Representatives Group, which is the focus on 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 ‘professional friendships’ evolved and ‘basic relationships of trust’ developed (interview with M. Scheich, 1997). 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). 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 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. 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, 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 other, permanent working groups or committees (cf. Lewis, 1998). Members of the Representatives Group, who at the same time were also members of COREPER, pointed out, that the group was rather heterogeneous at the outset, and although a significant club atmosphere developed, relations never got as close as between the ambassadors in COREPER (interviews, 1997, 1999). Observers noted that there was a disruption in terms of *esprit de corps* when six new members joined the negotiations after the Reflection Group.

The moderate socialisation processes occurring in the Representatives Group were less offset by competing bureaucratic pressures in the area of JHA than in other fields (cf. Niemann, 2005 forthcoming), as national interior and justice ministries barely interfered with the JHA negotiations conducted by foreign ministries. This was partly due to the lack of familiarity of JHA officials and ministers with the EU and IGC machinery. Other observers noted that JHA senior officials did not know how to best assert themselves in the JHA debate, unable (or lacking the familiarity) to network effectively on the European level, to build potent alliances with other capitals and exert direct pressure on the negotiators (interview, 1998). In addition, the (Irish and) Dutch Presidencies played their hand rather cleverly by putting forward an Action Plan Against Organised Crime, a sexy topic with much public

appeal, which attracted JHA officials' and ministers' attention and at the same time diverted their political energy away from the IGC (interviews, 1997, 1999).

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 senior national JHA officials' and ministers' attention to the Action Plan Against Organised Crime and away from the IGC, this time national ministries were much more alert and managed to assert their interests to a much greater degree. It has been noted that a substantial fraction of national officials in the area of justice and home affairs have been sceptical of the Amsterdam provisions and that they also sought to limit (further) loss of control (Guiraudon, 2003, p. 279, at 13). Their views were fed into the formation of national positions through the process of inter-ministerial coordination. This led to tight, restrictive and inflexible instructions to IGC Representatives. As a result, a reasoned discussion on the merits of the problem at hand became difficult. In addition, cooperative norms, such as reciprocity, that usually characterise negotiations in the EU context and 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, even though substantial time was dedicated to the extension qualified majority voting in the Representatives Group, there was such a large number of issues 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. Fourthly, the shorter life span of the Representatives Group was detrimental to the development of intense enmeshment and socialisation processes (interviews, 1997, 1999).

One of the more substantial changes from the previous two Treaty revisions was the greater favourable impact of socialisation, deliberation and learning processes in the Convention which also influenced the Constitutional Treaty outcome. Such developments and processes were facilitated by several favourable conditions during the Convention: (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 ideas and perceptions 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, p. 134; but also cf. Magnette and Nicolaïdis, 2004, p. 393). Close 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 governments’ 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 in the Convention made it very difficult for members of the Convention to reject something without explanation, or without entering into a reasoned discussion were his or her 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 rationales for further integrational steps in Title IV such as enlargement, exogenous pressures or the inadequacy of current decision rules for a timely realisation of the Tampere objectives, etc. now had a better chance to be taken up by actors and thus unfold their logic. Moreover, in such deliberative process, negotiators tended to concur (more) fully in the common results achieved. 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 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.<sup>21</sup> 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 and the dominant policy discourse suggested that the Convention text should be kept as much as possible (see e.g. Frankfurter Allgemeine Zeitung, 16/6/03; The Guardian, 14/3/03). In addition, due to the substantial bonding strength of the Draft Constitutional

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<sup>21</sup> Interestingly in this respect, on the issue of institutions quite a number of important decisions were taken in the Praesidium, while there was less debate in the Plenary. In the end, representatives of some of the smaller Member States who had also not been represented in the Praesidium did not really concur in the decision, also because they did not entirely feel part of the decision. As a result, these smaller Member States were also the first to demand a reopening of the institutional package during the IGC.

Treaty, the Convention text on most (non-institutional) issues became the basis for further negotiations in the subsequent IGC. Regarding visa, asylum and immigration policy, the bonding strength was such that the Convention text on these issues was not reopened.<sup>22</sup>

What has been presented above as socialisation, deliberation and learning is difficult to substantiate within given space limitations.<sup>23</sup> Suffice it to say as 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, 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. Finally, 'powerful' actors did not manage to prevail in the Convention when their arguments were not persuasive. For example, the German Foreign Minister and others sought to reintroduce unanimity for the whole area of immigration through amendments or in the Plenary discussion (Fischer, 2003). They were not successful as their case was not convincing given the powerful rationales for further communitarisation pointed out above. On the other hand, some German nationals in the Convention argued for an exclusion of Member States' right to determine access to the labour market by third-country nationals from the Treaty provisions. This was eventually taken on board by the Praesidium, partly because it could affect the sensitive area of Member States' labour/employment legislation and was thus considered justified by quite a number of people.<sup>24</sup>

### **The role of organised interests**

During the IGC 1996-97, interest groups asserted only moderate to medium pressure on member governments and central institutions in favour of communitarising visa, asylum and immigration policy. Most NGOs were sceptical of a Community competence in those areas for

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<sup>22</sup> Provisions on judicial cooperation in criminal matters and on police cooperation, which are however not part of this analysis, were altered during the IGC.

<sup>23</sup> But also see indications for socialisation and deliberation in the secondary literature: Cf.: Göhler and Marhold (2003: esp. 323 ff); Göhler (2003: esp. 27); Mauer (2003: esp. 132 ff.). For indicators of deliberation, communicative action and persuasion, see Checkel (2001), Risse (2000), Niemann (2004b).

<sup>24</sup> However, this provision was also, to some extent, included for strategic considerations, i.e. in order to ensure the full backing of the Convention text by the German government. This does not confirm with the tenets of communicative action. It occurred in the final stages of the Convention – referred to by some as the 'pre-IGC stage' – which was more characterised by 'bargaining'.

a long time, as member governments did for many years play a two level game, putting forward more restrictive policies, while putting the blame for such policies on Brussels (interview, 1999). Only since the mid-1990s did many NGOs more fully realise that the Commission pursued a more balanced and liberal course than most Member States which appealed to the wider NGO human rights community. Moreover, NGOs began to see that communitarisation would also entail other benefits such as enhanced democracy and judicial review. Hence, subsequently, NGOs come out more strongly in favour of communitarisation (Standing Committee of Experts, 1995, 1997; Justice, 1996), however, too late for a concerted campaign (interview, 1999).

While NGOs impact was limited on the wider issue of communitarisation of visa and migration policy, on a number of smaller migration related issues, such as anti-discrimination, interest group pressure did make a (greater) difference. As for the issue of anti-discrimination, before and during the IGC, NGOs have lobbied in favour of an anti-discrimination clause in the Treaty, as a legal basis for concrete action was thought to be lacking. They argued that this issue should be dealt with on the European level as individual Member States lacked courage to take appropriate action and because some of the problems, such as cross-border publications, have interstate dimensions (Justice, 1996a). A coalition – which can aptly be described as an advocacy coalition (cf. Sabatier and Jenkins-Smith, 1993, p. 225) – formed, consisting of a large number of NGOs, church-based organisations and trade unions across the EU as well as European-wide umbrella organisations, active in the areas of human rights, migration and anti-racism. It pushed strongly for Community wide anti-discrimination legislation and formulated its own treaty amendment (cf. Starting Line, 1994) with active support from the European Parliament (cf. 1995b) and to a lesser extent also from the European Commission (e.g. 1996c). It succeeded in persuading the influential Kahn Commission, the Consultative Commission on Racism and Xenophobia, to adopt its proposal and thus also got better access to national decision-makers, especially in France and Germany (interviews, 1997, 1999).

Pressures stemming from organised interests were very modest during the IGC 2000. NGOs and Think Tanks in the areas of migration, refugees and human rights continued to be supportive of (further) communitarisation of asylum, immigration and other JHA issues, mainly because they (still) perceived EU institutions to pursue more balanced and liberal policies than Member States' governments. This included support for enhanced judicial review and greater democratic control which would accompany full-fledged

communitarisation. However, NGOs and Think Tanks active in this area were not very assertive and outspoken during the IGC, for several reasons: firstly, JHA as part of the wider issue of the extension of qualified majority voting was fairly hidden on the IGC agenda. Secondly, despite the 'Dialogue on Europe' initiative by the Commission, in partnership with the EP and Member States, which aimed at an active dialogue with citizens and civil society, the IGC 2000 has generally been perceived as a less open process than the Convention and the Amsterdam IGC (interview, 2004). Thirdly, generally speaking NGOs in the area of migration and human rights are more concerned with substantive issues (related the content and objective of policy) than with decision-making rules. The Nice IGC, however, (almost) exclusively dealt with the latter aspect, as a result of which they got less involved.

Throughout the last Treaty revision, the role of organised interests provided a more substantial, albeit not decisive, impetus for Title IV decision rule reform compared with the IGC 2000. NGOs and, to a lesser extent, Think Tanks concerned mainly with issues of migration, refugees and human rights got more involved in the debates on visa, asylum and immigration policy,<sup>25</sup> due to the fact that JHA figured much more prominently on the agenda than during the Nice IGC, and because the Convention was a more open process and provided more extensive possibilities for involvement than the Nice IGC. On many occasions NGOs in the area of migration, refugees and human rights managed to pool their resources and issued joint position papers and submissions (Standing Committee of Experts *et al.*, 2002; AI *et al.*, 2003). Apart from pursuing direct contacts, some also attended the public hearings and used the chance to put their views to members of the Convention directly.

All in all, NGOs and Think Tanks active in this area came out clearly in favour of the Community method. Perhaps most consistently, they asked for greater judicial supervision through the European Court of Justice, particularly a system permitting all national courts to refer cases to the ECJ<sup>26</sup> which would enable a timely conclusion of cases and prevent divergences in the implementation of EC law. This would be desirable from the perspective of human rights and a fair and efficient functioning of EU asylum and immigration law. It would enable a more effective challenge to EC legislation in the migration field, as national courts cannot rule invalid Community acts without first obtaining an ECJ opinion. NGOs also

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<sup>25</sup> Other fractions of organised interests were also in the process of developing into agents for further communitarisation. Trade Unions and business interests in some Member States, such as Spain, Italy, France and Germany, have formed coalitions in favour of liberalising immigration policy (on this point see Caviedes 2004: 306). As this would be much easier under QMV, it would have been natural for them to push this issue at the last Treaty revision. However, there is no concrete evidence supporting this hypothesis.

<sup>26</sup> Under the current provision of Article 68 TEC only final courts have the right to refer cases to the ECJ.

uniformly asked for more democratic accountability, which entailed a greater role (co-decision) for the EP. The European Parliament was generally viewed by Rights NGOs as a counter weight to (some) Member States' restrictive policies on asylum and immigration (Standing Committee of Experts *et al.*, 2002). NGOs and Think Tanks concerned with issues of migration, refugees and human rights also, although slightly less outspokenly, favoured an extension of QMV to ensure more effective decision-making. Also, the unanimity rule is perceived to foster lowest common denominator decisions which tend to favour restrictive measures, while the protection of refugee rights, and integration issues more generally, tend to fall by the wayside (interview, 2004).

Overall, decision-makers seem to have taken notice of NGO input on JHA issues. Their views were generally seen as one of several sources of information for members of the Convention. NGO contributions had most leverage during the early, i.e. agenda-setting, stages of the Convention when members were still in the process of making up their minds. In addition to their direct influence during the Convention and IGC 2003/04, NGOs and Think Tanks have since the mid-1990s consistently and regularly contributed to the policy discourse with their calls for more judicial supervision, democratic accountability and decision-making effectiveness. Their influence in that respect is difficult to measure. However, as one member of the Convention put it, 'when you get these views over many years, they do influence your thinking to an extent, especially when you take the views of civil society seriously' (interview, 2004). By generally supporting the Draft Constitutional Treaty that came, NGOs and Think Tanks active in the area of migration and human rights contributed to reinforcing the bonding strength of the Convention text and thus also to a far-reaching overall outcome, including the one on Title IV issues.

### **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 future 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, p.

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, p. 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 the free movement rationale as a justification for a communitarisation of visa, asylum and immigration policy (e.g. Commission, 1994d, 1996d). Thirdly, general cohesion of the Commission has usually been pointed out as one of the strengths of the Commission compared with other players (Nugent, 1995). Throughout the IGC 1996-97, the Commission displayed very considerable cohesion on JHA. Due to this cohesion, the Commission was able to act swiftly and hence proactively, to lobby effectively, to be less vulnerable *vis-à-vis* Member States' 'divide and rule' strategies, and to act assertively at the negotiating table (interviews, 1997, 1999). Fourthly, although at IGCs the Commission is only one of many actors making proposals, it can still substantially influence the agenda. It has been pointed out, for example, that the relatively early stages of the decision-making process are of critical importance in terms of shaping actors' perceptions and interests and thus also in terms of eventual policy outcomes (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 (interview, 1999). Fifthly, 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 and thus, often considerably, advanced the substantive debate (interviews, 1997, 1999). Finally, the Commission was further capable of asserting itself by cultivating alliances with governmental and non-governmental elites (cf. Niemann, 2005 forthcoming).

The various *Presidencies*, in their roles as institutionalised mediator and promotional broker, contributed significantly to the changes on visa, asylum and immigration policy during the IGC. Both the Irish and Dutch Presidencies succeeded in their task as honest broker on the communitarisation of visa, asylum and immigration policy, as compromises were found by the Irish and Dutch Presidencies with which all parties could live without feeling pushed to the sidelines. The Presidencies also played a strong role in terms of ensuring 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, 1997). 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 Joint Action on Organised Crime parallel to the IGC, thereby minimising their interference with JHA issues at the Conference negotiated by the more ‘progressive’ foreign ministries (interview, 1999).

The role played by the *European Parliament* – even though its impact on the 1996-97 IGC negotiations on 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, with the newly constituted Committee on Civil Liberties and Internal Affairs after the EP elections in 1994 (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, 1999). 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.

Finally, 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, e.g. by often going beyond the express provisions of the Treaty (cf. P. Ireland, 1995; Niemann, 2005 forthcoming). Among these areas, the ECJ was probably most influential on the issue of anti-discrimination where its case law was also cited by NGOs (Justice, 1996b). The Court also indirectly influenced the IGC debate concerning the question of judicial review within JHA. Its sound reputation and the fact that it was well-established is likely to have contributed to its choice in fulfilling the need of judicial review (cf. Neuwahl, 1995).

Throughout the IGC 2000, the *Commission’s* assertion and impact on the issue of 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. 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, p. 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, 2002). There was no substantial comprehensive paper by the Commission on the extension of QMV in the area of justice and home affairs. Such a paper could have further contributed to cultivating the various structural rationales pointed out above. Also slightly detrimental for the Commission was Michel Barnier who was not at all times perceived as the Commission representative at the IGC, 'because people saw him at Amsterdam defending French interests and suddenly he was supposed to represent the Commission, while he was often following or coinciding with the French line' (interview, 2002).

As for the role of the *Presidency*, while the Portuguese accomplished the task of honest broker and promoter of common interests, the performance of the French Presidency in the important final half of the IGC was detrimental to a progressive outcome on Title IV. The French Presidency can be criticised on several accounts; firstly, 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 (cf. French Presidency, 2000a). Secondly, the French Presidency failed to display an adequate degree of leadership on a number of issues, including the extension of 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, and more generally, 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. This adversely affected its potential role as an honest broker, especially on institutional topics, but also more generally across all 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 change to assert itself during the important agenda-setting phase by submitting its opinion at a time when the issues had already largely been framed (EP, 2000). On Title IV, as on all JHA issues, it spoke out in favour of QMV and co-decision, but failed to assert itself (interview, 2002, 2004).

During the last Treaty revision, the *Commission's* assertion on the JHA debate substantially increased in comparison with the IGC 2000. Three factors mainly contributed to this: firstly, the Commission actively fostered 'spillover' by making a (more) considerable effort to explain the structural rationales for further integrative steps in the area of visa, asylum and immigration policy, for example by pointing to 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 member governments and other political actors and through interventions and papers at the Convention and other forums (e.g. Vitorino, 2001, 2002). The Commission also contributed 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, his reputation as credible and trustworthy, and finally due to the enormous amount of political energy that Vitorino and his cabinet had invested in the Convention and IGC.<sup>27</sup> 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 of Title IV by pointing to the various structural rationales.

The *European Parliament* made a considerably bigger impact on the last Treaty revision 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 the Convention. 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

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<sup>27</sup> On Vitorino's influence on the JHA debate, especially through his expertise, persuasiveness and credibility, see for example: Goulard (2003: 374). Further Commission expertise was brought to the Convention through invited experts, such as Jean-Louis de Brouwer, Head of Unit, DG, Justice and Home Affairs.

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 the extension of Community competence and qualified majority voting (as well concerning Title IV issues), also played a prominent role in their respective political families. On substance 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. Brook, 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.<sup>28</sup>

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. The Belgian Presidency in the second half of 2001, which 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 inertia forces at play were of medium strength. One very important aspect is sovereignty consciousness. Immigration and asylum policy, and more generally, touch upon fundamental aspects of the 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’ (Baldwin-Edwards, 1997, p. 497; Achermann, 1995). With the economic recessions in Europe since the early 1970s and rising numbers of refugees in the late 1980s, the political salience and sovereignty consciousness in the area of asylum and immigration policy further increased, as they became

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<sup>28</sup> Concerning support of the European Parliament for the Draft Constitutional Treaty, see for example EP (2003a, p. 7). Moreover, many/most of the 63 parliamentarians who signed the plea to keep the Draft Constitutional Treaty were MEPs, Cf. Frankfurter Allgemeine Zeitung, 14.11.2003, p. 1.

linked to sensitive issues like unemployment (and also internal security). It has been held that ‘the competent ministers act as policemen of sovereignty’ (van Ouirve, 1995, p. 395). As pointed out above, during the IGC negotiations, JHA ministers’ attention was successfully diverted away from the Conference by the Dutch Presidency, e.g. through discussions on the politically expedient Action Plan on Organised Crime. This development (significantly) reduced the impact of sovereignty consciousness at the 1996-97 IGC.

Similarly inhibiting agents of sovereignty consciousness (and domestic constraints) are bureaucrats working in national departments. ‘When policemen replace diplomats’ was the title of a French Senate report in 1998 which sums up the increasing involvement of internal security personnel at the European level dealing with issues such as migration management (see Guiraudon, 2003, p. 267). During the IGC 1996-97 bureaucrats from various ministries fed their countervailing demands into national positions 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 the French government in general and within French ministries (e.g. Justice, Interior) more specifically. The Danish opt-out has also largely been explained by sovereignty consciousness on various level of national government and administration.

As for domestic constraints, the most significant inertia force 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.<sup>29</sup> 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. Especially several CDU *Ministerpräsidenten* of the *Länder*, above all the Bavarian, Edmund Stoiber, opposed QMV for Title IV issues, partly for ideological reasons (i.e. sovereignty consciousness). They were also against such move because they feared potential detrimental effects of (uncontrolled) migration for their *Länder*, particularly regarding their regional labour markets. Stoiber’s intervention, backed by a number of colleagues of other CDU governed *Länder*, is said to have been decisive in persuading Kohl to press for an abolition of the envisaged automatic switch to QMV after three years. 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. Insiders claim that he did not have political support for both EMU and the shedding of more

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<sup>29</sup> However, Kohl was not isolated on this. Austria, France, Denmark and the UK had some reservations concerning an automatic switch to QMV after three years (interviews, Brussels, 1999).

sovereignty over immigration and asylum, which led him to backtrack on the latter issue, given his priority for EMU (interviews, 1997, 1999).

Diversity – either viewed as an aspect on its own or as a sub-issue of domestic constraints – constituted another inertia 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, p. 137).

Overall, during the IGC 2000 the forces countervailing further communitarisation of Title IV had gathered further strength and should be judged even stronger than during the previous IGC. With asylum and immigration policy constituting core state prerogatives, sovereignty consciousness remained an important factor. Mutual trust, for example in the administration and surveillance of external borders and the efficiency of each others judicial systems, which is one aspect of sovereignty consciousness, seems to have become an even stronger *problematique*. With the prospect of ten new Member States, additional trust was required in the judicial systems and efficient management of external borders on the part of the accession countries (interview, 2002).

National ministers and civil servants, by and large, continued to act as carriers of sovereignty consciousness. As opposed to the Amsterdam IGC, when JHA ministers' attention was successfully directed away from the IGC JHA issues, ministers were very alert and conscious of the IGC this time. After the considerable integrational step that was taken at Amsterdam, national bureaucrats sought to limit 'agency loss' (see Guiraudon, 2003, p. 279) during the legislative process and also in many cases continued to be sceptical of further integration in the areas of visa, asylum and immigration policy. Again it was the German delegation that most strongly opposed any broad scale extension of QMV in Title IV.<sup>30</sup> German opposition has, by some observers, been attributed to the strong reluctance from (senior) officials in the German ministries of interior and justice (interviews, 2002, 2004).

Domestic constraints also played an important role in hindering a further communitarisation of Title IV. Asylum and immigration had become topics of very high

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<sup>30</sup> However, Austria, the UK and France were also opposed, even though less severely. They were, to some extent, hiding behind the German 'veto'. Interview, Brussels, 2004.

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, p. 3). In Germany, there was additional pressure from several *Länder* governments on the Federal government not to give up the national veto (interview, 2002).

Diversity further contributed to countervailing the above dynamics. The existence of different legal traditions, different migratory pressures and different priorities in migration management based on labour market and colonial histories or geographical position – further exacerbated with enlargement – all spurred the fear to be on the losing end of a qualified majority in the Council, as this could imply very high costs of adjustment for ‘minoritised’ Member States.

During the Convention phase countervailing pressures manifested to a much lesser degree than during an IGC. Generally speaking, countervailing forces were still latently present in Member States’ political systems including governments and administrations. The big difference was twofold: (1) the Convention structure and environment shut out most of the looming inertia 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, pp. 134-37). 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. Due to the absence of inter-departmental coordination, representatives of national governments were not confined by the influence of the various functional ministries. In the Nice IGC, the Ministry of Interior was very influential in terms of shaping the formation of the German position along restrictive lines, close to the status-quo. During the Convention it was difficult for the Ministry to assert itself. Only towards the end of the Convention the Ministry is said to have made some impact on the line of the German government.

(2) Those inertia 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, to a large part did not succeed to assert their proposals, because their arguments were only accepted to a limited extent (interview, 2004). Of course, the impact of deliberative processes on outcomes should not be overstated. It is interesting to note, however, that most of the few modifications concerning Title IV issues were made in the final stage of the Convention, which some observers have termed the ‘pre-IGC stage’, during which some of the above pointed Convention structures which are disadvantageous to countervailing pressures had, to some extent, disappeared. For example, the German exception in the area of immigration regarding access to the labour market for third country nationals was mainly a strategic considerations of the Praesidium, so as to win German support for the overall Convention text.

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 strong 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 domestic constraints (and some sovereignty concerns) in Germany. Very important in that respect was the pressure from the CDU/CSU opposition which itself has partly been explained by ideological/sovereignty-conscious rationales. The 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. 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.<sup>31</sup>

The greatly reduced countervailing pressures also had an impact, beyond the Convention, on the entire Treaty revision exercise. Due to the considerable bonding strength of the Convention, described above, the results of the Convention had a much greater significance than normal IGC pre-negotiations or preparation exercises. Because of the

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<sup>31</sup> See: Bergius, Michael and Richard Meng, ‘EU-Konvent beugt sich Berlin beim Schutz des Arbeitsmarktes’, *Frankfurter Rundschau online*, 9.7.2003; on German opinion poll figures concerning this and related questions, see: Reckmann, Jörn, ‘Einigung auf gefährlich niedrige Standards’, *Frankfurter Rundschau online*, 3.5.2004.



satisfaction with, and concurrence in, the outcome concerning Title IV issues, there was strong agreement not to reopen the Convention text on visa, asylum and immigration policy. Hence, it was very difficult for any countervailing pressures to manifest to an extent which would have led to a change in the provisions. When the IGC formally began in October 2003, countervailing pressures gathered greater strength. Some pressures, such as bureaucratic constraints, however, could not unfold to the same extent as during former IGCs because the IGC 2003/04 was conducted on the political level and was also shorter, thus providing less scope for the materialisation of inertia forces. But most importantly, because Title IV issues were almost entirely kept off the agenda, countervailing forces were not really brought to bear on these issues. The inertia pressures that predominated the last IGC more generally and threatened to bring down the process in the autumn and winter 2003/04 are described elsewhere (Niemann, 2005 forthcoming).

## **CONCLUSION**

All in all, my framework seems to have provided a robust account for an analysis of the past three Treaty revisions on the communitarisation of visa, asylum and immigration policy. The hypothesised pressures can aptly explain variation in outcomes across cases. My empirical findings are summarised in Table 1.

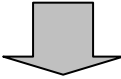

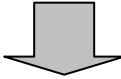

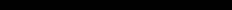

I argue that during the 1996-97 IGC fairly substantial countervailing pressures, particularly due to domestic constraints and sovereignty-consciousness, were largely overcome by strong dynamics. Of the two structural pressures, functional and exogenous, the former appears to have been predominant in decision-makers' considerations. 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 co-operation' 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, somewhat paradoxically, the minimal development of socialisation processes and the parallel occurrence of flawed co-operation 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. The role of organised interests had a further integrative, albeit moderate impact.

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 had changed. Particularly, the internal market rationale had diminished. This dynamic 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 supranational or transnational agents. The Commission, the French Presidency, the European Parliament and also organised interests 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 inertia forces (compared with the Amsterdam IGC) of sovereignty consciousness, domestic constraints and diversity.

As for the last Treaty revision, my analysis suggests that the dynamics of integration had gathered more strength again. 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 very 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. And perhaps even most significantly, socialisation, deliberation and learning processes during the Convention provided the much needed lubricant between structures and agents and constituted an important platform for the unfoldment of structural pressures. On the other hand, countervailing forces were greatly diminished in comparison with the Amsterdam and Nice 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	Convention/IGC 2002-04
<b>Pressures</b>			
<b>Functional pressures</b>	High	Medium	(Medium to) High
<b>Exogenous pressures</b>	Medium (to High)	Medium (to High)	(Medium to) High
<b>Socialisation, deliberation and learning</b>	Medium	Low	Medium to High
<b>The role of organised interests</b>	Low to Medium	Low	(Low to) Medium
<b>The role of supranational institutions</b>	(Medium to) High	Low (to Medium)	(Medium to) High
<b>Dynamics (combined)</b>	Strong 	(Weak to) Medium 	Strong 
<b>Countervailing forces (combined)</b>	 Medium	 (Medium to) Strong	 Weak to Medium
<b>Outcome (in terms of level/scope)</b>	(Medium to) High	Low (to Medium)	(Medium to) High

Arguably, the framework, especially through its dialectical nature (combining both dynamics and countervailing factors) enables us to account for more *specific* aspects of decision outcomes. Where there is across the board pressure for communitarisation (e.g. of visa, asylum and immigration policy), strong inertia forces in certain institutional or policy areas help us to make an informed guess concerning the extent and scope of integration, including issues and aspects where progress is less likely. For instance, the strong dynamics during the last IGC concerning Title IV issues suggested the likelihood of full communitarisation. When also considering the countervailing pressures at work, we may be able to estimate that areas, such as Member States' right to determine access to the labour market by third-country nationals, will

be excluded, (particularly) 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 (e.g. 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 inform and constitute decision-makers' interests and attitudes, such as endogenous-functional, exogenous and domestic structures, which suggests that dynamics and countervailing forces check and balance each other on many levels. However, these processes are notoriously difficult to capture empirically.

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 institutional questions and its failure to sufficiently narrow down the options for agreement. On the other hand, the IGC 1996-97 has indicated how the lack of socialisation at the level of policy-making can spur (further) integration during an Intergovernmental Conference. Also, elsewhere I have described how inertia forces can turn into dynamics, for example through the convergence of domestic preferences/constraints (cf. Niemann, 2005 forthcoming).

After having underlined the overall plausibility of the framework – while acknowledging certain conceptual simplifications – I will now briefly look at the causal relevance of individual hypothesised pressures by making use of a comparative analysis.<sup>32</sup> Firstly, we can identify and isolate the causal processes that lead to different outcomes (Ragin, 1987, p. 47). One way of advancing this method is to 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

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<sup>32</sup> A comparative analysis of six independent variables across three cases can of course under most circumstances generate only indeterminate results. While this is acknowledged here, it is also worth pointing out that a broader analysis with seven cases has brought about very similar results (Niemann, 2005 forthcoming).

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 revised neofunctionalist framework, an additional layer of complexity has been introduced: dynamics may not co-vary with outcomes in a linear fashion due to strong inertia 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 (Table 1: third row from bottom). 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. Through closer examination of Table 1 we can see that all dynamics, and particularly, functional pressures and the role of supranational institutions, co-vary with the scores determined for the combined dynamics.<sup>33</sup> When looking at final outcomes – while taking account of countervailing forces – this trend is also confirmed.

A second form of comparative method employed here in the pursuit of causal inferences is Mill's method of agreement (Mill, 1950). When employing this method, one looks at all cases where the dependent variable takes on the same value. In this way, no positive causality can be established, but irrelevant (or less relevant) variables can be identified. For example, one can identify all cases with strong overall dynamics or far-reaching outcomes. Those dynamics which are (repeatedly) at a low level, according to this logic, are likely to be rather dispensable. This latter scenario we have, to some extent but not very clear-cut, regarding the role of organised interests during the IGCs 1996-97 and 2002-04. Here low to medium values on this variable indicate that (strong) organised interests may not be necessary (but may still be conducive) for the constitution of powerful dynamics or the occurrence of progressive outcomes.

Given my theoretical framework and the resulting isolation of countervailing forces as a variable, the most conclusive comparative analysis can be made in terms of these countervailing forces. Their 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' inertia forces, respectively,

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<sup>33</sup> The (relatively high) value of exogenous pressures during the IGC 2000 may be seen as a slight anomaly. However, as structural (and also functional) pressures were not sufficiently acted upon by agents, the overall dynamics could not gather more strength. As mentioned earlier, structural pressures can only really make an impact in combination with (strong) agency.

somewhat tamed strong dynamics. In the 2000 case strong countervailing forces pushed medium dynamics back to a fairly minimal outcome (cf. Table 1).

Instead of theorising about the integration project and process as a whole, this framework seeks to explain particular decision-making instances or processes. However, my findings may allow for some more general informed guesses, and suggest that the integration process will further continue, both in terms of level and scope of integration. Inertia forces are likely – at least from time to time – to be insufficiently strong to counterbalance the integrational dynamics. And the IGC 2000 case suggests that even strong countervailing forces may not completely tame the dynamics of integration.

The tentativeness of parts of the preceding analysis (e.g. on socialisation and learning processes or the specification of conditions for occurrence and impact of pressures), the possibility of greater specification regarding the causal relevance of hypothesised pressures (e.g. which ones are merely *conducive* and which ones *necessary*) and the existence of (further) potential shortcomings, suggest that there is substantial ground for further research emanating from this study.

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